

**REPORT No. 77/11**  
CASE 10.932  
ADMISSIBILITY AND MERITS  
"SANTA BARBARA" CAMPESINO COMMUNITY  
PERU  
July 21, 2011

**I. SUMMARY**

1. On July 26, 1991, the Inter-American Commission on Human Rights (hereinafter the "Commission" or "the IACHR") received a petition lodged by the Center of Studies and Action for Peace (CEAPAZ) (hereinafter "the petitioners"),<sup>1</sup> which claimed that the Republic of Peru (hereinafter "the State" or "the Peruvian State") bore responsibility for the alleged disappearance of 15 individuals who mostly were members of two families from the community of Santa Barbara, Huancavelica Province, including seven children whose ages ranged from eight months to seven years old. The petitioners allege that the above disappearances were perpetrated by members of the Peruvian Army on July 4, 1991, and that the Army obstructed the efforts of the judiciary to conduct a judicial investigation into the facts.

2. The petitioners say that, despite the fact that the criminal responsibility of the military personnel charged was suitably established in the course of the investigation, and that even the military justice system found six members of the military to be responsible for the alleged offenses, on January 14, 1997, the Supreme Court applied Amnesty Law 26479, as a result of which the case lapsed into impunity. Later, after criminal proceedings were reopened in 2005, the petitioners say that on March 10, 2006, the courts ordered that the trial of the six accused should wait until they had been apprehended, and that on December 6, 2007, the trial of one of the accused began following his capture. According to the petitioners, 20 years after the disappearance of 15 members of the community of Santa Barbara, not one of the perpetrators has been convicted in a final judgment, clearly showing the impunity in which the facts languish.

3. The petitioners argue that the alleged offenses constitute, inter alia, violations of the rights to life (Article 4 of the Convention), humane treatment (Article 5 of the Convention), personal liberty (Article 7 of the Convention), and juridical personality (Article 3 of the Convention) of the 15 people who were illegally detained and then forcibly "disappeared." They also argue that, given that seven of the alleged victims were children at the time of the events, the State has also violated Article 19 of the Convention. The petitioners further charge violation of Articles 1, 8 and 6 of the Inter-American Convention against Torture in connection with the 15 victims. The petitioners argue that the impunity that still surrounds the alleged offenses as well as the due-process shortcomings that plagued the investigations amount to violations of Articles 2, 8, and 25 of the American Convention and Article I of the Inter-American Convention on Forced Disappearance of Persons.

4. Initially, the State said that it had been determined that 14 members of the Santa Barbara community had been retained and were missing. Later, the State acknowledged that the acts perpetrated in the community of Santa Barbara concerning the 15 alleged victims in the case constituted violations of the rights to liberty, life, and physical integrity recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the American Convention to Prevent and Punish Torture, all of which instruments were in force at the time of the events. The State holds that, although, at first, the Peruvian Army personnel who took part in those events benefited from Amnesty Law 26479 in January

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<sup>1</sup> In the course of processing the petition, the IACHR was informed by the petitioners in a communication of July 7, 1992, that the Center for Justice and International Law (CEJIL) had become a joint petitioner in the case.

1997, the State itself later ordered the criminal proceedings to be reopened in keeping with the judgment of the Inter-American Court of Human Rights in the Barrios Altos case on March 14, 2001.

5. The State argues that the petitioners have failed from the outset to observe the universally recognized subsidiary nature of the supranational system of protection and, as a result, have not exhausted domestic remedies. It says that the criminal proceeding has been ongoing since 2001, that efforts are still underway to locate the absent defendants, and that in 2008 a new investigation into the alleged offenses was opened by the Huancavelica Supra Provincial Criminal Prosecutor's Office. The State submits that the fact that a final outcome has not yet been reached in the case is not sufficient grounds to brand the State a promoter of impunity. In conclusion, the State considers that the situation of this case as it currently stands is not covered by any of the exceptions provided in Article 46(2) of the American Convention.

6. Having analyzed the available information, assessed the procedure, and applied Article 36(3) of its Rules of Procedure as they were then in force in order to defer a decision on admissibility, the Commission has found that the admissibility requirements set forth in Articles 46 and 47 of the American Convention have been met, and it concludes that the State is responsible for violation of the obligation to ensure: 1) the rights to personal liberty, humane treatment, life, and juridical personality under Articles 7, 5, 4 and 3 of the American Convention, taken in conjunction with Article 1(1) of that instrument, to the detriment of the 15 victims in the case; 2) the rights of the child in accordance with Article 19 of the American Convention to the detriment of the seven children: Yessenia, Miriam and Edith Osnayo Hilario; Wilmer Hilario Carhuapoma, Alex Jorge Hilario, and the brothers Raúl and Héctor Hilario Guillén; 3) the right to a family enshrined in Article 17 of the American Convention to the detriment of the victims in the case and their next-of-kin; 4) the right to a fair trial and judicial protection recognized in Articles 8 and 25 of the American Convention, taken in conjunction with Article 1(1) thereof, Articles I and III of the Inter-American Convention on Forced Disappearance of Persons, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the disappeared persons and their next-of-kin; and 5) the right to integrity to de detriment of the victim's family members.

## **II. PROCESSING BY THE COMMISSION**

7. The IACHR received the petition on July 26, 1991, and registered it as number 10.932, in keeping with its practice at the time. On August 1, 1991, the Commission transmitted the petition to the State and gave it 90 days to present its comments. The Peruvian State presented its response in notes dated September 23 and November 4, 1991, which were forwarded to the petitioners in a communication of December 16, 1991. The petitioners submitted observations in a communication of February 20, 1992, which was conveyed to the State on March 24, 1992. The petitioners requested the IACHR to grant precautionary measures in a communication dated March 11, 1992, which was forwarded to the State on March 24, 1992. On July 21, 1992, the Commission reiterated the request to the State for information made on March 24, 1992. The State presented its observations in a note dated September 21, 1992, which were transmitted to the petitioners on November 11, 1992, with the request that they submit their observations within 45 days.

8. The State presented information in a communication of February 24, 1993. The petitioners submitted observations in a communication of June 8, 1993, which was transmitted to the State on June 24, 1993. On July 2, 1993, the Commission sent a note to the State confirming receipt of the communication of February 24, 1993. Mrs. Luz Roque Montesillo submitted information in a communication dated October 5, 1993, which was relayed to the State in a communication dated December 24, 1996. Subsequently, on January 10, 1997, the IACHR instructed the State to ignore the above communication as it concerned information supplied by a person who was not a party in case 10.932. The petitioners presented information on November 18, 1997, which was conveyed to the State on December 11, 1997. The State submitted observations in a communication dated February 5, 1998, which was relayed to the petitioners on February 25, 1998.

9. On May 4, 2000, the IACHR requested the petitioners and the State to provide updated information and placed itself at the disposal of the parties with a view to reaching a friendly settlement in the case. The State requested an extension in a communication dated June 16, 2000. The petitioners requested an

extension on June 29, 2000, which the IACHR granted on July 24, 2000. Finally, the petitioners presented the information requested in a communication received on July 18, 2000, which was relayed to the State on August 3, 2000. The State submitted the information requested in a communication dated August 29, 2000, which was transmitted to the petitioners on September 21, 2000. On September 11, 2000, the IACHR requested the State for photocopies of the criminal proceedings. The State requested an extension in a communication of October 13, 2000, which the IACHR granted on November 8, 2000. The State submitted observations in a communication dated December 29, 2000, which was brought to the attention of the petitioners in a communication dated February 7, 2001.

10. In a communication dated January 17, 2001, the petitioners requested a hearing, which was granted by the IACHR in a communication dated January 31, 2001, and scheduled for March 2, 2001. On August 10, 2001, the petitioners requested that a working meeting be held during the 113th regular session of the IACHR, which the IACHR granted in a communication of August 30, 2001, and scheduled for October 3, 2001. The IACHR subsequently postponed that meeting until November 14, 2001, by means of a communication dated October 10, 2001, in order to enable the parties to discuss the possibility of initiating a friendly settlement procedure, which did not formalized.

11. In communications dated November 19 and 20, 2001, the Commission requested information from the petitioners and the State, respectively. The State responded in a communication dated December 7, 2001, which was sent to the petitioners on January 9, 2002. The Commission requested updated information from both parties on December 12, 2002. On March 23, 2004, the IACHR informed the petitioners that it had decided to proceed in accordance with Article 37(3) of its Rules of Procedure then in force and requested them to submit additional observations on the merits of the matter. In a communication dated May 14, 2004, the petitioners requested an extension of 45 days, which the IACHR granted in a communication of May 27, 2004. In a communication dated November 18, 2004, the IACHR informed the State of its decision to apply Article 37(3) of its Rules of Procedure then in force and requested that it submit its additional comments on merits.

12. The State presented its additional observations on merits by means of a communication of January 21, 2005. On April 26, 2007, the IACHR requested both parties to provide it with updated information. The State sought an extension in a communication of May 29, 2007, which the IACHR granted on July 3, 2007. The petitioners requested the IACHR to grant them an extension in a communication of May 25, 2007, which was granted in a communication dated August 6, 2007.

13. The State submitted information in a communication dated July 25, 2007, which was relayed to the petitioners in a communication of August 13, 2007. On August 2, 2010, the IACHR requested the petitioners and the State for updated information. The State presented information in a communication of September 2, 2010, and the petitioners did likewise in a communication dated October 5, 2010. This information was transmitted to the petitioners and the State, respectively, on December 7, 2010.

14. The State presented additional information in a communication dated January 10, 2011, which was relayed to the petitioners on January 11, 2011. The petitioners submitted comments on the State's brief in a communication of February 11, 2011, which was transmitted to the State on February 15, 2011. The State presented comments in a communication of March 21, 2011, which was transmitted to the petitioners in a communication of April 28, 2011. Also on April 28, 2011, the Commission requested the parties for a copy of the principal procedural documents in the judicial proceedings. The petitioners submitted their brief on May 16, 2011, and the State did likewise on May 17, 2011. The respective briefs were relayed to the parties on May 19, 2011.

### **III. POSITIONS OF THE PARTIES**

#### **A. *The Petitioners***

15. In their initial petition, the petitioners reported the detention/disappearance of 15 individuals, of whom seven were children: the sisters Yessenia Osnayo Hilario (age six years), Miriam Osnayo Hilario (age three

years), and Edith Onayo Hilario (age eight months); Wilmer Hilario Carhuapoma (age three years); the brothers Alex Jorge Hilario Guillén (age six years), Raúl Hilario Guillén (age 18 months), and Héctor Hilario Guillén (age six years); and eight adults: Francisco Hilario Torres (age 60 years); Dionicia Quispe Mallqui (age 57 years), her two daughters, Antonia Hilario Quispe (age 31 years) and Magdalena Hilario Quispe (age 26 years), and her daughter-in-law Mercedes Carhuapoma de la Cruz (age 20 years); Ramón Hilario Morán (age 26), Dionicia Guillén Riveros (age 24), and Elihoref Huamaní Vergara (age 22).

16. They say that these detentions/disappearances occurred on July 4, 1991, in the campesino community of Santa Barbara, Huancavelica Province, and that they were carried out by Peruvian army personnel from Huancavelica and Lircay Military Bases.

17. By way of background information, they say that on July 3, 1991, members of the Peruvian army from Santa Teresita Military Base in Huancavelica and Lircay Military Base launched a military operation code-named "Apolonia", and moved into the Huaroccopata and Pallcapampa sectors of the Santa Barbara community. In the course of the operation, the soldiers reportedly detained 10 campesino farmers, in spite of the fact that the latter supposedly handed over livestock to secure their release. They say that on July 4, 1991, before being released, they were taken to the Rudiopampa sector, where they witnessed a violent raid by soldiers accompanied by civilians thought to belong to the campesino militia of Lircay, who entered homes and committed a series of acts of larceny and abuses, including the appropriation of 780 animals.

18. The petitioners say that the same day, July 3, 1991, the community's council of elders reported these incidents to the Office of the Huancavelica Provincial Prosecutor for Crime Prevention, by means of official letter No. 020 CCSB-91. They say given the fact that several members of the community reported the theft of the livestock to the Directive Council of the community, the latter reported these claims in writing to the Office of the Prosecutor for Crime Prevention. They say that the summary of the charges contained in the complaint that the president of the community, Nicolás Hilario Morán, presented to the Office of the Huancavelica Provincial Prosecutor for Crime Prevention on July 8, 1991, noted the detention of 14 community members and the theft of 300 sheep, 450 alpacas, 15 horses, and 19 head of cattle, among other property, and that this was reiterated and elaborated upon at the Office of the Special Attorney of the Ombudsman in Lima on July 23, 1991, and set down in writing on August 2, 1991.

19. According to the petitioners, on July 4, 1991, the soldiers and the civilians who were accompanying them raided the homes of Francisco Hilario Torres and Ramón Hilario Morán, both of which are situated on a ranch in a spot known as Laccaypampa, in the Rudiopampa sector, and that after causing damages and appropriating the animals and other property, they detained and took away everyone inside (14 people, seven of them children), none of whom has been heard from since.

20. The petitioners note that on July 4, 1991, the provincial prosecutor, Luz Gladys Roque Montesillo, made her way to "Santa Teresita" Military Base in order to verify the claims, which she was unable to do as the base commander, Captain Jesús Rodríguez Franco, refused because the operation had not finished; however, he said that there was no one detained on the base.

21. The petitioners also say that on July 4, 1991, Mr. Alejandro Huamaní Robles and his 22-year-old son, Elihoref Huamaní Vergara, were on their way from their ranch, "Uña Corral", in the community of Santa Barbara, to Acobamba to bring in the harvest when they ran into a 15-man army patrol, which forced Elihoref Huamaní Vergara to accompany them. Elihoref Huamaní Vergara has not been seen since.

22. According to the petitioners, on July 11, 1991, Viviano Hilario Mancha, the father of Ramón Hilario Morán, who was detained/disappeared on July 4, 1991, together with his wife and two sons, went to the Varallón mine known as "Misteriosa" in Chunomayo (Community of Huachocolpa), to look for his missing relatives. At the mine entrance he reportedly saw the body of his six-year-old grandson Héctor Hilario Guillén along with a number of other half-buried bodies, whereupon he left in a panic. The petitioners say that Viviano Hilario Mancha reported the discovery of the bodies to Huancavelica Provincial Prosecutor's Office and to Huancavelica Examining

Magistrate's Court on July 12, 1991, as a result of which the magistrate determined to go to the scene on July 14, 1991, in order to proceed with the removal of the bodies.

23. The petitioners say that on July 14, 1991, 18 members of the community of Santa Barbara made their way to Misteriosa mine to take part, along with the examining magistrate, in the removal of the bodies. They say that when neared the mine they were met by a group of armed individuals in civilian clothes, who prevented them from reaching the place where the bodies were allegedly situated. They say that, after questioning them, the armed individuals identified themselves as soldiers from San Genaro Military Base. They claim that the soldiers kept them there from 10:30 a.m. until 6:00 p.m. and that upon letting them go forced them to return to their communities. They say that the examining magistrate never reached the mine and, therefore, the removal of the corpses was never carried out.

24. According to petitioners, while the community members were being detained on July 14, 1991, they heard "three dynamite blasts." They say that the president of the community of Santa Barbara presented a complaint to the Minister of Defense on July 16, 1991, alleging the detention and disappearance of 14 people, including seven children.

25. They say that the removal of the corpses was finally carried out by the Huancavelica examining magistrate on July 18, 1991. They note that in the course of the procedure none of the bodies that Mr. Viviano Hilario Mancha had reportedly seen were found; rather, there were fragments of skin, dried blood, burnt clothing, plaited fabrics, part of a foot, a tongue, and some bones, as well as 16 sticks of dynamite and fuses scattered around.

26. The petitioners say that upon returning to the city of Huancavelica on July 18, 1991, the Technical Police arrested community members Viviano Hilario Mancha, Zósimo Hilario Quispe, Moisés Hilario Quispe, Pascual Mancha Hilario, Lorenzo Quispe Huamán, Bonifacio Cusi Huamaní, and Nicolás Huamán Chumbes; all were released on July 19, 1991, except for the last two, who were held for several days more.

27. As for Elihoref Huamaní Vergara, who was detained by an army patrol while walking with his father on July 4, 1991, the petitioners say that Alejandro Huamaní Robles (his father) sought information about his son's whereabouts from the Minister of Defense on July 16, 1991, and from the commanders of Huancavelica and Lircay Military Bases on July 18, 1991, but failed to receive any response. Mr. Huamaní also reported the incident to the Office of the Huancavelica Provincial Prosecutor for Crime Prevention on July 18, 1991, and reiterated the complaint on July 23, 1991, to the Office of the Special Attorney of the Ombudsman in Lima, presenting it in writing on August 2, 1991. They also note that on July 18, 1991, Alejandro Huamaní Robles filed for a writ of habeas corpus with Lircay and Huancavelica the Magistrate's Courts, respectively. The petitioners say that Huancavelica Examining Magistrate's Court refused the petition on July 22, 1991. That decision was appealed on August 5, 1991; however, as yet, the outcome of the appeal is unknown. The petitioners say that Lircay Examining Magistrate's Court did not respond to the habeas corpus petition presented.

28. The petitioners hold that on July 22, 1991, the Huancavelica Mixed Provincial Prosecutor's Office reported to the Office of the Huancavelica Special Prosecutor for Crime Prevention on the procedure carried out on July 18, 1991, and that the human remains found were forwarded to the Technical Police and the medical examiner (Official letter No. 467-91-MP-FPM-HVCA).

29. The petitioners mention that on July 10, 1991, the daughter of the Prosecutor for Crime Prevention sustained a bullet wound in the mouth without fatal consequences, and that on July 28, 1991, Inés Sinchitullo Barboza, the official from the Office of the Attorney General in charge of preparing the report from the Office of the Prosecutor for Crime Prevention on the steps taken by the prosecutor's office in connection with the instant case to the Assistant Supreme Court Criminal Prosecutor in charge of the Office of the Ombudsman, was the target of an attack with explosives.

30. The petitioners say that in view of the existence of a number of acts of intimidation, on August 6, 1991, the Office of the Prosecutor for Crime Prevention requested the deputy governor of Huancavelica to order individual guarantees for the safety of the members of the council of elders of the community of Santa Barbara: Máximo Pérez Torres, Nicolás Hilario Huamán, and Lorenzo Quispe Huamán.

31. They say that on October 31, 1991, the local press published an announcement made by Senator Enrique Bernalles Ballesteros, Chair of the Senate Special Committee on the Causes of Violence and Possible Pacification Solutions, in which the Ministry of Defense responded to the complaint lodged by the community members of Santa Barbara, recognizing that military personnel murdered 14 campesinos from Santa Barbara. The petitioners say that this was the first time that the Peruvian armed forces had admitted relatively promptly to having violated human rights.

32. They say that on November 8, 1991, the Huancavelica Technical Police, acting on a court order, detained the president and fiscal officer of the community of Santa Barbara, Nicolás Hilario Morán and Lorenzo Quispe Huamán, respectively, in the city of Huancavelica, for obstruction of justice as a result of having falsely charged the security forces with the detention/disappearance of persons who had not been detained or disappeared. The petitioners say that the Huancavelica superior court prosecutor himself confirmed to them by telephone that he had brought the complaint against the above community members. The petitioners noted that these detentions coincided with an on-site visit of the Inter-American Commission to Peru. The petitioners say that, subsequently, on November 12, 1991, both the president and the fiscal officer of the community of Santa Barbara were released without being informed of their exact legal situation. In addition, the petitioners say that on February 19, 1992, three armed military personnel (two lieutenants and one private) appeared at the Office of the Huancavelica Mixed Provincial Prosecutor, who had filed criminal charges against the political/military commander of Huancavelica for the events at Santa Barbara, and threatened him, saying that they were waiting for him in Lircay to "settle the score."

### **The Military Jurisdiction**

33. According to the petitioners, the Peruvian government announced on October 31, 1991, that the Ministry of Defense had turned over to the military judicial authorities an army officer and five of his subordinates, who were charged with having committed excesses and murdered 14 members of the community of Santa Barbara in Huancavelica. The petitioners say that the document from the Ministry of Defense does not mention any of the victims by name and they, therefore, assumed that the Ministry was referring to the 14 community members whose detention was reported by the community of Santa Barbara on July 8, 1991. They say that none of the reports mentions the situation of Elihoref Huamaní Vergara, despite the fact that his detention/disappearance occurred on the same day as the other community members and in the same context.

34. They say that on November 26, 1991, the Ayacucho Permanent Military Tribunal (by official letter No. 422-PJ-JDP) served Viviano Hilario Mancha, Lorenzo Quispe Huamán, Moisés Hilario Quispe, Zósimo Hilario Quispe, Pascual Mancha Hilario, Nicolás Huamán Chumbes with summons to testify in the case against Army Lieutenant Javier Bendezú Vargas and others, for abuse of authority and crimes against life, the person, health, and other offenses, to the detriment of civilians. They say that all of the above summonsed persons, except for Zósimo Hilario Quispe, testified to the Ayacucho Military Tribunal in the city of Huancavelica.

35. The petitioners say that on February 5, 1992, Mr. Zósimo Hilario Quispe, who was, at once, the son, brother, brother-in-law, and uncle of some of the victims, presented a jurisdictional plea to the Peruvian Army's Second Judicial District, arguing that the investigation concerned ordinary, not military, crimes.

36. According to the petitioners, on October 16, 1992, the Permanent Court-Martial of the Army's Second Judicial District returned a judgment in which it decided:

- To acquit Lieutenant Javier Bendezú Vargas of the crimes of aggravated homicide and other offenses, and to convict him of the offense of abuse of authority, with the aggravating factor of misrepresentation, to the detriment of the civilians who died in the military operation;
- To acquit Noncommissioned Officer, Second Class, Fidel Eusebio Huaytalla and sentence him to 10 months' imprisonment and the payment of 200 nuevos soles in civil reparation to the State for the crime of disobedience;
- To acquit Noncommissioned Officer, Third Class, Dulio Chipana Tarqui of the crimes of extortion and disobedience and to sentence him to eight months' imprisonment for crimes against duty and conduct unbecoming;
- To acquit Sergeant, First Class, Oscar Carrera Gonzáles; Sergeant, Second Class, Dennis Pacheco; Sergeant, Second Class, Dennis Pacheco Zambrano; and Corporal Simón Breña Palante, and order their immediate release.

37. The petitioners informed the Commission that on February 10, 1993, the Supreme Council of Military Justice issued its final decision in which it confirmed the judgment at first instance and sentenced Lieutenant Bendezú to 10 years' imprisonment as the person responsible for of the crime of abuse of authority in the perpetration of the massacre.

38. The petitioners argue that a military tribunal is not the suitable jurisdiction for trying and punishing human rights violations committed by members of the State security forces, as it is a special jurisdiction with authority to decide on offenses committed in the line of duty, such as insubordination, desertion, cowardice, among others. The petitioners hold that almost all of the subordinates who took part directly in the massacre were acquitted; two soldiers received risible penalties; Lieutenant Bendezú, the chief culprit, was absolved of the crime of aggravated homicide and only sentenced, for abuse of authority, to 10 years imprisonment; and that the outcome of the proceedings was a clear reflection of the bias of the military judges in passing judgment.

### **The Ordinary Courts**

39. The petitioners say that in spite of all the charges brought by the members of the community of Santa Barbara in connection with the facts in the case, as well as the investigation opened by the Office of the Special Prosecutor for Crime Prevention, by November 28, 1991, a criminal trial had still not opened in the ordinary courts. Accordingly, on November 29, 1991, Mr. Zósimo Hilario Quispe filed a complaint with the Office of the Huancavelica Mixed Prosecutor against Javier Bendezú Vargas, Fidel Ausebio Hayta, Oscar Carrera Gonzáles, Carlos Padro Chinchay, and Dennis Pacheco, for crimes against life (aggravated homicide), property, personal liberty, and other offenses, to the detriment of 14 community members and their next-of-kin. The petitioners say that, together with Máximo Pérez Torres, a Santa Barbara community member, they petitioned the Prosecutor General of the Nation in written communications dated December 4, 1991 and January 10, 1992, to instruct the Huancavelica Mixed Provincial Prosecutor's Office to present the complaint.

40. The petitioners say that on February 20, 1992, the military court filed a motion disputing the jurisdiction of the Huancavelica lower court so that the latter might disqualify itself from hearing the case. They say that the Huancavelica lower court declared the motion unfounded and referred the incidental proceeding to the Correctional Tribunal, which, in turn, referred it to the Supreme Court of Justice of the Republic. The latter issued its ruling in June 1993, finding that the ordinary courts were the appropriate jurisdiction to investigate and try the alleged offenses.

41. The petitioners say that on February 26, 1992, another proceeding was brought in the ordinary jurisdiction (Huancavelica Lower Court) against the same military personnel and based on the same facts, on the charges of genocide, offenses against the administration of justice, larceny, and rape. They say that on January 12, 1993, the defendants were declared in default as fugitives justice.

42. With regard to admissibility requirements, the petitioners stated in 1992 that the instant case qualified for the exception provided in Article 46 of the American Convention as it concerned widespread violations in which it was inconceivable to consider the remedies under domestic jurisdiction to be effective.

43. The petitioners argue that access to the ordinary jurisdiction or regular courts is a basic guarantee of justice administration recognized in the Peruvian Constitution and in Articles 8(1) and 25(2)(a) of the American Convention. They say that Article 233(1) of the Constitution recognizes the "unity and exclusivity of the jurisdictional function" as a guarantee of administration of justice in the country. They say that, under this constitutional precept, the possibility of another authority passing decisions on matters of law can only occur in extremely exceptional circumstances. They note that Article 282 of the Constitution provides that "offenses committed in the line of duty by members of the armed forces and the police shall be submitted to the appropriate jurisdiction and the Military Code of Justice..." They hold that Article 10 of Law 24150, which sets out the standards to be observed in States of emergency, provides that "... [o]ffenses classified in the Military Code of Justice committed by members of the armed forces and the police in the line of duty are exclusively under military jurisdiction except where they are not connected with the service." In this regard, the petitioners argue that in the instant case, the attacks perpetrated, which were notable for their great cruelty and malice aforethought, and followed by an attempt to conceal the crime by dynamiting the corpses, constitute crimes against humanity that cannot be regarded as acts committed in the line of duty or abuse of authority.

44. The petitioners further argue that the jurisdiction of the ordinary courts in these cases is also recognized by international human rights law and they cite, in that connection, Article 25(1) of the American Convention and the Syracuse Principles (1984), which provide: "The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated."

45. In November 1997, the petitioners informed the Commission that on January 14, 1997, the Supreme Court of Justice had applied Amnesty Law 26479 in favor of the accused Javier Bendezú Vargas and the other military personnel who were being prosecuted in the ordinary jurisdiction, as a result of which the serious crimes committed had remained in impunity.

46. Subsequently, in 2010, the petitioners stated that on March 10, 2006, the judiciary, after vacating the decision by which Amnesty Law 26479 was applied in the instant case, ordered the trial of the six men accused of the Santa Barbara massacre to be suspended until they were in custody. They note that on December 18, 2006, the judiciary approved the closure of the case in favor of Carlos Manuel Pedro Chinchay on the grounds that he was a minor at the time of the events.

47. The petitioners report that on December 6, 2007, the trial began of Oscar Alberto Carrera Gonzáles following his capture, and that on March 4, 2008, he was sentenced in court to 12 years' imprisonment for the crime of extortion but acquitted of the crime of genocide; it was also determined that the statute of limitations as regards criminal action for the crimes of damages and larceny had run. They say that the judgment also ordered certified copies of the case file to be sent to the Huancavelica Prosecutor's Office in order to investigate Simón Fidel Breña Palante, a member of the so-called Escorpio patrol who took part in Operation Apolonia and who was named by the military personnel who testified in the trial as the person who fired the shots that killed the victims. They say that this judgment was appealed by the prosecutor's office, the convicted man's defense, and the relatives of the victims.

48. The petitioners say that in 2009, the Supreme Court approved the limitation on criminal action for larceny and damages, vacated the judgment of March 4, 2008, and ordered a retrial. As a result, they say that on June 15, 2010, the start of the trial of Oscar Alberto Carrera Gonzáles for genocide was scheduled for July (Case file No. 42-2006). The petitioners mention that, as yet, the other accused have not been apprehended despite the fact that there are outstanding national and international warrants for their arrest, and that some of them, such as Duilio Chipana Tarqui and Fidel Gino Eusebio Huaytalla, are in active military service, according to information provided by the Provostship of the Peruvian Army to the judiciary in official letter 3575/A/5/b of December 19,



2005. The petitioners say that the State could furnish the IACHR with the above official letter, as it is part of the record of the internal judicial proceedings and not in the hands of the petitioners. They note that, despite other requests made more recently to the Army to say whether or not the above military personnel are still active, they have received no further information. Mr. Oscar Alberto Carrera Gonzáles was placed at liberty in early 2010 because the time limit for his detention expired.

49. The petitioners say that in 2008 the Office of the Huancavelica Supra-Provincial Criminal Prosecutor opened an investigation into Simón Fidel Palante for the crime of genocide to the detriment of Francisco Hilario Quispe and 14 others (Case No. 61-2008). They say that in 2008 and 2009 Statements were taken from a number of relatives of the victims and, from March 1 to 8, 2010, an exhumation was conducted to recover the remains of the victims at Misteriosa mine. They say that, subsequently, from September 20 to 22, 2010, blood and saliva samples were taken from the victims' next-of-kin for the purposes of DNA analysis, and witness Statements were obtained from other members of the Escorpio patrol.

50. The petitioners argue that the alleged offenses constitute, inter alia, violations of the rights to life (Article 4 of the Convention), humane treatment (Article 5 of the Convention), personal liberty (Article 7 of the Convention), and juridical personality (Article 3 of the Convention) of the 15 people who were illegally detained and then forcibly "disappeared." They also argue that, given that seven of the alleged victims were children at the time of the events, the State has also violated Article 19 of the Convention. The petitioners further charge violation of Articles 1, 8, and 6 of the Inter-American Convention against Torture with regard to all 15 victims. The petitioners argue that the impunity that still surrounds the alleged offenses, which occurred almost 20 years ago, and the faults in due process in the course of the investigations amount to violations of Articles 2, 8, and 25 of the American Convention and Article I of the Inter-American Convention on Forced Disappearance of Persons.

51. The petitioners mention that the facts alleged in the instant case were the subject of an investigation by Peru's Truth and Reconciliation Commission (hereinafter "CVR"). Nonetheless, they say, the State has not acknowledged in an international proceeding its responsibility for the illegal detention and subsequent forced disappearance of the 15 members of the community of Santa Barbara, even though there are several documents in which the State accepts that the facts occurred and has not disputed the detention and ensuing disappearance of the 15 alleged victims.

52. As to admissibility, the petitioners argue that several of the exceptions to the rule of prior exhaustion of domestic remedies contained in Article 46(2) of the American Convention apply in the instant case. In this connection, they note with respect to the first investigations that the remedies sought were ineffective and that they were subsequently prevented from exhausting them by the amnesty laws in force since 1995. They argue that although two criminal trials are currently underway, neither of them has concluded, despite the fact that the events occurred almost 20 years ago, which constitutes an unwarranted delay in processing those remedies.

53. The petitioners argue that the State authorities failed to respond to most of the complaints initially presented by the victims and their next-of-kin, including two habeas corpus petitions filed for Elihoref Huamaní Vergara by his father with the lower courts of Lircay and Huancavelica. They say that only the complaint lodged on November 29, 1991, by Zósimo Hilario Quispe led to the opening of an investigation and a subsequent oral trial, which was closed as a result of the enactment of Amnesty Law 26479. They say that in the instant case the procedural activity and initiative of the relatives of the victims is demonstrated by the fact that they filed all the complaints and invoked all the remedies available and have persistently followed the case with the aim of obtaining justice for the violation of the rights of their loved ones.

54. The petitioners claim that in the instant case there have been various violations of fair trial guarantees, such as destruction of evidence and negligence in the custody thereof, obstruction of the investigation due to threats to justice operators, and lack of due diligence in the proceeding. The petitioners say that in the time between the commission of the crimes and the beginning of the first investigations, the members of the army took it upon themselves to destroy evidence at the scene of the crime.

55. The petitioners say that, to date, the mortal remains of the 15 victims in the case have not been identified, nor have the orders for the arrest of the alleged culprits been executed, which contributes to the perpetuation of violence. They say that proof of the foregoing is that on April 6, 2006, the Provostship of the Peruvian Army informed the judiciary that it did not have the authority to hand over the accused military personnel to it, by whom it meant Duilio Chipana Tarqui and Fidel Gino Eusebio Huaytalla. Consequently, the petitioners argue, the investigations carried out have failed to ensure access to justice in accordance with the international standards recognized in the American Convention.

**B. *Position of the State***

56. In September 1991, the State said that it had been determined that 14 members of the Santa Barbara community (seven of whom were children) had been detained on July 4, 1991, and, to date, were missing. It said that it had not been conclusively shown that the remains found in the Rudeo Pampa sector belonged to the disappeared persons, owing to the destroyed state of those remains. It said that, despite the fact that eyewitnesses claimed to have seen the whole bodies, the time that elapsed between their discovery and the inspection carried out by the judicial authorities allowed the perpetrators of the homicides to destroy most of the traces of the crime. The State also noted that the Army, in a written communication that it presented to the Office of the Huancavelica Special Prosecutor for Crime Prevention, denied any involvement in the detention of the above Santa Barbara community members.

57. Later, in September 1992, the State said that with the formal presentation of the relevant charges to the Permanent Court-Martial, the criminal proceeding instituted had reached the second jurisdictional instance. Consequently, the State argued, the domestic jurisdiction had not been exhausted in the case, and it requested the IACHR to proceed accordingly.

58. In February 1993, the State reported that the Review Chamber of the Supreme Council of Military Justice had, in view of the seriousness of the offenses, made a point of increasing the sentence handed down at first instance on Lieutenant Javier Bendezú Vargas to 10 years of effective imprisonment for the crime of abuse of authority, with the aggravating factor of misrepresentation, in the case known as the "Santa Barbara massacre", during which the Escorpio patrol, commanded by the said lieutenant set out from Lircay anti-subversive base (in Huancavelica) with the mission of proceeding to Rodeo Pampa to combat subversive criminals who were ravaging the area.

59. In February 1998, the State said that those responsible for what happened in Santa Barbara were investigated, prosecuted, and convicted in the military jurisdiction, and, as they came under the provisions of Article 1 of Law 26479, subsequently amnestied by the Supreme Council of Military Justice in its supreme final decision of January 14, 1997. Given that the above decision was the subject of an appeal for annulment, the Supreme Court of Justice ruled on the appeal, upholding the decision of the military court. The State explains that the amnesty introduced by Law 26479 constitutes a right which the Peruvian Congress exercised in the name of society in order to forget certain types of offense, which are considered non-punishable and not perpetrated, in accordance with Article 102(6) of the Peruvian Constitution of 1993.

60. The State argued that those aggrieved by the events at Santa Barbara could invoke their right to civil reparation and bring the appropriate actions against the authors of the crimes, in accordance with Article 58 of the Code of Military Justice, which provides that amnesties and pardons leave intact the possibility of civil actions for reparation. Based on the foregoing, the State requested that the IACHR set aside the petition.

61. In August 2000, the State reported that no one with a legitimate interest to represent those aggrieved by the events at Santa Barbara had sought recourse to the military courts to request payment of civil reparations by those responsible, as provided in the final decision of the Supreme Council of Military Justice of February 10, 1993, or attempted any other action for compensation in the ordinary jurisdiction.

62. In early 2005, the State informed the Commission that on January 3, 2005, the Office of the Superior Prosecutor Representing the Office of the Attorney General before the National Human Rights Council forwarded an official letter from the assistant prosecutor at Office of the Huancavelica Provincial Prosecutor, which said that, in accordance with the judgment on merits adopted in the Barrios Altos case by the Inter-American Court of Human Rights on March 14, 2001, Amnesty Laws 26479 and 26492 were declared incompatible with the American Convention on Human Rights and, therefore, lacked legal effect, for which reason he requested the Prosecutor General of the Nation to reopen the criminal proceeding against Infantry Lieutenant Javier Bendezú Vargas and others for genocide and other offenses to the detriment of Francisco Hilario Torres and others, and that the proceeding in question be referred to the Supreme Court of Justice so that, subject to the opinion of the Supreme Court Prosecutor, the case in question be ordered reopened.

63. The State said, "The acts perpetrated in the community of Santa Barbara constitute a violation of the rights to freedom, life and physical integrity recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the American Convention to Prevent and Punish Torture. Those instruments were in force at the time that the deeds were committed."

64. The State noted with respect to the acts under investigation that, given their nature and seriousness, as well as the rights violated, they constitute crimes covered by ordinary criminal law and international instruments for protection of human rights, and therefore could not in any circumstances be considered offenses committed in the line of duty. The State argued, therefore, it was for the ordinary jurisdiction, through the appropriate authorities of the Office of the Attorney General and the judicial branch, to investigate and prosecute the alleged authors and anyone else responsible for these acts.

65. In September 2010, the State informed the IACHR that the criminal trial of Javier Bendezú Vargas et al. for crimes against humanity in the form of genocide was referred on November 14, 2006, by the Transitional Mixed Chamber of the Superior Court of Justice of Huancavelica to the National Criminal Chamber. The State indicated that the proceedings were at the oral stage, specifically, the questioning of the defendant Oscar Carrera González, who was on restricted release to ensure his appearance at trial. As for the other accused (Javier Bendezú Vargas, Duilio Chipana Tarqui, Fidel Gino Eusebio Huaytalla, and Dennis Wilfredo Pacheco Zambrano), the State noted that they were classified as defendants in default. The State holds that it is proceeding with the criminal trial and has ordered a series of procedures and steps to elucidate the alleged facts, determine the whereabouts of the victims, and identify and punish those responsible.

66. In 2011, the State argued that, given the existence of an ongoing criminal proceeding in the domestic jurisdiction, the petitioners were distorting the nature of the inter-American system for protection of human rights by denying its subsidiary character. The State holds that, although, at first, the members of the Peruvian Army benefited from Amnesty Law 26479 in January 1997 and were freed, the State itself, through its independent administration of justice later ordered the criminal proceedings to be reopened and the alleged authors retried, in accordance with the judgment of the Inter-American Court of Human Rights of March 14, 2001 (Barrios Altos case), which found that Amnesty Laws 26479 and 26492 were incompatible with the American Convention on Human Rights and, therefore, lacked legal effect. The State says that since then the criminal prosecution of the authors of these regrettable events on the charge of genocide has continued in Huancavelica and in Lima. The State is of the view that, at all events, its alleged responsibility in the case should be judged as of the adoption into domestic law of the consequences of the abrogation of the above amnesty laws.

67. The State informed the Commission that, at December 23, 2010, the proceeding against former noncommissioned officer Oscar Alberto Carrera González, was at the trial stage (oral proceedings) and that pertinent testimony was being heard. The State also said that in 2008 the Huancavelica Supra Provincial Criminal Prosecutor's Office opened an investigation into the complaints made against former noncommissioned officer Simón Fidel Palante and that various procedures had been carried out in that investigation, including exhumation of the remains of the victims and the taking of blood samples from the next-of-kin for DNA analysis.

68. The State holds that the violations that gave rise to the original complaint had ceased with the annulment of the effects of the amnesty laws and the reopening of the proceedings against those responsible for the deeds, regardless of the fact that the proceeding continues against only one defendant and that the rest of the accused are in default. The State reasons, therefore, that the defects alleged by the petitioners have been remedied by the domestic courts in proceedings at the national level. In the final analysis, the State argues, to keep the case open in the international jurisdiction when proceedings are still underway in the domestic courts on the same matter constitutes a denial of the subsidiary and complementary nature of the inter-American system for protection of human rights.

69. The State is of the opinion that the petitioners failed from the outset to act in accordance with the subsidiary nature of the international protection system. It says that when the petitioners first took their case to the inter-American system for protection of human rights in July 1991 they had not exhausted the mechanisms provided under domestic jurisdiction, as required by Article 46(1)(a) of the American Convention. The State reminds the IACHR that when the petitioners increased their original petition they failed in a timely manner to use the means that the American Convention provides for justifying non-fulfillment of the admissibility requirements stipulated in Article 46(2) of the Convention. The State mentions that while the petition was at a standstill before the IACHR for several years, in the domestic jurisdiction the situation in the proceedings against the authors of the alleged deeds went through different stages. The State considers that none of the exceptions contained in Article 46(2) of the American Convention applies to the instant case, given that due legal process exists under Peruvian domestic law to protect the rights that were allegedly violated, as is demonstrated by the judicial proceedings and investigations currently underway.

70. The State says that the fact that a final outcome has not been reached in the case is not reason enough to brand the State a promoter of impunity. The State holds that the rule of discretion of justice system operators, in particular judges, must be observed as a cornerstone of the principle of legitimacy of the judicial function of every sovereign State. The State argues that the Commission cannot take upon itself the functions of an appeals court in order to examine alleged errors of fact or law that local courts may have committed while acting within the scope of their jurisdiction.

71. As for the alleged destruction of evidence of the crimes by agents of the State and the threats of physical harm made to witnesses and relatives of the victims, the State says that these allegations have not been proved and that, in any case, they refer to a different political situation which Peru has since overcome.

#### **IV. ANALYSIS**

##### **A. *Competence of the Commission Ratione Materiae, Ratione Personae, Ratione Temporis, and Ratione Loci***

72. The petitioners have standing under Article 44 of the American Convention to lodge petitions with the IACHR. The petition names as alleged victims individuals on whose behalf the Peruvian State undertook to observe and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Peru has been a party to the American Convention since July 28, 1978, when it deposited its instrument of ratification. Thus, the Commission has *ratione personae* competence to examine the petition.

73. The Commission is competent *ratione loci* to examine the petition because it alleges violations of rights protected in the American Convention that are purported to have occurred within the territory of Peru, a State party to said treaty.

74. The Commission is competent *ratione temporis* because the obligation to observe and ensure the rights protected in the American Convention was already binding upon the State at the time the events described in the petition are alleged to have occurred.

75. Finally, the Commission has *ratione materiae* competence because, as is explained in the section on colorability below, the petition alleges facts that could constitute violations of human rights protected by the American Convention; the Inter-American Convention to Prevent and Punish Torture, which the Peruvian State ratified on February 27, 1990; and the Inter-American Convention on Forced Disappearance of Persons, which was ratified by Peru on February 13, 2002.

**B. Admissibility Requirements**

**1. Exhaustion of Remedies under Domestic Law**

76. In order for a petition alleging a violation of the provisions of the American Convention to be admissible, it must comply with the requirements established in Article 46(1) of that international instrument. Article 46(1)(a) of the Convention States that to determine the admissibility of a petition or communication lodged in accordance with Articles 44 or 45 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.<sup>2</sup>

77. Article 46(2) of the Convention provides that the rule on prior exhaustion of domestic remedies does not apply 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;
- 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.

78. Under the Rules of Procedure of the IACHR, when 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.<sup>3</sup>

79. The petitioners argue that several of the exceptions to the rule of prior exhaustion of domestic remedies contained in Article 46(2) of the American Convention apply in the instant case. In this connection, they note with respect to the first investigations that the remedies invoked were ineffective and that they were subsequently prevented from exhausting them by the amnesty laws in force from 1995 onwards. They argue that although two criminal trials are currently underway, neither of them has concluded, despite the fact that the events occurred almost 20 years ago, and that, to date, the location of the remains of the 15 victims has not been established, nor have the orders of arrest been executed, which constitutes an unwarranted delay in processing those remedies.

80. For its part, the State argues that when the petitioners first took their case to the inter-American system for protection of human rights in July 1991 they had not exhausted the mechanisms provided in the domestic jurisdiction, as required by Article 46(1)(a) of the American Convention. The State mentions that, subsequently, when the petitioners extended their original petition they also failed in a timely manner to use the

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<sup>2</sup> I/A Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs* Judgment of June 15, 2005. Series C, No. 124, par. 48; *Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs* Judgment of September 7, 2004. Series C, No. 114, par. 48; and *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs* Judgment of July 2, 2004. Series C, No. 107, par. 80.

<sup>3</sup> Article 31(3) of the Rules of Procedure of the IACHR. See also I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, par. 64.

means that the American Convention provides for justifying non-fulfillment of the admissibility requirements stipulated in Article 46(2) of the Convention. The State argues that none of the exceptions contained in Article 46(2) of the American Convention applies to the instant case as it currently stands, given that due legal process exists under Peruvian domestic law to protect the rights allegedly violated. In this connection, the State mentions that since the time that Amnesty Laws 26479 and 26492 were declared incompatible with the American Convention and, therefore, lacking in legal effect, there have been two criminal proceedings underway.

81. In the instant case, the Commission notes that on July 8, 1991, Mr. Zósimo Hilario filed a complaint with the Office of the Huancavelica Special Prosecutor for Crime Prevention alleging the detention/disappearance of his parents, Francisco Hilario Torres and Dionicia Quispe Mallqui; his sisters, Antonia Hilario Quispe and Magdalena Hilario Quispe; his sister-in-law, Mercedes Carhuapoma de la Cruz; his nieces, Yassenia Osnayo Hilario, Miriam Osnayo Hilario, and Roxana Onayo Hilario; and his nephew Alex Jorge Hilario, who were allegedly taken away by 50 soldiers and civilians toward the district of Lircay on July 4, 1991.

82. Likewise, on July 8, 1991, Mr. Nicolás Hilario Morán, President of Santa Barbara campesino community lodged a complaint with the Office of the Huancavelica Provincial Prosecutor for Crime Prevention alleging the detention/disappearance on July 4, 1991, of 14 people from the community, including elderly persons and children, who were reportedly led away by army personnel and seven civilians. Mr. Hilario Morán also requested the prosecutor to adopt the appropriate precautionary measures. Subsequently, on July 16, 1991, Mr. Nicolás Hilario Morán presented a complaint to the Minister of Defense.

83. Furthermore, Mr. Viviano Hilario Mancha, the father of Ramón Hilario Morán, lodged a complaint with the Office of the Huancavelica Special Prosecutor for Crime Prevention on July 9, 1991, in which he Stated that the Army had taken away his son, his son's wife (Dionicia Guillén Riveros), and their two minor children. Later, on July 16, 1991, Nicolás Hilario Morán, filed another complaint with the Office of the Special Attorney of the Ombudsman alleging the above acts.

84. As for Elihoref Huamaní Vergara, who was detained by an army patrol while walking to Acobamba with his father on July 4, 1991, his father, Alejandro Huamaní Robles, filed for a writ of habeas corpus, first with Lircay Examining Magistrate's Court, and then with Huancavelica Examining Magistrate's Court, on July 18, 1991. Huancavelica Examining Magistrate's Court rejected the petition on July 22, 1991, which decision was appealed on August 5, 1991; the outcome of the appeal remains unknown. For its part, Lircay Examining Magistrate's Court did not respond to the habeas corpus petition presented. In addition, on July 18, 1991, Mr. Alejandro Huamaní filed two complaints: one with the commander of Lircay Military Base and the other with the commander of Huancavelica Military Base, claiming the detention/disappearance of his son by military personnel from both bases. Neither complaint received a reply. Subsequently, on August 5, 1991, Mr. Alejandro Huamaní Robles sent a letter to the Minister of Defense.

85. The Commission notes that Mr. Zósimo Hilario Quispe had to present another complaint on November 29, 1991, so that the office of the prosecutor might file the respective criminal charges with the examining magistrate's court. Furthermore, Mr. Zósimo Hilario Quispe requested the Prosecutor General on December 4, 1991, that the offenders be tried in the ordinary courts and, on February 5, 1992, presented a jurisdictional plea to the Peruvian Army's Second Judicial District, which was settled in June 1993 by the Supreme Court of Justice, which ruled in favor of the ordinary jurisdiction.

86. The Commission finds that while it is true that, as a result of the above-alleged acts, two criminal proceedings were instituted: one in the military jurisdiction toward the end of October 1991, and the other in the ordinary jurisdiction on February 26, 1992, the Criminal Chamber of Huancavelica Superior Court ruled on July 4, 1995, that Amnesty Law 26479 was applicable, and so the civil case was closed. This decision was upheld by the Supreme Court on January 4, 1997.

87. The Commission notes that on May 5, 2004, that is, almost 13 years after the events, the Office of the Huancavelica Criminal Prosecutor decided to send an official letter to the Prosecutor General requesting

that the criminal case be reopened based on the report of the Truth and Reconciliation Commission and the judgment of the Inter-American Court of Human Rights in the Barrios Altos case, which found that Amnesty Laws 26479 and 26492 were incompatible with the American Convention.

88. The Commission finds that, at present, that is, almost 20 years after the events, there are two criminal proceedings underway: one is for the crime of genocide against the only serviceman captured to date, which is at the trial stage; the other, for the crime of genocide, is at the investigation stage and was initiated in 2008 by the Office of the Huancavelica Supraprovincial Criminal Prosecutor against Simón Fidel Palante, who was identified by the other military personnel as the person who shot the 15 detained/disappeared persons. As yet, despite the fact that nearly 20 years have elapsed since the events, neither of these two proceedings has concluded and the human remains found at Misteriosa mine have not been identified.

89. The Commission's case law recognizes that when a publicly actionable offense is committed, the State has the obligation to institute criminal proceedings and pursue them,<sup>4</sup> and that in such cases, this is the best way to clarify the facts, prosecute the perpetrators, and establish the corresponding criminal punishment, in addition to providing for other forms of reparation, including financial reparation. Consequently, the Commission notes that the allegations of the petitioners as regards the detention and subsequent forced disappearance of seven children (three girls and four boys)<sup>5</sup> and eight adults amount,<sup>6</sup> under Peruvian domestic law, to criminal conduct whose investigation and prosecution should be initiated and pursued ex officio by the State, and therefore this is the process that constitutes the suitable remedy in the instant case.

90. In this regard, the Commission notes that, as a general rule, criminal investigations must be conducted promptly, in order to protect the interests of the victims, preserve the evidence, and safeguard the rights of anyone considered a suspect in the context of the investigation. As the Inter-American Court has noted, while every criminal investigation must meet a series of legal requirements, the rule of prior exhaustion of domestic remedies should not lead international action on behalf of the victims to come to a halt or to be delayed to the point of being rendered ineffective.<sup>7</sup>

91. Therefore, given the characteristics of the instant case and the time elapsed since the events that are the subject of the petition, the Commission finds to be applicable the exception provided in Article 46(2)(c) of the American Convention as regards the delay in domestic judicial proceedings. Therefore, the rule on exhaustion of domestic remedies can be set aside.

92. Invocation of the exceptions to the rule of exhaustion of domestic remedies provided in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights set forth therein, such as guarantees of access to justice. Nonetheless Article 46(2), by its nature and purpose, is autonomous from the substantive provisions of the Convention. Therefore, to determine whether or not the exceptions to the rule of exhaustion of domestic remedies are applicable to a particular case requires an examination carried out in advance of and separate from the analysis of the merits of the case, since it depends on a different standard of appreciation to that used to establish whether or not there has been a violation of Articles 8 and 25 of the Convention.

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<sup>4</sup> IACHR. Report 52/97, *Arges Sequeira Mangas*, February 18, 1998, pars. 96 and 97; Report 55/97, *Juan Carlos Abella*, November 18, 1997, par. 392, and Report °62/00, *Hernando Osorio Correa*, October 3, 2000, par. 24.

<sup>5</sup> The sisters Yasenía Osnayo Hilario, Miriam Osnayo Hilario, and Roxana Onayo Hilario; Wilmer Hilario Carhuapoma, and the brothers Alex Jorge Héctor Hilario Guillén, Raúl Hilario Guillén, and Héctor Hilario Guillén.

<sup>6</sup> Francisco Hilario Torres, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe, Mercedes Carhuapoma de la Cruz, Ramón Hilario Morán, Dionicia Guillén Riveros, and Elihoref Huamaní Vergara.

<sup>7</sup> I/A Court H.R., *Velásquez Rodríguez Case v. Honduras. Preliminary Objections* Judgment of June 26, 1987. Series C, No. 1, par. 93.

## 2. Timeliness of the Petition

93. Article 46(b) of the American Convention provides that for a petition to be admissible, it must be presented within six months of the date on which the party alleging violation of rights was notified of the final judgment. In cases such as this where an exception to the rule of prior exhaustion of domestic remedies is applied, the petition must be presented within a reasonable time, depending on the circumstances of the case.

94. In deciding if a petition was lodged within a reasonable time in accordance with Article 32 of the Commission's Rules of Procedure, the Commission must consider the date on which the alleged violation of rights occurred and the circumstances of the case.

95. Bearing in mind that the seven children (Yassenia Osnayo Hilario, Miriam Osnayo Hilario, Roxana Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario Guillén, Raúl Hilario Guillén, and Héctor Hilario Guillén) and the eight adults (Francisco Hilario Torres, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe, Mercedes Carhuapoma de la Cruz, Ramón Hilario Morán, Dionicia Guillén Riveros, and Elihoref Huamaní Vergara) are alleged to have disappeared on July 4, 1991, and that the petition was received by the IACHR on July 26, 1991, the Commission finds that the petition was presented in a timely manner and that the admissibility requirement as regards the time limit for lodging the petition should be considered met.

## 3. Duplication of Proceedings and *Res Judicata*

96. There is nothing in the record to suggest that the subject matter of the petition is pending in another international proceeding for settlement or that it has been previously studied by the Inter-American Commission. Therefore, the IACHR concludes that the exceptions provided at Article 46(1)(d) and Article 47(d) of the American Convention are not applicable.

## 4. Colorable Claim

97. Article 47(b) of the American Convention provides that petitions or communications that do not State facts that tend to establish a violation of human rights shall not be admitted. The Commission's review at this stage in the proceedings is not intended to establish whether a violation was committed, but whether the facts alleged, if shown to be true, could tend to establish the violation of a protected right. This is necessarily a preliminary or *prima facie* analysis and implies no prejudgment on the merits.

98. In light of the fact that the State has not refuted that the alleged victims were detained and then forcibly disappeared, and bearing in mind the arguments of fact and of law made by the parties, as well as the nature of the matter before it, the Commission finds that the petitioners' claims regarding the extent of the alleged responsibility of the State with respect to the facts alleged in the petition could characterize *prima facie* violations of the rights protected in Articles 3, 4, 5, 7, 8, and 25 of the American Convention, in conjunction with Articles 1(1) and 2 of that instrument; and in Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the seven children and eight adults: Yassenia Osnayo Hilario, Miriam Osnayo Hilario, Roxana Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Héctor Hilario Guillén, Raúl Hilario Guillén, Héctor Hilario Guillén, Francisco Hilario Torres, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe, Mercedes Carhuapoma de la Cruz, Ramón Hilario Morán, Dionicia Guillén Riveros, and Elihoref Huamaní Vergara; and in Articles 5, 8, and 25 of the American Convention to the detriment of their next-of-kin.

99. Moreover, taking into account that when Peru ratified the American Convention on Forced Disappearance of Persons on February 13, 2002, pledged to punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories, and also the continuing or permanent nature of the crime of forced disappearance, the Commission will analyze whether or not the alleged facts could characterize violations of articles I and III of the above mentioned instrument.



100. Furthermore, the Commission finds that, in light of the fact that seven of the 15 alleged victims were children at the time of the events, the facts alleged in the petition could also establish possible violations of Article 19 of the American Convention. Pursuant to the rules on interpretation of human rights set forth in the American Convention,<sup>8</sup> as well as the criteria established by the Inter-American Court of Human Rights with respect to the tendency to integrate the regional and universal systems for the protection of human rights,<sup>9</sup> and as regards the notion of *corpus juris* for the protection of the child,<sup>10</sup> the Commission will interpret the scope and content of the rights allegedly violated to the detriment of the seven children in the light of the provisions contained in the U.N. Convention on the Rights of the Child.

101. Furthermore, in view of the factual evidence set out in the instant petition and pursuant to the principle of *iura novit curia*, the Commission must assess the possible responsibility of the State for an alleged violation of Article 17 of the Convention, taken in conjunction with Article 1(1) thereof, in view of the fact that the disappeared persons belonged to two families.

102. The Commission concludes that it is competent to examine the complaint lodged by the petitioners and that the petition is admissible under the rules set forth in Articles 46 and 47 of the American Convention.

## V. ANALYSIS ON MERITS

103. The Commission notes that during the processing of the case the State initially denied the facts and subsequently recognized that “[t]he acts perpetrated in the community of Santa Barbara constitute a violation of the rights to freedom, life and physical integrity recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the American Convention to Prevent and Punish Torture, which instruments were in force at the time that the deeds were committed.” The Commission understands that the State recognizes its responsibility for the violation of Articles 4, 5 and 7 of the American Convention, and the other instruments above mentioned. The Commission values that the State had accepted its international responsibility related to these aspects of the case, and gives full recognition to this recognition.

104. The Commission observes that the State refers to the recognition of responsibility within the previous scope and in general terms regarding 14 of the 15 victims. The State has not referred lately to that recognition, it has not specified to what facts it applies, and it has not accepted responsibility related to the claims presented under Articles 8 and 25 of the American Convention.

105. The Commission also notes the differences between the positions of the parties regarding the scope of this recognition of responsibility and ability to establish the truth of what happened, to assist the administration of justice and seek redress for damages. Based on these differences the Commission considers necessary to record the facts of this case, as they arise from the file before the Commission and the Final Report of

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<sup>8</sup> American Convention, Article 29, Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: [...] b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party [...].

<sup>9</sup> I/A Court H.R., “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court* (Art. 64 of the American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A, No. 1, par. 41.

<sup>10</sup> I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C, No. 63, par. 194. *Case of the “Juvenile Reeducation Institute”*. Judgment of September 2, 2004. Series C, No. 112, par. 148; *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C, No. 110, par. 166. I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A, No. 17, pars. 24, 37, 53.

the Truth and Reconciliation Commission<sup>11</sup> (hereinafter “the CVR”), published on August 27, 2003, in the city of Lima and placed before the three branches of the Peruvian State, the Attorney General’s office and other agencies of the public administration and proceed to the determination of the scope of state responsibility and the resulting violations of the American Convention.<sup>12</sup>

**A. Considerations as to Fact: Established Facts**

106. In June 1991, an extension was decreed of the State of Emergency in the Department of Huancavelica, suspending exercise of the rights of inviolability of the home, free movement, assembly, and not to be detained except by a judicial order or in flagrante delicto.<sup>13</sup> A curfew from 7:00 p.m. to 6:00 a.m. was imposed in the city of Huancavelica. In its final report, the CVR explained that during that time, members of the Army or military patrols, on the pretext of maintaining order at night, would enter the homes of villagers, steal their belongings and animals, and, in some instances, even committed murder and rape.<sup>14</sup>

107. On July 2, 1991, two military patrols (“Escorpio” commanded by Infantry Lieutenant Javier Bendezú Vargas, and “Angel” under the command of Lieutenant Abel Gallo Coca) set out from Lircay and Santa Teresita military bases to carry out Operation Apolonia,<sup>15</sup> aimed at apprehending and/or destroying terrorist elements that were operating in the Rodeo Pampa area (Community of Santa Barbara)<sup>16</sup>, which was regarded by the Army as a “red zone” after the presence was reportedly detected of members of subversive groups that made incursions into nearby mines and nearby villages<sup>17</sup>. A deserter from the Shining Path, the child P.C.M., also known as “Félix”, acted as a guide in the above operation.<sup>18</sup>

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<sup>11</sup> The CVR’s Final Report has been used by the Commission in a series of cases, as well as by the Inter-American Court of Human Rights in ruling on facts and the international responsibility of the Peruvian State in the following matters: *Case of Anzaldo Castro v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 22, 2009, Series C No. 202; *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 La Cantuta*, Judgment of November 29, 2006, Series C No. 162; *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160; *Case of Baldeón García*, Judgment of April 6, 2006, Series C No. 147; *Gómez Palomino Case*, Judgment of November 22, 2005, Series C No. 136; and *Case of De la Cruz Flores*, Judgment of November 18, 2004, Series C No. 115.

<sup>12</sup> This placement was done in compliance with the mandate given by the President of the Republic in Supreme Decrees 065-2001-PCM and 101-2001-PCM. According to these Decrees, the CVR’s purpose was to establish the facts and responsibilities of the terrorist violence and human rights violations that were carried out between May 1980 and November 2000 by both the terrorist organizations and the agencies of the State, and to propose initiatives intended to ensure peace and harmony among the people of Peru.

<sup>13</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara: Context and Conclusions.

<sup>14</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara: Context.

<sup>15</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara: Context.

<sup>16</sup> Appendix 30. Judgment of October 16, 1992, Second Army Judicial District. Appendix to the State’s brief of December 29, 2000.

<sup>17</sup> Appendix 30. Judgment of October 16, 1992, Second Army Judicial District. Appendix to the State’s brief of December 29, 2000.

<sup>18</sup> Appendix 30. Judgment of October 16, 1992, Second Army Judicial District. Appendix to the State’s brief of December 29, 2000.

108. That same day, July 2, 1991, one of the patrols reached the Pallcca-Pampa, Huaraco Pata, Rodeo Pampa sector of the community of Santa Barbara and, after ruining the peasants' food supplies, assembled all the villagers and accused them of being terrorists.<sup>19</sup>

109. The "Escorpio" patrol, commanded by Infantry Lieutenant Bendezú Vargas, reached the Rodeo Pampa area of Santa Barbara campesino community on July 4, 1991, accompanied by a number of civilians.<sup>20</sup> The soldiers raided the homes of Francisco Hilario Torres and Ramón Hilario Morán, both of which are situated in the Laccaypampa area of the Rodeo Pampa sector, and, after causing damages and appropriating the animals and other property, detained and took away everyone inside the homes accusing them of having family members who would belong to Shining Path under their perception: Francisco Hilario Torres (age 60 years); his wife, Dionicia Quispe Mallqui (age 57 years); his daughters, Antonia Hilario Quispe (age 31 years) and Magdalena Hilario Quispe (age 26 years); his daughter-in-law Mercedes Carhuapoma de la Cruz (age 20 years); and his grandchildren, Yessenia (age 6 years), Miriam (age 3 years), and Edith Osnayo Hilario (age 8 months); Wilmer Hilario Carhuapoma (age 3 years); Alex Jorge Hilario (age 6 years); and Ramón Hilario Morán (age 26 years); his wife, Dionicia Guillén (age 24 years), and their sons Raúl Hilario Guillén (age 18 months) and Héctor Hilario Guillén (age 6 years).<sup>21</sup>

110. In addition, on July 4, 1991, Mr. Alejandro Huamaní Robles was on his way to Acobamba with his son, Elihoref Huamaní Vergara, who had recently been discharged from the Army (he had served in that institution from 1988 to 1990), and his grandson Elias Pumacahua Huamaní, age 12.<sup>22</sup> They had traveled two kilometers from his ranch, "Uña Corral", in the community of Santa Barbara, when they met an army patrol composed of 15 soldiers, who detained Elihoref Huamaní, without even asking for his identity papers<sup>23</sup> and forced Alejandro Huamaní Robles and his grandson to accompany them.<sup>24</sup> As they were walking, the military patrol encountered two other groups of soldiers, the second of which had with them a group of detained civilians with a large number of animals.<sup>25</sup> Shortly afterwards, Alejandro Huamaní and his grandson were released, while Elihoref Huamaní went on with the military patrol.<sup>26</sup> Elihoref's father did not express any undue concern at his son's detention at the

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<sup>19</sup> Appendix 2. Official letter No. 20 CCSB-91 of July 3, 1991, sent by the elders of Santa Barbara campesino community to the Office of the Huancavelica Special Prosecutor for Crime Prevention. Appendix 1 to the petitioners' brief of February 20, 1992.

<sup>20</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara. Campesinos accused of being terrorists detained.

<sup>21</sup> Appendix 3. Complaint of Nicolás Hilario Morán, President of Santa Barbara Campesino Community, presented on July 16, 1991, to the Office of the Special Attorney of the Ombudsman. Appendix 13 to the petitioners' brief of February 20, 1992; Appendix 4. Record of the complaint of Zósimo Hilario Quispe presented on July 8, 1991, to the Office of the Huancavelica Special Prosecutor for Crime Prevention. Appendix 9 to the petitioners' brief of February 20, 1992; Appendix 5. Petitioners' brief of October 5, 2010. List of victims and their next-of-kin

<sup>22</sup> Appendix 6. Record of the complaint presented by Alejandro Huamaní Robles on July 15, 1991, to the Office of the Huancavelica Special Prosecutor for Crime Prevention. Appendix 14 to the petitioners' brief of February 20, 1992; Appendix 7. Record of the verbal complaint presented by Alejandro Huamaní Robles on July 23, 1991, to the Office of the Special Attorney of the Ombudsman. Appendix 15 to the petitioners' brief of February 20, 1992.

<sup>23</sup> Appendix 5. Complaint presented by Alejandro Huamaní Robles on July 18, 1991, to the Office of the Huancavelica Senior Superior Court Prosecutor. Appendix 22 to the petitioners' brief of February 20, 1992.

<sup>24</sup> Appendix 7. Record of the verbal complaint presented by Alejandro Huamaní Robles on July 23, 1991, to the Office of the Special Attorney of the Ombudsman. Appendix 15 to the petitioners' brief of February 20, 1992.

<sup>25</sup> Appendix 7. Record of the verbal complaint presented by Alejandro Huamaní Robles on July 23, 1991, to the Office of the Special Attorney of the Ombudsman. Appendix 15 to the petitioners' brief of February 20, 1992.

<sup>26</sup> Appendix 7. Record of the verbal complaint presented by Alejandro Huamaní Robles on July 23, 1991, to the Office of the Special Attorney of the Ombudsman. Appendix 15 to the petitioners' brief of February 20, 1992.

time because, given that he had been recently discharged from the Army, he assumed that they would do him no harm, and he went on to Acobamba where he had some crops.<sup>27</sup>

111. On July 6, 1991, Mr. Zósimo Hilario Quispe, who was on a business trip at the time, learned that his relatives had disappeared and his home had been burned.<sup>28</sup> The following day, Zósimo Hilario traveled from Huancavelica to the ranch at Rodeo Pampa in the company of a number of representatives of the community of Santa Barbara and, upon reaching the spot, was met by the sight of burned-out homes; food, clothing, and other property strewn on the ground; and a great deal of blood in the areas around the houses.<sup>29</sup>

112. On July 8, 1991, Zósimo Hilario filed a complaint with the Office of the Huancavelica Special Prosecutor for Crime Prevention alleging the detention/disappearance of his parents, Francisco Hilario Torres and Dionicia Quispe Mallqui; his sisters, Antonia Hilario Quispe and Magdalena Hilario Quispe; his sister-in-law, Mercedes Carhuapoma de la Cruz; his nieces, Yasenia Osnayo Hilario, Miriam Osnayo Hilario, and Roxana Osnayo Hilario; and his nephew Alex Jorge Hilario, who were allegedly taken by 50 soldiers and civilians in the direction of the district of Lircay on July 4, 1991.<sup>30</sup>

113. Likewise, on July 8, 1991, Mr. Nicolás Hilario Morán, President of Santa Barbara campesino community lodged a complaint with the Office of the Huancavelica Provincial Prosecutor for Crime Prevention alleging the disappearance on July 4, 1991, of 14 people from the community, including elderly persons and children, who were reportedly led away by army personnel and seven civilians. Mr. Hilario Morán also requested the prosecutor to adopt the appropriate precautionary measures.<sup>31</sup>

114. On July 9, 1991, Viviano Hilario Mancha lodged a complaint with the Office of the Huancavelica Special Prosecutor for Crime Prevention in which he stated that on July 4, 1991, the Army had taken away his son, Ramón Hilario Morán; his son's wife, Dionicia Guillén Riveros, and their two minor children.<sup>32</sup>

115. On July 10, 1991, the Huancavelica Special Prosecutor for Crime Prevention, Dr. Luz Gladys Roque Montesillo, sent an official letter to the Military and Political Chief of Ayacucho to notify him of the complaint presented by Zósimo Hilario Quispe and ask him if the detainees had been taken to Lircay Military Base.<sup>33</sup> The Army denied the detention of the above persons in an official letter dated July 11, 1991.<sup>34</sup>

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<sup>27</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara. Campesinos accused of being terrorists detained.

<sup>28</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara. The discovery of the bodies.

<sup>29</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The extrajudicial executions in Santa Barbara; The discovery of the bodies.

<sup>30</sup> Appendix 4. Record of the complaint of Zósimo Hilario Quispe presented on July 8, 1991, to the Office of the Huancavelica Special Prosecutor for Crime Prevention. Appendix 9 to the petitioners' brief of February 20, 1992.

<sup>31</sup> Appendix 12. Complaint of Nicolás Hilario Morán, President of Santa Barbara Campesino Community, presented on July 8, 1991, to the Office of the Huancavelica Special Prosecutor for Crime Prevention. Appendix 12 to the petitioners' brief of February 20, 1992.

<sup>32</sup> Appendix 13. Record of the complaint of Viviano Hilario Mancha presented on July 9, 1991, to the Office of the Huancavelica Special Prosecutor for Crime Prevention. Appendix 11 to the petitioners' brief of February 20, 1992.

<sup>33</sup> Appendix 11. Official letter No. 0462-91-MP-FPM-HVCA of July 23, 1991, sent by the Office of Huancavelica Mixed Provincial Prosecutor to the Huancavelica Senior Superior Court Prosecutor. Appendix 24 to the petitioners' brief of February 20, 1992.

<sup>34</sup> Appendix 14. State's brief of September 23, 1991, p. 3.

116. On July 11, 1991, Mr. Viviano Hilario Mancha, the father and grandfather of the missing Ramón Hilario Morán and Héctor Hilario Guillén, came across a dog with a bloodstained muzzle at the entrance to the Misteriosa mine in the community of Huachocolpa. Accordingly, he looked into the mine entrance where he saw the half buried body of his grandson, six-year-old Héctor Hilario Guillén,<sup>35</sup> together with other bodies that he was unable to recognize.<sup>36</sup> Mr. Viviano Hilario Mancha Stated that at the entrance to the mine he saw two bundles of dynamite, so, thinking that they were going to explode, he left the spot and reported the find the following day,<sup>37</sup> July 12, 1991, to the Office of the Huancavelica Provincial Prosecutor and Huancavelica Examining Magistrate's Court.<sup>38</sup> That same day, July 12, 1991, the Directive Council of Santa Barbara campesino community requested the Huancavelica Mixed Provincial Prosecutor's Office to carry out the removal of the 14 bodies of the disappeared persons.<sup>39</sup>

117. The procedure for the removal of the bodies, set for July 14, 1991, could not be carried out because the group of villagers that went to assist the magistrate's court was stopped and prevented from reaching the mine by soldiers at an abandoned house near the mine, who kept them there from 10:00 a.m. to 5:30 p.m.<sup>40</sup> According to the report of the Truth and Reconciliation Commission, two of the villagers who were stopped testified that at approximately 3:30 p.m. they heard an explosion "caused by the fact that the soldiers were dynamiting the entrance to the shaft to erase the traces of the massacre and then threw the human remains into a very deep ravine."<sup>41</sup>

118. Having returned from Acobamba and being unable to find his son, on July 15, 1991, Alejandro Huamaní Robles, the father of Elihoref Huamaní Vergara, filed a complaint with the Office of the Huancavelica Provincial Prosecutor for Crime Prevention, in which he alleged the detention of Elihoref Huamaní Vergara by 15 members of the Army on July 4, 1991, and that he did not know of his whereabouts ever since.<sup>42</sup> He reiterated the complaint on July 18, 1991 to the Office of the Huancavelica Senior Superior Court Prosecutor.<sup>43</sup> On July 23, 1991,

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<sup>35</sup> Appendix 10. Record of the Statement of Viviano Hilario Mancha to the Office of the Special Attorney of the Ombudsman on July 23, 1991. Appendix 46 to the petitioners' brief of February 20, 1992.

<sup>36</sup> Appendix 8. Written communication of November 13, 1991, from CEAPAZ to the Office of the Prosecutor General. Appendix 27 to the petitioners' brief of February 20, 1992; Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The extrajudicial executions in Santa Barbara; The discovery of the bodies.

<sup>37</sup> Appendix 10. Record of the Statement of Viviano Hilario Mancha to the Office of the Special Attorney of the Ombudsman on July 23, 1991. Appendix 46 to the petitioners' brief of February 20, 1992.

<sup>38</sup> Appendix 8. Written communication of November 13, 1991, from CEAPAZ to the Office of the Prosecutor General. Appendix 27 to the petitioners' brief of February 20, 1992; Appendix 10. Official letter No. 020-CCSB-91 of July 12, 1991, sent by the elders of Santa Barbara campesino community to the Huancavelica Mixed Provincial Prosecutor's Office. Appendix 20 to the petitioners' brief of February 20, 1992; Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The extrajudicial executions in Santa Barbara; The discovery of the bodies.

<sup>39</sup> Appendix 10. Official letter No. 020-CCSB-91 of July 12, 1991, sent by the elders of Santa Barbara campesino community to the Huancavelica Mixed Provincial Prosecutor's Office, Appendix 20 to the petitioners' brief of February 20, 1992

<sup>40</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Erasing the Traces of the Massacre; Appendix 8. Written communication of November 13, 1991, from CEAPAZ to the Office of the Prosecutor General. Appendix 27 to the petitioners' brief of February 20, 1992.

<sup>41</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Erasing the Traces of the Massacre.

<sup>42</sup> Appendix 6. Record of the complaint presented by Alejandro Huamaní Robles on July 15, 1991, to the Office of the Huancavelica Special Prosecutor for Crime Prevention. Appendix 14 to the petitioners' brief of February 20, 1991.

<sup>43</sup> Appendix 5. Complaint presented by Alejandro Huamaní Robles on July 18, 1991, to the Office of the Huancavelica Senior Superior Court Prosecutor. Appendix 22 to the petitioners' brief of February 20, 1992.

Mr. Huamaní Robles made a verbal complaint in the same vein to the Office of the Special Attorney of the Ombudsman,<sup>44</sup> which he then submitted in writing on August 2, 1991.<sup>45</sup>

119. On July 16, 1991, Nicolás Hilario Morán, filed another complaint with the Office of the Special Attorney of the Ombudsman alleging the disappearance on July 4, 1991, of 14 people from the community, including elderly persons and children, who were reportedly led away by army personnel.<sup>46</sup>

120. In addition, on July 16, 1991, the president of Santa Barbara campesino community, Nicolás Hilario Morán, presented a complaint to the Minister of Defense, General Jorge Torres Aciego, alleging the homicide of 14 individuals, including two elderly persons and seven children, who had been detained in a military operation carried out in the community of Santa Barbara, by army personnel from Huancavelica and Lircay Military Bases.<sup>47</sup>

121. On July 17, 1991, the Directive Council of Santa Barbara campesino community reiterated their request to the prosecutor's office to set a date for carrying out the removal of the bodies at Misteriosa mine.<sup>48</sup>

122. On July 18, 1991, the Huancavelica Mixed Provincial Prosecutor's Office, together with the examining magistrate, members of the police, and villagers from Santa Barbara, traveled to Misteriosa mine, where they found only fragments of human remains at the mine entrance: a lock of human hair with particles of the scalp; a segment of a foot (terminal region); a piece of human skull; a large portion of a human tongue; two articular surfaces of human bones, a segment of a distal forearm, and a human hand, among other remains,<sup>49</sup> as well as 35 sticks of dynamite, six pieces of fuse, and other objects, which were sent on July 22, 1991, to the Departmental Headquarters of the Technical Police in Lima to ensure the best possible clarification of the facts.<sup>50</sup>

123. Upon returning to the city of Huancavelica on July 18, 1991, the Technical Police arrested community members Viviano Hilario Mancha, Zósimo Hilario Quispe, Moisés Hilario Quispe, Pascual Mancha Hilario, Lorenzo Quispe Huamán, Bonifacio Cusi Huamaní, and Nicolás Huamán Chumbes, who were held until July 19, 1991, except for the last two, who were held for several days more.<sup>51</sup>

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<sup>44</sup> Appendix 7. Record of the verbal complaint presented by Alejandro Huamaní Robles on July 23, 1991, to the Office of the Special Attorney of the Ombudsman. Appendix 15 to the petitioners' brief of February 20, 1992.

<sup>45</sup> Appendix 17. Written complaint of Alejandro Huamaní Robles presented to the Office of the Special Attorney of the Ombudsman on August 2, 1991. Appendix 16 to the petitioners' brief of February 20, 1992.

<sup>46</sup> Appendix 3. Complaint of Nicolás Hilario Morán, President of Santa Barbara Campesino Community, presented on July 16, 1991, to the Office of the Special Attorney of the Ombudsman. Appendix 13 to the petitioners' brief of February 20, 1992.

<sup>47</sup> Appendix 21. Complaint presented by the President of the Community of Santa Barbara to the Minister of Defense on July 16, 1991. Appendix 34 to the petitioners' brief of February 20, 1992.

<sup>48</sup> Appendix 14. Official letter No. 026-91-CCSB of July 17, 1991, from the elders of Santa Barbara campesino community to the Huancavelica Mixed Provincial Prosecutor's Office. Appendix 21 to the petitioners' brief of February 20, 1992.

<sup>49</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Erasing the Traces of the Massacre.

<sup>50</sup> Appendix 11. Official letter No. 0462-91-MP-FPM-HVCA of July 23, 1991, sent by the Office of Huancavelica Mixed Provincial Prosecutor to the Huancavelica Senior Superior Court Prosecutor. Appendix 24 to the petitioners' brief of February 20, 1992.

<sup>51</sup> Appendix 8. Written communication of November 13, 1991, from CEAPAZ to the Office of the Prosecutor General. Appendix 27 to the petitioners' brief of February 20, 1992.

124. The certificate and preliminary report of the Huancavelica medical examiner indicate that the remains collected were human,<sup>52</sup> and therefore were sent to Lima for the necessary expert analysis.<sup>53</sup> However, the police report of August 26, 1991, said that the remains found at the mine on July 18, 1991, "had not been fully confirmed as being human, much less those of the disappeared persons."<sup>54</sup>

125. Furthermore, on July 18, 1991, Mr. Huamaní Robles filed for writs of habeas corpus for his son, Elihoref Huamaní Vergara, with Lircay Examining Magistrate's Court<sup>55</sup> and Huancavelica Examining Magistrate's Court.<sup>56</sup> Huancavelica Examining Magistrate's Court rejected the petition on July 22, 1991, on the grounds that the inquiries it made and the Statements it received did not show that Mr. Elihoref Huamaní Vergara had been detained.<sup>57</sup> Alejandro Huamaní Robles appealed this decision before the same court on August 5, 1991,<sup>58</sup> the outcome of which remains unknown. Lircay Examining Magistrate's Court issued no ruling on the petition.

126. In addition, on July 18, 1991, Mr. Alejandro Huamaní Robles filed two complaints: one with the commander of Lircay Military Base and the other with the commander of Huancavelica Military Base, claiming the detention and disappearance of his son, Elihoref Huamaní Vergara, by military personnel from both bases.<sup>59</sup> After receiving no response, Mr. Huamaní Robles submitted another complaint on August 5, 1991, to the minister of defense.<sup>60</sup>

127. On July 22, 1991, the Office of the Huancavelica Special Prosecutor for Crime Prevention resent its official letter of July 10, 1991, to the military commander of Ayacucho, requesting information about patrols conducted by Huancavelica, Lircay, Acobamba, and Mantas Military Bases on July 3 and 4, 1991.<sup>61</sup>

128. According to the report of the Truth and Reconciliation Commission, the seven adults and seven children detained by the Army at Santa Barbara campesino community were taken, together with Elihoref Humani,

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<sup>52</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Erasing the Traces of the Massacre.

<sup>53</sup> Appendix 12. Report No. 17-91-FPEPD-HVCA of August 8, 1991, sent by the Office of the Special Prosecutor for Crime Prevention to the Assistant Supreme Court Criminal Prosecutor in charge of the Office of the Special Attorney of the Ombudsman. Appendix 26 to the petitioners' brief of February 20, 1992.

<sup>54</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Actions of the Office of the Attorney General.

<sup>55</sup> Appendix 17. Habeas corpus petition of July 18, 1991, presented by Alejandro Huamaní Robles for his son, Elihoref Huamaní Vergara, to Lircay Examining Magistrate's Court. Appendix 30 to the petitioners' brief of February 20, 1992.

<sup>56</sup> Appendix 18. Habeas corpus petition of July 18, 1991, presented by Alejandro Huamaní Robles for his son, Elihoref Huamaní Vergara, to Huancavelica Examining Magistrate's Court. Appendix 31 to the petitioners' brief of February 20, 1992.

<sup>57</sup> Appendix 19. Decision of Huancavelica Examining Magistrate's Court of July 22, 1991, on the habeas corpus petition filed on July 18, 1991, for Elihoref Huamaní Vergara. Appendix 32 to the petitioners' brief of February 20, 1992.

<sup>58</sup> Appendix 20. Appeal presented on August 5, 1991, against the decision of Huancavelica Examining Magistrate's Court of July 22, 1991. Appendix 33 to the petitioners' brief of February 20, 1992.

<sup>59</sup> Appendix 14. Complaints filed by Alejandro Huamaní Robles on July 18, 1991, against the commander of Lircay Military Base and the commander of Huancavelica Military Base. Appendices 36 and 37 to the petitioners' brief of February 20, 1992.

<sup>60</sup> Appendix 22. Complaint lodged by Alejandro Huamaní Robles with the Minister of Defense. Appendix 35 to the petitioners' brief of February 20, 1992.

<sup>61</sup> Appendix 11. Official letter No. 0462-91-MP-FPM-HVCA of July 23, 1991, sent by the Office of Huancavelica Mixed Provincial Prosecutor to the Huancavelica Senior Superior Court Prosecutor. Appendix 24 to the petitioners' brief of February 20, 1992.

to the abandoned Misteriosa mine situated in Huachocolpa campesino community.<sup>62</sup> On the way, the detainees were beaten and forced to walk for several hours with their hands bound and tied by their necks; they were given no food or water.<sup>63</sup> The soldiers placed the 15 detainees inside the mine and shot them with light submachine guns (FAL).<sup>64</sup> Also, according to the Truth and Reconciliation Commission, Lieutenant Bendezú Vargas ordered Sargent Duilio Chipana Tarqui to go back to the abandoned mine with three soldiers and seal the entrance.<sup>65</sup>

129. On October 25, 1991, the Ministry of Defense reported that it had determined that “a patrol from 43-Pampas Counter Subversive Battalion committed excesses against 14 campesinos presumed to be subversive criminals from the Rodeo-Pampa Campesino Community,” for which reason the complaint had been referred to the Permanent Court Martial of the Second Army Judicial District.<sup>66</sup> The complaint charged Infantry Lieutenant Javier Bendezu Vargas with the aggravated homicide of 14 campesinos (instigation), abuse of authority, and crimes against property (larceny); NCO Duilio Chipana Tarqui with crimes against duty and conduct unbecoming in service and offenses against the administration of justice; NCO, Second Class, Fidel Ausebio Huaytalla with crimes against duty and conduct unbecoming; Sargent, First Class, Oscar Carrera González with abuse of authority; Sargent, Second Class, Carlos Pedro Chincay with aggravated homicide, crimes against property (larceny), and violation of sexual liberty; and Sargent, Second Class, Dennis Pacheco Zambrano with crimes against property (larceny), and violation of sexual liberty.<sup>67</sup>

130. On October 31, 1991, the local press published a report informing that Senator Enrique Bernalles Ballesteros, Chair of the Senate Special Committee on the Causes of Violence and Possible Pacification Solutions, had informed the Senate of the response of the Ministry of Defense to the murder of 14 campesinos from the community of Santa Barbara, in which it acknowledged perpetration of the crimes and provided information on the steps taken to prosecute the alleged military personnel involved in the incident.<sup>68</sup>

131. On November 8, 1991, the Huancavelica Technical Police arrested Nicolás Hilario Morán and Lorenzo Quispe Huamán, the president and fiscal officer of the community of Santa Barbara, respectively, in the city of Huancavelica when they went to testify before the Office of the Special Prosecutor for Crime Prevention in connection with the disappearance of the seven adults and seven children on July 4, 1991. Their arrest was based on a complaint lodged by the Huancavelica Superior Court Prosecutor alleging obstruction of justice as a result of having falsely charged the security forces with the detention/disappearance of persons who had never been

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<sup>62</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Campesinos accused of being terrorists detained.

<sup>63</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Conclusions.

<sup>64</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Conclusions.

<sup>65</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Erasing the Traces of the Massacre.

<sup>66</sup> Appendix 15. Official letter No. 6671/SEMD-D of October 25, 1991, from the Ministry of Defense to Ambassador Alejandro Gordillo Fernández, Secretary General and Vice Minister of Foreign Affairs, on the murder of 14 campesinos from the community of Santa Barbara, formerly the Department of Ayacucho. Appendix to the State’s brief of September 23, 1991.

<sup>67</sup> Appendix 15. Official letter No. 6671/SEMD-D of October 25, 1991, from the Ministry of Defense to Ambassador Alejandro Gordillo Fernández, Secretary General and Vice Minister of Foreign Affairs, on the murder of 14 campesinos from the community of Santa Barbara, formerly the Department of Ayacucho. Appendix to the State’s brief of September 23, 1991.

<sup>68</sup> Appendix 16. Military Excess Caused the Death of 14 Campesinos. *Expreso* newspaper, October 31, 1991. Appendix 5 to the petitioners’ brief of November 5, 1991; Appendix 8. Written communication of November 13, 1991, from CEAPAZ to the Office of the Prosecutor General. Appendix 27 to the petitioners’ brief of February 20, 1992.



detained or disappeared.<sup>69</sup> Nicolás Hilario Morán and Lorenzo Quispe Huamán were held until November 12, 1991.<sup>70</sup>

132. On November 29, 1991, Zósimo Hilario Quispe filed a complaint with the Huancavelica Mixed Provincial Prosecutor's Office against Peruvian army personnel Javier Bendezu Vargas, Fidel Ausebio Huayta, Oscar Carrera González, Carlos Prado Chinchay, and Dennis Pacheco for crimes against life (aggravated homicide), property, personal liberty, and other offenses, to the detriment of the seven adults and seven children who disappeared on July 4, 1991, so that the office of the prosecutor might present the relevant criminal complaint to the appropriate examining magistrate's court, given that these were common crimes classified in the Criminal Code. Accompanying the complaint were certified copies of the entire investigation that the Office of the Huancavelica Prosecutor for Crime Prevention had carried out.<sup>71</sup>

133. Subsequently, in a written communication to the Prosecutor General of the Nation dated December 4, 1991, the petitioners requested that those responsible for the acts under investigation be tried in the ordinary jurisdiction, as established in the Constitution and laws, and not in the military jurisdiction.<sup>72</sup>

134. On February 5, 1992, Zósimo Hilario Quispe, presented a jurisdictional plea to the Peruvian Army's Second Judicial District, requesting the Permanent Court Martial of Ayacucho to refrain from hearing the case and to refer it to the Huancavelica Examining Magistrate, on the grounds that the military jurisdiction was only competent to examine offenses committed in the line of duty.<sup>73</sup>

135. On February 7, 1992, Dr. Manuel Córdova Polo, who was in charge of the Huancavelica Mixed Provincial Prosecutor's Office, brought a criminal complaint against Infantry Lieutenant Javier Bendezu Vargas; NCO, Third Class, Duilio Chipana Tarqui; NCO, Second Class, Fidel Ausebio Huaytalla; Sargent, First Class, Oscar Carrera González; Sargent, Second Class, Carlos Saa Prado Chinchay, and Sargent, Second Class, Dennis Saa Pacheco Zambrano, all members of the 43rd Pampas Counter Subversive Battalion, for crimes against life, the person, and health, in the form of genocide; against property, in the form of larceny, damages, and extortion; against the public administration – abuse of authority; and against the administration of justice, to the detriment of Francisco Hilario Torres, Ramón Hilario Morán, Dionisia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe, Mercedes Carhuapoma de la Cruz, Dionisia Guillén Riveros, Alex Jorge Hilario, Yesenia Osnayo Hilario, Héctor Hilario Guillén, Miriam Osnayo Hilario, Wimer Hilario Carhuapoma, Raúl Hilario Guillén, Roxana Osnayo and Elihoref Huamani Vergara, all of whom were campesinos from the community of Santa Barbara.<sup>74</sup>

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<sup>69</sup> Appendix 8. Written communication of November 13, 1991, from CEAPAZ to the Office of the Prosecutor General. Appendix 27 to the petitioners' brief of February 20, 1992.

<sup>70</sup> Appendix 8. Written communication of November 13, 1991, from CEAPAZ to the Office of the Prosecutor General. Appendix 27 to the petitioners' brief of February 20, 1992.

<sup>71</sup> Appendix 23. Complaint of Zósimo Hilario Quispe presented on November 29, 1991, to the Huancavelica Mixed Provincial Prosecutor's Office. Appendix 40 to the petitioners' brief of February 20, 1992; Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara. Procedures of the Huancavelica Mixed Provincial Prosecutor's Office.

<sup>72</sup> Appendix 24. Written communication of CEAPAZ of December 4, 1991, presented to the Office of the Prosecutor General. Appendix 41 to the petitioners' brief of February 20, 1992.

<sup>73</sup> Appendix 25. Jurisdictional plea submitted by Zósimo Hilario Quispe on February 5, 1992, to the Army's Second Judicial District. Appendix 39 to the petitioners' brief of February 20, 1992.

<sup>74</sup> Appendix 26. Huancavelica Mixed Provincial Office of the Attorney General, Complaint No. 19-92, of February 7, 1992, signed by Manuel Antonio Córdova Polo, Huancavelica Provincial Prosecutor. Appendix 3 to the petitioners' brief of June 8, 1993; Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara. Procedures of the Huancavelica Mixed Provincial Prosecutor's Office.

### The Military Jurisdiction

136. On October 23, 1991, the Permanent Court-Martial decided to investigate the military personnel allegedly responsible for the killing of 14 villagers from the community of Santa Barbara,<sup>75</sup> based on the opinion of the Inspectorate of the Second Army Judicial District, which found that on July 4, 1991, military personnel committed various offenses recognized in the Criminal Code, in reference to the Military Code of Justice, including aggravated homicide, abuse of authority, negligence, extortion and larceny; offenses against duty and the dignity of the service, and rape, and precisely sets out the offenses committed by each of the men involved.<sup>76</sup>

137. In a decision dated October 28, 1991, Major Juan Pablo Ramos Espinoza, Judge of the Sixth Ayacucho Permanent Military Tribunal, decided to take up the case and receive preliminary Statements from the accused, for whom he issued pre-trial detention orders. In the same decision the Judge ordered notify the Superior Court of Justice of Huancavelica, requesting information as to whether or not there was a proceeding underway on the same charges.<sup>77</sup>

138. On October 31, 1991, the Joint Chiefs of Staff of the Armed Forces publicly announced to the media that an investigation had been ordered into the deaths of 14 villagers in the campesino community of Santa Barbara as a result of excesses committed by an army battalion.<sup>78</sup>

139. On February 20, 1992, the Sixth Ayacucho Permanent Military Tribunal presented a conflict of jurisdiction, in view of the fact that the Lower Criminal Court of Huancavelica was on the point of opening an investigation into the military personnel who allegedly perpetrated the well-known "massacre of Santa Barbara"; that challenge was referred to the Criminal Chamber of the Supreme Court of Justice.<sup>79</sup>

140. The military court did not suspend the proceeding while the jurisdictional challenge was being settled. According to the Report of the Truth and Reconciliation Commission, the intention of the military jurisdiction was "to neutralize any subsequent judicial action, alleging the double jeopardy rule, given that the same facts were involved, although not the same offenses."<sup>80</sup>

141. On October 16, 1992, the Permanent Court-Martial of the Second Army Judicial District returned a judgment acquitting Lieutenant Javier Bendezú Vargas of the crimes of aggravated homicide, disobedience, negligence, and extortion; but convicting him instead of abuse of authority, with the aggravating factor of mendacity, to the detriment of the civilians who died in Operation Apolonia; he was sentenced to 18 months' imprisonment and the payment of 500 nuevos soles in civil reparations to be paid jointly with the State. It also

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<sup>75</sup> Appendix 28, Second Army Judicial District, October 23, 1991, Appendix to the State's brief of December 29, 2000,

<sup>76</sup> Appendix 27. 1st appendix to the State's brief of December 29, 2000; Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Military Jurisdiction.

<sup>77</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Military Jurisdiction.

<sup>78</sup> Appendix 16. Military Excess Caused the Death of 14 Campesinos. *Expreso* newspaper, October 31, 1991. Appendix 5 to the petitioners' brief of November 5, 1991.

<sup>79</sup> Appendix 29. Ayacucho, February 20, 1992, Decision to challenge the jurisdiction of the Examining Magistrate of the Ordinary Criminal Court of Huancavelica. Appendix to the State's brief of December 29, 2000; Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Military Jurisdiction.

<sup>80</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Military Jurisdiction.

acquitted Lieutenant Abel Hipólito Gallo Coca and NCO, Second Class, Fidel Gino Eusebio Huaytalla of the offenses of negligence and extortion, but convicted the latter of disobedience, with the aggravating factor of larceny, and sentenced him to two months' imprisonment and the payment of 200 nuevos soles in civil reparations; it acquitted Sargent, First Class, Oscar Alberto Carrera Gonzáles of the offenses of abuse of authority, disobedience, extortion, and violation of sexual liberty; Sargent, Second Class, Dennis Wilfredo Pacheco Zambrano of the offenses of abuse of authority and violation of sexual liberty, and, finally, Corporal Simón Fidel Breña Palante of the offenses of aggravated homicide and abuse of authority.<sup>81</sup>

142. Upon review, the Supreme Council of Military Justice, in a judgment of February 10, 1993, confirmed the decision of the Permanent Court Martial that acquitted Infantry Lieutenant Javier Bendezú Vargas of the offense of aggravated homicide, disobedience, negligence, and extortion, and convicted him of abuse of authority with the aggravating factor of mendacity. However, it amended the penalty and the amount of civil reparations imposed on the above officer, sentenced him to 10 years' imprisonment, and set the amount to be paid in civil reparations to the legal heirs of the deceased civilians at 4,000 nuevos soles. It also imposed on him the additional penalty of prohibition for life from serving in the armed forces or the national police of Peru. As regards the other convicted servicemen, the Permanent Court Martial upheld the judgment of the War Division in every respect.<sup>82</sup>

143. At the time the above sentence was passed, the Criminal Chamber of the Peruvian Supreme Court of Justice had not yet settled the jurisdictional challenge presented by the Sixth Ayacucho Permanent Military Tribunal of the Second Army Judicial District on February 20, 1992.<sup>83</sup> The Supreme Court of Justice issued its ruling in June 1993, finding that the ordinary courts were the appropriate jurisdiction to investigate and try the alleged offenses.

### **The Ordinary Courts**

144. Following the criminal complaint presented by the Huancavelica Mixed Provincial Prosecutor's Office on February 7, 1992, the Lower Criminal Court of Huancavelica opened a criminal proceeding by means of a decision dated February 26, 1992, against Lieutenant Javier Bendezú and five subordinates.<sup>84</sup>

145. On January 12, 1993, the defendants were declared in default as fugitives.<sup>85</sup>

146. In a decision dated August 19, 1994, the Huancavelica Criminal Chamber ruled that there were grounds to proceed to an oral trial against the military personnel involved on charges of genocide and other offenses.<sup>86</sup>

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<sup>81</sup> Appendix 30. Judgment of October 16, 1992, Second Army Judicial District. Appendix to the State's brief of December 29, 2000; Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Military Jurisdiction.

<sup>82</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Military Jurisdiction; Appendix 31. Supreme military Council, Lima, February 10, 1993; Appendix to the State's brief of December 29, 2000; and Appendix to the petitioners' brief of June 8, 1993.

<sup>83</sup> Appendix 35. Incidental proceeding on jurisdiction No. 46-92. Brief sent by Roger Niego Arana, representative of CEAPAZ, to the President of the Supreme Court of the Republic on May 13, 1993. Appendix to the petitioners' brief of June 8, 1993.

<sup>84</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Judiciary; Appendix 34. Huancavelica Examining Magistrate's Court, February 26, 1992. Appendix to the petitioners' brief of June 8, 1993.

<sup>85</sup> Appendix 41. Information supplied by the petitioners in a communication of October 5, 2010. Not contested by the State.

147. However, before the oral proceedings against the accused military personnel could begin, Amnesty Law 26479 was approved and enacted, for which reason, the Criminal Chamber of Huancavelica Superior Court, in a ruling dated July 4, 1995, found that the above law was applicable to the trial of Lieutenant Javier Bendezú Vargas and his subordinates, and ordered the case to be halted and permanently set aside. The court also expunged the judicial and police records of the six defendants who benefited from the amnesty.<sup>87</sup>

148. Although the Superior Chamber granted *sua sponte* an appeal for nullity on the grounds that one of the charges brought concerned offenses against the administration of justice to the detriment of the State, the application of the amnesty law met with the favorable opinion of the Supreme Court Prosecutor for Criminal Matters, Dr. Pedro Pablo Gutiérrez, which was ultimately confirmed by the First Transitional Criminal Chamber of the Supreme Court of Justice in a ruling dated January 14, 1997.<sup>88</sup>

### Amnesty Laws

149. On June 14, 1995, the Congress passed Law 26479, which granted amnesty to all military, police or civilian personnel involved in human rights violations committed between May 1980 and the date of the law's enactment that same day.<sup>89</sup>

150. Under Article 1 of Law 26479 the benefit applied to all military, police, and civilian officials, whether they had been accused, investigated, prosecuted, indicted, or convicted for common or military crimes in the ordinary or military jurisdiction. Article 4 of the law provided for the immediate release of all persons deprived of their freedom, whether they were arrested, detained, imprisoned, or serving a prison sentence. Article 6 ordered the permanent dismissal of all judicial proceedings that were ongoing or with a conviction issued, and prohibited the reopening of any new investigations into the subject matter of such proceedings.

151. On June 28, 1995, the Congress adopted Law 26492 which interpreted Article 1 of Law 26479 in the sense that observance of the general amnesty was mandatory for all jurisdictional organs and encompassed all acts arising or originated on the occasion or as a consequence of the fight against terrorism from May 1980 until June 14, 1995, irrespective of whether or not the military, police, or civilian personnel involved were accused, investigated, on trial, or convicted, and that all judicial proceedings in process or under enforcement were permanently dismissed.<sup>90</sup>

152. The IACHR analyzed the amnesty laws and their consequences in 1996. It found that Law 26479 interfered with the powers of the judiciary and that Law 26492 "not only fails to provide an effective remedy, but goes much further, denying any possibility of appeal or of bringing an objection based on human rights

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<sup>86</sup> Appendix 32. Order of August 19, 1994, Huancavelica Criminal Chamber, Opinion of the Court delivered by Dr. Sánchez Arroyo. Appendix to the State's brief of December 29, 2000; Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Judiciary.

<sup>87</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Judiciary.

<sup>88</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Judiciary; Appendix 33. First Transitional Criminal Chamber, Case 3465-95 Huancavelica, January 14, 1997. Appendix to the State's brief of December 29, 2000, and Appendix to the petitioners' brief of November 18, 1997.

<sup>89</sup> Law 26479, which granted a general amnesty to all military, police, and civilian personnel in various cases. Published in the official gazette, *El Peruano*, on June 15, 1995.

<sup>90</sup> Law 26492, promulgated on June 30, 1995 and published in the official gazette, *El Peruano*, on July 2, 1995.

violations.”<sup>91</sup> Accordingly, the IACHR recommended “that the Peruvian State repeal the Amnesty Law (26479) and the Law on Judicial Interpretation (26492) because they are incompatible with the American Convention, and investigate, try, and punish the State agents accused of human rights violations, especially violations that amount to international crimes.”<sup>92</sup>

153. On March 14, 2001, the Inter-American Court of Human Rights passed judgment in the Barrios Altos Case and found that Amnesty Laws 26479 and 26492 were incompatible with the American Convention on Human Rights and, consequently, lacked legal effect.<sup>93</sup> Subsequently, the Inter-American Court issued a judgment interpreting its judgment on merits and found that, given the nature of the violation that amnesty laws 26479 and 26492 constituted, the decision in the judgment on the merits in the Barrios Altos Case had generic effects.<sup>94</sup>

### **The Reopening of the Criminal Proceeding**

154. On May 5, 2004, the Office of the Huancavelica Criminal Prosecutor, taking into consideration the investigation of the Truth and Reconciliation Commission on the events in the case, as well as the judgment of the Inter-American Court of Human Rights in the Barrios Altos case v. Peru of March 13, 2001, which ruled that amnesty laws 26479 and 26492 were incompatible with the American Convention on Human Rights, decided to send an official letter to the Prosecutor General requesting that she contact the Office of the President of the Supreme Court with a view to reopening criminal case 93-027, which had been closed on July 4, 1995, when the defendants were granted amnesty.<sup>95</sup> On May 26, 2004, the Huancavelica Provincial Criminal Prosecutor presented the above request to the Prosecutor General, Nelly Calderón Navarro.<sup>96</sup>

155. On June 24, 2004, the Huancavelica Provincial Criminal Prosecutor asked the Prosecutor General to request the Supreme Court to order the case to be reopened, subject to the opinion of the Supreme Court Prosecutor.<sup>97</sup>

156. On November 10, 2005, the Office of the Attorney General in Huancavelica said that the criminal proceeding should continue from the stage that it had reached when the decision of July 4, 1995, was issued, and that, therefore, a date should be set for the hearing.<sup>98</sup>

157. On November 14, 2006, the registry office of the Transitional Mixed Chamber of the Superior Court of Justice in and for Huancavelica referred the case to the National Criminal Chamber in Lima, because the Mixed Chamber lacked jurisdiction.<sup>99</sup>

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<sup>91</sup> IACHR, Annual Report 1996, Chapter V, Part 4, Section IV.C.

<sup>92</sup> IACHR, Annual Report 1996, Chapter V, Part 4, Section VIII.6.

<sup>93</sup> I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C, No. 75, operative paragraph 4.

<sup>94</sup> I/A Court H.R., *Barrios Altos Case. Interpretation of the Judgment on the Merits* (Art. 67 American Convention on Human Rights). Judgment of September 3, 2001. Series C, No. 83, operative paragraph 3.

<sup>95</sup> Appendix 36. Office of the Attorney General, Office of the Huancavelica Government Attorney for Human Rights, Forced Disappearances, Extrajudicial Executions, and Exhumation of Secret Graves, May 5, 2004, Signed by Dr. Aurorita G. de la Cruz. Appendix to the State’s brief of January 28, 2005.

<sup>96</sup> Appendix 37. Official letter 825-2004-FPPE-DH-DF-EE-EFC-MP of May 6, 2004. Appendix to the State’s brief of January 28, 2005.

<sup>97</sup> Appendix 38. Official letter 1035-2004-MP-FPP-HUANCAVELICA of June 24, 2004, Huancavelica Provincial Criminal Prosecutor’s Office. Appendix to the State’s brief of January 28, 2005.

<sup>98</sup> Appendix 39. Office of the Attorney General, Huancavelica Mixed Provincial Prosecutor’s Office, Opinion No. 22/2005-VARIOS, Case No. 1993-027, Accused: Javier Bendezú Vargas et al.; Charge Genocide and others; Aggrieved: Francisco Hilario Torres et al., November 10, 2005. Appendix to the State’s brief of July 25, 2007.

158. On December 18, 2006, the judiciary approved the closure of the case in favor of Carlos Manuel Pedro Chinchay, on the ground that he was a minor at the time of the events.<sup>100</sup>

159. On December 6, 2007, the trial began of former serviceman Oscar Alberto Carrera González following his capture.<sup>101</sup>

160. On March 4, 2008, the National Criminal Chamber of the Superior Court of Justice in and for Lima sentenced Oscar Carrera González to 12 years' imprisonment for extortion and acquitted him of the charge of genocide. It was also determined that the statute of limitations as regards criminal action for the crimes of damages and larceny had run.<sup>102</sup> This judgment was appealed by the prosecutor's office, the convicted man's defense, and the relatives of the victims.

161. The judgment of March 4, 2008, also ordered certified copies of the case file to be sent to the Huancavelica Prosecutor's Office in order to investigate Simón Fidel Breña Palante, a member of the Escorpio patrol who took part in Operation Apolonia and who was named by the military personnel who testified in the trial as the person who fired the shots that killed the 15 victims.<sup>103</sup>

162. In 2009, the Supreme Court approved the statute of limitations on criminal action for larceny and damages, annulled Mr. Carrera González's conviction, and ordered a retrial.<sup>104</sup>

163. On January 14, 2010, the judiciary set the date for the start of Oscar Carrera González's new trial as March 2010, although subsequently the trial was suspended for administrative reasons and the accused was ordered released because the time limit for his pre-trial detention expired.<sup>105</sup>

164. The trial of Oscar Alberto Carrera González on the charge of genocide began in July 2010; as yet, the other accused have not been apprehended despite the fact that there are outstanding national and international warrants for their arrest, and that some of them, such as Duilio Chipana Tarqui and Fidel Gino Eusebio Huaytalla, are in active military service,<sup>106</sup> according to information provided by the Provostship of the Peruvian Army to the judiciary in official letter 3575/A/5/b of December 19, 2005.<sup>107</sup>

165. As of August 2010, the proceedings were at the oral stage, specifically, the questioning of the defendant Oscar Carrera González, who was on restricted release to ensure his appearance at trial, subject to compliance with the rules of conduct. At that time, the other accused (Javier Bendezú Vargas, Duilio Chipana

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<sup>99</sup> Appendix 40. Official letter No. 868-2007-JUS/CNDH-SE of May 31, 2007, signed by the Executive Secretary of the National Human Rights Council. Appendix to the State's brief of July 25, 2007.

<sup>100</sup> Appendix 42. Case 42-06 v. Javier Bendezú Vargas et al. Communication of June 13, 2007, signed by July Camargo Mondragón Lima, Registry Office clerk, National Criminal Chamber. Appendix to the State's brief of July 25, 2007.

<sup>101</sup> Petitioners' brief of October 5, 2010. Not contested by the State.

<sup>102</sup> Petitioners' brief of October 5, 2010, p. 3. Not contested by the State.

<sup>103</sup> Petitioners' brief of October 5, 2010, p. 3. Not contested by the State.

<sup>104</sup> Petitioners' brief of October 5, 2010, p. 3. Not contested by the State.

<sup>105</sup> Petitioners' brief of October 5, 2010, p. 3. Not contested by the State.

<sup>106</sup> Petitioners' brief of October 5, 2010, p. 3. Not contested by the State.

<sup>107</sup> Petitioners' brief of February 11, 2010. Not contested by the State.

Tarqui, Fidel Gino Eusebio Huaytalla, and Dennis Wilfredo Pacheco Zambrano) were classified as defendants in default.<sup>108</sup>

166. At December 23, 2010, the criminal proceeding against Oscar Alberto Carrera González and the other absent defendants was at the oral proceedings stage and testimony was being heard.<sup>109</sup>

**Proceeding Initiated by the Huancavelica Supra Provincial Criminal Prosecutor's Office in 2008**

167. Based on the judgment issued by the National Criminal Chamber on March 4, 2008, that same year (2008) the Huancavelica Supra-Provincial Criminal Prosecutor's Office opened an investigation into Simón Fidel Palante for the crime of genocide to the detriment of Francisco Hilario Quispe and 14 others.<sup>110</sup>

168. In 2008 and 2009, Statements were taken from a number of relatives of the victims.<sup>111</sup>

169. From March 1 to 8, 2010, an exhumation was conducted to recover the remains and determine if they belong to the victims at Misteriosa mine, where fragments, bone remnants, explosive materials and projectiles were found.<sup>112</sup> On July 23, 2010, the report of the forensic anthropology expert was sent to the Chief of the Forensic Investigations Laboratory for the Judicial Districts of Ayacucho and Huancavelica.

170. From September 20 to 22, 2010, blood and saliva samples were taken from the next-of-kin of the victims for the purposes of DNA analysis; and subsequently, witness Statements were obtained from other members of the Escorpio patrol.<sup>113</sup>

171. On April 28, 2011, the IACHR requested the State for a copy of the principal procedural documents in the criminal, disciplinary, and administrative proceedings, none of which have been forthcoming to date.

**B. Considerations as to Law**

**1. General Considerations on Forced Disappearance of Persons**

172. In its consistent case law on cases of forced disappearance of persons, the inter-American system for protection of human rights has reiterated that it constitutes an illegal act that gives rise to a multiple and continuing violation of several rights protected by the American Convention and places the victim in a State of complete defenselessness, giving rise to other related crimes. The State's international responsibility is increased when the disappearance forms part of a systematic pattern or practice applied or tolerated by the State. In brief, it

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<sup>108</sup> Appendix 41. Official letter 042-06-SPN of August 23, 2010, National Criminal Chamber. Appendix to the State's brief of September 2, 2010.

<sup>109</sup> Appendix 42. Report of the Records Clerk to the Coordinator of the National Criminal Chamber, Case 42-06, December 23, 2010. Appendix to the State's brief of January 10, 2011.

<sup>110</sup> Petitioners' brief of October 5, 2010, p. 3. Not contested by the State.

<sup>111</sup> Petitioners' brief of October 5, 2010, p. 3. Not contested by the State.

<sup>112</sup> Appendix 43. Procedure to Recover Human Bone Remains of March 1, 2010, signed por Juan Manuel Borjas Rosa, Supra-Provincial Criminal Prosecutor, Huancavelica Judicial District. Appendix to the State's brief of March 21, 2011; and Appendix to the petitioners' brief of October 5, 2010, p. 3.

<sup>113</sup> Petitioners' brief of October 5, 2010, p. 3. Not contested by the State.

is a crime against humanity involving a gross rejection of the essential principles on which the inter-American system is based.<sup>114</sup>

173. In its judgment in *Goiburú v. Paraguay*,<sup>115</sup> the Court offered the following review of the international treatment of forced disappearance:

Although the international community adopted the first declaration and the first treaty using the term forced disappearance of persons only recently in 1992 and 1994, respectively, already in the 1970s, the issue as such was examined in international human rights law and was developed within the framework of the United Nations system as of the 1980s.<sup>116</sup> The inter-American regional system had frequently used this term to refer to this series of acts and violations as a crime against humanity.<sup>117</sup> It is even described as such by Article 7(1)(i) of the 1998 Statute of the International Criminal Court, when committed as part of a widespread or systematic attack directed against any civilian population.<sup>118</sup> This description of the offense in reference has been reiterated in the text of Articles 5 and 8(1)(b) of the United Nations International Convention for the Protection

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<sup>114</sup> IACHR. Report 101/01. Case 10.247 and others. Extra-legal Executions and forced disappearance of persons. Peru. October 10, 2001. par. 178.

<sup>115</sup> I/A Court H.R., *Case of Goiburú et al.* Judgment on Merits, Reparations and Costs Judgment of September 22, 2006. Series C, No. 153. par. 82.

<sup>116</sup> I/A Court H.R., *Case of Goiburú et al.* Judgment on Merits, Reparations and Costs Judgment of September 22, 2006. Series C, No. 153. par. 82. Cf. The establishment of the Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights, by Resolution 20 (XXXVI) of February 29, 1980, is a clear demonstration of general censure and repudiation of the practice of disappearances, which had already received world attention by the General Assembly (Resolution 33/173 of December 20, 1978), the Economic and Social Council (Resolution 1979/38 of May 10, 1979) and the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Resolution 5B (XXXII) of September 5, 1979). The reports of the Special Rapporteurs or representatives of the Commission on Human Rights show concern that the practice of disappearances be stopped, that the victims reappear, and that those responsible be punished (*Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C, No. 4, par. 151. Likewise, the *Godínez Cruz Case*, par. 159, and *Fairén Garbí and Solís Corrales Case*. Judgment of March 15, 1989. Series C, No. 6, par. 146). The following resolutions of the United Nations General Assembly should also be cited: Resolution 3450 (XXX) of December 9, 1975, thirtieth session, on the question of missing persons in Cyprus as a result of the armed conflict; Resolution 32/128 of December 16, 1977, thirty-second session, proposing the establishment of a body to investigate the disappearances in Cyprus “impartially, effectively and speedily,” and Resolution 33/173 of December 20, 1978, thirty-third session, entitled “Disappeared Persons,” in which the General Assembly expressed its deep concern owing to “reports from various parts of the world relating to enforced or involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organizations,” as well as its concern about “reports of difficulties in obtaining reliable information from competent authorities as to the circumstances of such persons,” and indicating that there was a “danger to the life, liberty and physical security of such persons arising from the persistent failure of these authorities or organizations to acknowledge that such persons are held in custody or otherwise to account for them.”

<sup>117</sup> I/A Court H.R., *Case of Goiburú et al.* Judgment on Merits, Reparations and Costs Judgment of September 22, 2006. Series C, No. 153. par. 82. Cf. Resolution AG/RES. 666 (XIII-0/83) of November 18, 1983, and resolution AG/RES. 742 (XIV-0/84) of November 17, 1984, of the General Assembly of the Organization of American States. Also, cf. Inter-American Commission on Human Rights. Annual Report 1983-1984. Chapter IV, pars. 8, 9 and 12, and Chapter V, I.3, OEA/Ser.L/V/II.63 doc. 10 of September 28, 1984; Annual Report 1986-1987. Chapter V.II, OEA/Ser.L/V/II.71 Doc. 9 rev. 1 of September 22, 1987; Annual Report 1987-1988. Chapter IV, OEA/Ser.L/V/II.74 Doc. 10 rev. 1 of September 16, 1988; Annual Report 1990-1991. Chapter V, OEA/Ser.L/V/II.79, Doc. 12 rev. 1 of February 22, 1991, and Annual Report 1991. Chapter IV, OEA/Ser.L/V/II.81 Doc. 6 Rev. 1 of February 14, 1992.

<sup>118</sup> I/A Court H.R., *Case of Goiburú et al.* Judgment on Merits, Reparations and Costs Judgment of September 22, 2006. Series C, No. 153. par. 82. Cf. Rome Statute of the International Criminal Court adopted on July 17, 1998, by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an international criminal court, A/CONF.183/9.



of All Persons from Forced Disappearance, adopted by the recently created United Nations Human Rights Council in June 2006.<sup>119</sup>

174. The Commission also notes that the former UN Commission on Human Rights adopted resolutions in which it decided to continue to give particular consideration to cases of children subjected to enforced disappearance and to cooperate with the governments concerned in their identification.<sup>120</sup> Likewise, in its reports to the United Nations Human Rights Council, the Working Group on Enforced or Involuntary Disappearances has noted that children are also victims of disappearances, both directly and indirectly.<sup>121</sup>

175. Among the distinctive characteristics of a forced disappearance of persons are the means used to carry it out, which are designed to conceal any evidence of the facts, the corresponding responsibility, and the fate of the victim. Another feature is the manner in which the failure to elucidate the facts and identify those responsible affects not only the direct victim, but also their family and society in general.<sup>122</sup>

176. According to its consolidated case law, the Commission finds that forced disappearance is a complex human rights violation that continues in time so long as the whereabouts of the victim or of their remains are not known. The disappearance as such only ceases when the fate or whereabouts of the victim or their remains is determined. The Commission has adopted an integral approach to this human rights violation, understanding it as a continuing violation. This approach enables it to analyze and determine the full extent of the State's responsibility. It should be borne in mind that so long as the whereabouts of the victim are not determined or their remains located, the family and the rest of society must endure the experience of a forced disappearance with all the attendant consequences.<sup>123</sup>

177. Furthermore, the Commission notes that when a State ratifies the Inter-American Convention on Forced Disappearance of Persons undertakes "[n]ot to practice, permit, or tolerate the forced disappearance of persons, even in States of emergency or suspension of individual guarantees," in accordance with Article I (a) of that instrument. The Commission observes in the present case that although the events occurred before the State of Peru ratified the above mentioned Convention, the continuous nature of the crime of forced disappearance, its effects are prolonged in time, as long as the fate or whereabouts of the victim are not set. Consequently, the state is in a state of constant violation of its international obligations.<sup>124</sup>

178. Bearing in mind the foregoing, the Commission must analyze the established facts in the instant case to determine if they conform to the concept of forced disappearance established in Article II of the Inter-American Convention on Forced Disappearance of Persons that says "forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State

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<sup>119</sup> I/A Court H.R., *Case of Goiburú et al.* Judgment on Merits, Reparations and Costs Judgment of September 22, 2006. Series C, No. 153. par. 82. Cf. United Nations Human Rights Council. International Convention for the Protection of all Persons from Forced Disappearance. First session, agenda item 4, A/HRC/1/L.2, June 22, 2006.

<sup>120</sup> UN Commission on Human Rights. *Question of enforced or involuntary disappearances* Resolution 2000/37.

<sup>121</sup> United Nations Human Rights Council. Report of the Working Group on Enforced or Involuntary Disappearances. A/HRC/10/9. 25 February 2009. par. 456.

<sup>122</sup> IACHR, Report No. 111/09, Case 11.324, Merits, Narciso González Medina, Dominican Republic, November 10, 2009, par. 127; IACHR, Report No. 95/09, Cases 12.494, 12.517, 12.518, Gregoria Herminia et al., El Salvador, September 8, 2009, par. 167.

<sup>123</sup> IACHR, Report No. 111/09, Case 11.324, Merits, Narciso González Medina, Dominican Republic, November 10, 2009, par. 128; IACHR, Report No. 95/09, Cases 12.494, 12.517, 12.518, Gregoria Herminia et al., El Salvador, September 8, 2009, par. 168; Report No. 93/08, Case 12.529, Rainer Ibsen Cárdenas and José Luís Ibsen Peña, October 31, 2008, par. 226.

<sup>124</sup> IACHR, Report No. 93/08, Case 12.529, Rainer Ibsen Cárdenas and José Luís Ibsen Peña, October 31, 2008, par. 232.

or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”

179. The Inter-American Commission,<sup>125</sup> the Peruvian Truth and Reconciliation Commission (hereinafter “CVR”),<sup>126</sup> and the Inter-American Court of Human Rights have all established that at the time of the events in Peru there was a pattern of extrajudicial executions,<sup>127</sup> forced disappearances, and massacres attributed to agents of the State and groups linked to the security agencies.

180. As regards the context in which the events took place, the report of the Truth and Reconciliation Commission finds that State agents involved in the counter-subversive effort adopted the practice of forced disappearance as a means to combat subversion, as it had a deterrent effect on militants, potential members, or persons who sympathized with subversive organizations. “The intimidatory effect and message that family or community members could suffer the same violation could serve as a mechanism to discourage the population from continuing to sympathize with, tolerate, or coexist in harmony with subversive groups.”<sup>128</sup>

181. The Report of the Truth and Reconciliation Commission also mentions that, as there was greater impunity where the more isolated social groups were concerned (rural areas, peasants, Quechua speakers, illiterate people, women, etc.), victims of forced disappearance were immediately executed based on the assumption that these social groups would have more limited access to justice, greater fear of reporting the deeds, and less attention paid to their complaints, and therefore it was not necessary to take precautions and mobilize all the resources associated with forced disappearance (detention facilities, mechanisms for disposing of the bodies of victims, etc.).<sup>129</sup>

182. The petitioners sustain that even though the facts that are the subject of this case were investigated by Peru’s Truth and Reconciliation Commission, the State has not acknowledged in an international proceeding its responsibility for the illegal detention and subsequent forcible disappearance of the 15 victims, notwithstanding the existence of several documents in which the State accepts that the facts occurred. They say that, to date, the mortal remains of the 15 victims in the case have not been located or identified.

183. In September 1991, that is, two months after the events occurred, the State informed the Commission that it had been determined that 14 members of Santa Barbara campesino community had been

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<sup>125</sup> IACHR, Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.83, Doc. 31, March 12, 1993, pars. 16 et seq.; IACHR, Report 51/99, Case 10.471 Anetro Castillo Pezo et al., Peru, April 13, 1999, pars. 68-75; IACHR, Report 52/99, Case 10.544 Raúl Zevallos Loayza et al., Peru, April 13, 1999, pars. 45-52; IACHR, Report 53/99, Case 10.551 David Palomino Morales et al., Peru, April 13, 1999, pars. 70-77; IACHR, Report 54/99, Case 10.807, William León Laurente et al., Peru, April 13, 1999, pars. 68-75; IACHR, Report 55/99, Case 10.815 Juan De La Cruz Núñez Santana et al., Peru, April 13, 1999, pars. 62-69; IACHR, Report 56/99, Case 10.824 Eudalio Lorenzo Manrique et al., Peru, April 13, 1999, pars. 61-68; IACHR, Report 57/99, Case 10.827 Romer Morales Zegarra et al., Peru, April 13, 1999, pars. 28-35; IACHR, Report 101/01, Case 10.247 et al., Extrajudicial Executions and Forced Disappearances of Persons, Peru, October 11, 2001, pars. 172-179. All of these reports are available at <http://www.cidh.oas.org/annual.eng.htm>.

<sup>126</sup> Truth and Reconciliation Commission, Final Report, Lima: CVR, 2003, Volume VI, Chapter 1.2. Forced Disappearances, p. 57, Available at <http://www.cverdad.org.pe/ifinal/index.php>; See also Chapter 1.3. Extrajudicial Executions, p. 179.

<sup>127</sup> I/A Court H.R., *Case of Gómez Palomino*. Judgment of November 22, 2005. Series C, No. 136, pars. 54.1 – 54.4.

<sup>128</sup> Final Report of the Truth and Reconciliation Commission of Peru. Volume VI, Chapter I: Patterns in the perpetration of crimes and human rights violations, 1.2. Forced Disappearances: Victims of Forced Disappearance, p. 85.

<sup>129</sup> Final Report of the Truth and Reconciliation Commission of Peru. Volume VI, Chapter I: Patterns in the perpetration of crimes and human rights violations, 1.2. Forced Disappearances: Victims of Forced Disappearance, p. 105.

detained on July 4, 1991 and, to date, were missing, since it had not been demonstrated that the remains found in the Rodeo Pampa sector belonged to the missing persons. Subsequently, during the processing of the case by the IACHR, the State has not contested the classification of the facts in the instant case as forced disappearance.

184. The Commission takes it as proven that on July 4, 1991, the Escorpio patrol, in carrying out Operation Apolonia, the purpose of which was to "capture and/or destroy terrorist elements that were operating in the community of Santa Barbara," accompanied by a child deserter from the Shining Path who acted as their guide in the operation, raided the homes of Francisco Hilario Torres and Ramón Hilario Morán, and detained and took away everyone inside the two houses (seven children and seven adults): Francisco Hilario Torres (age 60 years); his wife, Dionicia Quispe Mallqui (age 57 years); his daughters, Antonia Hilario Quispe (age 31 years) and Magdalena Hilario Quispe (age 26 years); his daughter-in-law Mercedes Carhuapoma de la Cruz (age 20 years); and his grandchildren, Yessenia (age 6 years), Miriam (age 3 years), and Edith Osnayo Hilario (age 8 months); Wilmer Hilario Carhuapoma (age 3 years), and Alex Jorge Hilario (age 6 years); Ramón Hilario Morán (age 26 years); his wife, Dionicia Guillén (age 24 years), and their sons Raúl Hilario Guillén (age 18 months) and Héctor Hilario Guillén (age 6 years). The whereabouts of the seven children and seven adults is unknown since then. The Commission also takes as established that on July 4, 1991, Mr. Elihoreff Huamaní Vergara was detained by a military patrol in the presence of his father and has not been seen since.

185. The Commission has taken the following circumstances into consideration in determining that in the instant case the victims were subjected to forced disappearance: first, there was an illegal and arbitrary detention on the part of the State security forces; second, the victims were taken to an isolated spot a considerable distance from where they were detained for the precise reason of covering up and concealing the facts; third, the authorities refused to cooperate in the judicial investigation opened in response to the complaints lodged; and, fourth, days after the events occurred, a number of military personnel returned to the mine with the intention of erasing the material traces of the crime and preventing any subsequent investigation or clarification thereof. In that regard, the Commission takes into account that the main characteristics of the forced disappearance were the lack of information about the arrest and that the aim of the events that followed was to impede the exercise of judicial remedies.

186. In addition, the Commission notes that the case-law of the Court has found that the victims of forced disappearance in Peru at the time of the events were usually individuals identified by police authorities, by the military forces and by the paramilitary commandos, as alleged members, collaborators or supporters of Sendero Luminoso (Shining Path) or the Movimiento Revolucionario Tupac Amarú (Tupac Amarú Revolutionary Movement),<sup>130</sup> as occurred in the instant case. As regards the techniques used to destroy any evidence of the crimes committed during the forced disappearance procedure, the CVR pointed out in its report that said techniques included, inter alia, the mutilation or cremation of victim's mortal remains,<sup>131</sup> which is consistent with the modus operandi used in the instant case.

187. The Commission also notes that, according to the established facts, to date, the relatives of the victims have not received the results of the DNA tests, which were only performed in 2010, almost 19 years after the events occurred, based on the exhumation conducted in March 2010, despite the fact that remains – very probably human – were found in the removal of the bodies carried out on July 18, 1991.

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<sup>130</sup> I/A Court H.R., *Case of Gómez Palomino*. Judgment of November 22, 2005. Series C, No. 136, par. 54.1. See also, IACHR Application in the Case of Santiago Fortunato Gómez Palomino. (Case 11.062) v. Peru Washington, D.C., September 13, 2004, par. 27.

<sup>131</sup> I/A Court H.R., *Case of Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 83; I/A Court H.R., *Case of Gómez Palomino*. Judgment of November 22, 2005. Series C, No. 136, par. 54.1. See also, IACHR Application in the Case of Santiago Fortunato Gómez Palomino. (Case 11.062) v. Peru Washington, D.C., September 13, 2004, par. 27.

188. Consequently, based on the analysis in this chapter, the Commission finds that the above evidence is sufficient to conclude that what happened to the 15 victims should be categorized as forced disappearance.

**2. Right to personal liberty, humane treatment, life, and juridical personality (Articles 7,<sup>132</sup> 5,<sup>133</sup> 4(1),<sup>134</sup> and 3 of the American Convention,<sup>135</sup> in connection with the obligation to ensure rights (Article 1(1) of that instrument)<sup>136</sup>**

189. According to the case law of the Inter-American Court, in cases of forced disappearance it is unnecessary to perform a detailed analysis of the arrest in relation to each of the guarantees recognized in Article 7 of the American Convention. In the opinion of the Inter-American Court, when it is demonstrated that deprivation of freedom was a step prior to achieving the disappearance of the victims, it is not necessary to determine whether or not the alleged victims were informed of the reasons for their detention; whether or not said detention was effected regardless of the reasons and conditions established in the legislation in force at the time of the events; or whether the act of the detention was unreasonable, unpredictable or disproportionate.<sup>137</sup>

190. The Court has also held that when examining an alleged forced disappearance it should be taken into account that the deprivation of liberty of the individual must be understood merely as the beginning of the constitution of a complex violation that is prolonged over time until the fate and whereabouts of the alleged victim are established.<sup>138</sup>

191. As to the right to humane treatment, the Inter-American Court has recognized that “a person illegally detained [...] is in a situation of heightened vulnerability in which there is a high risk of his/her rights being violated, such as the right to physical integrity and to be treated with dignity.”<sup>139</sup> Furthermore, the Inter-American Court has held that forced disappearance violates that right since “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment which [...] violates the right of every detainee

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<sup>132</sup> Article 7

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

<sup>133</sup> Article 5

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

<sup>134</sup> Article 4.

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

<sup>135</sup> Article 3

Every person has the right to recognition as a person before the law.

<sup>136</sup> Article 1(1)

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.

<sup>137</sup> I/A Court H.R., *Case of La Cantuta*. Judgment of November 29, 2006, Series C No. 162, par. 109.

<sup>138</sup> I/A Court H.R., *Case of Ticona Estrada et al v. Bolivia. Preliminary Objections, Merits, Reparations and Costs* Judgment of November 27, 2008. Series C, No. 191, par. 56.

<sup>139</sup> I/A Court H.R., *Bámaca Velásquez Case v. Guatemala*. Judgment of November 25, 2000. Series C, No. 70, par. 90.

under Article 5(1) and 5(2).”<sup>140</sup> Specifically, the Court has determined that it is clear that in the case of a forced disappearance, the victim’s personal integrity is affected in all its dimensions.<sup>141</sup>

192. The Commission noted in its 1993 report on Peru that, at the time the events, violations of the right to life, such as forced disappearance, were frequently preceded by mistreatment and torture, generally aimed at forcing the victims to make self-incriminating confessions to get those victims to provide information on subversive groups or to create the kind of fear among the people that will deter them from cooperating with subversive groups.<sup>142</sup>

193. Besides the feelings of anxiety and fear inspired by the forced disappearance, the Commission has taken as established that on July 4, 1991, as the 15 victims were being taken to Misteriosa mine they were beaten and forced to walk for several hours with their hands bound and tied by their necks, and that they were not given food or water. Consequently, the Commission concludes that the victims were humiliated, tortured, and in fear for their lives. The Commission underscores that this assumption is made independently of the ages of the victims. The Commission notes that the ages of the child victims at the time of the events ran from 8 months to 6 years old, a factor that should be taken into account in weighing their suffering.<sup>143</sup>

194. With respect to the right to life, the Inter-American Court has repeatedly held that said right is a fundamental human right, the full exercise of which is a prerequisite for the enjoyment of all other human rights.<sup>144</sup> The Court has also said that the foregoing means that States have both the obligation to guarantee the creation of the necessary conditions to ensure that violations of this inalienable right do not occur, as well as the duty to prevent the infringement of the said right by its officials or private individuals.<sup>145</sup> According to the Court, the object and purpose of the Convention, as an instrument for the protection of the human being, requires that the right to life be interpreted and enforced so that its guarantees are truly practical and effective (*effet utile*).<sup>146</sup>

195. According to the Court’s case law, the practice of disappearances has frequently involved the secret execution of those detained, without trial, followed by concealment of the corpse in order to eliminate any material evidence of the crime and to ensure absolute impunity, which entails a brutal violation of the right to life, established in Article 4 of the Convention.<sup>147</sup> The jurisprudence of the Inter-American system has also determined that when a person has disappeared in violent circumstances and remained disappeared for a long time it is reasonable to presume that he has been killed.<sup>148</sup>

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<sup>140</sup> I/A Court H.R., *Velásquez Rodríguez Case*. Merits, pars. 156 and 187; *Case of the Miguel Castro-Castro Prison*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C, No. 160, par. 323; I/A Court H.R. *Case of Ticona Estrada et al. v. Bolivia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C, No. 191, par. 58.

<sup>141</sup> I/A Court H.R. *Case of Ticona Estrada et al. v. Bolivia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C, No. 191, par. 58.

<sup>142</sup> IACHR, *Report on the Situation of Human Rights in Peru*, March 12, 1993, pars. 18 et seq.

<sup>143</sup> IACHR, Report No. 95/09, Cases 12.494, 12.517, 12.518, Gregoria Herminia et al., El Salvador, September 8, 2009, par. 195.

<sup>144</sup> I/A Court H.R., *Case of Zambrano-Vélez et al.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C, No. 166, par. 78; and *The “Street Children” Case (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C, No. 63, par. 144.

<sup>145</sup> I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C, No. 63, par. 144.

<sup>146</sup> I/A Court H.R., *Case of Zambrano-Vélez et al.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C, No. 166, par. 79; and *Case of Baldeón García*. Judgment of April 6, 2006. Series C, No. 147, par. 83.

<sup>147</sup> I/A Court H.R., *Case of the 19 Merchants*. Judgment of July 5, 2004. Series C, No. 109. par. 154; *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C, No. 70. par. 130.

<sup>148</sup> I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C, No. 4, par. 188.

196. In its analysis of the facts, the Commission has taken into account that the victims were civilians, half of them children. Under Article 29(b) of the American Convention<sup>149</sup> and as the Inter-American Court found in the *Case of the "Mapiripán Massacre" v. Colombia*

with regard to establishment of the international responsibility of the State in the instant case, the Court cannot set aside the existence of general and special duties of the State to protect the civilian population, derived from International Humanitarian Law, specifically Article 3 common of the August 12, 1949 Geneva Agreements and the provisions of the additional Protocol to the Geneva Agreements regarding protection of the victims of non-international armed conflicts (Protocol II). Due respect for the individuals protected entails passive obligations (not to kill, not to violate physical safety, etc.), while the protection due entails positive obligations to impede violations against said persons by third parties. Carrying out said obligations is significant in the instant case, insofar as the massacre was committed in a situation in which civilians were unprotected in a non-international domestic armed conflict.<sup>150</sup>

197. As regards the child victims, Article 38(1) of the Convention on the Rights of the Child provides,<sup>151</sup> "States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. Furthermore, Article 6 of the above Convention provides, "1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."

198. With regard to the facts in the instant case and bearing in mind the armed conflict that framed them, the Commission finds it appropriate to apply Articles 6 and 38 of the Convention on the Rights of the Child, as it has done in previous cases.<sup>152</sup> In addition, the Commission notes that common Article 3 of the Geneva Conventions expressly forbids under any circumstances violence against "[p]ersons taking no active part in the hostilities,"<sup>153</sup> including children.<sup>154</sup> For its part, Article 13 of Protocol II recognizes the principle of civilian immunity as follows:<sup>155</sup>

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

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<sup>149</sup> Article 29(b) of the American Convention on Human Rights – Restrictions Regarding Interpretation: "No provision of this Convention shall be interpreted as: [...] b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party [...]"

<sup>150</sup> I/A Court H.R., *Case of the "Mapiripán Massacre" v. Colombia. Merits, Reparations and Costs. v. Colombia*. Judgment of September 15, 2005. Series C, No. 134, par. 114.

<sup>151</sup> Peru ratified the Convention on the Rights of the Child on September 4, 1990. Available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)

<sup>152</sup> See IACHR, Report No. 86/10, Case 12.649, Merits, [Community of Rio Negro of the Maya Achi People and its Members](#), Guatemala, July 14, 2010, par. 256.

<sup>153</sup> Peru ratified the Geneva Conventions on February 15, 1956. Available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

<sup>154</sup> Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Working Paper Nº 1, The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation, October 2009, p. 5.

<sup>155</sup> Peru ratified Protocol II to the Geneva Conventions on July 14, 1989. Available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.<sup>156</sup>

199. Furthermore, the United Nations Security Council expressed concern in its resolutions 1261 (1999) and 1325 (2000) “that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements...”<sup>157</sup>

200. The Commission finds that in the instant case the right to life was violated of Francisco Hilario Torres; his wife, Dionicia Quispe Malqui; their daughters, Antonia and Magdalena Hilario Quispe; their daughter-in-law, Mercedes Carhuapoma de la Cruz; Ramón Hilario Morán and his wife, Dionicia Guillén; and Elihoref Huamaní Vergara, as well as of the children: Yessenia, Miriam and Edith Osnayo Hilario; Wilmer Hilario Carhuapoma; Alex Jorge Hilario; and the brothers Raúl and Héctor Hilario Guillén, since it may be reasonably infer from all the evidence, including Viviano Hilario Mancha’s testimony before the Prosecutors Office of July 12, 1991, in which he stated he saw the half-buried corpse of his grandson along with others who could not recognize, and from the report of the Truth and Reconciliation Committee that the members of the Escorpio military patrol killed the victims and later blew up their corpses with dynamite. The Commission notes that 20 years after the events occurred, the remains found at Misteriosa mine have still not been identified or delivered to their relatives.

201. Based on the foregoing, the Commission finds that there is sufficient evidence in the instant case to conclude that Peru is responsible for violation of Articles 7, 5, and 4 of the American Convention in conjunction with Article 1(1) thereof, to the detriment of the 15 victims in the case.

202. As regards the right to recognition of juridical personality, the Commission recalls that this right is an essential and necessary prerequisite in order to hold and exercise all rights, since without it, a person does not enjoy the protection and guarantees that the law offers, simply because they are invisible to it.<sup>158</sup>

203. By its very nature, forced disappearance of persons seeks the juridical annulment of the individual precisely in order to remove them from the protection that the laws and justice afford them. Thus, the apparatus of repression ensures that persons may be deprived of their rights with impunity by placing them beyond the reach of any possible judicial protection. The aim of those who perpetrate forced disappearance is to operate outside the law and conceal any evidence of crime, thereby seeking to avert its investigation and punishment, and prevent the person or their next-of-kin from filing suit or, in the event suit is filed, from accomplishing a positive result.<sup>159</sup>

204. In this connection, in various instances in the past the Inter-American Commission has consistently held that a person who has been detained and disappeared is “necessarily placed outside of and excluded from the juridical and institutional order of the State, which ha[s] the effect of denying recognition of

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<sup>156</sup> Colombia ratified Protocol II Additional to the Geneva Conventions on August 14, 1995. Available at: <http://www2.ohchr.org/english/law/protocol2.htm>.

<sup>157</sup> United Nations, Security Council, S/RES/1325 (2000) of 31 October 2000.

<sup>158</sup> IACHR, Report No. 95/09, Cases 12.494, 12.517, 12.518, Gregoria Herminia et al., El Salvador, September 8, 2009, par. 207.

<sup>159</sup> IACHR, Report No. 95/09, Cases 12.494, 12.517, 12.518, Gregoria Herminia et al., El Salvador, September 8, 2009, par. 208.

their very existence as human beings entitled to be recognized as such before the law,” and, therefore, has found that Article 3 of the Convention has been violated.<sup>160</sup>

205. The Human Rights Committee has concluded that one of the violations that may result from forced disappearance is a denial of the victim’s right to recognition as a person before the law<sup>161</sup>.

206. Likewise, Article 7(2)(i) of the 1998 Rome Statute provides that “Enforced disappearance of persons” means “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

207. Similarly, the definition contained in Article 2 of the International Convention for the Protection of all Persons from Forced Disappearance (2006) recognizes that the adverse consequence of the refusal to acknowledge the deprivation of liberty or whereabouts of the disappeared person is, in combination with other elements of the disappearance, to “place such a person outside the protection of the law.”<sup>162</sup>

208. Equally, the United Nations Independent Expert on Enforced or Involuntary Disappearance of Persons has stated that forced disappearance can also entail violation of the right to recognition as a person before the law on the basis that acts of enforced disappearance are aimed at removing the victim from the protection of the law.<sup>163</sup>

209. For its part, the Inter-American Court has recognized that that one of the characteristics of forced disappearance, in contrast to extra-legal executions, is that it implies the State’s refusal to acknowledge that the victim is under its custody and provide information in that regard, in order to create uncertainty as to his whereabouts, life or death, cause intimidation, and suppress his rights.<sup>164</sup>

210. The violation of the right to legal personality that comes with forced disappearance is such that several States in the region have had to adopt specific laws to distinguish this phenomenon from extrajudicial execution. The State prevents living people from exercising their rights and obligations because the State denies their final fate.<sup>165</sup> In particular, the States have adopted several acts and established case-law in light of the lack of specific rules regarding the absence of a person due to forced disappearance and the corresponding inability to

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<sup>160</sup> IACHR, Report 11/98 (Case 10.606 – Guatemala), par. 57; Report 55/99 (Cases 10.815, 10.905, 10.981, 10.995, 11.042, 11.136 – Peru), par. 111; Report 56/98 (Cases 10.824, 11.044, 11.124, 11.125, 11.175 – Peru), par. 110; Report 3/98 (Case 11.221 – Colombia), par. 64; Report 30/96 (Case 10.897 – Guatemala), par. 23; and Report 55/96 (Case 8076 - Guatemala), par. 24.

<sup>161</sup> Human Rights Committee of the International Covenant on Civil and Political Rights. Communication 1327/2004. *Grioua v. Algeria*. paras. 7.8 and 7.9.

<sup>162</sup> Adopted by United Nations General Assembly resolution A/RES/61/177 of 20 December 2006.

<sup>163</sup> United Nations, Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, E/CN.4/2002/71, 8 January 2002, para. 70.

<sup>164</sup> I/A Court H.R., Case of Anzualdo Castro v. Peru, Judgment of September 22, 2009, Series C No. 202, par. 91.

<sup>165</sup> For example, in the case of detainees-disappeared persons who remain alive the State denies the right of access to a judge if they are in detention, and in the case of detainees-disappeared persons who had been executed it denies the consequential rights of the deceased persons’ next-of-kin, such as, rights of inheritance, for instance, which are obstructed by the indeterminate legal status of the detainee-disappeared person.



exercise his or her rights and obligations and the effects that such situation produces on his or her next-of-kin and third parties.<sup>166</sup>

211. Based on the foregoing considerations, the Commission concludes that the State of Peru violated the rights to personal liberty, humane treatment, life and juridical personality recognized at Articles 7, 5, 4, and 3 of the American Convention, in conjunction with the obligations set forth in Article 1(1) of said instrument, to the detriment of Francisco Hilario Torres; his wife, Dionicia Quispe Malqui; their daughters, Antonia and Magdalena Hilario Quispe; their daughter-in-law, Mercedes Carhuapoma de la Cruz; Ramón Hilario Morán and his wife Dionicia Guillén; and Elihoref Huamaní Vergara; as well as the children: Yessenia, Miriam and Edith Osnayo Hilario; Wilmer Hilario Carhuapoma; Alex Jorge Hilario; and the brothers Raúl and Héctor Hilario Guillén, with the aggravating factor that they were young children at the time of the events.<sup>167</sup>

### 3. Rights of the Child (Articles 19 and 1(1) of the American Convention)<sup>168</sup>

212. Bearing in mind the particular characteristics of the instant case and the fact that seven of the 15 victims were children at the time of their forced disappearance, the Commission believes it appropriate to examine the State's obligations under Article 19 of the American Convention.

213. According to the Court's case law, Article 19 of the American Convention should be understood as a complementary right that the Convention establishes for individuals who need a special protection based on their physical and emotional development.<sup>169</sup> Children, therefore, possess not only the same human rights that correspond to all persons, but also special rights accruing to their child status, in regard to which the family, society and the State have specific duties.<sup>170</sup> In sum, the rights of children must be safeguarded both in view of their status as human beings and by reason of their special condition, to which end special protective measures must be adopted. This added obligation to provide protection<sup>171</sup> and these special duties should be regarded as ascertained based on the needs of the child as a person with rights.<sup>172</sup>

214. The Commission has referred in previous cases to the *corpus juris* on the human rights of the child in the following terms:

For an interpretation of a State's obligations vis-a-vis minors, in addition to the provision of the American Convention, the Commission considers it important to refer to other international

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<sup>166</sup> I/A Court H.R., Case of Anzaldo Castro v. Peru, Judgment of September 22, 2009, Series C No. 202, par. 100.

<sup>167</sup> See Prosecutor v. Kunarac, Kovac and Vukovic, ICTY (2001), where the International Criminal Tribunal for the Former Yugoslavia found that when the victims of murder, torture or bodily harm are children, this is considered an aggravating factor, and therefore warrants a higher penalty for those responsible.

<sup>168</sup> Article 19 of the American Convention States, "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."

<sup>169</sup> I/A Court H.R., *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C, No. 148, par. 106; *Case of Baldeón García*, Judgment of April 6, 2005. Series C, No. 147, par. 244; *Case of the "Mapiripán Massacre"*, Judgment of September 15, 2005. Series C, No. 134, par. 152; and, in particular, *Case of the "Juvenile Reeducation Institute"*, Judgment of September 2, 2004. Series C, No. 112, par. 147, and *Case of Servellón-García et al.* Judgment of September 21, 2006, par. 113

<sup>170</sup> Advisory Opinion OC-17/2002, par. 62: Adoption of special measures to protect children is a responsibility both of the State and of the family, community, and society to which they belong.

<sup>171</sup> I/A Court H.R., *Case of the "Juvenile Reeducation Institute"*, par. 160; Case of the Gómez Paquiyauri Brothers, pars. 124, 163-164, and 171; *Case of Bulacio*, pars. 126 and 134; *The "Street Children" Case (Villagrán Morales et al.)*, pars. 146 and 191; and *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005, par. 172. In the same connection: Advisory Opinion OC-17/02, pars. 56 and 60.

<sup>172</sup> I/A Court H.R., *Case of the Indigenous Community Sawhoyamaxa*. Judgment of March 29, 2006, par. 154

instruments that contain even more specific rules regarding the protection of children. Those instruments include the Convention on the Rights of the Child and the various United Nations declarations on the subject. This combination of the regional and universal human rights systems for purposes of interpreting the Convention is based on Article 29 of the American Convention and on the consistent practice of the Court and of the Commission in this sphere.<sup>173</sup>

215. For its part, the Court has found that both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help the Court establish the content and scope of the general provision established in Article 19 of the American Convention, using specific provisions of the Convention on the Rights of the Child in interpreting Article 19 of the American Convention.<sup>174</sup>

216. The Inter-American Court has found, “The special vulnerability of boys and girls due to their condition as such becomes even more evident in a situation of domestic armed conflict, (...), since they are least prepared to adapt or respond to said situation and, sadly, it is they who suffer its abuse in a disproportionate manner.”<sup>175</sup>

217. Regarding Peru, the Commission observes that in 1993 the Committee on the Rights of the Child expressed “its deep concern at the continued violence which has already caused thousands of killings, disappearances and displacements of children and parents” and recommended that “investigations be conducted into cases of extrajudicial executions, disappearances and torture which are carried out in the context of the internal violence prevailing in several parts of the country”.<sup>176</sup>

218. The Commission notes that, according to the Report of the CVR, “13.19% of forced disappearances were committed against persons under the age of 18, which suggests that on certain occasions the practice of forced disappearance was used indiscriminately.”<sup>177</sup> In this regard, the above report says that one of the patterns of disappearance of children emerged “as a consequence of a number of incursions in rural areas and the subsequent detention of the entire family in military barracks,”<sup>178</sup> since, from a logic of war, the killing of children was one of the costs of eradicating subversion,<sup>179</sup> and in the fight to destroy the enemy it did not matter if those killed were innocent, much less children.<sup>180</sup>

219. In the instant case, the Commission has taken it as established that the community of Santa Barbara was regarded by the Army as a “red zone” after the presence was reportedly detected of members of subversive groups that made incursions into nearby mines and population centers, and that the detention of

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<sup>173</sup> IACHR, Report No. 41/99, Case 11.491, Minors in Detention, Honduras, March 10, 1999, par. 72.

<sup>174</sup> I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C, No. 63, par. 194; see also: *Case of the “Juvenile Reeducation Institute”*, Judgment of September 2, 2004. Series C, No. 112, par. 148; and *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004, par. 166.

<sup>175</sup> I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C, No. 134, par. 156.

<sup>176</sup> UN Doc. CRC/C/15/Add.8 of October, 18, 1993, p.7 and 16.

<sup>177</sup> Final Report of the Truth and Reconciliation Commission of Peru. Volume VI. Chapter 1: Patterns in the perpetration of crimes and human rights violations: Violence against Children, p. 593.

<sup>178</sup> Final Report of the Truth and Reconciliation Commission of Peru. Volume VI. Chapter 1: Patterns in the perpetration of crimes and human rights violations: Violence against Children, p. 595.

<sup>179</sup> Final Report of the Truth and Reconciliation Commission of Peru. Volume VI. Chapter 1: Patterns in the perpetration of crimes and human rights violations: Violence against Children, p. 596.

<sup>180</sup> Final Report of the Truth and Reconciliation Commission of Peru. Volume VI. Chapter 1: Patterns in the perpetration of crimes and human rights violations: Violence against Children, p. 597.

Ramón Hilario Morán, Francisco Hilario Torres, and their families came about because the soldiers perceived them as members or relatives of members of subversive groups. Therefore, the Commission believes that in the instant case the violation of the rights of the children was designed to punish all the members of the two families as well as to have an chilling effect on the rest of the community and, in general, all the residents in the area.

220. Consequently, the IACHR notes that in the instant case, the State not only failed to provide the seven disappeared children the guarantees and protection due to them by reason of their vulnerability, but also, through its agents, actively caused their rights to be violated. Consequently, it is clear that the seven children: Yessenia (age six years), Miriam (age three years), and Edith Osnayo Hilario (age eight months); Wilmer Hilario Carhuapoma (age three years); Alex Jorge Hilario (age six years), and the brothers, Raúl (age 18 months) and Héctor Hilario Guillén (age six years), failed to receive those special measures of protection that their greater vulnerability due to their young age required. In light of the foregoing, the Commission concludes that the State of Peru violated its obligations under Article 19 of the Convention, in connection with Article 1(1) thereof, to the detriment of the above seven children.

221. Finally, the Commission also notes that according to the proven facts, the child P.C.M, a supposed deserter from Shining Path, acted as a guide in the above operation, despite the prohibition of child recruitment into the armed forces or armed groups and their use in hostilities, in contravention of the international *corpus iuris* for the protection of the rights of the child<sup>181</sup>.

#### 4. Right to Protection of the Family (Article 17(1) of the American Convention)<sup>182</sup>

222. In view of the fact that the victims in the case belonged to two families, the Commission considers it pertinent to examine the obligations of the State under Article 17 of the American Convention, which recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The Inter-American Court has held that the protection of the family and its members is guaranteed also in Article 11(2) of the Convention that encompasses the prohibition of arbitrary or abusive interferences with the family, as well as by Article 19, that determines the protection of the rights of the child by the family, society, and State.<sup>183</sup>

223. The Commission notes that the very nature of the systematic disappearance of persons entails, among the goals sought with its practice, the predetermined infliction of severe harm on the social structures, collectives, and institutions against which it is used. Forced disappearance is normally part of a counterinsurgency policy and, as such, at the same time as it seeks to eliminate abductees with impunity, its goals can also include the

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<sup>181</sup> Article 4 of the Additional Protocol of the Geneva Conventions, ratified by Peru on July 14, 1989, establishes the prohibition to recruit children less than fifteen years into armed forces or groups and to participate directly in hostilities. Additionally, Articles 2 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, ratified by Peru on May 8 of 2001, establishes the obligation to impede the recruitment and use in the hostilities of people less than 18 years by armed groups different than the Military, including the legal measures to prohibit and criminalize these practices. Furthermore, Article 6.3 of the above mentioned Protocol establishes "States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration". See also: UN Security Council Resolutions [1261 \(1999\)](#), [1314 \(2000\)](#), [1379 \(2001\)](#), [1460 \(2003\)](#), [1539 \(2004\)](#) y [1612 \(2005\)](#) and, UN General Assembly resolutions [A/RES/51/77](#), [A/RES/53/128](#), [A/RES/54/149](#), [A/RES/54/263](#), [A/RES/55/79](#), [A/RES/56/138](#), [A/RES/57/190](#), [A/RES/58/157](#), [A/RES/59/261](#), A/RES/60/231, A/Res/61/146, A/Res/62/141, [A/RES/63/241](#) y [A/RES/64/146](#).

<sup>182</sup> Article 17(1) of the American Convention provides, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.[...]"

<sup>183</sup> I/A Court H.R. *Case of Chitay-Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs* Judgment of May 25, 2010. Series C, No. 212, par. 156.

destruction of the victims' family structures and of any other social unit or collective social to which they belong so that, through terror, its message of intimidation is made to reach the rest of their milieu.<sup>184</sup>

224. In the instant case the Commission has taken it as proven that on July 4, 1991, members of the Escorpio patrol raided the homes of Francisco Hilario Torres and Ramón Hilario Morán, and detained and took away everyone inside the two houses, all of whom were their kin and, mostly, women and children, accusing them of having next kin that would be members of Shining Path's based on their perception. Indeed, the facts show that Zósimo Hilario Quispe found out on July 6, 1991, that his parents, two sisters, sister-in-law, nephews, and nieces had disappeared and his home had been burned. Equally, the IACHR has taken it as fact that Ramón Hilario Morán, his wife, and their two children were taken from the other home that was raided. Subsequently, another patrol detained Elihoref Huamaní Vergara as he was on his way with his father to farm crops.

225. Bearing in mind that the purpose of the forced disappearance of the victims in this case was to punish not only the victims, but also their families and their community, the Commission concludes that the State breached its obligation to protect the rights of the family enshrined in Article 17 of the American Convention, to the detriment of the 15 victims in the instant case and their next-of-kin: Francisco Hilario Torres; his wife, Dionicia Quispe Malqui; their daughters, Antonia and Magdalena Hilario Quispe; their daughter-in-law, Mercedes Carhuapoma de la Cruz; Ramón Hilario Morán and his wife, Dionicia Guillén; and Elihoref Huamaní Vergara, as well as the children: Yessenia, Miriam and Edith Osnayo Hilario; Wilmer Hilario Carhuapoma; Alex Jorge Hilario; and the brothers Raúl and Héctor Hilario Guillén; and their next-of-kin: Zósimo, Marcelo, and Gregorio Hilario Quispe; Zenón Cirilo Osnayo Tunque, Víctor Carhuapoma de la Cruz, Ana de la Cruz Carhuapoma, Marcelo Hilario Quispe, Abilio Hilario Quispe, Viviano Hilario Mancha, Dolores Morán Paucar, Justiniano Guillén Ccanto, Victoria Riveros Valencia, Abilio Hilario Quispe, Marino Huamaní Vergara, and Alejandro Huamaní Robles.

**5. The Right to a Fair Trial and Judicial Protection (Articles 8(1)<sup>185</sup> and 25(1)<sup>186</sup> of the American Convention on Human Rights) in Connection with the Obligation to Ensure Rights and the Duty to Adopt Provisions under Domestic Law (Articles 1(1) and 2 thereof) and Article I<sup>187</sup> and III<sup>188</sup> of the Inter-American Convention on Forced Disappearance of Persons. Articles 1,<sup>189</sup> 6,<sup>190</sup> and 8<sup>191</sup> of the Inter-American Convention to Prevent and Punish Torture.**

<sup>184</sup> IACHR, Application to the Inter-American Court of Human Rights in the case of Florencio Chitay Nech et al. (Case 12.599) against the Republic of Guatemala, April 17, 2009, par. 182.

<sup>185</sup> Article 8(1) of the American Convention: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

<sup>186</sup> Article 25 (1) of the American Convention: "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."

<sup>187</sup> IACFDP, Article I.b): "The States Parties to this Convention undertake: b) To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;"

<sup>188</sup> IACFDP, Article III: "The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined."

The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person."

<sup>189</sup> Article 1 of the Inter-American Convention to Prevent and Punish Torture

226. The Inter-American Court has considered the content of the right to the truth in its case-law, especially in cases of forced disappearances. In the case of *Velásquez Rodríguez* the Court confirmed the existence of “the right to inform the relatives of the fate of the victims and, if they were killed, the location of their remains.”<sup>192</sup> In this type of cases, it is considered that the relatives of the disappeared victims are victims of the phenomena of forced disappearance, by which they are entitled to have the facts investigated and the responsible prosecuted and punished.<sup>193</sup> The Court has recognized that the right to the truth of the relatives of victims of serious human rights violations is framed within the right to access to justice.<sup>194</sup> Furthermore, the Court has based the obligation to investigate into the facts as a means for redress, on the need to repair the violation of the right to know the truth in the specific case.<sup>195</sup>

227. The right to know the truth has been also recognized by several treaties of the United Nations and recently, by the General Assembly of the Organization of American States (OAS).<sup>196</sup>

228. According to the case-law of the Inter-American Court:

...the right to know the truth represents a necessary effect for it is important that a society knows the truth about the facts of serious human rights violations. This is also a fair expectation that the State is required to satisfy, on the one hand, by means of the obligation to investigate human rights violations and, on the other hand, by the public dissemination of the results of the criminal and investigative procedures. The right to know the truth requires from the State the procedural determination of the patterns of joint action and of all those who participated in various ways in said violations and their corresponding responsibilities. Moreover, in compliance with the obligation to guarantee the right to know the truth, States may establish Truth Commissions, which can contribute to build and safeguard historical memory, to clarify the

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...continuation

The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

<sup>190</sup> Article 6 of the Inter-American Convention to Prevent and Punish Torture

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

<sup>191</sup> Article 8 of the Inter-American Convention to Prevent and Punish Torture

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

<sup>192</sup> I/A Court H.R., *Velásquez Rodríguez Case v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, par. 181.

<sup>193</sup> I/A Court H.R., *Case of Blake v. Guatemala. Merits*. Judgment of January 24, 1998. Series C, No. 36. par. 97.

<sup>194</sup> I/A Court H.R., *Case of Anzaldo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 118.

<sup>195</sup> I/A Court H.R., *Case of Anzaldo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 118.

<sup>196</sup> Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (E/CN.4/2005/102/Add.1); Report on the update of the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, by Professor Diane Orenlicher (E/CN.4/2005/102, of February 18, 2005); Study on the Right to the Truth, Report of the United Nations High Commissioner for Human Rights (E/CN.4/2006/91 of January 9, 2006); OAS General Assembly. Resolutions on the Right to the Truth, AG/RES. 2175 (XXXVI-O/06), AG/RES. 2267 (XXXVIII-O/ 2267, and AG/RES. 2406 (XXXVIII-O/08).

events and to determine institutional, social and political responsibilities in certain periods of time of a society.<sup>197</sup>

229. With respect to the rights of the next-of-kin of victims of human rights violations to obtain justice and reparation, the Court has found that

[f]rom Article 8 of the Convention it is evident that the victims of human rights violations, or their next-of-kin should have substantial possibilities to be heard and to act in the respective proceedings, both to clarify the facts and punish those responsible, and to seek due reparation.<sup>198</sup>

230. Likewise, the Court has ruled that the next-of-kin of the alleged victims have the right to expect, and the States the obligation to ensure, that what befell the alleged victims will be investigated effectively by the State authorities; that proceedings will be filed against those allegedly responsible for the unlawful acts; and, if applicable, the pertinent penalties will be imposed, and the losses suffered by the next-of-kin repaired.<sup>199</sup> Based on the foregoing, once State authorities have knowledge of a violation of human rights, in particular of the rights to life, humane treatment, and personal liberty,<sup>200</sup> they should initiate a serious, impartial and effective investigation, ex officio and without delay,<sup>201</sup> which should be carried out within a reasonable time.<sup>202</sup>

231. In addition, the Court has held that “as a result of the protection granted by Articles 8 and 25 of the Convention, the States are obliged to provide effective judicial recourses to the victims of human rights violations that must be substantiated according to the rules of due process of law.”<sup>203</sup>

232. As to the substance of the duty to investigate with due diligence, the Inter-American Court has held that the investigation should be undertaken utilizing all the legal means available and should be oriented

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<sup>197</sup> I/A Court H.R., *Case of Anzaldo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 119.

<sup>198</sup> I/A Court H.R., *Case of García-Prieto et al.*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C, No. 168. par. 102; I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.)*, Judgment of November 19, 1999. Series C, No. 63. par. 227; I/A Court H.R., *Case of the Serrano-Cruz Sisters. Merits, Reparations and Costs*. Judgment of March 1, 2005. Series C, No. 120, par. 63.

<sup>199</sup> I/A Court H.R., *Case of García-Prieto et al.*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C, No. 168. par. 103; I/A Court H.R., *Case of Bulacio. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 18, 2003. Series C, No. 100, par. 114; and I/A Court H.R., *Case of the Miguel Castro-Castro Prison*. Judgment of November 25, 2006. Series C, No. 160. par. 382.

<sup>200</sup> I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C, No. 167. par. 100.

<sup>201</sup> I/A Court H.R., *Case of García-Prieto et al.*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C, No. 168. par. 101; I/A Court H. R., *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C, No. 110. pars. 146; I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz*, Preliminary Objections, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C, No. 167. par. 130.

<sup>202</sup> I/A Court H.R., *Case of Bulacio*. Judgment of September 18, 2003. Series C, No. 100. par. 114; I/A Court H.R., *Case of the Rochela Massacre*. Judgment of May 11, 2007. Series C No. 163, par. 146; I/A Court H.R., *Case of the Miguel Castro-Castro Prison*. Judgment of November 25, 2006. Series C, No. 160. par. 382.

<sup>203</sup> I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C, No. 167. par. 124; I/A Court H.R., *Case of the Rochela Massacre*. Judgment of May 11, 2007. Series C No. 163, par. 145; I/A Court H.R., *Case of the Miguel Castro-Castro Prison*. Judgment of November 25, 2006. Series C, No. 160. par. 381; and I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.)*. Judgment of November 24, 2006. Series C, No. 158, par. 106.

toward the determination of the truth.<sup>204</sup> In that same vein, the Court has found that the State has the duty to ensure that everything necessary is done to learn the truth about what happened and for those responsible to be punished,<sup>205</sup> and involving every State institution.<sup>206</sup> The Court has also said that the authorities should adopt all reasonable measures to guarantee the necessary probative material in order to carry out the investigation.<sup>207</sup>

233. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective,<sup>208</sup> or as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof.<sup>209</sup>

234. Specifically with respect to the content of the State's obligation to investigate complaints of forced disappearance of persons, the Commission finds it pertinent to recall that the Court has held that "faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*."<sup>210</sup> Hence, whenever there are reasonable motives to suspect that a person has been subjected to forced disappearance an investigation should be opened *ex officio*,<sup>211</sup> without delay, and in a serious, impartial, and effective manner.<sup>212</sup> In any case, every State authority, public or private officer who is aware of acts purported to forcibly disappear persons, shall immediately report them.<sup>213</sup>

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<sup>204</sup> I/A Court H.R., *Case of García-Prieto et al.*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C, No. 168. par. 101.

<sup>205</sup> I/A Court H.R., *Case of Bulacio*. Judgment of September 18, 2003. Series C, No. 100. par. 114; I/A Court H.R., *Case of the Rochela Massacre*. Judgment of May 11, 2007. Series C No. 163, par. 146; I/A Court H.R., *Case of the Miguel Castro-Castro Prison*. Judgment of November 25, 2006. Series C, No. 160. par. 382.

<sup>206</sup> I/A Court H.R., *Case of Cantoral-Huamán and García-Santa Cruz*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C, No. 167. par. 130; I/A Court H.R., *Case of the Massacre of Pueblo Bello*. Judgment of January 31, 2006. Series C, No. 140. par. 120; and I/A Court H.R., *Case of Huilca Tecse*. Judgment of March 3, 2005. Series C, No. 121, par. 66.

<sup>207</sup> I/A Court H.R., *Case of Zambrano-Vélez et al.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C, No. 166. par. 122.

<sup>208</sup> I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C, No. 4. par. 177; I/A Court H.R., *Case of Cantoral-Huamán and García-Santa Cruz*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C, No. 167. par. 131; and I/A Court H.R., *Case of Zambrano-Vélez et al.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C, No. 166. par. 120.

<sup>209</sup> I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C, No. 4. par. 177; I/A Court H.R., *Case of Zambrano-Vélez et al.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C, No. 166. par. 120.

<sup>210</sup> I/A Court H.R., *Case of Goiburú et al.* Judgment on Merits, Reparations and Costs Judgment of September 22, 2006. Series C, No. 153. par. 84; *Case of Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 59; and *Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs* Judgment of November 23, 2009. Series C, No. 209, par. 139.

<sup>211</sup> *Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs* Judgment of November 23, 2009. Series C, No. 209. par. 143.

<sup>212</sup> *Case of Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 65, and *Case of Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C, No. 209, par. 143.

<sup>213</sup> *Case of Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 65, and *Case of Radilla Pacheco v. Mexico, Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2009. Series C, No. 209, par. 143.

235. Furthermore, in cases such as the instant one, in which acts that amount to torture could have been committed, Inter-American Court has held that the State has the obligation to carry out an effective investigation to identify, prosecute and punish those responsible:

in the light of the general obligation to guarantee all persons under their jurisdiction the human rights enshrined in the Convention, established in Article 1(1) of the same, along with the right to humane treatment pursuant to Article 5 (Right to Humane Treatment) of said treaty, there is a State obligation to start ex officio and immediately an effective investigations that allows it to identify, prosecute, and punish the responsible parties, when there is an accusation or well-grounded reason to believe than an act of torture has been committed.<sup>214</sup>

236. In the instant case, the petitioners argue that even though the facts were investigated by the Truth and Reconciliation Commission, the State has not acknowledged in an international proceeding its responsibility for the illegal detention and subsequent forced disappearance of the 15 victims. Despite that, the State does not dispute the facts and in a number of documents accepts that the facts occurred. The petitioners argue that, at first, there was no response of any kind from the State authorities to the complaints presented by the victims and their next-of-kin. They say that a criminal proceeding was opened in the ordinary courts only after Zósimo Hilario Quispe lodged the complaint of November 29, 1991; in other words, almost five months after the events occurred. However, that proceeding was set aside following the adoption of Amnesty Law 26479. The petitioners argue that in the instant case there have been various violations of fair trial guarantees, such as destruction of evidence and negligence in the custody thereof, as well as obstruction of the investigation due to threats to justice operators. The petitioners say that members of the army took it upon themselves to destroy the evidence at the scene of the crime. They argue that although two criminal proceedings are currently underway, neither of them has concluded, even though the events occurred almost 20 years ago, which constitutes an unwarranted delay in processing those remedies.

237. For its part, the State has not refuted the facts. However, it notes that the fact that a final outcome has not been reached in the case is not reason enough to brand the State a “promoter of impunity” since the rule of discretion of justice system operators must be observed. In that connection, the State argues that the Commission cannot take upon itself the functions of an appeals court. As regards the submissions of the petitioners with respect to destruction of evidence of the crimes by agents of the State, as well as those concerning threats of physical harm made to witnesses and relatives of the victims, the State argues that these allegations have not been proved and that, in any case, they refer to a different political situation which Peru has since overcome.

238. The Commission, therefore, must determine if the State has conducted the criminal investigations with due diligence and within a reasonable time, and if those investigations have been effective remedies for ensuring the alleged victims’ right of access to justice.<sup>215</sup>

239. The Commission wishes to emphasize that its analysis in this chapter must consider the particular seriousness of the allegations. Accordingly, the Commission will consider the matter in the light of the Inter-American Convention to Prevent and Punish Torture, under which the State has a duty to prevent and punish torture and to take “effective measures to prevent and punish torture within [its] jurisdiction,” given that the

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<sup>214</sup> I/A Court H.R., *Case of the Miguel Castro-Castro Prison*. Judgment of November 25, 2006. Series C, No. 160, par. 345; *Case of Vargas-Areco*, Judgment of September 26, 2006. Series C, No. 155, par. 79; *Case of Gutiérrez Soler*, Judgment of September 12, 2005. Series C, No. 132, par. 54; and *Case of Baldeón García*, Judgment of April 6, 2006. Series C, No. 147, par. 156. In the same connection, see Eur.C.H.R., *Case of İlhan v. Turkey* [GC], Judgment of 27 June 2000, App. No. 22277/93, paras. 92 and 93; and Eur.C.H.R., *Case of Assenov and others v. Bulgaria*, Judgment of 28 October 1998, App. No. 90/1997/874/1086, para. 102. See also IACHR, Report 53/01, Case 11.565 Ana Beatriz and Celia González Pérez (Mexico), April 4, 2001.

<sup>215</sup> I/A Court H.R., *Case of Anzaldo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 126.



Court has established that “these provisions [...] specify and complement the State’s obligations regarding compliance with the rights enshrined in the American Convention,” as well as the “international corpus juris on the matter of protection of personal integrity.”<sup>216</sup>

240. Finally, in its analysis the Commission will take into consideration the Inter-American Convention on Forced Disappearance of Persons, Article 1 of which provides that States undertake to “punish [...] those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories [...] and t]o take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.”

241. The Commission notes that following the detention/disappearance on July 4, 1991, of the seven children and seven adults who made up the families of Francisco Hilario Torres and Ramón Hilario Morán by members of the Army, Zósimo Hilario Quispe (the son of Francisco Hilario Torres) lodged a complaint on July 8, 1991, with the Office of the Huancavelica Special Prosecutor for Crime Prevention. Likewise, on July 8, 1991, Mr. Nicolás Hilario Morán, President of Santa Barbara campesino community lodged a complaint alleging the same acts with the prosecutor’s office and requested the prosecutor to adopt the appropriate precautionary measures. The next day, July 9, 1991, Ramón Hilario Morán’s father, Viviano Hilario Mancha, filed another complaint with the Office of the Huancavelica Special Prosecutor for Crime Prevention alleging the detention/arrest of his son, daughter-in-law, and two grandchildren by military personnel.

242. Despite the fact that in cases of forced disappearance, it is essential for prosecutorial and judicial authorities to take prompt and immediate action by ordering timely and necessary measures to determine the whereabouts of the victim or the place where he or she might be deprived of liberty,<sup>217</sup> the Huancavelica Mixed Provincial Prosecutor’s Office merely sent an official letter to the Military and Political Chief of Ayacucho to notify him of the complaint presented by Zósimo Hilario Quispe and ask him if the detainees had been taken to Lircay Military Base, something which the Army denied in an official letter of July 11, 1991. Subsequently, on July 22, 1991, the Office of the Huancavelica Special Prosecutor for Crime Prevention resent its official letter of July 22, 1991, to the military commander of Ayacucho, requesting information about patrols carried out by Huancavelica, Lircay, Acobamba, and Mantas Military Bases on July 3 and 4, 1991; it received no reply.

243. Later, following the discovery of bodies at Misteriosa mine and based on Viviano Hilario Mancha’s complaint presented to the Provincial Prosecutor’s Office on July 12, 1991, the prosecutor’s office scheduled the removal of the bodies for July 14, 1991, which procedure could not be carried out. Following this, on July 17, 1991, the elders of Santa Barbara campesino community had to reiterate their request to the prosecutor’s office to set a date for the removal of the bodies, which was finally completed on July 18, 1991. The Commission notes that when the above procedure was carried out the authorities only found human remains since, as the Truth and Reconciliation Commission determined and the facts established before this Commission suggest, the leader of the Escorpio patrol ordered three soldiers to return to the abandoned mine and seal the entrance with dynamite charges, which it is very probable that they did on July 14, 1991. In addition to the above complaints, the Commission notes that on July 16, 1991, the president of Santa Barbara campesino community filed a complaint with the Office of the Special Attorney of the Ombudsman and another with the Minister of Defense alleging the same acts. However, neither complaint resulted in any action or procedural measures being taken

244. The Commission notes that, besides the inaction of the authorities in the preliminary investigation of the charges made, the families and leaders of Santa Barbara community who presented the complaints were the target of various acts of intimidation and harassment designed to persuade them to desist

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<sup>216</sup> I/A Court H.R., *Case of the “Las Dos Erres” Massacre v. Guatemala. Preliminary Objection. Merits. Reparations and Costs.* Judgment of November 24, 2009. Series C, No. 211, par. 137, and *Case of the Miguel Castro-Castro Prison v. Peru. Merits, Reparations and Costs.* Judgment of November 25, 2006. Series C, No. 160. pars. 276, 377 and 379.

<sup>217</sup> I/A Court H.R., *Case of Anzaldo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 134.

from their complaints and to obstruct justice. In this connection, the Commission recalls that according to the established facts, the group of villagers that was on its way to the removal of the bodies scheduled for July 14, 1991, was detained by army personnel from 10:00 a.m. until 5:30 p.m., while others dynamited the mine. Furthermore, on July 18, 1991, after having found the remains of the dynamited corpses at the mine and proceeded with their collection, the technical police arrested Viviano Hilario Mancha (father and grandfather of some of the victims), Zósimo Hilario Quispe (son, brother, and uncle of other victims), and five other villagers on their return to the city of Huancavelica, most of whom were released the next day. Subsequently, on November 8, 1991, the Huancavelica technical police arrested the president of Santa Barbara campesino community, Nicolás Hilario Morán, as well as Lorenzo Quispe Huamán, when they went to give a Statement at the prosecutor's office in connection with the facts in the case, based on a complaint filed against them by the Huancavelica Superior Court prosecutor for obstruction of justice as a result of having presented false charges accusing the security forces of detentions/disappearances that never occurred.

245. As regards the disappearance of Elihoref Huamaní Vergara, his father, Alejandro Huamani Robles, having returned from Acobamba and not finding his son, filed a complaint with the Office of the Huancavelica Provincial Prosecutor for Crime Prevention on July 15, 1991, which complaint he reiterated on July 18, 1991, to the Office of the Huancavelica Senior Superior Court Prosecutor. Furthermore, on July 18, 1991, Alejandro Huamaní Robles filed for a writ of habeas corpus with Lircay and Huancavelica Examining Magistrate's Courts, respectively. Huancavelica Examining Magistrate's Court refused the petition on July 22, 1991, on the ground that the detention of Elihoref Huamaní Vergara had not been proven. Accordingly, Alejandro Huamaní appealed that decision on August 5, 1991; however, as yet, the outcome of the appeal is unknown. Lircay Examining Magistrate's Court never issued a ruling on the petition. On July 18, 1991, Mr. Alejandro Huamaní filed two complaints: one with the commander of Lircay Military Base and the other with the commander of Huancavelica Military Base, claiming the detention/disappearance of his son by military personnel from both bases. After receiving no response, Mr. Huamaní Robles submitted another complaint on August 5, 1991, to the minister of defense, who did not respond to the complaint either. Consequently, the remedies were ineffective.

246. The Commission notes that in spite of the Peruvian State's obligation to investigate ex officio, without delay and in a serious, impartial and effective manner, in view of the seriousness of the charges, "the complaints presented by the families of the disappeared persons were in the majority of cases followed by inaction or timid and ineffective actions on the part of the judiciary and the Office of the Attorney General, [as] is borne out by their lack of willingness to investigate and even obstruction of the investigation."<sup>218</sup>

247. The Commission finds that the criminal proceeding in the ordinary jurisdiction only began on February 26, 1992, more than seven months after the events occurred, following the presentation of another complaint by Zósimo Hilario Quispe on November 29, 1991, and his insistence that the prosecutor's office bring an indictment against the military personnel on trial in the military jurisdiction since late October 1991 for "excesses" against 14 peasants "alleged to be subversive criminals" from the community of Santa Barbara.

248. The Commission notes that the report of the Truth and Reconciliation Commission mentions, in reference to this criminal proceeding, that, "rather than pursue the investigations, the lower criminal court in charge of the inquiry simply took down the particulars of the aggrieved, complainants, and witnesses, and asked them if they confirmed their Statements made to the Office of the Attorney General. (...) The evidentiary proceedings were very superficial and provided no further evidence connected with the events in the community of Santa Barbara on July 4, 1991. As for preliminary Statements from the accused, these are not in the record because the proceeding was carried out in the absence of the military personnel involved, who were declared in default."<sup>219</sup>

<sup>218</sup> Truth and Reconciliation Commission, Final Report, Lima: CVR, 2003, Volume VI, Chapter 1.2. Forced Disappearances, p. 110.

<sup>219</sup> Appendix 1. Final Report of the Truth and Reconciliation Commission of Peru. Volume VII. Chapter 2: Cases Investigated by the CVR 2.50. The Extrajudicial Executions in Santa Barbara, Proceedings in the Judiciary.

249. The Commission notes with regard to the proceeding instituted in the military jurisdiction toward the end of October 1991, that the State of Peru recognized while the case was being processed before the IACHR that, given their nature and seriousness, as well as the rights violated, the facts that are the subject of this case cannot be considered “offenses committed in the line of duty” and, therefore, it was for the ordinary jurisdiction to investigate and prosecute their alleged authors. Accordingly, the Commission reiterates that military justice should be used only to judge active-duty military officers for the alleged commission of service-related offenses, strictly speaking. Human rights violations must be investigated, tried, and punished in keeping with the law, by the regular criminal courts. Inverting the jurisdiction in cases of human rights violations should not be allowed, as this undercuts judicial guarantees, under an illusory image of the effectiveness of military justice, with grave institutional consequences, which in fact call into question the civilian courts and the rule of law.<sup>220</sup> In particular, the IACHR has determined that, as a result of their nature and structure, military courts do not meet the requirements of independence and impartiality imposed by Article 8(1) of the American Convention in cases involving human rights violations.<sup>221</sup>

250. As for the proceeding reopened at the end of 2005 when the amnesty laws were declared incompatible with the American Convention, the Commission notes that six years later only one member of the Escorpio patrol has been caught and, after the judgment at first instance against him was vacated in 2008, the proceeding was reportedly at the oral trial stage as of August 2010. The Commission notes that according to the established facts, the defendants were declared in default by the courts on January 12, 1993; in other words, before the judgment at second instance was issued in the military jurisdiction. Nevertheless, it is a fact not disputed by the State and, therefore, established in the eyes of this Commission that, even though as of 2005 there were outstanding national and international warrants for the arrest of the other accused, two of them were military personnel on active duty, according to information provided by the Provostry of the Peruvian Army to the judiciary in official letter 3575/A/5/b of December 19, 2005. The Commission has also received no information that following the reopening of the proceeding steps have been taken to remedy the flaws in the investigation pointed out by the CVR in its report.

251. The Commission notes that, as a result of the judgment of March 4, 2008, against the only accused captured (which was vacated in 2009 by the Supreme Court) an investigation was opened in 2008 by the Huancavelica Supra Provincial Criminal Prosecutor’s Office into Simón Fidel Palante for the crime of genocide to the detriment of the victims in the case, after he was identified by the military personnel who testified in the trial as the person who fired the shots that killed the eight adult and seven child victims. However, it was only in 2010 that another exhumation of the remains that were left at Misteriosa mine was carried out and blood and saliva samples were taken from the victims’ next-of-kin for the purposes of DNA analysis. In this connection, the State has not explained what happened to the remains collected 19 years ago on July 18, 1991, during the removal of the bodies and sent on July 22, 1991, to the Departmental Headquarters of the Technical Police in Lima “to ensure the best possible clarification of the facts,” or why DNA tests was not carried out earlier and what the results were of the tests performed in 2010. With respect to the importance of DNA testing, the UN Working Group on Enforced or Involuntary Disappearances noted in its General Comment on the Right to the Truth in Relation to Enforced Disappearances that the remains of the person should be clearly and indisputably identified, including through DNA analysis.<sup>222</sup>

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<sup>220</sup> IACHR, Application to the Inter-American Court of Human Rights in the case of Valentina Rosendo Cantú et.al. against the United Mexican States, August 2, 2009, par. 123; IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, doc. 59 rev. June 2, 2000, Chapter II, par. 214.

<sup>221</sup> IACHR, Application to the Inter-American Court of Human Rights in the case of Valentina Rosendo Cantú et.al. against the United Mexican States, August 2, 2009, par. 126; IACHR, Report 53/01, Case 11.565 Ana Beatriz and Celia González Pérez (Mexico), April 4, 2001, par. 81.

<sup>222</sup> See [http://www2.ohchr.org/english/issues/disappear/docs/GC-right\\_to\\_the\\_truth.pdf](http://www2.ohchr.org/english/issues/disappear/docs/GC-right_to_the_truth.pdf), p. 5

252. The Commission reiterates that, in keeping with the case law of the Court, the right of access to justice implies the effective determination of the facts under investigation and, if applicable, of the corresponding criminal responsibilities in a reasonable time; therefore, considering the need to guarantee the rights of the injured parties, a prolonged delay may constitute, in itself, a violation of the right to a fair trial. Besides, because it is a forced disappearance, the right of access to justice includes the determination of the fate or whereabouts of the victim.<sup>223</sup>

In these cases, impunity will not be eliminated unless it is accompanied by the determination of the general responsibility- of the State- and individuals- criminal and of its agents or of individuals. In complying with this obligation, the State is required to remove all obstacles, legal and factual, contributing to impunity. The investigations must be conducted in line with the rules of due process of law, which implies that the bodies of administration of justice must be organized in a manner so that its independence and impartiality is guaranteed and the prosecution of grave human rights violations is made before regular courts, in order to avoid impunity and search for the truth. Moreover, given the nature and gravity of the facts, particularly since they occurred in a context of systematic human rights violations, and since the access to justice is a peremptory rule under International Law, the need to eliminate impunity gives rise to an obligation for the international community to ensure inter-State cooperation by which they must adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and the international law to prosecute it and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so.<sup>224</sup>

253. The Commission notes that the Court has analyzed the content and scope of the Amnesty Laws 26479 and 26.492 in the *Barrios Altos Case v. Peru*. The Court's judgment on merits of March 14, 2001 in that case found that they "are incompatible with the American Convention [...] and, consequently, lack legal effect."<sup>225</sup> Specifically, the Court's interpretation found that "[e]nactment of a law that is manifestly incompatible with the obligations undertaken by a State Party to the Convention is per se a violation of the Convention for which the State incurs international responsibility [and] that, given the nature of the violation that amnesty laws No. 26479 and 26492 constitute, the decision in the judgment on the merits in the *Barrios Altos Case* has generic effects."<sup>226</sup>

254. The Commission notes that, according to the established facts, for 10 years (from July 4, 1995, when the Criminal Chamber of Huancavelica Superior Court declared Amnesty Law 26479 applicable, until the case was reopened toward the end of 2005) the victims' next-of-kin did not have access to an effective remedy to uphold their rights. For the whole of the time that Amnesty Laws 26492 and 26479 were in force, the criminal proceeding with which the instant petition is concerned was closed, which, because of those laws, made prosecution of the State agents involved impossible. Therefore, while they remained in force, the above laws were a delaying factor in the investigations and an impediment to the clarification of the facts, which situation is imputable to the State. Accordingly, the Commission concludes that throughout the 10 years that the amnesty laws were applied to this particular case, the State violated its obligation under article 2 of the Convention to adapt its domestic law to said instrument.

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<sup>223</sup> I/A Court H.R., *Case of Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 124.

<sup>224</sup> I/A Court H.R., *Case of Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 125; *Case of La Cantuta v. Peru. Merits, Reparations and Costs*. Judgment of November 29, 2006.

Series C, No. 162, par. 160.

<sup>225</sup> *Barrios Altos Case v. Peru. Merits*. Judgment of March 14, 2001. Series C, No. 75, pars. 41-44 and y operative paragraph four.

<sup>226</sup> *Barrios Altos Case v. Peru. Interpretation of the Judgment on the Merits*. Judgment of September 3, 2001. Series C, No. 83. par. 18 and operative paragraph two.

255. Based on the analysis contained in this chapter, the Commission finds that the facts surrounding the disappearance of the victims in the case almost 20 years ago have not been diligently investigated, nor have the myriad violations that occurred in the course thereof been examined. Moreover, during that time the State failed to adopt the necessary measures to fully identify the remains of the persons found on July 18, 1991, in an attempt to determine the whereabouts of the disappeared as well as prosecute and punish all those responsible. Consequently, the Commission concludes that the judicial authorities have acted with a lack of diligence and willingness to boost the criminal proceeding forward in a bid to clarify all the events that occurred on July 4, 1991, and punish those responsible.

256. Based on the submissions of the parties, the established facts, and the analysis performed, the Commission concludes that, almost 20 years after the forced disappearance of the 15 victims, the true facts of which have yet to be fully disclosed, the domestic criminal proceedings have not constituted effective remedies to ascertain the fate of the victims or to ensure the rights of access to justice and to know the truth through the investigation and punishment, as appropriate, of those responsible, or to provide full reparation for the consequences of violations. Based on the foregoing, the Commission finds that the State violated the rights recognized in Articles 8(1) and 25(1) of the American Convention, in connection with Articles 1(1) and 2 thereof and I.b) and III of the Inter-American Convention on Forced Disappearance of Persons; and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the eight adults and seven children who disappeared, and their next of kin.

**5. Right to humane treatment (Articles 5 and 1(1) of the American Convention) of the victims' next-of-kin**

257. The right to integrity of the person is enshrined in Article 5(1) of the American Convention, which provides "Every person has the right to have his physical, mental, and moral integrity respected." In that regard, the Commission has recognized that:

Among the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of their human personality. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect.<sup>227</sup>

258. The case-law of the Inter-American Court has established that the next-of-kin of the victims of human rights violations may, in turn, be victims of abridgment of the right to mental and moral integrity.<sup>228</sup> Thus, the Inter-American Court has considered that the mental and moral integrity of the victims' next of kin has been violated in light of the additional suffering experienced as a result of the specific circumstances surrounding the

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<sup>227</sup> IACHR. Report 38/00, Case 11.743, Merits, [Rudolph Baptiste](#), Grenada, April 13, 2000, par. 89.

<sup>228</sup> I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C, No. 99, par. 101; *Case of the "Las Dos Erres" Massacre v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C, No. 211, par. 206; and *Case of Heliodoro Portugal v. Panama*. Preliminary Objections, Merits, Reparations and Costs Judgment of August 12, 2008. Series C, No. 186, par. 163,

violations committed against their loved ones<sup>229</sup> and of subsequent acts or omissions by the State authorities in relation to the facts.<sup>230</sup>

259. The Commission notes that, in keeping with the Court's case law, "in cases involving forced disappearance of people, it can be understood that the violation of the right to mental and moral integrity of the victim's next-of-kin is, precisely, a direct consequence of that event, which causes them severe suffering and is made worse, *inter alia*, by the continued refusal of State authorities to supply information on the victim's whereabouts or to conduct an effective investigation to elucidate the facts."<sup>231</sup>

260. Consequently, in light of the events surrounding the forced disappearances, the State had the obligation to ensure the right to humane treatment also to the next-of-kin by conducting effective investigations, the absence of effective remedies constituted a source of additional suffering and anguish not only for the victims, seven of whom were children at a young age at the time of the events, but also for their next-of-kin. The Commission has verified all the attempts made before the various State institutions and offices by the families following the disappearance of the 15 victims, for the purposes of determining their whereabouts and investigating and punishing the alleged culprits.

261. Bearing in mind that in some cases the Court has considered that the continued deprivation of the truth concerning the fate of a disappeared person constitutes a form of cruel and inhuman treatment for the close family,<sup>232</sup> the Commission concludes that in the instant case there was a violation of the right to humane treatment of the next of kin of the victims as enshrined in Article 5 of the American Convention, in connection with Article 1(1) thereof, to the detriment of: Zósimo Hilario Quispe (son of Francisco Hilario Torres and Dionicia Quispe Malqui; brother of Antonia Hilario Quispe and Magdalena Hilario Quispe; and uncle of six-year-old Alex Jorge Hilario), Marcelo Hilario Quispe (husband of Mercedes Carhuapoma de la Cruz; father of three-year-old Wilmer Hilario Carhuapoma; brother of Antonia Hilario Quispe and Magdalena Hilario Quispe; uncle of six-year-old Alex Jorge Hilario; and son of Francisco Hilario Torres and Dionicia Quispe Malqui), Gregorio Hilario Quispe (son of Francisco Hilario Torres and Dionicia Quispe Malqui; brother of Antonia Hilario Quispe and Magdalena Hilario Quispe, and uncle of six-year-old Alex Jorge Hilario), Zenón Cirilo Osnayo Tunque (husband of Antonia Hilario Quispe and father of six-year-old Yessenia, three-year-old Miriam, and eight-month-old Edith Osnayo Hilario), Víctor Carhuapoma de la Cruz (brother of Mercedes Carhuapoma de la Cruz and uncle of three-year-old Wilmer Hilario Carhuapoma), Ana de la Cruz Carhuapoma (mother of Mercedes Carhuapoma de la Cruz and grandmother of three-year-old Wilmer Hilario Carhuapoma), Abilio Hilario Quispe (son of Ramón Hilario Morán and stepbrother of six-year-old Héctor Hilario Guillén and 18-month-old Raúl Hilario Guillén), Viviano Hilario Mancha and Dolores Morán Paucar (father and mother of Ramón Hilario Morán), Justiniano Guillén Ccanto and Victoria Riveros Valencia (father and mother of Dionisia Guillén Ribero), and Marino Huamaní Vergara and Alejandro Huamaní Robles (brother and father, respectively, of Elihoref Humani Vergara).

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<sup>229</sup> I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C, No. 160, par. 335; *Case of Vargas-Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C, No. 155, par. 96; and *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C, No. 153, par. 96.

<sup>230</sup> I/A Court H.R. *Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits and Reparations* Judgment of May 26, 2010. Series C, No. 213, par. 195.

<sup>231</sup> I/A Court H.R., *Case of Blake v. Guatemala, Merits*. Judgment of January 24, 1998. Series C, No. 36. par. 114; *Case of Ticona Estrada et al v. Bolivia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C, No. 191, par. 87; *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C, No. 162, par. 123; *Case of Anzaldo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 105.

<sup>232</sup> *Case of Trujillo Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C, No. 92, par. 114; *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C, No. 162, par. 125; *Case of Anzaldo Castro v. Peru*, Judgment of September 22, 2009, Series C No. 202, par. 113.

## VI. CONCLUSIONS

Based on the foregoing factual and legal considerations, the Commission concludes that the Republic of Peru is responsible for breach of its obligations to prevent violations and ensure:

1. The rights to personal liberty, humane treatment, life and juridical personality in accordance with Articles 7, 5, 4, and 3 of the American Convention, in conjunction with Article 1(1) of said instrument, to the detriment of the adults Francisco Hilario Torres; his wife, Dionicia Quispe Malqui; their daughters, Antonia and Magdalena Hilario Quispe; and their daughter-in-law, Mercedes Carhuapoma de la Cruz; Ramón Hilario Morán and his wife Dionicia Guillén; and Elihoref Huamaní Vergara; as well as the children: Yessenia, Miriam and Edith Osnayo Hilario; Wilmer Hilario Carhuapoma; Alex Jorge Hilario; and the brothers Raúl and Héctor Hilario Guillén;

2. the rights of the child in accordance with Article 19 of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of the children: Yessenia, Miriam and Edith Osnayo Hilario; Wilmer Hilario Carhuapoma; Alex Jorge Hilario; and the brothers Raúl and Héctor Hilario Guillén;

3. the rights of the family recognized in Article 17 of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of the disappeared persons: Dionicia Quispe Malqui; her daughters, Antonia and Magdalena Hilario Quispe; and her daughter-in-law, Mercedes Carhuapoma de la Cruz; Ramón Hilario Morán and his wife, Dionicia Guillén; and Elihoref Huamaní Vergara, as well as the children: Yessenia, Miriam and Edith Osnayo Hilario; Wilmer Hilario Carhuapoma, Alex Jorge Hilario, and the brothers Raúl and Héctor Hilario Guillén; and their next-of-kin: Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque, Víctor Carhuapoma de la Cruz, Ana de la Cruz Carhuapoma, Viviano Hilario Mancha, Dolores Morán Paucar, Justiniano Guillén Ccanto, Victoria Riveros, Marino Huamaní Vergara, and Alejandro Huamaní Robles;

4. the right to a fair trial and judicial protection recognized in Articles 8 and 25 of the American Convention, taken in conjunction with Article 1(1) thereof, Article 1 of the Inter-American Convention on Forced Disappearance of Persons, and Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the disappeared persons and their next-of-kin;

5. Articles 8(1) and 25 of the American Convention in connection with the provisions set forth in Articles 1(1) and 2 thereof and in Article III of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of the victims and their next-of-kin.

6. The right to humane treatment of the victims' next-of-kin recognized in Article 5 of the American Convention, in connection with Article 1(1) of that instrument.

## VII. RECOMMENDATIONS

262. Based on the analysis and conclusions contained in the instant report, the Inter-American Commission on Human Rights recommends that the Peruvian State:

1. Provide adequate reparation for the human rights violations found in the instant report in material as well as moral respects that take into account the special condition of the seven child victims in the case, including fair compensation, elucidation and circulation of the historical truth of the events, remembrance of the disappeared victims, and implementation of an adequate program of psychosocial care for the next-of-kin of the disappeared victims.

2. Establish a mechanism that, to the extent possible, enables complete identification of the disappeared victims and the return of the mortal remains of those victims to their families.

3. Carry out and conclude, as appropriate, the domestic proceedings connected with the human rights violations found in the instant report and pursue the investigations in an impartial and effective manner

within a reasonable time in order to completely clarify the events, identify the architects and material authors, and impose the appropriate penalties.

4. Strengthen the capacity of the judiciary to adequately and efficiently investigate the facts and punish those responsible, including through provision of the necessary material and technical resources to ensure the correct conduct of proceedings.

5. Adopt such measures as may be necessary to prevent any such events from occurring in the future, in keeping with the duty to protect and ensure the human rights recognized in the American Convention. In particular, implement permanent education programs on human rights and international humanitarian law in the training schools of the armed forces.

6. Take administrative measures against those public officials found to have been involved in the commission of the violations found in this report, including any judges or magistrates who failed to properly discharge their duty to protect fundamental rights.<sup>233</sup>

#### **VIII. NOTICE**

263. The Commission decides to transmit the instant report to the Peruvian State and to grant it two months to implement the recommendations it contains. That period will be counted from the date of transmission of the instant report to the State, which shall not be at liberty to make it public. The Commission also decides to notify the petitioners of the adoption of a report under Article 50 of the Convention.

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<sup>233</sup> See recommendation g) of the Report of the Peruvian Truth and Reconciliation Commission. Volume IX Part Four: Recommendations of the CVR: Toward a National Commitment to Reconciliation.