

**REPORT No. 66/10**  
CASE 12.444  
MERITS  
EDUARDO NICOLÁS CRUZ SÁNCHEZ, ET AL  
PERU  
March 31, 2011

**I. SUMMARY**

1. On February 3, 2003, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a complaint lodged by Juan Miguel Jugo Viera on behalf of the Association for Human Rights [Asociación Pro Derechos Humanos (APRODEH), Edgar Cruz Acuña and Herma Luz Cueva Torres, alleging the responsibility of the State of Peru (hereinafter “Peru,” or “the State,” or “the Peruvian State”). The petition claimed that the State is internationally responsible for the detention and summary execution of Eduardo Nicolás Cruz Sánchez and Herma Luz Meléndez Cueva (hereinafter “the alleged victims”), inasmuch as members of the Peruvian Army had retaken control of the residence of the Ambassador of Japan in Peru on April 22, 1997, which had been held by members of the Túpac Amaru Revolutionary Movement [Movimiento Revolucionario Túpac Amaru] (hereinafter “MRTA”) since December 17, 1996. On January 28, 2005, the Executive Secretariat of the IACHR received the accreditation of the Center for Justice and International Law (CEJIL) as co-petitioner (they and the initial petitioners shall be referred to hereinafter as “the petitioners”).

2. On February 27, 2004, the Commission approved Admissibility Report No. 13/04, in which it concluded that it had competence to take up the complaint lodged by the petitioners and decided, based on the arguments of fact and law and without prejudging the merits of the matter, to declare the complaint admissible for the alleged violation of Articles 4, 8 and 25 of the American Convention on Human Rights (hereinafter “American Convention”) in relation to Article 1(1) of that instrument.

3. During the proceedings on the merits, the petitioners claimed that after having retaken control of the residence of the Ambassador of Japan in Peru, members of the Peruvian Army summarily executed Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza,<sup>1</sup> while they were in a state of defenselessness. They also contended that members of the army removed the bodies and prevented the entry of the Public Ministry; that rather than transfer the corpses to the Institute of Forensic Medicine for an official autopsy, they took them to the National Police hospital which was not equipped to conduct such a procedure; they blocked the entry of third parties as well as the taking of photographs. They did not allow the next of kin to identify the bodies, which were buried in secrecy in different cemeteries. The petitioners added that following a jurisdictional challenge, the matter was taken up by the military justice system for the prosecution of the military personnel involved, which is not the adequate jurisdiction to prosecute the violations committed. They also claimed that the civilian jurisdiction responsible for trying “other agents” has not been effective. According to the petitioners, the aforementioned facts give rise to State responsibility for the violation of Articles 4, 8 and 25 of the American Convention, in relation to Article 1(1) of that instrument. They also alleged that the State is responsible for the violation of the personal integrity of the victims’ next of kin.

4. The State, for its part, claimed that the Chavín de Huántar operation was conducted in a responsible manner and “prioritized the life of the hostages and the terrorists.” According to Peru, the latter “knew from the start that an act of that nature carried with it the risks inherent to an illicit act.” In relation to the competence of the military justice system, the State pointed out that the matter was tried in

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<sup>1</sup> The IACHR determined in its Admissibility Report that the violations alleged in the case had also occurred with respect to Mr. Peceros Pedraza and although “the latter was not named in the petition ... [his] rights also appear to have been violated in these same events and in the same way.” In the proceeding on the merits, therefore, the petitioners have referred to all three victims, including Mr. Peceros Pedraza.

the military jurisdiction for the following reasons: (i) the accused were active-duty officials; (ii) they acted in the discharge of their assigned duties in a military operation; (iii) the legally protected interest is “discipline and the protection of life, the supreme aim of the State;” (iv) the acts were defined in the Code of Military Justice and occurred in a battle between commandos and terrorist group; and (v) they were acting in a zone declared to be in a “state of emergency.” The State also contended that the evidence must be examined in a domestic legal proceeding. It added that the criminal trial held in the civilian justice system was conducted in accordance with the procedural guidelines provided under the law.

5. After examining the position of the parties, the Inter-American Commission concluded that the Peruvian State is responsible for the violation of the rights to life, due process and judicial protection enshrined in Articles 4, 5, 7, 8 and 25 of the American Convention, in relation to the obligation set out in Article 1(1) of that instrument, to the detriment of Eduardo Nicolás Cruz Sánchez and Herma Luz Meléndez Cueva.

## **II. PROCEEDING BEFORE THE IACHR**

6. APRODEH, Edgar Cruz Acuña and Herma Luz Cueva Torres lodged the initial petition on February 3, 2003. The procedures from the submission of the petition through the admissibility decision are set out in detail in the Admissibility Report issued on February 27, 2004.<sup>2</sup>

7. On March 11, 2004, the Commission notified the parties of the aforementioned report and, pursuant to Article 38.1 of the Rules of Procedure in effect at that time, granted the petitioners two months to present their additional observations on the merits. In addition, based on Article 38.2 of the Rules of Procedure, it placed itself at the parties’ disposal to seek a friendly settlement.

8. On June 1, 2004, the petitioners submitted their observations on the merits, which the IACHR forwarded to the State on June 17, 2004, requesting it to submit its observations within a two month period. The State did not submit its observations.

9. On October 25, 2004, the petitioners reported that Mr. Montesinos Torres, Mr. Nicolás de Bari Hermoza Ríos and Mr. Roberto Huamán Acurra, on trial in the civilian justice system in relation to the alleged events, had been released because a verdict had not been handed down within the time period established under the law.

10. On January 4, 2005, the petitioners asked to attend a hearing in relation to the instant case. On January 28, 2005, the Commission notified the parties of that hearing. That same day, the petitioners accredited CEJIL as a co-petitioner. A public hearing was held on the instant case on February 28, 2005, during its 122 regular session, which was attended by the petitioners and the State, and at which Mr. Hidetaka Ogura testified.

11. On April 23, 2008, the petitioners forwarded an additional communication on the merits. On May 23, 2008, the IACHR forwarded this communication to the State, requesting it to submit its observations within a one month period. On June 25, 2008, the State requested an extension of this time period, and a one month extension was granted on June 27 of that year. On August 5, 2008, the State submitted its observations. On September 2, 2008, the IACHR forwarded this communication to the petitioners, requesting them to submit their respective observations within a one month period.

12. On October 8, 2008, the petitioners submitted their observations on the State’s communication. On October 27, 2008, the IACHR forwarded them to the State, requesting it to present any observations it considered relevant within one month. On November 29 and December 29, 2008, the State requested an extension to respond to the Commission’s request. On December 2, 2008, and January 6, 2009, the Commission granted those extensions for periods of one month.

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<sup>2</sup> IACHR, Report No. 13/04 (Admissibility), Petition 136/03, EDUARDO NICOLÁS CRUZ SÁNCHEZ ET AL, February 27, 2004.

13. The State submitted its observations on February 6 and 12, 2009. On March 23, 2009, the IACHR forwarded them to the petitioners, requesting them to submit their observations within a one month period. On April 29, 2009, the petitioners requested an extension of time for the submission of their observations, which was granted on May 11, 2009. On May 15, 2009, the petitioners submitted their observations, which were forwarded to the State on May 26, 2009. On March 26, 2010, the State submitted a communication, which was forwarded to the petitioners on March 31, 2010.

14. On February 8, 2011, the petitioners submitted additional information. On February 8, 2011, the IACHR forwarded this information to the State and requested it to submit its observations within a one month period.

### **III. POSITION OF THE PARTIES**

#### **A. Position of the petitioners**

15. The petitioners alleged that in response to the seizure of the residence of the Ambassador of Japan in Peru by members of the Túpac Amaru Revolutionary Movement (hereinafter "MRTA") on December 17, 1996, the government appointed a High Level Commission to negotiate the demands of the MRTA members and to seek the release of the hostages. The government was able to secure the release of most of the hostages. The negotiations stalled on several occasions, however, and on March 6, 1997, the MRTA leader announced the suspension of talks after discovering that the government was digging a tunnel to gain access to the residence.

16. In this context, then President of the Republic, Alberto Fujimori Fujimori, together with presidential advisor Vladimiro Montesinos Torres and the Commander General of the Armed Forces, Nicolás de Bari Hermoza Ríos, planned a rescue operation called "Chavín de Huántar." On April 22, 1997, the government decided to storm the residence, believing that the situation had reached the point where neither party was going to give in. The government also had obtained information from inside the residence indicating that the situation had reached an extreme in which the integrity of the hostages was at risk. During the rescue operation, 71 hostages were freed and one hostage, two members of the security forces and all fourteen MRTA members died. According to the official version, the latter died in battle. The petitioners contend, however, that subsequent testimony and expert examinations indicate the contrary, at least in regard to the three victims in the instant case.

17. The petitioners asserted that the day after the events, the Special Military Judge ordered that the bodies be collected and transferred to the Central Hospital of the National Police to perform the relevant examinations rather than to the Institute of Forensic Medicine for an official autopsy. The Director General of the National Police ordered the General Director of Health to perform the autopsies in an environment that would allow "strict control over the entry of persons" and prohibited the taking of photographs or films. The petitioners claim that the autopsies were not performed according to legal and scientific standards and that medical experts were denied entry, and therefore no ballistics, anthropological, explosives or other tests were performed. They also claimed that the next of kin were not allowed to identify the bodies, which had been secretly buried in different cemeteries in the city of Lima.

18. The petitioners pointed out that four years after the events, based on a complaint lodged by the next of kin, the Office of the Attorney General requested the pre-trial detention of officers of the armed forces and this request was upheld by the presiding judge. For its part, the military justice system initiated a proceeding against 140 commandos who had participated in the operation on charges of abuse of authority and international law violations [*jus gentium*] under the Code of Military Justice. This gave rise to a challenge over jurisdiction to try the matter. The Supreme Court of Justice ruled in favor of the military justice system for the investigation of several commandos, arguing that because the operation took place in an area that had been declared an emergency zone and during a military operation, any criminal offenses they may have committed fell under military jurisdiction. The Court further pointed out that anyone other than those commandos would be regarded as offenders for crimes set out under civilian law.

19. The petitioners reported that in 2004, in the course of the trial in the civilian justice system, Vladimiro Montesinos, Nicolás de Bari and Roberto Huamán Azurra were ordered released on grounds that the statute of limitations for pre-trial detention had expired. They also claimed that the arrest warrant against Zamudio Aliaga had never been enforced. Subsequently, at the conclusion of the investigatory phase, the prosecutor assigned to the case determined that the criminal liability of Bari Hermoza Ríos, Montesinos Torres, Huamán Azurra, Zamudio Aliaga, Vianderas Ottone, Solari de la Fuente and Ángeles Villanueva had been demonstrated. The Third Special Criminal Chamber of the Superior Court of Lima took up the criminal charges filed by the prosecutor and public hearings are currently underway.

20. They added that in August 2003, the Office of the Attorney General of the Nation filed a complaint against former President Fujimori; the constitutional proceeding, however, was set aside and only recently have formal charges been brought and a case opened against him for extrajudicial executions in the instant case.

21. Based on the foregoing, the petitioners contend that the events described hereinabove constitute violations of Articles 4, 8 and 25 of the American Convention on Human Rights, all in relation to Article 1(1) of that instrument.

22. In relation to Article 4 of the Convention, the petitioners specifically claimed that State agents summarily executed Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza during the military operation. In this regard, they pointed out that notwithstanding the official version to the effect that the MRTA members had died in battle, witness testimony and the expert medical examinations performed on the bodies indicate that the victims in this case at least were summarily executed. They contended that during the operation, State agents incurred in a disproportionate use of force after having repelled the danger. They added that while the military incursion anticipated the use of the necessary armed force to protect the lives of the hostages, it failed to include sufficient safeguards to ensure proportionality and the necessary use of force once the situation was under control, and did not anticipate the possibility of arresting the MRTA members. The petitioners claimed that, to the contrary, the commandos were instructed to neutralize them and finish them off, and added that there was a parallel chain of command that took orders from Vladimiro Montesinos in order to ensure that the MRTA members would be executed. Hence, unidentified commandos “were given the mission to ensure the execution of any terrorists that might have been left wounded.” Moreover, State agents used the technique of “selective instinctive shooting” and did not have instruments to neutralize and detain the MRTA members. The petitioners added that although the authorities were apprised of what was occurring during the operation, they did not prohibit illegal orders during either the planning or commando training process or issue clear orders to prevent the execution of the victims. Finally, they asserted that the State has not conducted a serious, impartial and effective investigation into the executions.

23. The petitioners pointed out that while they are aware that the actions of the MRTA constituted a legitimate reason for Peru to deploy its security forces, the prohibition on the arbitrary taking of life is absolute and may not be suspended under any circumstances.

24. In relation to Article 8 of the Convention, the petitioners claimed that the State failed to conduct an effective, impartial and serious investigation and as a result, over thirteen years have transpired during which time the perpetrators of the extrajudicial executions have not been tried. They asserted, among other things, that Peru did not officially open an investigation into the incidents, it applied the military justice system, it failed to protect the evidence, it did not allow the next-of-kin access to the victims and it has exerted pressure on the judiciary during the proceedings. According to the petitioners, for all of these reasons, the facts in this case have gone unpunished.

25. In this regard, they claim that the military justice system is not the appropriate jurisdiction for investigating the incidents, since the independence and impartiality of the military tribunal is compromised. Indeed, the military judge that ordered the collection, autopsies and burial of the bodies did

not fulfill the guarantee of independence and impartiality required by the American Convention, even if it did have jurisdiction under Peruvian law. In this regard, they pointed out that military judges are appointed and removed by the Executive Branch and are subject to its rules.

26. Moreover, they contended that the judges that subsequently presided in the case against the commandos also did not satisfy the requirements of independence and impartiality. They added that the partiality of the military justice system is evident in its organic structure and in its proceedings which, in the case at hand, were intended to extricate the perpetrators of the acts from the civilian justice system and ensure impunity. They added that notwithstanding numerous testimonies that point to the involvement and direction of the military judge and prosecutors in these irregularities, none of them has ever been charged.

27. According to the petitioners, the Supreme Court's decision to remit the investigation of the acts associated with the commandos to the military justice system was erroneous. They pointed out that the provisions of the Code of Military Justice on which the Supreme Court based its decision are incompatible with inter-American standards. They added that the military justice system disregarded the evidence collected during the investigation before the ordinary criminal court, dismissed the case against the accused, and waited a month before making its ruling public so as to avert any challenge. The next of kin did not have access to the proceedings, which were secret.

28. Moreover, the petitioners asserted that the State failed to protect the evidence in order to conduct the investigation and did not allow the victims' next of kin to participate in the proceedings. In this regard, it did not preserve the crime scene, the autopsies were performed in an irregular manner in contravention of legal and scientific standards; the bodies were examined in a facility that was not equipped for the task; the next of kin were not notified that these examinations were being performed, nor were they brought in to identify the bodies or informed about the autopsies, or the time and place of burial. What is more, the final version of the report was not released publically until four years after the events.

29. The petitioners stressed that the State did not open a legal investigation after the events occurred, and only did so four years later when the families of the victims lodged a complaint. The entire legal proceeding has been fraught with unjustified delays and prolonged lapses with no procedural activity whatsoever. In addition, individual responsibility has yet to be determined. All of this constitutes a violation of the right to be heard within a reasonable time period and a denial of justice.

30. In relation to Article 25 of the American Convention, the petitioners claim that the State failed to provide an effective remedy to the victims and their relatives. They noted that the initial taking of evidence was incomplete, deficient and irregular, with the attendant impact on subsequent legal proceedings. They added that the imposition of the military jurisdiction that precluded the courts of civilian jurisdiction from investigating, prosecuting and punishing the military personnel constitutes a serious violation of judicial protections and due process guarantees. They further noted that the commandos who were tried and acquitted by the military court are not being investigated by the civilian authorities based on an erroneous application of the principles of *res judicata* and *non bis in idem*. The failure to investigate and determine criminal liability constitutes a wrong to the victims and their relatives—whose right to truth and access to justice has been seriously violated—as well as a flagrant disregard for the duty to investigate.

31. According to the petitioners, the State is also responsible for violating the personal integrity of the victims' next of kin. They asserted that these individuals had suffered deeply due to the execution of their relatives. To make matters worse, the State did not notify them of the transfer or burial of the bodies. It also failed to notify them of the findings of the autopsies performed on the victims or the causes and circumstances of their death. The petitioners added that those deaths were not even investigated until the relatives themselves lodged a criminal complaint. They contended that the families also have had to face the slow pace of the proceedings, attempts to cover up the deaths, and the lack of due diligence on the part of the authorities in the civilian and military jurisdictions.

## B. Position of the State

32. During the public hearing held at the IACHR, the State asserted that the instant case “is among those that has most deeply moved Peruvian society” and added that though the Commission, in its admissibility report, had found indications that illicit acts were committed, that does not negate the fact that the operation was a success and 71 hostages were freed unharmed. With respect to the investigations initiated, Peru reported that the military proceeding is closed and that the Peruvian constitutional system provides no recourse for the review of judgments handed down by the Supreme Council of Military Justice. The State added that the case of Eduardo Cruz Sánchez, alias Tito, was not included in the military proceeding. With regard to the jurisdiction of the military justice system, the State reported that both the Constitutional Court and the Supreme Court handed down rulings in 2004 in which they established that human rights abuses were not duty-related crimes. It added that the Constitutional Court held that the composition of the military justice system should be changed given its dependence on the Executive Branch and had called for the passage of the necessary legislation to proceed with this adjustment. Finally, the State indicated that the current panorama “is complex in terms of which entities should pronounce” in the instant case and concluded therefore, that “it expects its authorities to proceed in accordance with the law” in relation to the illegal acts.

33. In its communications, the State asserted that the instant case is a matter of “national security and therefore must be handled and analyzed with the appropriate confidentiality, ensuring due process guarantees (...) as subjects of international law, and should not be regarded exclusively from one vehement and impassioned point of view, but rather from the standpoint of a State carrying out sovereign and necessary actions in fulfillment of the role that corresponds to all States to the benefit of their citizens.”

34. The State alleged that the Chavín de Huántar operation, whose objective was to rescue the hostages, was completely planned, responsible, and “prioritized the life of the hostages and the terrorists.” It was not an improvised operation that disregarded the planning and tactics to be followed. The State reported that the operation put an end “to an act of urban terrorism” and that the hostage rescue “brought tranquility to Peruvian and Japanese society, which had been left in suspense day after day as their fellow citizens were deprived of their liberty and faced routine threats against their lives.” The State therefore had the obligation to “guarantee the right to life of the hostages and find a solution to the terrorist action.”

35. The State claimed that the members of the MRTA “knew from the start that an act of that nature carried with it the risks inherent to an illicit act” It added that the members of the MRTA were heavily armed and used their weapons during the battle, which resulted in the death of one hostage and two commandos.

36. In relation to the jurisdiction of the military justice system, the State pointed out that based on the complaint lodged by the petitioners for events related to the seizure of the Embassy of Peru, the Prosecutor of the Court Martial [Consejo de Guerra Militar Especial] had charged Néstor Cerpa Cartolini and other military personnel for the crime of treason against the fatherland. It went on to say that subsequently, the Court Martial appointed an Ad Hoc Special Military Criminal Judge to preside over the case. On June 26, 2002, the Supreme Council of Military Justice ruled that the Third Specialized Criminal Court of the Superior Court of Lima should desist from the investigative phase, since the Armed Forces personnel were included in the initiation of the investigative phase before the Court Martial of the Supreme Council of Military Justice. In response, the Third Specialized Criminal Court filed a jurisdictional challenge. The Transitory Criminal Chamber of the Supreme Court then proceeded to settle the challenge in favor of the military jurisdiction.

37. In its ruling on the jurisdictional challenge, the Supreme Court held that the operation was conducted pursuant to a superior order in the discharge of a duty and therefore the perpetrators should be subject to the jurisdiction of the military justice system under the domestic law in force at that time. In synthesis, according to the State, the acts were tried in the military jurisdiction for the following reasons: (i) the accused were active duty officers; (ii) they were acting in the discharge of their assigned duties in a

military operation; (iii) the legally protected interest is “discipline and the protection of life, the supreme aim of the State;” (iv) the acts were defined in the Code of Military Justice and were the result of a battle between commandos and a group of terrorists; and (v) they were acting in a zone declared to be in a “state of emergency.”

38. With regard to the petitioners’ allegations of pressures, the State reported that the Supreme Court settled the matter of jurisdiction pursuant to the powers vested in it and in different political circumstances than those which prevailed under the Fujimori government, and its independence and impartiality are therefore unquestionable. In relation to the alleged pressures brought to bear by the Executive Branch, the State contended that the political circumstances characterizing the transition government hardly point to the existence of pressure, “much less on a human rights issue.”

39. The State pointed out that its alleged international responsibility is based on testimonies and expert reports which must be examined at trial, which is the appropriate proceeding to arrive at a determination as to whether the deaths were indeed summary executions.

40. The State described the operational plans and the various chains of command. It pointed out that the National Intelligence System, through Vladimiro Montesinos, was in charge of supervision and implementation of the operational aspects. The State also discussed the jurisprudence related to the use of force.

41. In addition, Peru described the proceedings in the civilian court case in 2002 and in 2007 and referred to the extradition process against former President Fujimori.

42. The State claimed that the criminal case is proceeding in accordance with the procedural guidelines set out under the law and has not been abandoned or dismissed. In terms of the reasonable time period, it explained that there are no procedural regulations in effect to estimate the exact time frame from the beginning to the end of an oral trial. In regard to the interruption of the hearing, Peru claimed that under the law, the presiding court may extend the periods of suspension provided in the law when particular difficulties arise in substantiating the oral phase of the trial.

#### **IV. ANALYSIS OF THE MERITS**

##### **A. Examination of the Evidence**

43. Pursuant to Article 43(1) of its Rules of Procedure,<sup>3</sup> the Commission will examine the facts and evidence supplied by the parties, as well as the information obtained during the hearing held at its 122nd Regular Session. In addition, the IACHR will take into account other information that is a matter of public knowledge, including the resolutions of United Nations human rights committees, reports by the IACHR and by the internal entities established by the Peruvian State, the Final Report of the Truth and Reconciliation Commission (hereinafter “the TRC”),<sup>4</sup> reports from Peruvian and international nongovernmental organizations, laws, decrees, and other normative instruments.

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<sup>3</sup> Article 43.1 of the Rules of Procedure of the IACHR states as follows: “The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge.” As it has done in other reports, the IACHR will take into account in particular reports prepared by the United Nations and the reports of the Commission itself. 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/iffinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>4</sup> The Final Report of the TRC has been used by the Commission in several previous reports, as well as by the Inter-American Court of Human Rights in determining the 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 Huamani 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. 159. Continues...

44. In the following paragraphs, the IACHR will pronounce on the context for the allegations articulated by the parties, the specific facts that have been established and the consequent international responsibility of the Peruvian State. Before pronouncing on the established facts, however, the IACHR deems it relevant to refer to the historical context alleged by the parties and the behavior of the main actors in the armed conflict that took place in Peru in the 1980s and 1990s.

**B. Previous considerations – the use of indiscriminate violence by insurgent groups and extralegal actions by the security forces**

45. In its chapter on “armed actors” the Final Report of the TRC asserted that in May 1980, the leadership of the self-named Communist Party of Peru – Sendero Luminoso put into effect its plan to bring down the representative-democratic system of government and impose its own ideal of political and social organization in Peru.<sup>5</sup> The annihilation of community leaders, and local authorities; the personality cult of founder Abimael Guzmán Reinoso, the elimination of peasant communities that did not support the organization, the deliberate use of terror and other actions in violation of International Humanitarian Law were some of the tactics employed by Sendero Luminoso in its effort to build a “new State.”<sup>6</sup> According to the TRC, the violent acts attributed or claimed by that group left more than 31,000 people dead—which amounts to 54% of the fatal victims of the armed conflict—, displaced tens of thousands more, and caused a prolonged state of despair among the Peruvian population.<sup>7</sup>

46. From the inception of its “revolutionary war of the people” in 1984, the Túpac Amaru Revolutionary Movement (MRTA) contributed to the insecurity in Peru and for violations of the basic rights of thousands of Peruvian men and women. The most prominent criminal activities attributed to or claimed by the MRTA include assaults on financial institutions; attacks on business establishments; attacks on police posts and on the residences of government officials; selective killings of government officials; kidnappings of businessmen and high-level government officials and diplomats; the execution of indigenous leaders and some killings motivated by the sexual orientation or gender identity of the victims.<sup>8</sup>

47. In its Second Report on the Situation of Human Rights in Peru, the IACHR stressed that acts of violence promoted by Sendero Luminoso and the MRTA “led to the loss of life and property (...), in addition to the pain and suffering caused by the permanent state of anxiety to which Peruvian society, in general, was subjected.”<sup>9</sup>

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2006. Series C, No. 147; *Case of Gómez Palomino*, 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. This report was also submitted by the petitioners in the instant case.

<sup>5</sup> Final Report of the Truth and Reconciliation Commission, 2003, Volume II, Chapter 1, *Armed Actors*, 1.1 *The Communist Party of Peru – Sendero Luminoso*, pp. 29 and 30, available at: [www.cverdad.org.pe/ifinal/index.php](http://www.cverdad.org.pe/ifinal/index.php).

<sup>6</sup> Final Report of the Truth and Reconciliation Commission, 2003, Volume I, Chapter 1, *The periods of violence*, p. 54; Chapter 3, *Faces and profiles of the violence*, pp. 168 and 169, Volume II, Chapter 1, *Armed actors*, 1.1 *The Communist Party of Peru- Sendero Luminoso*, p. 128; and Volume VI, Chapter 1, *Patterns in the commission of human rights violations and crimes*, 1.1 *Assassinations and massacres*, p. 16, available at: [www.cverdad.org.pe/ifinal/index.php](http://www.cverdad.org.pe/ifinal/index.php).

<sup>7</sup> Final Report of the Truth and Reconciliation Commission, 2003, Volume II, Chapter 1, *Armed Actors*, 1.1 *The Communist Party of Peru- Sendero Luminoso*, pp. 13, 127 – 130, available at: [www.cverdad.org.pe/ifinal/index.php](http://www.cverdad.org.pe/ifinal/index.php). The following position is found in a 1991 document titled *Sobre las dos colinas: guerra antisubversiva y sus aliados*, believed to have been written by Abimael Guzmán Reinoso: “Our point of departure is that we do not ascribe to the Universal Declaration of Human Rights, nor to that of Costa Rica [...]. We reject and condemn human rights because they are bourgeois, reactionary and counter-revolutionary rights; today they are the weapon of revisionists and imperialists, and mostly of Yankee imperialism.” In this regard, see Amnesty International, *Human Rights in a Time of Impunity*, May 1996. Section 4, *Abuses by the Armed Opposition*, available at: <http://asiapacific.amnesty.org/library/Index/ESLAMR460011996?open&of=ESL-325>.

<sup>8</sup> Final Report of the Truth and Reconciliation Commission, 2003, Volume II, Chapter 1, *Armed actors*, 1.4 *The Movimiento Revolucionario Túpac Amaru*, pp 387, 389, 392, 431, 432 and 433, available at: [www.cverdad.org.pe/ifinal/index.php](http://www.cverdad.org.pe/ifinal/index.php).

<sup>9</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.LV/II.106, Doc. 59 rev., June 2, 2000, Introduction, B. Frame of Reference, para. 7, available at: [www.cidh.oas.org/countryrep/Peru2000sp/indice.htm](http://www.cidh.oas.org/countryrep/Peru2000sp/indice.htm).

48. In its reports on individual cases and on the general situation of human rights in Peru, the IACHR has underscored that in the context of the struggle against irregular armed groups, the police and military forces engaged in extralegal practices that resulted in serious human rights abuses.<sup>10</sup> Similarly, it has pointed out that security agents were responsible for committing arbitrary detentions, torture, rape, extrajudicial executions and forced disappearances, in many cases against individuals with no ties whatsoever to the insurgent groups.<sup>11</sup>

49. The Inter-American Court of Human Rights has established that in the most intense periods of the armed conflict, “Arbitrary executions were a systematic practice carried out in the backdrop of the contra-subversive strategy of State agents.”<sup>12</sup> The Court has pronounced on the formation of extermination groups within the Armed Forces and on a government policy in effect for several years that promoted the commission of selective extrajudicial executions, forced disappearances and torture of those suspected of belonging to insurgent groups.<sup>13</sup> Finally, the Inter-American Court<sup>14</sup> and the TRC<sup>15</sup> have discussed the excessive and lethal use of force in prisons housing people involved in terrorism or treason cases.

### C. Proven facts

#### *Seizure of the residence of the Ambassador of Japan by members of the Túpac Amaru Revolutionary Movement and negotiation process*

50. On the night of December 17, 1996, an event was held in the residence of Morihisa Aoki, the Ambassador of Japan, to celebrate the birthday of Japanese Emperor Akihito. The approximately six hundred guests included Supreme Court justices, members of Congress, ministers of government, high-level Armed Forces and National Police commanders, diplomats and politicians.<sup>16</sup>

51. Meanwhile, fourteen members of the Túpac Amaru Revolutionary Movement (hereinafter “MRTA”) descended from an ambulance parked in front of a building adjacent to the Japanese residence. The MRTA members were: Néstor Fortunato Cerpa Cartolini, alias “Evaristo”, Roli Rojas Fernández, alias “Árabe”, Eduardo Nicolás Cruz Sánchez, alias “Tito,” Luz Dina Villoslada Rodríguez, alias “Gringa,” Alejandro Huamaní Contreras, Adolfo Trigo Torres, Víctor Lubier Luis Cáceres Taboada, Iván Meza Espíritu, Artemio Shigari Rosque, alias “Alex” or “Cone,” Herma Luz Meléndez Cueva, alias “Cynthia,”

<sup>10</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Introduction, B. Frame of Reference, para. 9, available at: [www.cidh.oas.org/countryrep/Peru2000sp/indice.htm](http://www.cidh.oas.org/countryrep/Peru2000sp/indice.htm).

<sup>11</sup> IACHR, Report No. 101/01, Case 10.247 et al, *Extrajudicial Executions and Forced Disappearances of Persons*, Peru, October 11, 2001, paras. 163 to 179; Report No. 57/99, Case 10.827, *Romer Morales Zegarra et al.*, and Case 10.984, *Carlos Vega Pizango*, Peru, April 13, 1999, paras. 28 to 44; Report No. 1/96, Case 10.559, *Julio Apfata Tañire Otavire et al.*, Peru, March 1, 1996, Section I. Background, and Report No. 37/93, Case 10.563, *Guadalupe Ccalloccunto Olano*, Peru, October 7, 1993, Section I. Background.

<sup>12</sup> Inter-Am. Ct. H.R., *Case of La Cantuta*. Judgment of November 29, 2006, Series C, No. 162, para. 80.1.

<sup>13</sup> Inter-Am. Ct. H.R., *Case of La Cantuta*. Judgment of November 29, 2006, Series C, No. 162, paras. 83 and 84; *Case of Gómez Palomino*, Judgment of November 22, 2005. Series C, No. 136, para. 54.1 and *Case of Huilca Tecse v. Peru*, Judgment of March 3, 2005, Series C, No. 21, para. 60.9.

<sup>14</sup> Inter-Am. Ct. H.R., *Case of Neira Alegría et al v. Peru*. Judgment of January 19, 1995. Series C, No. 20, para. 69 and *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 197, numbers 18 to 40.

<sup>15</sup> Final Report of the Truth and Reconciliation Commission, 2003, Volume VII, Chapter 2, *Cases Investigated by the TRC*, 2.67 *Extrajudicial executions in El Frontón and Lurigancho Prisons (1986)* and 2.68 *Extrajudicial executions in the Canto Grande prison (1992)*, available at: [www.cverdad.org.pe/ifinal/index.php](http://www.cverdad.org.pe/ifinal/index.php).

<sup>16</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009, and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of December 1, 2003, appendix submitted at the public hearing.

Bosco Honorato Salas Huamán, Salomón Víctor Peceros Pedraza, and two others who were not identified.<sup>17</sup>

52. The MRTA group, armed with military equipment such as rifles, machine guns, rocket-launchers, pistols, revolvers, hand grenades, explosives and anti-gas masks, entered the building adjacent to the embassy and opened a hole in the wall. In this way, they entered the residence, overpowered the security guards and took the guests hostage.<sup>18</sup>

53. The demands of the MRTA members included the release of 458 imprisoned MRTA members and, following their release, their safe conduct to the central forest, together with the group occupying the residence.<sup>19</sup>

54. Former president Alberto Fujimori convened an emergency meeting of his cabinet of ministers and appointed a negotiator. At the same time, the International Committee of the Red Cross (ICRC) succeeded in communicating with the MRTA members to offer humanitarian intermediation.<sup>20</sup> Finally, a Commission of Guarantors, which included foreign representatives and was accepted by the MRTA members, was charged with conducting the dialogue.

55. The MRTA members released most of the hostages between December 17, 1996 and January 1, 1997,<sup>21</sup> with 72 of them remaining in the residence.<sup>22</sup>

56. The negotiating team offered the MRTA members a plane that would take them out of the country. Meanwhile, the latter called for the release of their leaders confined in the Yanamayo prison and on the Callao Naval Base.<sup>23</sup>

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<sup>17</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>18</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>19</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>20</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>21</sup> On December 17, 106 people, including the elderly, were released; the ambassadors of Germany, Canada and Greece were released on December 18, along with a Peruvian diplomat and the French cultural attaché and four more elderly individuals; 38 people were released on December 20, including the ambassadors of Egypt, Brazil, and South Korea, the mayor of Callao, former presidential candidate Alejandro Toledo and Congressman Javier Diez Canseco; 225 hostages were released on December 22, including ambassadors, business people, economists, and the former Labor Minister; the Ambassador of Uruguay was released on December 24; the first secretary of the ambassador of Japan was released on December 25 and the Ambassador of Guatemala on December 27; 24 hostages including ambassadors, two ministers, five members of Congress, Supreme Court justice, government officials and high level military officers were released; two additional hostages were freed on December 31 and, on January 1, 1997, the MRTA commando released seven hostages.

<sup>22</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009, and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>23</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

57. The negotiations lasted for four months and four days, during which time several meetings took place between the government and MRTA members.<sup>24</sup> In early March, the former president of the Republic visited the Dominican Republic and Cuba to investigate places that might receive the MRTA members.<sup>25</sup>

58. On March 6, 1997, Néstor Cerpa, the leader of the MRTA group, announced the suspension of the talks after discovering that the government had dug a tunnel in order to storm the residence. On March 12, 1997, one more meeting was held between the government interlocutor and MRTA representatives and this reopened the talks. On March 13, 1997, the Commission of Guarantors held its first separate meeting with the MRTA in an effort to soften its position, and subsequently held its first separate meeting with the government interlocutor.<sup>26</sup>

59. On March 21, 1997, the Commission of Guarantors issued an appeal to the government and the MRTA, warning that the situation was “reaching a possible endpoint.” Néstor Cerpa refused to accept the idea of asylum in Cuba; he insisted on the release of his comrades and announced the suspension of dialogue, accusing the government of planning an incursion into the residence through a tunnel.<sup>27</sup>

60. On April 22, 1997, “in light of the failure of the talks to reach a peaceful solution to the hostage problem in the residence of the Ambassador of Japan, and left with no option other than the use of force,” the President of the Republic ordered the hostage rescue operation.”<sup>28</sup>

*Implementation of Operation Nipón 96 or Chavín de Huántar*

61. Parallel to the negotiations, then President Fujimori had ordered the Commander General of the Army, Major General E.P. Nicolás de Bari Hermoza Ríos, National Intelligence Service advisor Vladimiro Montesinos Torres, and the military high command to prepare a contingency plan to rescue the hostages in case the negotiations failed.<sup>29</sup> General Augusto Jaime Patiño ordered Colonel José Williams Zapata to prepare Operations Plan Nipón 96.<sup>30</sup>

62. According to Operation Plan Nipón 96, its objective was to seize control of the property in order to “capture or eliminate the MRTA terrorists and rescue the hostages in order to establish the rule of law and contribute to the consolidation of national pacification.” To this end, they should use “measures and actions designed to prevent or neutralize terrorist actions ...and (should) not commit excesses of any sort, maintaining absolute respect for HR, which is not to say that forceful action would not be taken.”<sup>31</sup>

<sup>24</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>25</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>26</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>27</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>28</sup> Appendix 2, Operation Plan A “NIPON” 96 (1<sup>st</sup> Special Forces [FFEE] Division), Appendix 5 to the State’s communication of February 6, 2009, submitted at the public hearing.

<sup>29</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009 and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of December 1, 2003, submitted at the public hearing.

<sup>30</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>31</sup> Appendix 2, Operations plan A “NIPON” 96 (1<sup>st</sup> division Special Forces [FFEE]), Appendix 5 to the State’s communication of February 6, 2009. Submitted at the public hearing.

63. The operational chain of command reached the highest levels of military authority, passing through National Intelligence Service advisor Vladimiro Montesinos Torres and extending all the way up to then President Fujimori.<sup>32</sup> A continuous communications system was in place throughout the operation.<sup>33</sup>

64. Peruvian Army General Augusto Jaime Patiño, who took orders from the Commander General of the Army, was head of the Tactical Operations Center and constituted the second level of command; Colonel José Williams Zapata, who commanded the group that would carry out the intervention, represented a third level of command.<sup>34</sup> Vladimiro Montesinos was responsible for the intelligence side of the operation by order of the President of the Republic. Montesinos, in turn, ordered Colonel Roberto Edmundo Huamán Azcurra to make use of the information obtained from inside the residence. Colonel Huamán Azcurra ordered Colonel Jesús Zamudio Aliaga to take charge of digging the tunnels, securing the houses adjacent to the residence of the Ambassador, and filming and photographing the rescue operation.<sup>35</sup>

65. After being informed that the conditions for the intervention were in place, President Fujimori, through the chain of command, order the operation to begin. After detonating several underground explosions, approximately 143 commanders formed into different groups entered the Embassy residence through tunnels, while some of the MRTA members were playing a game of “*fulbito*.” Lieutenant Gustavo Jiménez Chávez, Lieutenant Colonel Juan Alfonso Valer Sandoval, hostage Carlos Giusti Acuña,<sup>36</sup> and all fourteen MRTA members perished in the operation. The remaining 71 hostages were freed alive. An additional 14 State agents and 8 hostages were wounded during the operation.<sup>37</sup>

66. The tactic of “selective instinctive shooting” (SIS) was employed during the operation. It consists of firing three shots in two seconds to the vital parts of the adversary, followed by a shot to the head of the enemy; “if the criminal was still alive, he was given the *coup de grâce*.”<sup>38</sup>

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<sup>32</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf> Appendix 3, Appendix 8, Prosecutor’s Inquiry [vista fiscal] of the Public Ministry, dated April 14, 2003, Appendix of the petitioners’ communication of February 19, 2003. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009, and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of December 1, 2003, appendix submitted at the public hearing.

<sup>33</sup> Report No. 01-1 Special Forces Div. [Div. FFEI] April 1997, Operation Chavín de Huántar (Hostage Rescue Operation), Appendix 7 to the State’s communication of February 6, 2009, and public hearing. Prosecutor’s Inquiry [vista fiscal], April 14, 2003, documents provided at the public hearing, Appendix to the petitioners’ communication of February 19, 2003, see in this regard, the summary of the testimony given by Guillermo Castillo Meza, Antonio Olivares Príncipes, Ronald Javier Pérez Pezo.

<sup>34</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>35</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>36</sup> Autopsy Protocol, Volume 4.

<sup>37</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>. See Appendix 2, Appendix 15, Report of the Intervention of the Forces of Order in Compliance with Operations Plan Chavín de Huántar, appendix submitted at the public hearing. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009 and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of 1° December 2003, appendix submitted at the public hearing.

<sup>38</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf> See also, Appendix 4, expanded statement of January 11, 2002, by General José Daniel Williams Zapata. See the Statement of Lt. Col. Luis Alberto Donoso Volpe, a member of Group 5, before the Public Ministry.

67. According to the official version, all fourteen MRTA members died in the battle. There are, however, other versions of the way in which Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza were killed.

68. According to the official version concerning Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, they were killed by gunfire when armed MRTA members approached the hostage evacuation area carrying firearms.<sup>39</sup> Alternative versions, however, were provided by some of the members of the group in charge of the individual or individuals and the circumstances in which the shots were fired.<sup>40</sup>

69. One of the hostages, Hidetaka Ogura, former First Secretary of the Embassy of Japan in Lima, stated that while he was being evacuated together with other hostages, he saw that

Two members of the MRTA were surrounded by soldiers, a woman called "Cynthia" and a man [he] could not recognize because he was short and was surrounded by tall soldiers. Before descending the portable staircase, [he] heard "Cynthia" yelling something like: "Don't kill him" or "Don't kill me."<sup>41</sup>

70. The following day, these two individuals were found lying half a meter apart with multiple projectile wounds on the second floor of the residence in the room marked "I."

71. According to the report of the identification and removal of the bodies on April 23, 1997, by the Special Military Judge and the Military Prosecutor, NN09, later identified as Víctor Salomón Peceros Pedraza, presented "three perforations on the right side of the abdomen, another two bullet wounds on the right side of the face, and three perforations to the head."<sup>42</sup> NN10, later identified as Herma Meléndez Cueva and found half a meter from the former, presented "six perforations by bullet ...(and one) bullet wound under the left eye."<sup>43</sup> Both were found on the second floor of the residence<sup>44</sup> in the area identified as Section I, which was under the responsibility of Team 8 of the DELTA Assault Element during the operation.<sup>45</sup>

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<sup>39</sup> Reconstruction of the Events in the Replica of the Residence of the Ambassador of Japan created by the Investigative Office [Vocalía de Instrucción] of the Supreme Council of Military Justice, June 3, 2003; documents submitted during the public hearing.

<sup>40</sup> Huaracaya Lovón stated that commandos Paz Ramos and Alvarado Díaz killed the MRTA members; Paz Ramos stated that he had not fired a single shot, and Becerra Noblecilla stated that Huaracaya Lovón, Alvarado Díaz and Becerra Noblecilla were the ones who fired. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of 1° December 2003, appendix submitted at the public hearing.

<sup>41</sup> Appendix 5, Letter dated August 20, 2001 from Hidetaka Ogura to the Judiciary of Peru, appendix to the representatives' communication of April 22, 2008. Testimony given at the public hearing before the IACHR on February 28, 2005.

<sup>42</sup> Appendix 6, Report of the identification and removal of the corpses of the criminal terrorists belonging to the Túpac Amaru Revolutionary Movement found in the Residence of the Ambassador of Japan, appendix to the representatives' communication of April 22, 2008, submitted at the public hearing.

<sup>43</sup> Appendix 6, Report of the identification and removal of the corpses of the criminal terrorists belonging to the Túpac Amaru Revolutionary Movement found in the Residence of the Ambassador of Japan, appendix to the representatives' communication of April 22, 2008, submitted at the public hearing.

<sup>44</sup> Appendix 6, Report of the identification and removal of the corpses of the criminal terrorists belonging to the Túpac Amaru Revolutionary Movement found in the Residence of the Ambassador of Japan, appendix to the representatives' communication of April 22, 2008, submitted at the public hearing.

<sup>45</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>. Team 8 of the DELTA Assault Element was commanded by Capt. E.P. Raúl Huaracaya Lovón and made up of Captains Walter Becerra Noblecilla and Jorge Félix Díaz, Lieutenants Juan Moral Rojas, Tomás César Rojas Villanueva, and Manuel Antonio Paz Ramos, SO3 José Alvarado Díaz, and two naval officers. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

72. It is also worth noting that according to testimony presented before the Office of the Attorney General, the areas adjacent to Room I were under the control of the operation's military forces.<sup>46</sup> In this regard, the Office of the Attorney General found that:

Even though the testimony of Team No. 8 under the command of Captain Raúl Huarcaya Lovón, and made up of Captains Water Becerra Noblecilla and Jorge Félix Díaz, Lieutenants Juan Moral Rojas, Tomás César Rojas Villanueva, Manuel Antonio Paz Ramos, SO3 Medic José Alvarado Díaz and two naval officers in charge of rescuing the hostages from Room I. "although the aforementioned commandos in their ...statements ...which are classified, state that as they were evacuating the last hostage found in Room 1 by way of a balcony ...two terrorists appeared at the door: a man carrying an UZI or AKM, and a woman with a war grenade in her hands and for that reason they proceeded to shoot at them and kill them; this does not explain, however, how the wronged parties were able to get... to the main entrance of Room "I" if it is true that the rooms and hallways adjacent to this room were under the control of commandos from Teams 7 and 8."<sup>47</sup>

73. The partial reference autopsy conducted on April 23, 1997, indicates that Víctor Salomón Peceros Pedraza presented "GSW to the head, thorax and extremities" and Herma Luz Meléndez Cueva presented "GSW to the head, thorax and upper left limb."<sup>48</sup> The autopsies conducted in 2001 by the Institute of Forensic Medicine of Peru determined that Víctor Salomón Peceros Pedraza received nine gunshot wounds, six of them to the face and thorax,<sup>49</sup> and Herma Luz Meléndez Cueva received fourteen gunshot wounds, seven to the head, one to the neck and six to the thorax.<sup>50</sup>

74. In relation to Eduardo Nicolás Cruz Sánchez, alias "Tito," the official version indicates that he died in combat; his body, discovered on the first floor of the residence, presented "a large orifice in the head [...] and in his right hand was a grenade he had not managed to throw."<sup>51</sup>

75. According to Mr. Hidetaka Ogura, however, once the group of hostages he was with had been freed and was already in the yard of the house next door to the residency of the Ambassador:

[He] saw a member of the MRTA called "Tito." His hands were tied behind his back and his body was face down on the ground. He moved his body and that was how [he] was able to tell that he was alive. He was wearing a short-sleeved green t-shirt and dark colored shorts. When "Tito" attempted to raise his head, an armed police officer who was guarding him kicked him in the head causing him to bleed. It was a police officer because the police were guarding the house next door. A few minutes later, a soldier emerged from the tunnel; he had "Tito" picked up, and took him to the

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<sup>46</sup> See the proceeding for the legal inspection of the replica of the residence of the Ambassador of Japan, July 20, 2002.

<sup>47</sup> Appendix 8, Prosecutor's Inquiry [vista fiscal] April 14, 2003, documents submitted at the public hearing.

<sup>48</sup> Appendix 6, Report of the identification and removal of the corpses of the criminal terrorists belonging to the Túpac Amaru Revolutionary Movement found in the Residence of the Ambassador of Japan, Appendix to the representatives' communication of April 22, 2008, submitted at the public hearing.

<sup>49</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>50</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>51</sup> Appendix 6, Report of the identification and removal of the corpses of the criminal terrorists belonging to the Túpac Amaru Revolutionary Movement found in the Residence of the Ambassador of Japan, appendix to the representatives' communication of April 22, 2008, provided at the public hearing. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

residency through the tunnel. "Tito" disappeared from the yard in that manner and [he] did not see him again after that. Some shots were still being fired up until he left the house next door.<sup>52</sup>

76. According to Mr. Hidetaka Ogura's testimony before the IACHR, a few minutes after the soldiers had taken "Tito" through the tunnel to the residence, President Fujimori arrived with his security detail or advisors, entered the tunnel and headed for the residence.<sup>53</sup>

77. The house adjacent to the residency of the Ambassador where two groups of hostages were taken (one comprising eleven Japanese individuals and the other six Peruvian justices),<sup>54</sup> was being guarded by members of the police. Two of them, agents Raúl Robles Reynoso and Marcial Teodorico Torres Arteaga, stated that while they were aiding the Peruvian and Japanese hostages who were arriving in the yard through a tunnel connecting the two houses, one of the hostages gestured to him that an MRTA member was among them. They proceeded to separate him from the rest, bound his hands, and radioed their immediate superior, Colonel Zamudio Aliaga, who ordered them to remain where they were and he would send someone to pick him up.<sup>55</sup> The MRTA member was wearing a dark green shirt and dark shorts, and "visibly" was not carrying a weapon of any sort.<sup>56</sup> What is more, he was absolutely fine physically, but "he was acting stunned, because you could see the fear in his face."<sup>57</sup> After the police had detained him, the MRTA member even "begged for his life and [they] told him not to be afraid, that nothing was going to happen to him there."<sup>58</sup> Minutes after the two police officers reported the presence of the MRTA member, a commando emerged from the tunnel, took hold of him and, despite his struggles, led him back through the tunnel to the residence of the Ambassador.<sup>59</sup>

78. In his statement before the Special Provincial Prosecutor for Human Rights, police agent Robles Reynoso asserted that:

He thought that the captured MRTA member would be publicly presented as a prisoner and would then be interrogated or made to provide valuable information, yet ... he was surprised to see on the news that all of the MRTA members had died in combat. He had remained silent, without telling anyone about it for fear of some reprisal from the system, as had occurred in past cases ...<sup>60</sup>

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<sup>52</sup> Appendix 5, Letter dated August 20, 2001 from Hidetaka Ogura to the Judiciary of Peru, appendix to the representatives' communication of April 22, 2008. Testimony given during the public hearing on February 28, 2005.

<sup>53</sup> Appendix 10, Hidetaka Ogura's testimony before the IACHR on February 28, 2005.

<sup>54</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ffinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>55</sup> Appendix 8, Prosecutor's Inquiry [Vista Fiscal] April 14, 2003, Appendix to the petitioners' communication of February 19, 2003. Appendix 11, Statement of Torres Arteaga, Marcial Teodorico and Raúl Robles Reynoso of December 28, 2001, before the Office of the Special Provincial Prosecutor for Human Rights. See also, Appendix 3, non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>56</sup> Appendix 8, Prosecutor's Inquiry [Vista Fiscal] of the Public Ministry of April 14, 2003, appendix to the petitioners' communication of February 19, 2003. Appendix 11, Statement of Torres Arteaga, Marcial Teodorico and Raúl Robles Reynoso of December 28, 2001, before the Office of the Special Provincial Prosecutor for Human Rights.

<sup>57</sup> Appendix 11, Statement of Torres Arteaga, Marcial Teodorico of December 28, 2001, before the Office of the Special Provincial Prosecutor for Human Rights.

<sup>58</sup> Appendix 11, Statement of Raúl Robles Reynoso of December 28, 2001, before the Office of the Special Provincial Prosecutor for Human Rights.

<sup>59</sup> Appendix 8, Prosecutor's Inquiry [Vista Fiscal] of the Public Ministry of April 14, 2003, appendix to the petitioners' communication of February 19, 2003. Appendix 11, Statement of Torres Arteaga, Marcial Teodorico and Raúl Robles Reynoso of December 28, 2001, before the Office of the Special Provincial Prosecutor for Human Rights.

<sup>60</sup> December 28, 2001, statement by Raúl Robles Reynoso before the Office of the Special Provincial Prosecutor for Human Rights.

79. According to the partial reference autopsy performed on Eduardo Nicolás Cruz Sánchez on April 23, 1997, he presented with “a severe gunshot wound on the right side with exposed fractures and loss of brain matter.”<sup>61</sup> Moreover, subsequent expert reports indicate that he took only one gunshot wound to the neck. In this regard, it was determined that:

Given the characteristics of the wounds to the cranium, it can be inferred that they were caused by a projectile fired from a high-speed firearm, with the victim positioned lower than the assailant, who was behind and to the left of the victim.<sup>62</sup>

[...]

The region that received the impact (the posterior region of the neck) is not very accessible to an assailant, particularly if the target is mobile. This individual would have had to have been immobilized before being shot.<sup>63</sup>

80. Once the operation was over, the wounded hostages and commandos were taken to the Central Military Hospital.<sup>64</sup> Autopsies were performed on the bodies of commandos Alfonso Valer Sandoval and Gustavo Jiménez Chávez, and hostage Carlos Ernesto Giusti Acuña on the night of April 22, 1997.<sup>65</sup>

*Proceedings following the operation*

81. Also on April 22, 1997, the special military judge and special military prosecutor arrived at the residence of the Ambassador but were unable to inspect all of the facilities “for security reasons, since there was information that strategic areas of the Residence had been mined [...] which put at risk the security of the personnel involved, and it was therefore decided that the identification and removal of the corpses (of the MRTA members) would take place the following day.”<sup>66</sup>

82. On April 23, 1997, the special military judge and the special military prosecutor went to the residence of the Ambassador of Japan and ordered that the bodies of the MRTA members be removed and taken to the Central Hospital of the National Police. They also ordered the chief of pathology, National Police Medical Commander Herbert Ángeles Villa Nueva to perform the official autopsies.

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<sup>61</sup> Appendix 6, Report of the identification and removal of the corpses of the criminal terrorists belonging to the Túpac Amaru Revolutionary Movement found in the Residence of the Ambassador of Japan, Appendix to the representatives’ communication of April 22, 2008.

<sup>62</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009 and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of 1° December 2003, appendix submitted at the public hearing.

<sup>63</sup> Appendix 12, Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, prepared by Clyde C. Show, PhD and José Pablo Baraybar, MSc. Peruvian Forensic Anthropology Team [Equipo Peruano de Antropología Forense (EPAF)] of July 2001, appendix to the representatives’ communications of April 22, 2008, and February 3, 2003. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009 and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of December 1, 2003, appendix submitted at the public hearing.

<sup>64</sup> Appendix 13, Log of patients admitted to the Central Military Hospital, appendix submitted at the public hearing.

<sup>65</sup> Appendix 14, Autopsy Protocol of Lt. Gustavo Jiménez Chávez, Dr. Ernesto Giusti Acuña and Lt. Col. Juan Alfonso Valer Sandoval, appendix submitted at the public hearing. See also, their death certificates, appendix submitted at the public hearing.

<sup>66</sup> Appendix 15, Report of the intervention of the forces of order in compliance with Operations Plan Chavín de Huántar, appendix submitted at the public hearing.

83. The partial reference autopsies that were actually performed found that the fourteen MRTA members had died of “hypovolemic shock due to GSW” (gunshot wounds).<sup>67</sup> Orders were also given for the identification of the bodies by fingerprinting experts and the recording of death certificates for them.<sup>68</sup> According to the testimony given by two expert witnesses to the Office of the Prosecutor, whose signatures appear on the Report of identification and removal of corpses, they were not present at the moment of such identification and removal, but were later forced by military authorities to sign the Report.<sup>69</sup>

84. Fernando Vianderas Ottone, Director General of the National Police, ordered the Director General of Health, Martín Solari de la Fuente, to take all pertinent measures to ensure that the autopsies were performed in an atmosphere that would allow “strict control over the entry of persons” and prohibited the taking of photographs and films. He also ordered that only the staff in charge of autopsies and personnel from the legal department of the army would be allowed access, “which restricted the access of the National Police specialists who were to perform the auxiliary examinations; those who were allowed into the Autopsy Room were not permitted to take the necessary samples for that purpose.”<sup>70</sup> Moreover, according to the declarations given by the expert witnesses that performed the necropsies, “the chief in service gave the order to do the minimum possible”; the orders came directly from the President; the National Police Hospital was not an adequate environment to perform the necropsies, because the patients who died with criminal signs in such hospital were transferred to the Central Morgue of Lima.<sup>71</sup>

85. The bodies of the fourteen MRTA members were secretly buried by National Police officers in different cemeteries in the city of Lima. All of the bodies were identified as N.N., with the exception of three,<sup>72</sup> one of which was Eduardo Nicolás Cruz Sánchez.<sup>73</sup>

86. On April 30, 1997, the Armed Forces prepared a report on the implementation of Operations Plan Chavín de Huántar.<sup>74</sup>

#### *Investigation into the events*

87. Three years after Operation Chavín de Huántar, relatives of some of the dead MRTA members lodged a criminal complaint before the Public Ministry claiming that they had been summarily executed.<sup>75</sup>

<sup>67</sup> Appendix 16, Partial reference autopsies of the fourteen MRTA members, appendix submitted at the public hearing.

<sup>68</sup> Appendix 6, Report of the identification and removal of the corpses of the criminal terrorists belonging to the Túpac Amaru Revolutionary Movement found in the Residence of the Ambassador of Japan, appendix to the representatives' communication of April 22, 2008. Order for release of remains of April 25, 1997, appendix submitted at the public hearing. Appendix 17, Death certificate and autopsy certificate of Eduardo Nicolás Cruz Sánchez, appendix submitted at the public hearing. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>69</sup> Inquiry by the Public Ministry of September 22, 2006, (file provided by the State).

<sup>70</sup> See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>71</sup> Inquiry by the Public Ministry of September 22, 2006, (file provided by the State).

<sup>72</sup> Roli Rojas Fernández, Néstor Cerpa Cartolini and Eduardo Cruz Sánchez.

<sup>73</sup> Appendix 18, Certificate of verification of the graves of members of the terrorist criminals [DD-TT], public hearing. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing. Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>.

<sup>74</sup> Report No. 01-1 Special Forces Div. [Div. FFEE], April 1997 Operation Chavín de Huántar (Hostage Rescue Operation), Appendix 7 to the State's communication of February 6, 2009.

<sup>75</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>

88. In February 2001, the Office of the Special Provincial Prosecutor sent the autopsy protocols performed on the fourteen MRTA members on April 23, 1997, to the Central Division of Thanatological and Auxiliary Examinations (DICETA) requesting the latter to determine “whether the autopsies were performed in keeping with the medical and legal standards in effect for violent deaths.”<sup>76</sup>

89. With no possibility of determining the causes of death based on the aforementioned autopsies, the Office of the Prosecutor ordered the exhumation of the bodies so that a group made up of forensic medicine experts, other experts from the Criminalistics Division of the National Police and the Peruvian Forensic Anthropology Team, and experts Dr. Clyde Collins Snow and José Pablo Baraybar, could identify the people who had died and determine the causes of their deaths.<sup>77</sup> The office also ordered expert examinations by the Criminalistics Division of the National Police of Peru and by the Genetic Identification Laboratory of the University of Granada, Spain, for DNA tests.<sup>78</sup>

90. On August 20, 2001, Hidetaka Ogura, the former First Secretary of the Embassy of Japan in Lima and a former hostage, sent a letter to the Peruvian judiciary stating what he had seen on the day the residence of the Ambassador was retaken, in relation to the three MRTA members known as “Tito” and “Cynthia” and a third, short individual later identified as Víctor Salomón Peceros Pedraza<sup>79</sup>.

91. On May 24, 2002, the Office of the Special Provincial Criminal Prosecutor filed criminal charges against Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Edmundo Huamán Ascurra, Augusto Jaime Patiño, José Williams Zapata, Luis Alatrística Rodríguez, Carlos Tello Aliaga, Hugo Víctor Robles del Castillo, Víctor Hugo Sánchez Morales, Jesús Zamudio Aliaga, Raúl Huaracaya Lovón, Walter Martín Becerra Noblecilla, José Alvarado Díaz, Manuel Antonio Paz Ramos, Jorge Félix Díaz, Juan Carlos Moral Rojas and César Rojas Villanueva, for an alleged offense committed against the life, body and health –qualified homicide – of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza. He also filed charges against Juan Fernando Vianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva. Finally, he decided not to initiate proceedings “for now” in the deaths of the other MRTA members<sup>80</sup> “as it was necessary, in any

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...continuation

Appendix 20, Criminal complaint lodged by the Office of the Prosecutor on May 24, 2002, appendix to the State’s communication of August 5, 2008. Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009 and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of December 1, 2003, appendix submitted at the public hearing.

<sup>76</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V.

<sup>77</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V. Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UJE/2.66.%20%20ENABJADA%20JAPON.pdf> See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009 and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of December 1, 2003, appendix submitted at the public hearing.

<sup>78</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UJE/2.66.%20%20ENABJADA%20JAPON.pdf> See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009 and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of December 1, 2003, appendix submitted at the public hearing.

<sup>79</sup> Appendix 5, August 20, 2001, letter sent by Hidetaka Ogura to the Judiciary of Peru, appendix to the representatives’ communication of April 22, 2008. Testimony given before the IACHR at the public hearing on February 28, 2005. Testimony authenticated before the TRC in a May 21, 2003 letter.

<sup>80</sup> Adolfo Trigo Torres or Adolfo Trigozo Torres, Roli Rojas Fernández, Néstor Fortunato Cerpa Cartolini, Iván Meza Espíritu, Bosco Honorato Salas Huamán, Luz Dina Villoslada Rodríguez, and NN four and thirteen.

case, to collect more evidence on the form and circumstances of their death.” He also forwarded certified copies for purposes of the investigation against Fujimori.<sup>81</sup>

92. The expert reports requested by the Office of the Prosecutor (*supra*) were issued in July<sup>82</sup> and August,<sup>83</sup> 2001. They found projectile wounds to the head and/or neck in all fourteen cases and to the neck in 57% of the cases, all of which involved “entry wounds through the posterior region”<sup>84</sup> of the neck, through the first and third cervical vertebrae, and exit wounds through the first cervical vertebrae in the facial region.<sup>85</sup> This led to the inference that “the victim’s position in relation to the shooter was always the same and the victim’s mobility, therefore, was minimal if not “0.”<sup>86</sup> Moreover, the reports concluded that in at least eight cases there was evidence that “the victims had been in an incapacitated state when they were shot” and that those firing those shots “were duly cognizant of how lethal they were.”<sup>87</sup>

93. Specifically in relation to the alleged victims in the instant case, the reports pointed out that Víctor Salomón Peceros Pedraza had received two gunshot wounds to the head, one to the inferior maxilla, three to the thorax, two to the pelvis and one to the left hand. They likewise determined that Herma Luz Meléndez Cueva had received seven gunshot wounds to the head, one to the neck, which had entered in the left posterior area, and six to the thorax.<sup>88</sup> With respect to Eduardo Nicolás Cruz Sánchez, the report determined that the gunshot wound had entered “in the left posterior region of the neck and exited in the right lateral region of the head.”<sup>89</sup> One of the reports added that because “the region that received the impact [...] is not very accessible to an assailant, especially if the target is mobile, this individual would have to have been immobilized prior to being shot.”<sup>90</sup>

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<sup>81</sup> Appendix 20, Charges filed by the Office of the Prosecutor on May 24, 2002, appendix to the State’s communication of August 5, 2008.

<sup>82</sup> Appendix 12, Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, prepared by Clyde C. Show, PhD and José Pablo Baraybar, MSc. Peruvian Forensic Anthropology Team [Equipo Peruano de Antropología Forense (EPAF)] of July 2001, Appendix to the representatives’ communications of April 22, 2008, and February 3, 2003. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009 and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of 1<sup>o</sup> December 2003, appendix submitted at the public hearing.

<sup>83</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V. See also, Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State’s communication of August 5, 2008 and February 6, 2009 and appendix to the representatives’ communication of April 22, 2008. Appendix to the State’s communication of 1<sup>o</sup> December 2003, appendix submitted at the public hearing.

<sup>84</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V.

<sup>85</sup> Appendix 12, Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, prepared by Clyde C. Show, PhD and José Pablo Baraybar, MSc. Peruvian Forensic Anthropology Team [Equipo Peruano de Antropología Forense (EPAF)] of July 2001, appendix to the representatives’ communications of April 22, 2008, and February 3, 2003.

<sup>86</sup> Appendix 12, Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, prepared by Clyde C. Show, PhD and José Pablo Baraybar, MSc. Peruvian Forensic Anthropology Team [Equipo Peruano de Antropología Forense (EPAF)] of July 2001, appendix to the representatives’ communications of April 22, 2008, and February 3, 2003.

<sup>87</sup> Appendix 12, Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, prepared by Clyde C. Show, PhD and José Pablo Baraybar, MSc. Peruvian Forensic Anthropology Team [Equipo Peruano de Antropología Forense (EPAF)] of July 2001, appendix to the representatives’ communications of April 22, 2008, and February 3, 2003.

<sup>88</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V.

<sup>89</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V.

<sup>90</sup> Appendix 12, Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, prepared by Clyde C. Show, PhD and José Pablo Baraybar, MSc. Peruvian Forensic Anthropology Team [Equipo Peruano de Antropología Forense (EPAF)] of July 2001, appendix to the representatives’ communications of April 22, 2008, and February 3, 2003.

94. The Office of the Prosecutor ordered that the reports be kept confidential since “their dissemination could obstruct the due clarification of the facts.”<sup>91</sup>

95. On June 11, 2002, the Third Criminal Chamber of the Superior Court of Justice issued a restricted summons (*orden de comparecencia restringida*) against Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Edmundo Huamán Ascurra, Augusto Jaime Patiño, José Williams Zapata, Luis Alatriza Rodríguez, Carlos Tello Aliaga, Hugo Víctor Robles del Castillo, Víctor Hugo Sánchez Morales, Raúl Huaracaya Lovón, Walter Martín Becerra Noblecilla, José Alvarado Díaz, Manuel Antonio Paz Ramos, Jorge Félix Díaz, Juan Carlos Moral Rojas and Tomás César Rojas Villanueva to the detriment of Víctor Salomón Peceros Pedraya, and against Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Edmundo Huamán Ascurra, Augusto Jaime Patiño, José Williams Zapata, Luis Alatriza Rodríguez, Carlos Tello Aliaga, Benigno Leonel Cabrera Pino and Jorge Orlando Fernández Robles to the detriment of Eduardo Nicolás Sánchez.<sup>92</sup> It also cancelled the arrest warrants “against those defendants in the record for measures to restrict liberty,” issued an arrest warrant against Jesús Zamudio Aliaga, ordered that the criminal, judicial and police records of all of the accused be obtained, and declared that there were no grounds to initiate proceedings against Juan Fernando Dianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva for crimes against the administration of justice – obstruction of justice by concealing evidence – committed against the State.<sup>93</sup>

96. On July 11, 2002, Edgar Odón Cruz Acuña, a relative of Eduardo Nicolás Cruz Sánchez, joined the case as a civil party and filed an appeal of the June 11, 2002, decision concerning the restricted summons and the finding that there were no grounds to initiate proceedings against Fernando Vianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva.<sup>94</sup> The Office of the Supreme Special Criminal Prosecutor also appealed the ruling on the same points.<sup>95</sup> On September 4, 2002, Nemesia Pedraza Chávez, mother of Salomón Víctor Peceros Pedraza, joined the case as a civil party.<sup>96</sup>

### ***The challenge over jurisdiction and the military justice system***

97. The military justice system opened an investigation that paralleled the investigation underway in the civilian jurisdiction. The next of kin of the executed persons did not have access to the military jurisdiction. On May 29, 2002, the Court Martial [Sala de Guerra del Supremo Tribunal Militar] decided to open the investigative phase against the military personnel who had participated in the operation, for the alleged crimes of abuse of authority, violations of international law [*jus gentium*] and against life, body and health, in the form of qualified homicide, to the detriment of Roli Rojas Fernández, Luz Dina Villoslada Rodríguez, Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva.<sup>97</sup>

<sup>91</sup> Appendix 23, August 23, 2001 Resolution of the Office of the Special Provincial Prosecutor, appendix submitted by the petitioners on February 3, 2003, Volume V.

<sup>92</sup> Namely, Hugo Víctor Robles del Castillo, Víctor Hugo Sánchez Morales, Raúl Huaracaya Lovón, Walter Martín Becerra Noblecilla, José Alvarado Díaz, Manuel Antonio Paz Ramos, Jorge Félix Díaz, Juan Carlos Moral Rojas, Tomás César Rojas Villanueva, Benigno Leonel Cabrera Pino and Jorge Orlando Fernández Robles.

<sup>93</sup> Appendix 3, Non-certified copy of the order to initiate proceedings of June 11, 2002, appendix to the State's communication of August 5, 2008 and February 6, 2009 and appendix to the representatives' communication of April 22, 2008. Appendix to the State's communication of December 1, 2003, appendix submitted at the public hearing.

<sup>94</sup> Appendix 24, Constitution of civil party of July 11, 2002, Appendix to the State's communication of August 5, 2008.

<sup>95</sup> Appendix 25, Document from the Office of the Supreme Special Criminal Prosecutor, appendix to the State's communication of August 5, 2008.

<sup>96</sup> Appendix 26, Constitution of civil party of September 4, 2002, appendix to the State's communication of August 5, 2008.

<sup>97</sup> Appendix 21, Non-certified copy of the April 5, 2004 Resolution of the Supreme Council of Military Justice, submitted at the public hearing. Appendix 22, Press article “CSJM archivaría proceso de Chavín de Huántar,” March 19, 2004. “CSJM archiva el proceso judicial de Chavín de Huántar,” July 6, 2003.

The military proceedings did not include Eduardo Nicolás Cruz Sánchez.

Continues...

98. The Office of the Supreme Council of Military Justice submitted a jurisdictional challenge to the Supreme Court of Justice, which was settled by the Transitory Criminal Law Chamber of the Supreme Court of Justice on August 16, 2002.<sup>98</sup> The Court settled the matter in favor of the military jurisdiction in relation to the military personnel involved in the operation and ordered the investigative phase to proceed in the civilian jurisdiction in relation to anyone “other than the commandos”, namely, Vladimiro Montesinos Torres, Nicolás de Bari Hermosa Ríos, Roberto Huamán Ascurra and Jesús Zamudio Aliaga. The Court’s reasoning was as follows:

The military operation [...] was planned and carried out under orders from then President of the Republic Alberto Fujimori Fujimori, Supreme Chief of the Armed Forces, to preserve internal order and national security, which had been severely undermined by the armed attack of a terrorist group [...] the intervention by the Military Commandos therefore qualifies as an action that took place in a zone that had been declared to be in a state of emergency and is therefore subject to article ten of Law twenty-four thousand one hundred fifty, which provides that members of the Armed Forces who serve in zones declared to be under a state of exception are subject to the Code of Military Justice and any infractions they may commit in the discharge of their duties as set out in that Code fall under Exclusive Military Jurisdiction [*Fuero Privativo Militar*], save those that are unrelated to the service which is, in effect, the case of the persons not included in the order to initiate proceedings issued by the military justice system;

The military group formed and trained for the hostage rescue operation was obeying a superior order in a situation of clear military confrontation, and therefore any punishable infractions or excesses set out in the Code of Military Justice must be considered as having taken place in the discharge of duties and the perpetrators must be subject to military jurisdiction in accordance with the regulations contained in the Code of Military Justice; another essential argument derives from the strict application of article one hundred seventy-three of the Political Constitution of the State, which provides that in case of a duty-related crime, members of the Armed Forces and the National Police are subject to the respective jurisdiction and to the Code of Military Justice, and this provision is also applicable to civilians for the crimes of Treason against the Fatherland and Terrorism; it is also the case that the punishable acts in question are set out in the Code of Military Justice as violations of international law [*jus gentium*] [...]

The provisions of article three hundred twenty-four of the Code of Military Justice must be interpreted in light of the provisions of article one hundred seventy-three of the Political Constitution of the State inasmuch as those who were allegedly wronged acted as an armed group belonging to the “Túpac Amaru” terrorist organization [...] and it is therefore improper to regard them as civilians.

The determination of jurisdiction over the investigation and trial of any excesses that may have occurred, the hostage rescue having been concluded, in which military personnel, members of the group of commandos and personnel not belonging to that corps could have been involved, must be undertaken in strict adherence to the provisions of articles three hundred forty-two and three hundred forty-three of the Code of Military Justice, to the effect that each jurisdiction, the military and the civilian, must independently take up the crime under its purview in accordance with the relevant criminal law.

The [...] members of the corps of commandos acted in a military operation pursuant to an order issued in accordance with the Constitution and by an authority empowered to do so, and any criminal infractions they may have committed should therefore be taken up by the military justice system, which is not the case of anyone other than those commandos, who would have acted, as the case may be, as offenders or perpetrators of crimes established under civilian law and therefore must remain subject to the civilian jurisdiction.

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...continuation

On the other hand, the file of the IACHR does not show that the next of kin had access to the military process.

<sup>98</sup> Petitioners’ communication of February 3, 2003.

With respect to the defendants in the civilian jurisdiction, Vladimiro Montesinos Torres, Nicolás de Bari Hermosa Ríos, Roberto Huamán Ascurra and Jesús Zamudio Aliaga, persons other than those in the military operation involved in the investigation into possible summary executions of surrendered terrorists, would constitute a case of a human rights violation defined as a crime against humanity, similar to other cases that have been reopened in the civilian jurisdiction, and therefore a joinder of cases would be appropriate [...] insofar as they all derive from the same criminal intent.<sup>99</sup>

99. On October 15, 2003, more than one year after the jurisdictional challenge was settled, the Court Martial [*Sala de Guerra del Supremo Tribunal Militar*] dismissed the case involving the crimes of violating international law [*jus gentium*], abuse of authority and qualified homicide in favor of all of the military personnel who were on trial and had participated in the operation.<sup>100</sup> Its reasoning was as follows:

[...] the Armed Forces having assumed [...] control over a State of Emergency, for which the events were a consequence of service or duty-related acts and any illegality that may have derived from that service constitutes a duty-related crime, as there is a cause and effect relationship between the duty and the illegal acts ascribed. Therefore, the military criminal jurisdiction is found to be apt under the provisions of [...] the Political Constitution of Peru, insofar as it meets the following requirements: a) the accused are active duty military personnel, b) they acted in the discharge of their assigned duties in the military operation, c) the legally protected interests is discipline and the protection of the values that inform military life, and d) the acts described in the complaint are defined in articles ninety-four, one hundred seventy-nine and one hundred eighty of the Code of Military Justice; the acts occurred as a result of a battle between the commandos [...] and the subversive group...organized and equipped as a military force...in a struggle with the characteristics of a military battle, in which there were dead and wounded on both sides. It is therefore necessary to evaluate the necessary conditions for legitimate defense and the circumstances surrounding the battle, the dangerousness of the subversive agents who were provisioned with war weapons and supplies [...] and who at all times demonstrated the belligerence inherent to terrorist groups, and a situation in which the lives of the hostages were in grave danger ...having died (one hostage, Carlos Giusti Acuña) and two of the commandos involved, with several hostages and commandos seriously wounded. This is indicative of the intensity of the battle [...] and therefore in conducting an objective assessment it was necessary to evaluate the necessary conditions to preserve the physical integrity and lives of the hostages ...

[...]the version of extrajudicial executions [...] is based solely on the sworn testimony provided by ...Hidetaka Ogura [...] and these claims [...] have not been confirmed or upheld by a court of jurisdiction ...

[...] the commandos acted in the legitimate defense of human life and in strict compliance with their constitutionally-protected official duties [...]

Due to the inherent nature of the events, it is impossible to know with certainty which of all of the shots fired caused the death of each one of the MRTA members, much less who did it. That being the case, the commission of international law violations [*jus gentium*], abuse of authority and qualified homicide to the detriment of the aforementioned MRTA members cannot be proved inasmuch as the deaths of the rebels were the result of the battles, inasmuch as it has not been proved that the alleged executions actually occurred, given the lack of incontrovertible and indisputable evidence in the record that would indicate otherwise, particularly if the events took place in a situation involving crossfire.

The most rigorous and complete expert examinations relating to the thanatological studies of the bodies [...] took place more than four years after the events occurred, which means, for example

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<sup>99</sup> Appendix 22, Non-certified copy of the Ruling handed down by the Transitory Criminal Chamber of the Supreme Court of Justice on August 16, 2002, Appendix 2 of the State's communication of February 6, 2009, appendix to the State's communication of December 1, 2003, communication of the petitioners of February 3, 2003.

<sup>100</sup> Appendix 9 Ruling of the Review Chamber of the Supreme Council of Military Justice of April 5, 2004, Appendix 3 to the State's communication of February 6, 2009.

that signs such as powder burns [signo de Benassi] used to determine the proximity of the firearm when it was shot [...] are not found [...]

100. On November 8 and 9, 2003, the President of Peru promoted Brigadier General Williams Zapata to the rank of Major General and Manuel Antonio Paz Ramos to the rank of Major, effective on January 1, 2004; both had been acquitted in the deaths of Víctor Salomón Peceros Pedraza and Herma Luz Meléndez,<sup>101</sup>

101. On April 5, 2004, the Supreme Council of Military Justice approved the order from the War Chamber of the Military Tribunal dismissing the case and closing it definitively “for lack of any evidence whatsoever that points to the commission of the crime under investigation.”<sup>102</sup>

102. On September 23, 2004, the Review Chamber of the Supreme Council of Military Justice ruled to permanently close the case.<sup>103</sup> The military proceeding was thus concluded, because as it was stated by Peru, the Peruvian system does not provide recourse for the review of judgments handed down by the Supreme Council of Military Justice<sup>104</sup>.

### ***The civilian jurisdiction***

103. Months after the jurisdictional challenge had been settled, on April 2, 2003, the Special Criminal Chamber of the Superior Court of Justice of Lima overturned the appeal of June 11, 2002, in relation to the point declaring that there were no grounds to initiate investigative proceedings against Fernando Vianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva for crimes against the administration of justice – obstruction of justice by concealing evidence – committed against the State and ordered the opening of investigative proceedings against them.<sup>105</sup> On April 30, 2003, a restricted summons was issued against those individuals.<sup>106</sup> On August 12, 2003, the case of Fernando Vianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva was joined to the case against Vladimiro Montesinos Torres et al.<sup>107</sup>

104. On April 14, 2003, based on the expert reports and testimonies, the Office of the Special Provincial Prosecutor found that the criminal responsibility of Messers. Montesinos Torres, de Bari Hermoza Ríos and Huamán Acurra had been demonstrated for the commission of a crime against the life, body and health- qualified homicide- of Herma Luz Cueva and Víctor Salomón Peceros Pedraza. It also found that they, and Jesús Zamudio Aliaga, were criminally responsible for the commission of the same crime to the detriment of Eduardo Nicolás Cruz Sánchez.<sup>108</sup>

105. On August 4, 2003, the Office of the Attorney General of the Nation filed charges before the Congress of the Republic against Alberto Fujimori for the alleged commission of a crime against the

<sup>101</sup> Appendix 32, *Diario El Peruano*, Sunday, December 9, 2003, and November 8, 2003, communication of the petitioners of

<sup>102</sup> Appendix 9 Ruling of the Review Chamber of the Supreme Council of Military Justice of April 5, 2004, Appendix 3 to the State’s communication of February 6, 2009.

<sup>103</sup> Appendix 9, Ruling of the Review Chamber of the Supreme Council of Military Justice September 23, 2004, Appendix 4 to the State’s communication of February 6, 2009.

<sup>104</sup> Stated by Peru during the public hearing held at the IACHR.

<sup>105</sup> Appendix 27, Supreme Court Ruling of April 2, 2002, appendix to the State’s communication of August 5, 2008, appendix to the State’s communication of 1º December 2003, appendix submitted at the public hearing. See the trial document of June 30, 2003, appendix submitted at the public hearing.

<sup>106</sup> Appendix 28, Trial Document dated June 30, 2003, appendix submitted at the public hearing.

<sup>107</sup> Appendix 29, August 12, 2002 Ruling, appendix to the State’s communication of August 5, 2008.

<sup>108</sup> Appendix 8, Prosecutor’s Inquiry of the Public Ministry of April 14, 2003, provided at the public hearing.

life, body and health – qualified homicide – of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cuevas and Víctor Salomón Peceros Pedraza. According to the complaint, the execution of the MRTA members had either been decided from the time the operation was planned or was a decision made immediately following their capture and, in either case, was ordered by then President Fujimori.<sup>109</sup>

106. On October 3, 2003, the State was deemed to have third-party civil liability in the case in the civilian jurisdiction pursuant to the petition of the civil party.<sup>110</sup>

107. In response to a motion entered by the defendants, on October 15, 2004, the Judge of the Third Special Criminal Chamber of the Superior Court of Justice of Lima ordered the immediate release of Vladimiro Montesinos, Nicolás de Bari Hermoza Ríos and Roberto Edmundo Huamán Acurra on grounds that “the ordinary period of detention [...] had inexorably expired, due not to any laxity in the actions of this Court, but because the trial documents with the final reports were remanded to the Superior Special Criminal Chamber on November 3, 2003, and remained in that state for eight months before being returned on July 7, 2004.”<sup>111</sup>

108. On March 21, 2005, the First Special Criminal Chamber of the Superior Court of Justice of Lima requested the Criminal Chamber of the Supreme Court of the Republic to determine whether it should hear about the case taking into consideration that there had been a change in the legal situation of the detainee, from being detained to being freed. On September 22, 2005, the Transitory Criminal Chamber of the Supreme Court of Justice held that it was the Third Special Criminal Chamber of the Superior Court of Lima.<sup>112</sup>

109. On August 21, 2006, the Third Criminal Chamber of the Superior Court of Justice of Lima ruled in favor of the objection lodged by the defense team of Juan Fernando Vianderas Ottone and Martín Fortunato Luis Solari de la Fuente, finding that the statute of limitations applied to the criminal suit against them as accessories to the crime of concealing evidence [*cuprimiento real*], committed against the State because of the time that had transpired. It therefore ordered the case definitively closed.<sup>113</sup>

110. On September 22, 2006, the Office of the Third Supreme Criminal Prosecutor determined that the commission of crimes had been established and proceeded to indict Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, and Roberto Edmundo Huamán Acurra for an alleged crime committed against the life, body and health – qualified homicide – of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza. It also charged those individuals, along with Jesús Zamudio Aliaga, for an alleged crime committed against the life, body, and health – qualified homicide – of Edgar Nicolás Cruz Sánchez. In addition, it filed charges against Juan Fernando Vianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva.<sup>114</sup>

111. On April 3, 2007, the new date was for initiating the oral phase was set for May 28, 2007.<sup>115</sup>

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<sup>109</sup> Appendix 1, TRC, 2.66. EXTRAJUDICIAL EXECUTIONS IN THE RESIDENCE OF THE AMBASSADOR OF JAPAN (1997), TRC, <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.66.%20%20ENABJADA%20JAPON.pdf>

<sup>110</sup> Appendix 31, October 3, 2003 Ruling, appendix to the State’s communication of August 5, 2008.

<sup>111</sup> Appendix 33, October 15, 2004 Rulings, appendix to the State’s communication of August 5, 2008.

<sup>112</sup> Appendix 34, appendix to the State’s communication of August 5, 2008.

<sup>113</sup> Appendix 35, Ruling No. 143-06 issued August 21, 2006 by the Third Special Criminal Chamber of the Superior Court of Justice of Lima, appendix to the State’s communication of August 5, 2008.

<sup>114</sup> Report of the Ministry of Justice of February 6, 2009, addressed to the IACHR.

<sup>115</sup> Appendix 36, April 3, 2007, ruling of the Third Special Criminal Chamber of the Superior Court of Lima, appendix to the State’s communication of August 5, 2008.

112. On June 12, 2007, the Office of the Attorney General filed formal charges against Alberto Fujimori Fujimori and Manuel Tullume González, for crimes committed against Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza. On July 16, 2007, the Third Special Criminal Court of Lima initiated investigative proceedings against Alberto Fujimori and held that there were no grounds to proceed against Tullume González.<sup>116</sup> On August 1, 2007, the Office of the Attorney General appealed the decision not to proceed against Tullume González.<sup>117</sup> On October 29, 2007, a request was made to Chile for an expansion of the extradition request against Fujimori.<sup>118</sup> On January 31, 2008, the Office of the Attorney General requested an extension of the investigative period from the Judiciary and this was granted on February 18.<sup>119</sup> In an opinion issued on April 30, 2008, the Office of the Attorney General, at the request of the civil party, requested that the order to initiate investigatory proceedings be expanded to assign third-party civil liability to the Peruvian State.<sup>120</sup>

113. On May 18, 2007, the first oral phase was initiated before a panel comprising Judges José Antonio Neyra Flores, Manuel Carranza Paniagua y Carlos Manrique Suárez. Judges Carlos Augusto Manrique Suárez and José Antonio Neyra Flores were later removed from their posts in 2009 and 2010.

114. On July 23, 2009, the Full Council decided not to restore “confidence in Judge Carlos Augusto Manrique Suárez, who was one of the presiding judges in the case in the civilian jurisdiction; as a result, it decided not to confirm him for the position of Judge of the Twenty-first Court of Instruction of Lima [Vigésimo Primer Juzgado de Instrucción de Lima] of the Lima Judicial District.”<sup>121</sup> On August 31, 2009, Judge Manrique Suárez lodged an extraordinary appeal against the aforementioned decision,<sup>122</sup> which was rejected on September 30, 2009.<sup>123</sup>

115. On November 6, 2009, APRODEH was notified of the order which declared “the interruption of the public hearing, with the evidence examined during the oral trial maintained” and reserved the date to initiate a new oral trial “as soon as possible.”<sup>124</sup>

116. Judge José Antonio Neyra Flores was replaced by Judge Sonia Liliana Tellez Portugal. Also, on January 7, 2010, the Third Special Criminal Chamber ruled that the new oral trial would begin on March 19, 2010.<sup>125</sup>

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<sup>116</sup> Appendix 37, Report No. 001-2008-JSA-FPECDDHH of the Provincial Prosecutor of the Office of the Special Provincial Prosecutor for Human Rights Violations, appendix to the State’s communication of August 5, 2008. Appendix 38, Criminal charges by the Special Provincial Prosecutor for Human Rights Crimes against Alberto Fujimori Fujimori of June 7, 2007, appendix to the State’s communication of August 5, 2008. Appendix 39, Ruling on lack of grounds of July 26, 2007, appendix to the State’s communication of August 5, 2008.

<sup>117</sup> Appendix 37, Report No. 001-2008-JSA-FPECDDHH of the Provincial Prosecutor of the Office of the Special Provincial Prosecutor for Human Rights Violations, appendix to the State’s communication of August 5, 2008. Appeal dated July 31, 2007, appendix to the State’s communication of August 5, 2008.

<sup>118</sup> Appendix 37, Report No. 001-2008-JSA-FPECDDHH of the Provincial Prosecutor of the Office of the Special Prosecutor for Human Rights Violations, appendix to the State’s communication of August 5, 2008.

<sup>119</sup> Appendix 37, Report No. 001-2008-JSA-FPECDDHH of the Provincial Prosecutor of the Office of the Special Prosecutor for Human Rights Violations, appendix to the State’s communication of August 5, 2008.

<sup>120</sup> Appendix 37, Report No. 001-2008-JSA-FPECDDHH of the Provincial Prosecutor of the Office of the Special Prosecutor for Human Rights Violations, appendix to the State’s communication of August 5, 2008.

<sup>121</sup> Appendix 40, Ruling No. 163-2009 of July 23, 2009, appendix to the petitioners’ communication of December 10, 2009.

<sup>122</sup> Appendix 41, Ruling No. 199-2009-PCNM of September 30, 2009, and extraordinary appeal lodged by Carlos Augusto Manrique Suárez n/cert. and n/signature, appendix to the petitioners’ communication of December 10, 2009.

<sup>123</sup> Appendix 41, Ruling No. 199-2009-PCNM of September 30, 2009, appendix to the petitioners’ communication of December 10, 2009.

<sup>124</sup> Appendix 42, Ruling No. 182-09 of October 15, 2009 and legal notification of the Third Special Criminal Chamber of the Superior Court of Lima, appendix to the petitioners’ communication of December 10, 2009.

<sup>125</sup> *Cfr.* Appendix 43, Ruling of January 7, 2010, appendix to the petitioners’ communication of February 8, 2011.

### *Relatives of the victims*

117. The relatives of the victims that have been identified are: i) Florentín Peceros Farfán,<sup>126</sup> Nemezia Pedraza<sup>127</sup> and Jenifer Solange Peceros Quispe<sup>128</sup>, father, mother and daughter respectively of Víctor Salomón Peceros Pedraza; ii) Herma Luz Cueva Torres<sup>129</sup>, mother of Herma Luz Meléndez Cueva; iii) Edgar Odón Cruz Acuña<sup>130</sup> and Lucinda Rojas Landa,<sup>131</sup> father and partner respectively of Eduardo Nicolás Cruz Sánchez.

## **C. Considerations of law**

### **2. Right to life (Article 4(1))<sup>132</sup>**

118. In relation to the right to life, the Commission recalls:

Article 4 of the Convention guarantees the right of every human being to not be deprived of his life arbitrarily, which includes the need that the State adopt substantive measures to prevent the violation of this right, as would be the case of all measures necessary to prevent arbitrary killings by its own security forces, as well as to prevent and punish the deprivation of life as a consequence of criminal acts carried out by individual third parties.<sup>133</sup>

119. The Inter-American Court has held that States have the right and obligation guarantee their security and maintain public order, using force as necessary.<sup>134</sup> In this regard, the IACHR recalls that while state agents, in the course of anti-terrorist operations may resort to the use of lethal force against suspected terrorists, and in some circumstances lethal force may be required, the power of the State is not unlimited, nor may it resort to any means to achieve its ends “regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes.”<sup>135</sup> As the Inter-American Court of Human

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<sup>126</sup> Petitioners’ communication of February 8, 2011. Mr. Peceros Farfán also took part in the examinations performed in 2002. See Appendix 43, Forensic Stomatology of Víctor Salomón Peceros Pedraza prepared by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V.

<sup>127</sup> Petitioners’ communication of February 8, 2011. Ms. Pedraza joined the domestic criminal case as a civil party on September 4, 2002, appendix to the State’s communication of August 5, 2008. Finally, she took part in the examinations performed in 2002. See Appendix 43, Forensic Stomatology of Víctor Salomón Peceros Pedraza prepared by the Institute of Forensic Medicine, submitted by the petitioners on February 3, 2005, Volume V.

<sup>128</sup> Petitioners’ communication of February 8, 2011.

<sup>129</sup> Petitioners’ communication of February 8, 2011. Ms. Herma Luz Cueva Torres also took part in the examinations performed in 2002. See Appendix 43, Forensic stomatology of Herma Luz Meléndez Cueva performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V. She is also a co-petitioner before the IACHR in the instant case.

<sup>130</sup> Petitioners’ communication of February 8, 2011. Mr. Cruz Acuña also joined the domestic criminal case as a civil party on July 11, 2002, appendix to the State’s communication of August 5, 2008. He is also a co-petitioner before the IACHR in the instant case.

<sup>131</sup> Appendix 7, Report of the forensic medical examinations performed by the Institute of Forensic Medicine, appendix submitted by the petitioners on February 3, 2003, Volume V, documenting the participation of Lucinda Rojas Landa in her capacity as Eduardo Cruz Sánchez’s partner.

<sup>132</sup> Article 4.1 of the American Convention stipulates that: 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>133</sup> Inter-Am. Ct. H.R., *Case of Servellón García et al. Judgment of September 21, 2006. Series C No. 152*, para. 98; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia). Judgment of July 5, 2006. Series C No. 150*, para. 64; Inter-Am. Ct. H.R., *Case of Ximenes Lopez v. Brazil. Preliminary Objection. Judgment of November 30, 2005. Series C No. 139*, para.125; and Inter-Am. Ct. H.R., *Case of the Ituango Massacres. Judgment of July 1, 2006. Series C No. 148*, para. 131.

<sup>134</sup> Inter-Am. Ct. H.R., *Case of Servellón García et al. Judgment of September 21, 2006. Series C No. 152*; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia). Judgment of July 5, 2006. Series C No. 150*;

<sup>135</sup> *Case of Neira Alegría*, para. 7.7.

Rights (hereinafter “the Inter-American Court”) has determined, “disrespect for human dignity cannot serve as the bases for any State action.”<sup>136137</sup>

120. Therefore, according to the jurisprudence of the Inter-American Court, while law enforcement officials may legitimately use lethal force in the performance of their duties, this use must be defined by exceptionality and must be planned and proportionally limited by the authorities so that “force or coercive means may only be used once all other methods of control have been exhausted and have failed.”<sup>138</sup> In this sense, the use of force must be defined by its exceptionality and must be planned and proportionally limited by the authorities. According to the Court, the use of lethal force and firearms against persons by State security agents requires a higher degree of exceptionality, and must be forbidden as a general rule. Its exceptional use must be determined by the law and restrictively construed so that it is used to the minimum extent possible in all circumstances and never exceeds the use which is “absolutely necessary” in relation to the force or threat to be repelled.<sup>139</sup> Whenever excessive force is used, any resulting deprivation of life is arbitrary.<sup>140</sup>

121. In this regard, the IACHR has held that state agents may use lethal force “where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate.”<sup>141</sup> The use of force, including lethal force, will only be lawful when nonviolent means are manifestly incapable of protecting the threatened rights.<sup>142</sup>

122. For its part, the European Court of Human Rights (hereinafter “the European Court”) has held that the term “absolutely necessary” in relation to the use of lethal force demands a test of necessity that is stricter and more convincing than that used to determine whether State action is necessary in a democratic society. As a result, any use of force must be strictly proportionate to the legitimate aim pursued.<sup>143</sup>

123. Therefore, when it is alleged that a death has occurred as a result of the excessive use of force, the Inter-American Court has set out clear rules concerning the burden of proof. According to the Court:

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<sup>136</sup> *Case of Neira Alegría*, para. 75, referring to the *Case of Velásquez Rodríguez*, para. 154 and *Case of Godínez Cruz*, para. 162.

<sup>137</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 107.

<sup>138</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007*. Series C No. 166, para. 83; and Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia)*. Judgment of July 5, 2006. Series C No. 150, para. 67. See also, ECHR, *Case of Nachova and others v. Bulgaria*, Application nos. 43577/98 and 43579/98, Judgment of 6 July, 2005, para. 94.

<sup>139</sup> Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia)*, Judgment of July 5, 2006. Series C No. 150, para. 68. In a similar sense, see, ECHR, *Huohvanainen v. Finland*, 13 March 2007, no. 57389/00, paras. 93-94; ECHR, *Erdogan and Others v. Turkey*, 25 April 2006, no. 19807/92, para. 67; ECHR, *Kakoulli v. Turkey*, 22 November 2005, no. 38595/97, paras. 107-108; ECHR, *McCann and Others v. the United Kingdom*, Judgment of 27 September 1995, Series A no. 324, paras. 148-150, 194, and the Code of Conduct for Law Enforcement Officials adopted by the United Nations General Assembly, Resolution 34/169, of December 17, 1979, Article 3.

<sup>140</sup> Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia)*, Judgment of July 5, 2006. Series C No. 150, para. 68. In a similar sense, see also, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990, Principle 9. See also, IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II., Doc. 57, December 31, 2009, para. 107.

<sup>141</sup> CIDH, *Report on Terrorism and Human Rights*, para. 87. CIDH, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II., Doc. 57, December 31, 2009, para. 113.

<sup>142</sup> CIDH, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II., Doc. 57, December 31, 2009, para. 117.

<sup>143</sup> ECHR, *Case of Isayeva, Yusupova and Bazayeva v. Russia*, Application nos. 57947/00, 57948/00 and 57949/00, Judgment of 24 February, 2005, para. 169.

[...] whenever the use of force [by state agents results in the death or injuries to one or more individuals, the State has the obligation to give a satisfactory and convincing explanation of the events and to rebut allegations over its liability through appropriate evidentiary elements.<sup>144</sup>

124. Similarly, Article 3 of the United Nations Code of Conduct for Law Enforcement Officials stipulates that: “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty;”<sup>145</sup> and Principle 4 of the “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials”<sup>146</sup> indicates that “[l]aw enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force or firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”

125. As a result, the law must determine when State security agents may use lethal force, interpreting its use restrictively, that is, only when it is absolutely necessary in relation to the force or threat to be repelled.<sup>147</sup> Clearly, “state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat, and use force only against the former.”<sup>148</sup>

126. In this sense, the IACHR deems it important to recall that:

[...] States must not use force against individuals who no longer present a threat [...], such as individuals who have been apprehended by authorities, have surrendered, or who are wounded and abstain from hostile acts [...] The use of lethal force in such a manner would constitute extra-judicial killings in flagrant violation of Article 4 of the Convention and Article I of the Declaration.<sup>149/150</sup>

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<sup>144</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 108*; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia), Judgment of July 5, 2006. Series C No. 150, para. 80*; Inter-Am. Ct. H.R., *Case of Baldeón García. Judgment of April 6, 2006. Series C No. 147, para. 120.*

<sup>145</sup> U.N. doc. A/34/46 (1979), G.A. res. 34/169.

<sup>146</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990.

<sup>147</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 84*; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia). Judgment of July 5, 2006. Series C No. 150, para. 68.* In a similar sense, see also ECHR, *Huohvanainen v. Finland*, 13 March 2007, no. 57389/00, paras. 93-94; ECHR, *Erdogan and Others v. Turkey*, 25 April 2006, no. 19807/92, para. 67; ECHR, *Kakoulli v. Turkey*, 22 November 2005, no. 38595/97, paras. 107-108; ECHR, *McCann and Others v. the United Kingdom*, Judgment of 27 September 1995, Series A no. 324, paras. 148-150, 194, and Code of Conduct for Law Enforcement Officials adopted by the United Nations General Assembly, Resolution 34/169, of December 17, 1979, Article 3; According to Principle 11 of the “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,” adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from August 27 to September 7, 1990, the rules and regulations on the use of firearms by law enforcement officials should contain clear guidelines that: a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted; b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm; c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk; d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them; e) Provide for warnings to be given, if appropriate, when firearms are to be discharged; f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

<sup>148</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 85*; in a similar sense, IACHR. *Report on Terrorism and Human Rights 2002.*

<sup>149</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 91. See also, *Case of Arturo Ribón Avila*, paras. 159 on; *Case of Bustios Saavedra*, paras. 58-63; *Case of Carandiru*, paras. 63, 67 and 91.

<sup>150</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 85.*

127. It is for this reason that, as soon as the State realizes that its Security Forces have used their firearms and that such use had lethal consequences, the State has the obligation to initiate, *ex officio* and without delay, a serious, independent, impartial and effective investigation.<sup>151</sup> This is derived from the State's obligation "to see that their security forces, which are entitled to use legitimate force, respect the life of the individuals under their jurisdiction."<sup>152</sup>

128. Moreover, in cases where extrajudicial killings are alleged,

[...] it is essential that States effectively investigate the deprivation of the right to life, and in its case, punish all those responsible, especially when state agents are involved, since on the contrary, it would be creating, within an environment of impunity, the conditions necessary for the repetition of this type of facts, which is contrary to the duty to respect and guarantee the right to life. Besides, if the acts that violate human rights are not investigated seriously, they would in some way, result aided by public power, which compromises the State's international responsibility.<sup>153</sup>

129. The *United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* refers to the principles of investigation that must be observed when a death is believed to have been caused by an extrajudicial execution. The European Court of Human Rights, for its part, has specified the content of an effective investigation designed to evaluate the lawfulness of the lethal use of force. In the words of that Tribunal,

[...] The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The investigation must be independent, accessible to the victim's family, carried out with reasonable promptness, and effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or was illegal, and must permit a degree of public scrutiny of the investigation and its results.<sup>154</sup>

130. The European Court has determined that given the importance of protecting the right to life, its deprivation must be subject to the most careful scrutiny, taking into consideration not only the actions of state agents, but also all circumstances surrounding the case.<sup>155</sup>

131. In the case of Manuel Stalin Bolaños v. Ecuador, the Inter-American Commission held that

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<sup>151</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 88; Inter-Am. Ct. H.R., *Case of Juan Humberto Sánchez v. Honduras*. Judgment of June 7, 2003. Series C No. 99, para. 112. See also *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 256, and Inter-Am. Ct. H.R., *Case of Vargas Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155, para. 77. In a similar sense, see also ECHR, *Erdogan and Others v. Turkey*, 25 April 2006, no. 19807/92, paras. 122-123, and ECHR, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, paras. 111-112, 6 July 2005. See also, IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II., Doc. 57, December 31, 2009, para. 120.

<sup>152</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 81; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Judgment of July 5, 2006. Series C No. 150, para. 66. See also Inter-Am. Ct. H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 238, and Inter-Am. Ct. H.R., *Case of Servellón García et al v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 102.

<sup>153</sup> Inter-Am. Ct. H.R., *Case of Servellón García et al v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 123; Inter-Am. Ct. H.R., *Case of Baldeón García v. Peru*. Judgment of April 6, 2006. Series C No. 147, para. 91; Inter-Am. Ct. H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 145; Inter-Am. Ct. H.R., *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, paras. 137 and 232.

<sup>154</sup> ECHR. *Hugh Jordan v. the United Kingdom*, no. 24746/94 para. 105-109, 4 May 2001.

<sup>155</sup> ECHR, *Case of Isayeva, Yusupova and Bazayeva v. Russia*, Application nos. 57947/00, 57948/00 and 57949/00, Judgment of 24 February, 2005, para. 170. ECHR, *Case of Nachova and others v. Bulgaria*, Application nos. 43577/98 and 43579/98, Judgment of 6 July, 2005, para. 93.

[The] procedures which should be employed [by the State] in the case of an unexplained death in custody exist to provide assurance that it does not remain unexplained [...] [Therefore, the] illegal apprehension and detention of [the victim], his unexplained death in custody, and the failure of the Government to undertake adequate measures to address the grave allegations raised in relation to his death, lead the Commission to conclude that the right to life of [the victim] was violated as a result of the failure of the Government to fulfill its duty to respect and guarantee the right to life [...] recognized in Article 4, of the American Convention.<sup>156</sup>

132. Before examining the specific facts of the case, the Commission recognizes that Operation Chavín de Huántar had the legitimate objective of protecting the lives of the hostages, who had spent over four months inside the residence of the Ambassador of Japan under the control of fourteen members of the MRTA insurgent group. The IACHR is well aware that the kidnapping of diplomats and civilians violates the basic principles of International Humanitarian Law and it is likewise cognizant that the individuals in the MRTA's power were at constant risk of their lives and personal integrity. In this regard, the Commission has determined in its *Report on Terrorism and Human Rights* that States have the obligation to protect and guarantee the security of their populations against terrorist actions.<sup>157</sup>

133. Without detriment to the foregoing, the Commission deems it important to recall that when adopting security measures, States must comply with their international obligations, including International Human Rights Law. As the Commission has pointed out, "unqualified respect for human rights must be a fundamental part of any anti-subversive strategies, when such strategies have to be implemented," and this entails respect for the full scope of human rights.<sup>158</sup> The IACHR underscores that the power of the State is not unlimited, nor may it resort to any means to achieve its ends "regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes."<sup>159</sup>

134. The IACHR points out that under International Human Rights Law, certain obligations, including the prohibition on the arbitrary deprivation of life, are not derogable even in situations of extreme insecurity such as those caused by terrorism. Finally, the IACHR stresses that procurement of security measures and protection of the rights of persons are not mutually exclusive. To the contrary, the strict observance of those rights reinforces human dignity and other principles inherent to the rule of law, which illegal behaviors such as terrorism seek to destroy.<sup>160</sup>

135. In the following paragraphs, the Commission will examine whether, in the instant case, the state agents acted in accordance with the principles of international human rights law when they used lethal force against MRTA members during the anti-terrorist operation.

136. The IACHR observes in relation to the instant case, that while Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros all died in the context of Operation Chavín de Huántar, their deaths occurred in different circumstances. It will therefore examine them separately.

*With respect to Eduardo Nicolás Cruz Sánchez, alias "Tito"*

<sup>156</sup> IACHR, Report No. 10/95, Case 10.580, *Manuel Stalin Bolaños Quiñónez (Ecuador)*. Report on Admissibility and the Merits. 1995, paras. 34 and 37.

<sup>157</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 33. See also IACHR, *Ten Years of Activities 1971-1981* (General Secretariat, OAS, 1982).

<sup>158</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 122. See also IACHR, *Annual Report of the IACHR 1990-91*, Chapter V, Part II, p. 512. The member States of the OAS have explicitly recognized unqualified respect for the rule of law and fundamental human rights as a necessary requirement in efforts to fight terrorism. See for example, Resolution AG/RES.1043 (XX-0/90), of the OAS General Assembly, twentieth regular session of the General Assembly of the OAS, 1990; Inter-American Convention against Terrorism, Preamble, Article 15.

<sup>159</sup> *Case of Neira Alegría*, para. 7.7

<sup>160</sup> International Commission of Jurists. *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, p. 21, (2009), available at [www.icj.org/dwn/database/EJP-Report.pdf](http://www.icj.org/dwn/database/EJP-Report.pdf).

137. The Commission observes that the statements of former hostage Hidetaka Ogura, as well as those of Raúl Robles Reynoso and Marcial Teodorico Torres Arteaga, the police agents responsible for guarding the house next door to the Ambassador's residence, are consistent in asserting that in the yard of that residence where two groups of hostages had been taken by way of a tunnel, MRTA member Eduardo Nicolás Cruz Sánchez, alias "Tito," had concealed himself among them, but was exposed by a hostage. As a result, the aforementioned police agents tied his hands, placed him on the ground and, after they had notified their hierarchical superior, Colonel Zamudio Aliaga, a commando appeared and took Mr. Cruz Sánchez back through the tunnel to the Ambassador's residence. According to the statements, at the time he was turned over to the soldier and taken back through the tunnel to the Ambassador's residence, Eduardo Nicolás Cruz Sánchez was alive, unarmed and neutralized. What is more, according to the statements of the police agents who had apprehended him, Mr. Cruz Sánchez was afraid and even "begged for his life," at which time they told him that "nothing was going to happen to him" and then handed him over to the soldier who took him back through the tunnel.

138. That same night, the body of Eduardo Nicolás Cruz Sánchez turned up in the Ambassador's residence with a gunshot wound to the posterior region of the neck and, according to the report on the removal of the body, with "a grenade [in his hand] that he had not managed to throw." One of the witnesses who had detained him, police agent Reyes Reynoso, stated before the ordinary criminal court that "he thought he would be publicly presented as a prisoner [and therefore] he was surprised to see on the news that all of the MRTA members had died in combat..." He had remained silent, however, "for fear of some reprisal from the system..."<sup>161</sup>

139. In addition to the foregoing, it should be noted that the partial reference autopsy performed the day after the events determined that Eduardo Nicolás Cruz Sánchez had received a "severe gunshot wound" to the right side of his head with exposed fractures and loss of brain matter, and that he had died of "hypovolemic shock." The autopsies ordered by the Public Prosecutor's Office in 2001 indicated that, based on an analysis of trajectory of the gunshot wound, it could be inferred that Mr. Cruz Sánchez "would have had to have been immobilized before being shot," and that he was "positioned lower than the assailant, who was behind and to [his] left."

140. The Commission recalls that the Court has determined that the State must prove that the government authorities attempted to use other, less lethal means of intervention to no avail, and that the actions of the security forces were necessary and proportionate in relation to the exigencies of the situation, in particular, the threat presented by the victim.<sup>162</sup>

141. In this sense, the IACHR observes that the State has failed to explain why Mr. Cruz Sánchez, after having been detained and taken back inside the Ambassador's residence, turned up dead, with a bullet in his neck and a grenade in his hand, particularly taking into account that the statements corroborate each other in asserting that his hands were tied and he was unarmed. The IACHR also notes that the form of Eduardo Nicolás Cruz Sánchez's death is situated in a context of a government policy that promoted the commission of extrajudicial killings of presumed terrorists by state agents (*supra* para. 50).

142. In view of the foregoing, the IACHR considers that after he was apprehended, Eduardo Nicolás Cruz Sánchez did not pose any danger whatsoever to the hostages or to state agents and, in fact, he had been neutralized by the police agents responsible for guarding the house next door to the Ambassador's residence. Despite this, the expert examination is clear in its determination that, contrary to what was suggested in the Report on the Removal of the Bodies, Mr. Cruz Sánchez was summarily executed by a *coup de grâce* to the neck fired by state agents while he was immobilized. This constitutes an extrajudicial execution.

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<sup>161</sup> Statement by Raúl Robles Reynoso of December 28, 2001, before the Special Provincial Prosecutor for Human Rights.

<sup>162</sup> Inter-Am. Ct. H.R.. *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007.* Series C No. 166. Para. 108.

143. The IACHR likewise observes that based on the evidence contained in the case file, Operation Chavín de Huántar had a chain of command which included President Fujimori Fujimori at the first level, Vladimiro Montesinos and the Commander General of the Armed Forces at the second level, and the commanders of the operation at the third level. The latter included Colonel Zamudio Aliaga, who ordered a soldier to bring Mr. Cruz Sánchez back to the Ambassador's residence. Here it should be noted that, based on the evidence, several authorities knew about the detention of Mr. Cruz Sánchez. Moreover, Eduardo Nicolás Cruz Sánchez was one of the three members identified by the government as MRTA leaders inside the Ambassador's residence.

144. In view of the lethal use of force by state agents, the Peruvian authorities have not determined by means of internal investigations whether the use of force to the detriment of Eduardo Nicolás Cruz Sánchez adhered to the principles of legality, necessity and proportionality. The State did not initiate an *ex officio* proceeding in this regard, nor did it initiate an internal administrative proceeding to determine whether or not the force used was legitimate or preserve evidentiary materials. The only action ordered immediately after the death of Mr. Cruz Sánchez was the removal of the body and the performance of a partial reference autopsy. Moreover, although the report on the removal of the bodies was signed by certain experts, the statements given years later before the Public Prosecutor's Office indicate that those individuals were compelled to do so by the military high command, even though they had not been present at the time. The case file also shows that the professionals responsible for performing the autopsies the day after the events were forbidden to take photographs and videos, which limited the quality of the autopsies. As one of these experts stated in the course of the investigation by the Prosecutor's Office: "all examinations must include a photo to create a lasting record of the different procedures performed in the mouth." The case file also offers no indication that the weapons allegedly found on Mr. Cruz Sánchez were preserved or that paraffin tests were performed.

145. The professionals involved in the partial autopsy also asserted in their statements before the Public Prosecutor's Office that "the autopsy order issued by the Chief of Service was to do the minimum," that the orders came from the President, that they did not have a suitable setting, and that dead patients presenting some indication of a crime were transferred to the Central Morgue of Lima.<sup>163</sup>

146. In view of the shortcomings of the partial reference autopsy performed on April 23, 1997, after the criminal case was opened in the ordinary jurisdiction based on a complaint lodged by the relatives of some of the MRTA members, the Public Prosecutor's Office ordered the exhumation of the remains of the dead MRTA members and the preparation of an expert report. The latter revealed the shortcomings of the initial autopsy and determined that, as a result, it was physically impossible to arrive at new determinations in cases such as paraffin tests or a more detailed examination of the injuries since there was no longer skin on the remains, nor photographs or videos from the first autopsy. According to the 2001 expert report:

Due to the advanced state of decomposition ... and the absence of soft parts, the distances from which the projectiles were fired cannot be fully determined. The signs found in the gunshot entry wounds, in the bones, could correspond to shots fired from a short or long distance.<sup>164</sup>

147. It is also important to recall, just as the military court determined, that:

... The most rigorous and complete expert examinations relating to the thanatological studies of the bodies [...] took place more than four years after the events occurred, which means, for example

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<sup>163</sup> Inquiry by the Public Ministry of September 22, 2006, (file provided by the State).

<sup>164</sup> Report on the human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, prepared by Clyde C. Show, PhD and José Pablo Baraybar, MSc. Peruvian Forensic Anthropology Team (EPAF) July 2001, appendix to the representatives' communication of April 22, 2008 and February 3, 2003. Report of the forensic medical examinations performed by the Institute of Forensic Medicine.

that signs such as powder burns [signo de Benassi] used to determine the proximity of the firearm when it was shot [...] are not found [...]<sup>165</sup>

148. The Commission observes that, as established by the proven facts, the Armed Forces obstructed the timely performance of the initial procedures following the deaths of the MRTA members. This had an impact on subsequent investigations since even though more complete expert examinations were performed four years after the fact, a complete analysis was impossible due to the time that had elapsed and the shortcomings in the first autopsies.

149. In this regard, the State has provided no evidence, aside from the report on the removal of the bodies, to indicate that Eduardo Nicolás Cruz Sánchez was carrying a weapon at the time of his death and had tried to use it, for which reason he would have been shot. The State has also failed to explain why Mr. Cruz Sánchez received a single *coup de grâce* to the neck.

150. The IACHR also observes, as it will discuss in the chapter on due process guarantees and judicial protection, that in response to the lethal use of force by state agents, the State did not preserve evidentiary material or open an *ex officio* investigation into the murder of Eduardo Nicolás Cruz Sánchez, and the investigation opened years later in the civilian court has charged only the masterminds, and not a single direct perpetrator. The State also did not submit information as to whether it has examined whether the use of force adhered to the principles of legality, necessity and proportionality.

*In relation to Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva*

151. The Commission observes that in his statement, former hostage Hidetaka Ogura asserts that as he was being evacuated from the Ambassador's residence, he saw how two MRTA members, a short man and a woman known as "Cynthia" were surrounded by commandos; he later heard the woman yell not to kill them. For their part, the soldiers responsible for controlling what was known as "Room 1," from whence Mr. Ogura was evacuated, stated that Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva appeared from the hallway, armed, the former with a machine gun and the latter with a grenade. The next day, these two individuals appeared half a meter apart with multiple gunshot wounds to vital parts of their bodies.

152. The IACHR observes that the versions offered by the soldiers to the Public Prosecutor's Office contain discrepancies as to the individual who allegedly shot Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva. According to the record of the opening of proceedings [*auto de apertura*] in June 2002, Colonel Huaracaya Lovón, the officer in charge of the commando for Room I, stated that commandos Paz Ramos and Alvarado Díaz were the ones who shot at the aforementioned MRTA members; conversely, commando Paz Ramos denied having fired at them and soldier Becerra Noblecilla said that soldiers Huaracaya Lovón, Alvarado Díaz and he himself were the ones who had fired.<sup>166</sup> In addition, Colonel Huaracaya Lovón indicated that the man was carrying a machine gun and "he could not tell whether the female terrorist was carrying a weapon." At the same time, soldier Manuel Antonio Paz Ramos stated that the woman was carrying a war grenade and intended to detonate it, "which caused him to react quickly and fire off several shots, although he could not tell whether or not he had hit the male subversive since his main concern was the woman." José Luis Alvarado Díaz asserted that he and Paz fired at the man carrying a machine gun.

153. It is also important to note that according to the aforementioned statements, the areas adjacent to Room I were under military control. In this sense, the Public Prosecutor's Office stressed that although the statements of the members of Team 8 indicated that Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva were armed, "this does not explain, however, how the wronged parties were

<sup>165</sup> Appendix 9, Ruling of the Review Chamber of the Supreme Council of Military Justice of April 5, 2004, appendix 3 to the State's communication of February 6, 2009.

<sup>166</sup> Inquiry of the Public Ministry of September 22, 2006, file provided by the State.

able to get... to the main entrance of Room "I" if it is true that the rooms and hallways adjacent to this room were under the control of commandos from Teams 7 and 8."

154. Moreover, in his statement before the Public Prosecutor's Office, Officer Luis Ernesto Gálvez Melgar, a member of the Explosive Deactivation Unit who entered Room I afterward, stated that the aforementioned MRTA members were killed without offering any resistance whatsoever, since he did not see "any weapon around them, besides which the position in which they were found so indicated."<sup>167</sup>

155. In addition to the foregoing, it should be noted that, as mentioned in the section on the death of Mr. Cruz Sánchez, the bodies were removed without the presence of the proper professionals and the partial reference autopsies performed the day after the events were incomplete, there were no paraffin tests, nor tests on the trajectory and distance of the gunshot wounds. Photographs and filming were forbidden. These autopsies were confined to determining that both had died of "hypovolemic shock," due to "GSW to the head, thorax and extremities in the case of Mr. Peceros Pedraza and to GSW to the head, thorax and upper left limb," in the case of Ms. Meléndez Cueva. The autopsies ordered by the Public Prosecutor's Office in 2001 determined that Víctor Salomón Peceros Pedraza had received nine gunshot wounds, six of them to the face and thorax, and Herma Luz Meléndez Cueva had received fourteen gunshot wounds, seven to the head, one to the neck and six to the thorax. It was further determined that the trajectory of two of the three gunshot wounds that Mr. Peceros Pedraza received in the head traveled from back to front, and that in the case of Herma Luz Meléndez Cueva, most of the bullets followed a downward path.

156. In relation to the foregoing, it is important to underscore that according to the information in the case file, in the course of Operation Chavín de Huántar the tactic of selective instinctive (or point) shooting was applied, which consists of firing several times at the vital parts of the adversary, "aiming at the head, since that is a vulnerable point." According to the testimonies given in the domestic venue, "if the enemy was still alive [...] he was given the *coup de grâce* or the so-called "security shot."

157. The IACHR also observed that, as it will discuss in the chapter on due process guarantees and judicial protection, in view of the patent use of lethal force by state agents, Peru did not open an *ex officio* investigation into the murder of Peceros Pedraza and Meléndez Cuevas, nor did it conduct detailed and complete autopsies in an opportune manner. It opened a military investigation that absolved all of the military personnel who were being prosecuted in that jurisdiction and the investigation opened in the ordinary jurisdiction has only accused the masterminds. The State also did not submit any information as to whether it has conducted a thorough analysis to determine whether the use of force adhered to the principles of legality, necessity and proportionality; it has merely stated in the military jurisdiction that the deaths occurred during a battle.

158. In light of the above, the IACHR observes that Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cuevas received multiple bullet wounds to vital parts of the body consistent with the technique of selective shooting, which was intended to eliminate, rather than neutralize the enemy. In addition to this, the IACHR notes that the statements given by the soldiers involved contain inconsistencies as far as the individual or individuals who allegedly fired the shots and failed to explain how the two MRTA members could have entered through a hallway that was already under the control of the commandos. Moreover, according to Mr. Ogura's testimony, MRTA members Víctor Salomón Peceros Pedraza and Herma Meléndez Cueva were alive and surrounded by military personnel who outnumbered them; in other words, they had been neutralized and Herma Meléndez Cueva had even begged for their lives. Finally, the State failed to perform the autopsies in a timely manner immediately after the events, and it has not conducted a serious, impartial and effective investigation into the events.

159. In this sense, it should be recalled that "as the Inter-American Court and the Commission have stated, the level of force used must be justified by the circumstances [...] for the purpose of, for example, self-defense, or neutralizing or disarming the individuals involved in a violent confrontation."

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<sup>167</sup> Inquiry of the Public Ministry of September 22, 2006, file provided by the State..

160. The IACHR observes that in the framework of the instant case, the State has not provided a consistent explanation of the way in which Peceros Pedraza and Meléndez Cueva were killed. Similarly, based on the evidence in the case file, it is reasonable to believe that Peceros Pedraza and Meléndez Cueva were neutralized by military agents, begged for their lives, and nonetheless were extrajudicially killed, receiving multiple bullet wounds to vital parts of their bodies that were intended to eliminate them.

161. In light of the foregoing, and of the evaluation of all of the evidence, the Commission considers that the Peruvian State is responsible for having extrajudicially executed Eduardo Nicolás Cruz Sánchez, Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cuevas, and it therefore concludes that the State violated Article 4(1) of the American Convention, in relation to Article 1(1) of that instrument, to their detriment.

**3. The right to due process guarantees and judicial protection (Articles 8(1)<sup>168</sup> and 25(1)<sup>169</sup> of the American Convention on Human Rights, in relation to Article 1(1) of that instrument**

162. The Commission recalls that it is a basic principle of law concerning the international liability of the State, established in International Human Rights Law, that every State is internationally liable for acts or omissions by any of its branches or agencies in violation of the internationally recognized rights, pursuant to Article 1(1) of the American Convention.<sup>170</sup> Articles 8 and 25 of the Convention establish the scope of the afore-mentioned principle in connection with the acts and omissions of the domestic judicial authorities.<sup>171</sup>

163. The Commission notes that while the obligation to investigate is an obligation of means and not results, that obligation

[...] must be assumed by the State as its own juridical duty and not as a simple formality condemned beforehand to be fruitless, or as a simple action of individual interests, which depends on the procedural initiative of the victims or their next of kin, or on the private contribution of evidentiary elements.<sup>172</sup>

164. In the instant case, the petitioners contend that, although more than thirteen years have transpired since the events, the deaths of Edgar Nicolás Cruz Sánchez, Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva, the State has failed to conduct an effective, impartial and serious investigation. In this regard, they asserted, *inter alia*, that Peru did not open an *ex officio* investigation into the events, applied the military jurisdiction, failed to preserve evidentiary material, did not provide access

<sup>168</sup> 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>169</sup> 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>170</sup> Inter-Am. Ct. H.R., *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 172, Inter-Am. Ct. H.R., *Case of Baldeón García v. Peru*. Judgment of April 6, 2006. Series C No. 147, para. 140; Inter-Am. Ct. H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, paras. 111 and 112; and Inter-Am. Ct. H.R., *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 108.

<sup>171</sup> Inter-Am. Ct. H.R., *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 173, Inter-Am. Ct. H.R., *Case of Baldeón García v. Peru*. Judgment of April 6, 2006. Series C No. 147, para. 141; Inter-Am. Ct. H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 28; and Inter-Am. Ct. H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 109.

<sup>172</sup> Inter-Am. Ct. H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 255; Inter-Am. Ct. H.R., *Case of Vargas Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155, para. 75; Inter-Am. Ct. H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C No. 148, para. 131; and Inter-Am. Ct. H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 120.

to the victims' next of kin, and has pressured the judiciary in the course of the proceedings. They claimed that all of this means that the events in this case have gone unpunished. In relation to the military jurisdiction, they claim that it is not the appropriate venue to investigate the events, since the independence and impartiality of the military court is compromised. They added that the Supreme Court ruled incorrectly when it remanded the investigation of the events to the military jurisdiction.

165. In the petitioners' view, moreover, the State did not provide an effective remedy to the victims and their next of kin. They added that interference by the military justice system, which impeded the civilian jurisdiction from investigating, prosecuting and punishing the soldiers, constitutes a serious violation of judicial protection and due process guarantees. They added that the military personnel who were absolved by the military courts are not being investigated by the civilian authorities due to an erroneous invocation of the principle of *res judicata* and the guarantee of *non bis in idem*.

166. For its part, the State claimed that its alleged international liability is based on statements and expert reports, which must be examined in a trial, which is the appropriate venue to determine whether the deaths were, in effect, extrajudicial executions. It also contended that the events were tried in the military jurisdiction for the following reasons: (i) the accused were active duty officers; (ii) they acted in the discharge of their assigned duties in a military operation; (iii) the legally protected interest was "discipline and the protection of life, the supreme aim of the State;" (iv) the acts were defined in the Code of Military Justice and were the result of a battle between commandos and a terrorist group; and (v) they acted in a zone declared to be in a "state of emergency."

167. The State also asserted that the criminal proceeding in progress is being conducted in accordance with the procedural guidelines established by law and has not been abandoned or dismissed. In regard to the reasonable time period, it explained that there is no procedural regulation in force that calculates an exact time frame from the beginning to the end of an oral trial.

168. First of all, the IACHR wishes to reiterate that while it is qualified to determine the international liability of the State and the legal consequences derived therefrom, it does not have the power to investigate and punish the individual conduct of the state agents who were allegedly involved in the violations.<sup>173</sup> The Commission recalls that according to the jurisprudence of the Court:

[T]he aim of International Human Rights Law is to provide the individual with means of protection of internationally recognized human rights vis-à-vis the State. Under international jurisdiction, the parties and the subject matter of the controversy are, by definition, different than under domestic jurisdiction.<sup>174</sup>

169. Therefore, in relation to the State's claim that the facts of the instant case should be tried in a domestic legal proceeding, "as the appropriate venue for determining whether the deaths were, in effect, extrajudicial executions," the IAHCR recalls that:

[I]n order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, [the Commission and the Court] may have to examine the respective domestic proceedings. In light of the above, the domestic proceedings must be considered as a whole, and

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<sup>173</sup> Inter-Am. Ct. H.R., *Case of the Gómez Paquiyauri Brothers v. Peru. Merits, Reparations and Costs*. Judgment of July 8, 2004. Series C No. 110, para. 73; and *Case of the "Street Children" (Villagrán Morales et al) v. Guatemala*. Preliminary Objections. Judgment of September 11, 1997. Series C No. 32, para. 223.

<sup>174</sup> Inter-Am. Ct. H.R., *Case of the Gómez Paquiyauri Brothers v. Peru. Merits, Reparations and Costs*. Judgment of July 8, 2004. Series C No. 110, para. 73; Inter-Am. Ct. H.R., *Case of the "Five Pensioners" v. Peru*. Judgment of February 28, 2003. Series C No. 98, para. 163; Inter-Am. Ct. H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua*. Judgment of August 31, 2001. Series C No. 79, para. 154; Inter-Am. Ct. H.R., *Case of Ivcher Bronstein v. Peru*. Judgment of February 6, 2001. Series C No. 74, para. 168; Inter-Am. Ct. H.R., *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 109; Inter-Am. Ct. H.R., *Case of Bámaca Velásquez v. Guatemala*. Judgment of November 25, 2000. Series C No. 70, para. 210; and Inter-Am. Ct. H.R., *Case of the "Street Children" (Villagrán Morales et al) v. Guatemala*. Judgment of November 19, 1999. Series C No. 63, para. 220.

the role of the international court is to establish whether the proceedings as a whole were in accordance with international provisions.<sup>175</sup>

170. Whenever state agents have, under any circumstance, caused the death of a person, the State has the obligation to investigate and to give a satisfactory and convincing explanation of the events and to rebut allegations over its liability based on appropriate evidentiary elements.<sup>176</sup> Similarly, it is important to bear in mind that

... the European Court of Human Rights held that investigations on the excessive use of force must be subject to public scrutiny to secure accountability of government officers in theory as well as in practice. Furthermore, said Court has stated that the assessment on the use of force which involved use of firearms must be made taking into account all the circumstances and factual backdrop, including the planification and control of the facts under scrutiny.<sup>177</sup>

171. The Commission will now examine the due diligence on the part of the State in the proceeding initiated at the domestic level in relation to the deaths of Eduardo Nicolás Cruz Sánchez, Víctor Salomón Peceros Pedraza and Herma Meléndez Cuevas, in order to determine whether it was carried out with respect for due process guarantees and has provided an effective remedy to ensure the rights to a fair trial, the truth about the events, and reparation to their next of kin.

172. It has been proven that three years after the events occurred, the relatives of the MRTA members who died in Operation Chavín de Huántar lodged a criminal complaint before the Public Ministry for the alleged extrajudicial execution of the fourteen MRTA members. As a result, in January 2001, the Public Prosecutor's Office ordered a review of the autopsies performed the day after the events. Finding it impossible to obtain additional information about the form and circumstances of their deaths due to the shortcomings in those autopsies, the Public Prosecutor's Office ordered the exhumation of the bodies and a new analysis performed by the Peruvian Institute of Forensic Anthropology. It also designated two experts to prepare a report. In August of that year, former hostage Hidetaka sent a letter from Japan describing what he had seen on the day the events occurred.

173. On May 24, 2002, the Public Prosecutor's Office decided to bring charges against the alleged masterminds of the events and against fifteen military men alleged to be the direct perpetrators, for the deaths of Eduardo Nicolás Cruz Sánchez, Víctor Salomón Peceros Pedraza and Herma Meléndez Cuevas. At that stage of the proceeding, the Public Prosecutor's Office determined that "for the moment" it would not pursue the case involving the other MRTA members who had died for lack of evidentiary elements. Several days later, on May 29, 2002, the military justice system opened an investigation of all of the military personnel involved in the Operation, in relation to the deaths of Víctor Salomón Peceros Pedraza, Herma Meléndez Cuevas, and two other MRTA members: Roli Rojas Fernández and Luz Dina Villoslada Rodríguez. The Office of the Supreme War Council filed a jurisdictional challenge before the Supreme Court of Justice which, in August 2002, ruled in favor of the military jurisdiction with respect to the members of the armed forces who had been part of the commando and determined that the civilian courts would take up the facts in relation to persons "other" than the commando. In October 2003, the

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<sup>175</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007.* Series C No. 166, para. 142; Inter-Am. Ct. H.R., *Case of Lori Berenson Mejía v. Peru.* Judgment of November 25, 2004. Series C No. 119, para. 133; Inter-Am. Ct. H.R., *Case of Myrna Mack Chang v. Guatemala.* Judgment of November 25, 2003. Series C No. 101, para. 200; and Inter-Am. Ct. H.R., *Case of Juan Humberto Sánchez v. Honduras.* Judgment of June 7, 2003. Series C No. 99, para. 120.

<sup>176</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007.* Series C No. 166, para 108; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela.* Judgment of July 5, 2006. Series C No. 150, para. 80; Inter-Am. Ct. H.R., *Case of the Miguel Castro Castro Prison v. Peru.* Judgment of November 25, 2006. Series C No. 160, para. 273, and Inter-Am. Ct. H.R., *Case of Baldeón García v. Peru.* Judgment of April 6, 2006. Series C No. 147, para. 120. In a similar sense, see also Inter-Am. Ct. H.R., *Case of Juan Humberto Sánchez v. Honduras.* Judgment of June 7, 2003. Series C No. 99, para. 111.

<sup>177</sup> Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, paras. 82 and 83; ECHR, *Case of Makaratzis v. Greece.* Judgment of 20 December 2004. Application No. 50385/99, para. 59.

military justice system dismissed the case against all of the commandos involved in the events and in September of that year, ordered the case definitively closed. Parallel to this, in the ordinary jurisdiction, the Public Prosecutor's Office filed charges in September 2006. The oral phase, which commenced in 2008, is still ongoing and has not delivered a verdict as of the date this report was adopted.

#### *Preservation of evidentiary material*

174. In the first place, the IACHR recalls that in cases such as the one under study, in which a death has occurred at the hands of state agents, it is particularly important "that the competent authorities adopt all reasonable measures to guarantee the necessary probative material in order to carry out the investigation."<sup>178</sup> In this regard, the Inter-American Court has specified that "the effective determination of the truth within the framework of the obligation to investigate the death of a person must be showed in the first stages of the proceeding, with all diligence,"<sup>179</sup> and must take into account the Manual on the Effective Prevention and Investigation of Extra-legal Executions.<sup>180</sup> In this sense,

[t]he State authorities that carry out an investigation must, *inter alia*, a) identify the victim; b) recover and preserve the evidentiary material related to the death; c) identify possible witnesses and obtain their statements with regard to the death that is being investigated; d) determine the cause, form, place, and time of death, as well as any procedure or practice that could have caused it, and e) distinguish between a natural death, an accidental death, suicide, and homicide. Besides, it is necessary to thoroughly investigate the crime scene, perform autopsies and competent professionals employing the most appropriate procedures must carefully practice analysis of the human remains.<sup>181</sup>

175. The Commission observes that, according to the United Nations Manual on Extra-legal Executions, due diligence in a forensic medical investigation into a death requires maintaining a chain of custody for each item of forensic evidence.<sup>182</sup> On this point, the Inter-American Court has stated that

This consists of keeping a precise written record, complemented, as applicable, by photographs and other graphic elements, to document the history of the item of evidence as it passes through the hands of the different investigators responsible for the case. The chain of custody can extend beyond the trial, sentencing and conviction of the accused, given that old evidence, duly preserved, could help exonerate someone who has been convicted erroneously. The exception to the foregoing is the positively identified remains of victims, which can be returned to their families for burial, on condition that they cannot be cremated and may be exhumed for new autopsies.<sup>183</sup>

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<sup>178</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007.* Series C No. 166, para. 122.

<sup>179</sup> Inter-Am. Ct. H.R., *Case of González et al ("Cotton Field") v. Mexico.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 300; Inter-Am. Ct. H.R., *Case of Servellón García et al v. Honduras.* Judgment of September 21, 2006. Series C No. 152, para. 120; Inter-Am. Ct. H.R., *Case of the Miguel Castro Castro Prison v. Peru.* Judgment of November 25, 2006. Series C No. 160, para. 383 and *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007.* Series C No. 166, para. 121 and United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions, E/ST/CSDHA/12 (1991).

<sup>180</sup> Inter-Am. Ct. H.R., *Case of Servellón García et al v. Honduras.* Judgment of September 21, 2006. Series C No. 152, para. 120; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela.* Judgment of July 5, 2006. Series C No. 150, para. 140; Inter-Am. Ct. H.R., *Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 179; Inter-Am. Ct. H.R., *Case of the Ituango Massacres v. Colombia.* Judgment of July 1, 2006. Series C No. 148, para. 298; and United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions, E/ST/CSDHA/12 (1991).

<sup>181</sup> Inter-Am. Ct. H.R., *Case of Servellón García et al v. Honduras.* Judgment of September 21, 2006. Series C No. 152, para. 120.

<sup>182</sup> Manual on the Effective Prevention and Investigation of Extra-legal Executions, and Inter-Am. Ct. H.R., *Case of González et al ("Cotton Field") v. Mexico.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 305.

<sup>183</sup> Inter-Am. Ct. H.R., *Case of González et al ("Cotton Field") v. Mexico.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 305.

176. In this regard, the Commission observes that there were a number of irregularities in the collection and preservation of evidence in the instant case. For example: i) the removal of the bodies conducted by the military judge and prosecutor occurred one day after the events and there is no information in the case file to indicate that the crime scene was secured at that time; ii) at least two experts were compelled by the military authorities to sign the report of removal of the bodies even though they were not present at the time; iii) the military judge order that autopsies be performed in a facility that was not equipped for the procedure, namely the National Police hospital, whose staff was not accustomed to performing such procedures; iv) personnel not directly involved in the autopsies were forbidden entry and the professionals involved were not allowed to take photos or videos; v) paraffin tests and ballistics tests to compare the weapons used in the operation were not performed; vi) dental exams were not performed; vii) there was no analysis of the distance from which the bullets found in the bodies were shot; viii) only three of the fourteen bodies were identified, one of them as that of Eduardo Nicolás Cruz Sánchez; ix) the remains of the fourteen MRTA members were buried in secrecy.

177. Those irregularities were confirmed when, in 2001, the Public Prosecutor's Office requested an analysis of the partial reference autopsies performed on April 23, 1997, to determine the cause of death of the MRTA members. Upon finding that there was insufficient information to do this, the Public Prosecutor's Office ordered the exhumation of the bodies and the preparation of new reports. Significantly, during the proceedings in the military jurisdiction, it was noted that:

The most rigorous and complete expert examinations relating to the thanatological studies of the bodies [...] took place more than four years after the events occurred, which means, for example that signs such as powder burns [signo de Benassi] used to determine the proximity of the firearm when it was shot [...] are not found [...]

178. As indicated by the proven facts and the preceding paragraphs, the State did not preserve the necessary evidentiary material, nor did it act with due diligence in conducting inquiries critical to determining the necessity and proportionality of the use of force employed by the state agents who participated in the operation in which Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Salomón Peceros Pedraza lost their lives. In the Commission's view, this clearly demonstrates the failure not only to preserve the related evidence, but also to conduct inquiries essential for an investigation into the events.

#### *Opening of investigations into the events*

179. The IACHR notes that, after the events occurred, the State neglected to open an *ex officio* investigation. It was not until after more than three years had transpired that the Public Prosecutor's Office opened an investigation pursuant to a criminal complaint lodged by the relatives of two of the dead MRTA members. The Commission observes that no investigation of an administrative nature was opened either. In this regard, the Commission recalls that as soon as the State becomes aware that its Security Forces have used firearms and that this has resulted in the death of a person or harm to his personal integrity, it has the obligation to open, *ex officio* and without delay, a serious independent, impartial and effective investigation. This is derived from the obligation of States to "see that their security forces, which are entitled to use legitimate force, respect the right to life of the individuals under their jurisdiction."<sup>184</sup>

180. As has been proven, the Public Prosecutor's Office opened an investigation in May 2002 against 15 commandos of the Operation, the alleged direct perpetrators, and against the presumed

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<sup>184</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para.81; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Judgment of July 5, 2006. Series C No. 150, para. 66. See also Inter-Am. Ct. H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 238, and Inter-Am. Ct. H.R., *Case of Servellón García et al v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 102.

masterminds of the events. Several days later, the military justice system opened its own investigation of all of the commandos involved in the Operation. At the request of the military justice system, the Supreme Court of Justice ruled on the jurisdictional challenge, holding that the military personnel that formed part of the commando should be tried by the military justice system, and the others in the civilian courts.

- *Regarding the jurisdictional challenge*

181. The IACHR observes that the Supreme Court of Justice based its reasoning on the fact that the events took place in a “clear military battle” and therefore the commandos acted in a military operation in a state of emergency, pursuant to an order issued on constitutional grounds and therefore any “infractions of a criminal nature” or “punishable excesses” that may have been committed must be aired in the military courts. It also held that the criminal charges brought in the regular court system against defendants Montesinos Torres, Nicolás de Bari Hermosa Ríos, Roberto Huamán Ascurra and Jesús Zamudio Aliaga, persons not directly involved in the military operation, “would constitute a case of a Human Rights Violation defined as a Crime against Humanity...insofar as they all derive from the same criminal intent.” In other words, in the view of the Supreme Court of Justice, the events being tried could constitute human rights violations, including those defined as crimes against humanity. This notwithstanding, because it deemed the acts committed by the commandos to be duty-related crimes, it remanded them to the military jurisdiction.

182. On this point, it should be noted that the TRC stated that this decision “constituted an unfortunate setback in the Peruvian justice system from the standpoint of effective, impartial and transparent investigation of conducts that violate the fundamental rights of persons.”

- *Regarding the process in the military jurisdiction*

183. The IACHR recalls that in cases such as the one under study, where deaths have occurred at the hands of state agents, it is particularly important that the authorities not only preserve the evidence for an investigation, but also that they “be independent, both *de jure* and *de facto*, from the officials involved in the facts of the case.”<sup>185</sup> In other words, when State officials have used force, in order for an investigation is to be effective, the persons responsible for carrying out that investigation must be hierarchically and institutionally independent of those who may be implicated in the death,<sup>186</sup> which definitively implies that their independence must be real.<sup>187</sup>

184. Similarly, the Commission reiterates that when state agents use lethal force, as in the instant case, the State must conduct an independent and impartial investigation to establish whether that use of force adhered to the principles of legality, necessity and proportionality.

185. In this regard, the IACHR observes that according to the Supreme Court, the intervention by military commandos during the operation occurred in the context of a zone declared to be in a state of emergency, and therefore they were subject to the Code of Military Justice “and any infractions they may commit in the discharge of their duties as set out in that Code fall under Military Jurisdiction [Fuero Privativo Militar].” For its part, the military justice system held that because they occurred in the framework of a state of emergency,

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<sup>185</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 122.

<sup>186</sup> European Court of Human Rights, *Case of Slimani v. France*, Application no. 57671/00, Judgment of 27 July, 2004, para. 32; Inter-Am. Ct. H.R., *Case of Durand and Ugarte v. Peru*. Judgment of August 16, 2000. Series C No. 68, paras. 125 and 126; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Judgment of July 5, 2006. Series C No. 150, para. 81.

<sup>187</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 122.

[...] the events were a consequence of service or duty-related acts and any illegality that may have derived from that service constitutes a duty-related crime, as there is a cause and effect relationship between the duty and the illegal acts ascribed. Therefore, the military criminal jurisdiction is found to be apt under the provisions of [...] the Political Constitution of Peru, insofar as it meets the following requirements: a) the accused are active duty military personnel, b) they acted in the discharge of their assigned duties in the military operation, c) the legally protected interests is discipline and the protection of the values that inform military life, and d) the acts described in the complaint are defined in articles ninety-four, one hundred seventy-nine and one hundred eighty of the Code of Military Justice.

186. As far as the military jurisdiction, the IACHR recalls that it must only be applied in conjunction with an offense against a military criminal legal interest associated with the specific duties of defense and security of the State,<sup>188</sup> and never to investigate human rights abuses. In this sense, the IACHR has stated on other occasions that:

The military criminal justice system has certain peculiar characteristics that impede access to an effective and impartial remedy in this jurisdiction. One of these is that the military jurisdiction cannot be considered a real judicial system, as it is not part of the judicial branch, but is organized instead under the Executive. Another aspect is that the judges in the military judicial system are generally active-duty members of the Army, which means that they are in the position of sitting in judgment of their comrades-in-arms, rendering illusory the requirement of impartiality, since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context.

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 ordinary 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>189</sup>

187. On this point, the Inter-American Court has held that:

[...] military criminal jurisdiction in democratic states, in times of peace, has tended to be reduced and has even disappeared, reason for which, if a State conserves it, its use shall be minimum, as strictly necessary, and shall be inspired on the principles and guarantees that govern modern criminal law. In a democratic State of law, the military criminal jurisdiction shall have a restrictive and exceptional scope and be directed toward the protection of special juridical interests related to the tasks characteristic of the military forces. Therefore, the Tribunal has previously stated that only active soldiers shall be prosecuted within the military jurisdiction for the commission of crimes or offenses that based on their own nature threaten the juridical rights of the military order itself.<sup>190</sup>

<sup>188</sup> Inter-Am. Ct. H.R., *Case of Palamara Iribarne*. Judgment of November 22, 2005. Series C No. 135. para. 132

<sup>189</sup> IACHR. Report N° 2/06 (Merits). Case 12.130, *Miguel Orlando Muñoz Guzmán (Mexico)*, February 28, 2006, paras. 83 and 84.

<sup>190</sup> Inter-Am. Ct. H.R., *Case of Radilla Pacheco v. Mexico*. Judgment on Preliminary Objections, Merits, Reparations and Costs. November 23, 2009, para. 272; Inter-Am. Ct. H.R., *Case of Castillo Petruzzi et al v. Peru*, Inter-Am. Ct. H.R.. Merits. Judgment of November 3, 1997. Series C No. 34, para. 128; Inter-Am. Ct. H.R., *Case of Durand and Ugarte v. Peru*. Merits. Judgment of August 16, 2000. Series C No. 68, para. 117; Inter-Am. Ct. H.R., *Case of Cantoral Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 112; Inter-Am. Ct. H.R., *Case of Las Palmeras v. Colombia*. Merits. Judgment of December 6, 2001. Series C No. 90, para. 51; Inter-Am. Ct. H.R., *Case of the 19 Merchants v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109, para. 165; Inter-Am. Ct. H.R., *Case of Lori Berenson Mejía v. Peru*, Merits, Reparations and Costs. Judgment of November 25, 2004. Series C No. 119, para. 142; Inter-Am. Ct. H.R., *Case of the Mapiripán Massacre v. Colombia*, Preliminary Objections. Judgment of March 7, 2005. Series C No. 122, para. 202; Inter-Am. Ct. H.R., *Case of Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, paras. 124 and 132; Inter-Am. Ct. H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 145, para. 189; Inter-Am. Ct. H.R., *Case of Almonacid Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 131; Inter-Am. Ct. H.R., *Case of La Cantuta v. Peru*, Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 142; Inter-Am. Ct. H.R., *Case of the Rochela Massacre v. Colombia*, Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 200; Inter-Am. Ct. H.R., *Case of Escué Zapata v. Colombia*, Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, para. Continues...

[...] Likewise, [the] Court has established that, taking into account the nature of the crime and the juridical right damaged, military criminal jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of violations of human rights<sup>191</sup> but that instead the processing of those responsible always corresponds to the ordinary justice system.<sup>192</sup>

188. Duty-related crimes, then, which are the crimes that may be aired in the military justice system, are “punishable act[s] [that] must constitute an excess or an abuse of power that takes place in the context of an activity directly related to a legitimate function of the armed forces.”<sup>193</sup> Moreover, “the nexus between the criminal act and the activity related to military service is broken when the offense is extremely grave, as in the case of crimes against humanity. In such circumstances, the case must be removed to the civilian justice system.”<sup>194</sup>

189. On this point, the TRC stated that, in its judgment, remanding to the military jurisdiction ‘denaturalizes the substantive competence of military tribunals which must be confined to the protection of military legal interests.’

190. In this sense, the Commission concludes that the arbitrary and extrajudicial executions and the shooting of survivors may not be considered duty-related crimes but rather serious human rights abuses and therefore the investigation into the facts in the instant case should have gone forward in the ordinary courts.

191. As the Inter-American Court has maintained, “[a]ll organs that exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of due process established in Article 8 of the Convention.”<sup>195</sup> Similarly, according to the principles relating to the investigation of arbitrary and extrajudicial executions States must carry out a “thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions”<sup>196</sup> and “identify and bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>197</sup>

192. The Inter-American Court has also specified that:

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...continuation

105, and Inter-Am. Ct. H.R., *Case of Tiu Tojin v. Guatemala*, Merits, Reparations and Costs. Judgment of November 26, 2008. Series C No. 190, para. 118.

<sup>191</sup> Inter-Am. Ct. H.R., *Case of Radilla Pacheco v. Mexico*. Judgment on Preliminary Objections, Merits, Reparations and Costs. November 23, 2009, para. 273; Inter-Am. Ct. H.R., *Case of the Rochela Massacre v. Colombia*, Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 200, and Inter-Am. Ct. H.R., *Case of Escué Zapata v. Colombia*, Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, para. 105.

<sup>192</sup> Inter-Am. Ct. H.R., *Case of Radilla Pacheco v. Mexico*. Judgment on Preliminary Objections, Merits, Reparations and Costs. November 23, 2009, para. 273; Inter-Am. Ct. H.R., *Case of Durand and Ugarte v. Peru*, Merits. Judgment of August 16, 2000. Series C No. 68, para. 118; Inter-Am. Ct. H.R., *Case of La Cantuta v. Peru*, Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 142; and, Inter-Am. Ct. H.R., *Case of the Rochela Massacre v. Colombia*, Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 200.

<sup>193</sup> Constitutional Court of Colombia, decision C-358 of August 5, 1997. In that same sense, see IACHR. *Third Report on the Situation of Human Rights in Colombia*, para. 30.

<sup>194</sup> Constitutional Court of Colombia, decision C-358 of August 5, 1997. In that same sense, see IACHR. *Third Report on the Situation of Human Rights in Colombia*, para. 30.

<sup>195</sup> Inter-Am. Ct. H.R., *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141. para. 148; Inter-Am. Ct. H.R., *Case of Palamara Iribarne*, Judgment of November 22, 2005. Series C No. 135 para. 164; Inter-Am. Ct. H.R., *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, para. 149; Inter-Am. Ct. H.R., *Case of Ivcher Bronstein*. Judgment of February 6, 2001. Series C No. 74, para. 104.

<sup>196</sup> United Nations Economic and Social Council. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. Resolution 1989/65 of May 24, 1989.

<sup>197</sup> United Nations General Assembly. Resolution 59/197. Extrajudicial, Summary or Arbitrary Executions (A/RES/59/197), March 10, 2005.

[...] “[w]hen the military jurisdiction assumes competence over a matter that should be heard by the ordinary jurisdiction, it is violating the right to a competent tribunal and, *a fortiori*, to due process,” which is, at the same time, intimately related to the right to a fair trial.<sup>198</sup> Those courts must be competent, independent and impartial.<sup>199</sup>

193. Contrary to those principles and to the consistent jurisprudence of the Inter-American System, in the instant case, which involves the violation of human rights, the deaths of Víctor Salomón Peceros Pedraza and Herma Luz Meléndez were taken up by a tribunal that was neither competent, nor, as we shall discuss later, impartial or independent.

194. In this sense, the Commission observes that military courts cannot be an independent and impartial organ to investigate and try human rights violations since the Armed Forces have a “deep-seated *esprit de corps*” which is sometimes misinterpreted as requiring them to cover up crimes committed by their fellow soldiers.<sup>200</sup> Similarly, the IACHR considers that impartiality is compromised when military authorities prosecute actions whose active subject is another member of the Army, since investigations into the conduct of members of the security forces carried out by other members of those same forces generally serve to conceal the truth rather than to reveal it.<sup>201</sup>

195. The IACHR recalls that a tribunal’s impartiality is based on its members not having a direct interest, a pre-established position or a preference for one of the parties, nor any involvement in the controversy. In the case at hand, the analysis of the process carried out in the military jurisdiction reveals that the latter decided to dismiss and close the case on the following grounds:

[...]the subversive group [...] organized and equipped as a military force [...] in a struggle with the characteristics of a military battle, in which there were dead and wounded on both sides. It is therefore necessary to evaluate the necessary conditions for legitimate defense and the circumstances surrounding the battle, the dangerousness of the subversive agents who were provisioned with war weapons and supplies [...] and who at all times demonstrated the belligerence inherent to terrorist groups, and a situation in which the lives of the hostages were in grave danger ...having died (one hostage, Carlos Giusti Acuña) and two of the commandos involved, with several hostages and commandos seriously wounded. This is indicative of the intensity of the battle [...] and therefore in conducting an objective assessment it was necessary to evaluate the necessary conditions to preserve the physical integrity and lives of the hostages [...]

[...]the version of extrajudicial executions [...] is based solely on the sworn testimony provided by ...Hidetaka Ogura [...] and these claims [...] have not been confirmed or upheld by a court of jurisdiction [...]

[...] the commandos acted in the legitimate defense of human life and in strict compliance with their constitutionally-protected official duties [...]

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<sup>198</sup> Inter-Am. Ct. H.R., *Case of Radilla Pacheco v. Mexico*. Judgment on Preliminary Objections, Merits, Reparations and Costs. November 23, 2009, para. 273; Inter-Am. Ct. H.R., *Case of Castillo Petrucci et al v. Peru*, Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, para. 128; Inter-Am. Ct. H.R., *Case of Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 143, and Inter-Am. Ct. H.R., *Case of Tiu Tojín v. Guatemala*, Merits, Reparations and Costs. Judgment of November 26, 2008. Series C No. 190, para. 118.

<sup>199</sup> Inter-Am. Ct. H.R., *Case of Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, para. 112; Inter-Am. Ct. H.R., *Case of the 19 Merchants v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109, para. 167; Inter-Am. Ct. H.R., *Case of Escué Zapata v. Colombia*, Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, para. 101; Inter-Am. Ct. H.R., *Case of Radilla Pacheco v. Mexico*. Judgment on Preliminary Objections, Merits, Reparations and Costs. November 23, 2009, para. 273, Inter-Am. Ct. H.R., *Case of Durand and Ugarte v. Peru*. Merits. Judgment of August 16, 2000. Series C No. 68, para. 117, para. 118; Inter-Am. Ct. H.R., *Case of La Cantuta v. Peru*, Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 142; y, Inter-Am. Ct. H.R., *Case of the Rochela Massacre v. Colombia*, Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 200.

<sup>200</sup> IACHR. *Third Report on the Situation of Human Rights in Colombia*, paras. 26-29.

<sup>201</sup> IACHR. *Third Report on the Situation of Human Rights in Colombia*, para. 19.

Due to the inherent nature of the events, it is impossible to know with certainty which of all of the shots fired caused the death of each one of the MRTA members, much less who did it. That being the case, the commission of international law violations [*jus gentium*], abuse of authority and qualified homicide to the detriment of the aforementioned MRTA members cannot be proved inasmuch as the deaths of the rebels were the result of the battles, inasmuch as it has not been proved that the alleged executions actually occurred, given the lack of incontrovertible and indisputable evidence in the record that would indicate otherwise, particularly if the events took place in a situation involving crossfire.

The most rigorous and complete expert examinations relating to the thanatological studies of the bodies [...] took place more than four years after the events occurred, which means, for example that signs such as powder burns [signo de Benassi] used to determine the proximity of the firearm when it was shot [...] are not found [...]

196. In other words, in its analysis of the use of lethal force by military personnel, the military court based its reasoning on generalities such as how the MRTA members “at all times demonstrated [their] belligerence and that the commandos acted “in the legitimate defense of human life.” The military tribunal also discarded the testimony of Mr. Ogura, did not take into account the statements given before the Public Prosecutor’s Office that corroborated the former, and finally, cast doubt on the expert examinations performed in 2001.

197. Moreover, the State has not conducted a judicial investigation of the arbitrary and extrajudicial executions in relation to the direct perpetrators of the death of Víctor Salomón Peceros Pedraza and Herma Luz Meléndez, other than that conducted in the military jurisdiction. It also did not conduct such an investigation in respect of the direct perpetrators in the death of Eduardo Nicolás Cruz Sánchez, even though this matter had not been aired in the military jurisdiction. Here, the IACHR observes that the next of kin did not have access to the military criminal proceedings against the individuals involved in the executions, nor did they have any recourse to challenge the judging of the facts by that jurisdiction since the process was conducted in secrecy and, as the State contended, no remedy existed to appeal the decision of the military court.

198. In any event, the IACHR recalls that based on the facts in the instant case, it has been established that from the standpoint of international law, state agents used excessive and lethal force and the State is therefore liable for the extrajudicial execution of Eduardo Nicolás Cruz Sánchez, Víctor Salomón Peceros Pedraza and Herma Luz Meléndez. Despite this, the acts remain in a state of total impunity.

199. The facts outlined above are a clear example of what the Commission stated previously in relation to human rights violations committed by members of the armed forces and tried by the military jurisdiction, in the sense that “where the State allows investigations to be conducted by the organs potentially implicated, independence and impartiality are clearly compromised [...] The consequence of such compromise is insulation of those presumably responsible from the normal operation of the legal system.”<sup>202</sup> In this sense, the IACHR recalls that airing serious human rights violations in the military justice system, as in the instant case, constitutes a violation *inter alia* of the rights enshrined in Articles 8 and 25 of the American Convention.<sup>203</sup>

200. As evidenced in the instant case, in which deaths resulted from the excessive use of force, contrary to its international obligations<sup>204</sup> the State has not conducted a serious, independent,

<sup>202</sup> IACHR. Report N° 10/95, Case 10.580, *Manuel Stalin Bolaños*, Ecuador, Annual Report of the IACHR 1995, OEA/Ser.LV/II.91, Doc. 7, rev. 3, April 3, 1996, para. 48.

<sup>203</sup> IACHR. *Annual Report of 1993*. OEA/Ser.LV/III.85. February 11, 1994.

<sup>204</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 108 and 88; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia)*, Judgment of July 5, 2006. Series C No. 150, para. 80; Inter-Am. Ct. H.R., *Case of Baldeón García*. Judgment of April 6, 2006.

impartial and effective investigation, has not offered a satisfactory and convincing explanation of the facts, and has not rebutted, based on the evidence, the allegations concerning its liability. To the contrary, the IACHR observes that the State remanded the matter to the military jurisdiction, which refused the next of kin access to the executed victims and acquitted the military personnel involved, leaving the facts in this case totally unpunished.

201. Based on the foregoing, the Commission considers that the State exceeded the bounds of the military justice sphere in contravention of the parameters of exceptionality and restriction that characterize the military criminal jurisdiction and extended the competence of the military jurisdiction to crimes that had no direct relation to military discipline or to the legally protected interests of that jurisdiction, freed the military personnel involved in the events, and denied the next of kin of the executed victims a fair trial.

- *In relation to the criminal proceeding*

202. According to Article 8(1) of the Convention, one of the elements of due process is that the cases brought before the courts are decided within a reasonable time and by a competent judge. In this sense, a protracted delay can constitute, per se, a violation of judicial guarantees.<sup>205</sup> The reasonability of the time period should be analyzed with regard to the total duration of the criminal proceeding.<sup>206</sup>

203. The Commission recalls that as soon as the State realizes that its Security Forces have used firearms and that this has resulted in the death of a person or harm to his personal integrity, it has the obligation to open, *ex officio* and without delay, a serious, independent, impartial and effective investigation. This derives from the obligation of States to “to see that their security forces, which are entitled to use legitimate force, respect the life of the individuals under their jurisdiction.”<sup>207</sup> Moreover, as the Court has specified in cases of alleged extrajudicial killings,

[...] it is essential that the States effectively investigate the deprivation of the right to life, and in this case, punish all those responsible, especially when state agents are involved, since on the contrary, it would be creating, within an environment of impunity, the conditions necessary for the repetition of this type of facts, which is contrary to the duty to respect and guarantee the right to life. Besides, if the acts that violate human rights are not investigated seriously, they would, in some way, result aided by public power, which compromises the State's international responsibility.<sup>208</sup>

...continuation

Series C No. 147, para. 120. Inter-Am. Ct. H.R., *Case of Servellón García et al v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 123; Inter-Am. Ct. H.R., *Case of Baldeón García v. Peru*. Judgment of April 6, 2006. Series C No. 147, para. 91; Inter-Am. Ct. H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 145; Inter-Am. Ct. H.R., *Case of the “Mapiripán Massacre” v. Colombia*. Judgment of September 15, 2005. Series C No. 134, paras. 137 and 232. Inter-Am. Ct. H.R., *Case of Juan Humberto Sánchez v. Honduras*. Judgment of June 7, 2003. Series C No. 99, para. 112. See also *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 256, and Inter-Am. Ct. H.R., *Case of Vargas Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155, para. 77. In a similar sense, see also ECHR, *Erdogan and Others v. Turkey*, 25 April 2006, no. 19807/92, paras. 122-123, and ECHR, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, paras. 111-112, 6 July 2005.

<sup>205</sup> Inter-Am. Ct. H.R., *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 166; Inter-Am. Ct. H.R., *Case of Gómez Palomino v. Peru*. Judgment of November 22, 2005. Series C No. 136, para. 85; and Inter-Am. Ct. H.R., *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005. Series C No. 124, para. 160.

<sup>206</sup> Inter-Am. Ct. H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 129; Inter-Am. Ct. H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 104; and Inter-Am. Ct. H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 168.

<sup>207</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007*. Series C No. 166, para.81; Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Judgment of July 5, 2006. Series C No. 150, para. 66. See also Inter-Am. Ct. H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 238, and Inter-Am. Ct. H.R., *Case of Servellón García et al v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 102.

<sup>208</sup> Inter-Am. Ct. H.R., *Case of Servellón García et al v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 123; Inter-Am. Ct. H.R., *Case of Baldeón García v. Peru*. Judgment of April 6, 2006. Series C No. 147, para. 91; Inter-Am. Ct. H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 145; Inter-Am. Ct. H.R., *Case of the “Mapiripán Massacre” v. Colombia*. Judgment of September 15, 2005. Series C No. 134, paras. 137 and 232.

204. When the authorities realized that the MRTA members had been killed by state officials who had used force by means of firearms, the State had the obligation to activate *ex officio* “and without delay, mechanisms to carry out an appropriate control and verification of the legality of the use of force, through a serious, independent, impartial and effective investigation of the facts at the domestic level.”<sup>209</sup> In the instant case, the Commission notes that the events occurred in April 1997 and, as of the date of this report, fourteen years after the events occurred, a legal ruling has not been handed down by the regular court system in relation to them.

205. The IACHR takes the view that in order to establish whether an investigation has been conducted promptly, it is necessary to take into consideration a series of factors, such as the time that has transpired since the crime was committed, whether the investigation has progressed beyond the preliminary phase, the steps taken by the authorities, and the complexity of the matter.<sup>210</sup> Moreover, the Commission recalls that the Inter-American Court has specified that a prolonged delay may, in itself, constitute a violation of judicial guarantees, and it therefore falls to the State to explain and prove why it has required more time than would be reasonable to deliver final judgment in a specific case,<sup>211</sup> something that it has failed to do in the instant case.

206. Therefore, under the terms of Article 8(1) of the Convention, the Commission will take into consideration, in light of the specific circumstances of the case, the three elements that it has taken into account in its consistent jurisprudence: a) the complexity of the matter, b) the conduct of the judicial authorities, and c) the procedural activities of the interested party.<sup>212</sup>

207. In this regard, the Commission considers that while the instant case might pose a certain degree of complexity in terms of the number of persons dead and accused, it must be recalled that fourteen years after the events, and ten after the case was opened, the latter remains in the oral phase of the trial and no verdict has been delivered. Moreover, as has been proven, the authorities obstructed the performance of a timely and complete autopsy, neglected to open an *ex officio* investigation for over three years, waited five years to file charges, and have failed to pronounce in a timely manner on different matters.

208. As an example, Vladimiro Montesinos, Nicolás de Bari Hermoza Ríos and Roberto Edmundo Huamán Acurra were ordered released on grounds that the judicial authority had failed to rule on their liability in a timely manner, and therefore “the ordinary period of detention [...] had inexorably expired [...] and remained in that state for eight months before being returned on July 7, 2004.” Similarly, the lack of a timely ruling on the liability of the accused Fernando Vianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles led to their acquittal. What is more, nearly four years have transpired since the oral trial began and it has still not been concluded. It is also important to underscore that Mr. Alberto Fujimori was not charged until 2007, and there has been no progress in that case.

209. Finally, in terms of the procedural activity of the interested parties, the Commission notes that, since a death is involved, in other words a crime of public action, the State has the duty to conduct an *ex officio* investigation, without the need for the participation of the interested parties. Independently of this, the records show that relatives of Eduardo Nicolás Cruz Sánchez and Herma Luz Meléndez Cueva

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<sup>209</sup> Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007.* Series C No. 166, para. 122.

<sup>210</sup> IACHR, Report No. 130/99, Víctor Manuel Oropeza (Mexico), Petition 11.740, paras. 30-32.

<sup>211</sup> Inter-Am. Ct. H.R., *Case of Ricardo Canese v. Paraguay.* Judgment of August 31, 2004. Series C No. 111, para. 142.

<sup>212</sup> IACHR, Report on the Merits No. 77/02, Waldemar Gerónimo Pinheiro and José Víctor dos Santos (Case 11.506), December 27, 2002, para. 76. See also Inter-Am. Ct. H.R., *Case of López Álvarez v. Honduras.* Judgment of February 1, 2006. Series C No. 141, para. 132; Inter-Am. Ct. H.R., *Case of García Asto and Ramírez Rojas v. Peru.* Judgment of November 25, 2005. Series C No. 137, para. 166; and Inter-Am. Ct. H.R., *Case of Acosta Calderón v. Ecuador.* Judgment of June 24, 2005. Series C No. 129, para. 105; U.N. doc. CCPR/C/GC/32 of August 23, 2007, Human Rights Committee, General Comment N° 32, para.35.

joined the criminal case as civil parties and submitted several procedural motions during the process. Similarly, relatives of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Salomón Peceros Pedraza cooperated with the nine studies performed on the remains in 2001.

210. Taking into account the foregoing, the IACHR finds that there was a violation of the reasonable time period in the criminal proceeding in the case under study.

211. Moreover, the Commission observes that despite evidence in the case file concerning obstruction by the military judge, the latter has never been prosecuted. It is also telling that no member of the military has been prosecuted as a triggerman in the execution of Eduardo Nicolás Sánchez, and all of the commandos who participated in the Operation were absolved in relation to the executions of Víctor Salomón Cruz Sánchez and Herma Luz Meléndez Cruz.

212. With respect to an effective remedy, the Commission emphasizes that the State sent part of the examination of the facts to the military jurisdiction where the proceeding was conducted in secrecy and the relatives were unable to participate. In the ordinary court jurisdiction, fourteen years after the events and ten years after the case was opened, there has not been a single conviction. Therefore, the Commission finds that the State has not guaranteed them an effective judicial remedy.

213. Based on the discussion presented in this chapter, the Commission concludes that in the instant case, the competent authorities failed to respect the judicial guarantees to which the relatives of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Salomón Peceros Pedraza were entitled, and did not provide them with an effective remedy to guarantee a fair trial, a determination of the truth of what happened, and the investigation, identification, prosecution and where warranted, punishment of the direct perpetrators and masterminds of the execution of those individuals. Therefore, the State is responsible for the violation of the right to due process guarantees and to judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of that treaty, to the detriment of Florentín Peceros Farfán, Nemecia Pedraza, Jenifer Solange Peceros Quispe, Herma Luz Cueva Torres, Edgar Odón Cruz Acuña and Lucinda Rojas Landa, relatives of the victims of extrajudicial execution.

### **3. Failure to comply with the obligation to adopt domestic provisions (Article 2 of the American Convention), in relation to Articles 8 and 25 of that instrument**

214. The Commission also considers that the facts surrounding the extrajudicial execution of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza amount to a failure to comply with Article 2 of the American Convention to the detriment of their next of kin. In this sense, while the Inter-American Commission did not pronounce on the alleged violation of that article in its admissibility report, it has been substantiated by the information and documentation provided by the parties during the processing of the instant case, and the State has had the opportunity to defend itself and to present any relevant pleadings and in fact, did so during the public hearing when it referred to its domestic jurisdiction on this point. Therefore, in application of the principle of *iura novit curia*, the Commission will develop its considerations on this point.

215. Article 2 of the American Convention establishes the general obligation of each State to adjust its domestic law in keeping with the provisions of the former in order to guarantee the rights enshrined therein, which implies that the measures of domestic law must be effective (principle of *effet utile*).<sup>213</sup>

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<sup>213</sup> Inter-Am. Ct. H.R., *Case of Radilla Pacheco v. Mexico*. Judgment on Preliminary Objections, Merits, Reparations and Costs. November 23, 2009, para. 288, Inter-Am. Ct. H.R., *Case of Garrido and Baigorria v. Argentina*, *Case of Garrido and Baigorria v. Argentina*. Merits. Judgment of February 2, 1996. Series C No. 26, para. 68; Inter-Am. Ct. H.R., *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 55.

216. The IACHR observes that the Supreme Court of Justice of Lima based its reasoning on the fact that the commandos who participated in Operation Chavín de Huántar acted “in the discharge of their duties,” under orders, in the context of a state of emergency. It also determined that this reasoning was supported by several articles of the Military Code in effect at the time of the events and by Law 24.150, in light of Article 173 of the Political Constitution of Peru, which provided that:

in case of a duty-related crime, members of the Armed Forces and the National Police are subject to the respective jurisdiction and to the Code of Military Justice, and this provision is also applicable to civilians for the crimes of Treason against the Fatherland and Terrorism. ...

217. In this regard, the Inter-American Court has established that:

The possibility that the military courts prosecute any soldier who is accused of an ordinary crime, for the mere fact of being in service, implies that the jurisdiction is granted due to the mere circumstance of being a soldier. In that sense, even when they crime is committed by soldiers while there are still in service or based on acts of same, this is not enough for their knowledge to correspond to the military criminal justice.<sup>214</sup>

218. In this sense, the Commission observes that despite finding that the facts in the instant case could amount to crimes against humanity, the Supreme Court determined that they should be taken up by the military court in relation to the soldiers involved in the operation. Moreover, this interpretation neglected to clearly and unambiguously identify which of the crimes are considered to be service-related by establishing the direct and proximal relationship with the military function or with the infringement of legally protected interests inherent to the military system.<sup>215</sup>

219. In this regard, the IACHR considers it relevant to point out that during the public hearing held in 2005, the State reported that in 2004, the Constitutional Court and the Supreme Court delivered judgments establishing that human rights violations are not service-related crimes. This notwithstanding, the IACHR notes that the State did not explain exactly how this jurisprudence might have influenced the facts in the instant case.

220. The Commission concludes, therefore, that the State failed to fulfill the obligation contained in Article 2 of the American Convention, in relation to Articles 8 and 25 of that treaty, by extending the competence of the military jurisdiction to crimes that had no direct relationship with military discipline or legally protected interests inherent to the military.

#### **4. Right to personal integrity (Article 5 of the Convention), in relation to Article 1(1) of that instrument to the detriment of the victims’ next of kin**

221. In the Commission’s view, the facts surrounding the extrajudicial execution of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza also constitute violations of Article 5 of the American Convention to the detriment of their next of kin. In this regard, while the Inter-American Commission did not pronounce on the alleged violation of this article in its admissibility report, the petitioners raised it after the admissibility report had been issued, besides which, the allegation is substantiated in the information and documentation provided by the parties during the processing of the instant case, with respect to which the State has had the opportunity to defend itself and submit its pleadings. Therefore, in application of the principle of *iura novit curia*, the Commission shall articulate its considerations on this point.

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<sup>214</sup> Inter-Am. Ct. H.R., *Case of Radilla Pacheco v. Mexico*. Judgment on Preliminary Objections, Merits, Reparations and Costs. November 23, 2009, para. 286.

<sup>215</sup> Inter-Am. Ct. H.R., *Case of Radilla Pacheco v. Mexico*. Judgment on Preliminary Objections, Merits, Reparations and Costs. November 23, 2009, para. 284. See also Inter-Am. Ct. H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207, para. 55, Inter-Am. Ct. H.R., *Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135, para. 126.

222. In relation to the relatives of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, the Commission wishes to emphasize that that the Inter-American Court has repeatedly stated that “the next of kin of the victims of human rights violations may also be victims.”<sup>216</sup>

223. Specifically with respect to arbitrary and extrajudicial executions, the Court has stated that “no evidence is required to prove the grave impact on the mental and emotional well-being of the next of kin of the victims.”<sup>217</sup> In light of the foregoing, in relation to the suffering and anguish suffered by the next of kin, and consistent with the jurisprudence of the inter-American human rights system on this subject, the Commission considers that they were also victims of a violation of their personal integrity.

224. Moreover, the IACHR notes that the petitioners claimed that the State is responsible for the violation of the personal integrity of the victims’ next of kin. They asserted that those individuals had suffered intensely due to the execution of their relatives. Moreover, the State did not notify them of the transfer of the bodies, or their burial; it also did not notify them about the results of the autopsies performed on the victims’ bodies or the causes and circumstances of their death. They added that the deaths were not investigated until the next of kin lodged a criminal complaint. Subsequently, the families have had to face the slow pace of the process, attempts to cover-up the deaths and the lack of due diligence on the part of the civilian and military judicial authorities. The state did not submit any observations in this regard.

225. Moreover, the Commission observes that the mortal remains of the executed victims were buried as NN (with the exception of Eduardo Nicolás Cruz Sánchez). The IACHR takes note of the representatives’ claim that the victims were buried without identifying them or notifying their next of kin. The State does not contest these facts in its pleadings. In this regard, the IACHR considers that the case file does not contain elements that would indicate that the executed victims were handed over to their next of kin so that the latter could dispose of their remains. In virtue of the foregoing, and assuming that they were not, in fact, handed over to the families, the Commission finds that this circumstance constitutes additional suffering for the next of kin, who were denied the ability to bury them in the place of their choosing and in keeping with their beliefs.

226. Finally, as noted earlier, the State is responsible for neglecting to seriously investigate the arbitrary and extrajudicial killings of the aforementioned victims and because of this, the facts have gone unpunished. In relation to this, the Court has established that the lack of effective remedies constitutes a source of additional suffering and anguish for the victims’ next of kin<sup>218</sup> who, in the instant case, still have not seen justice done nearly fourteen years after the events.

227. Consequently, the IACHR concludes that the State violated Articles 5(1) and 5(2) of the Convention in relation to Article 1(1) of that treaty to the detriment of the next of kin of the executed victims, namely Florentín Peceros Farfán, Nemecia Pedraza, Jenifer Solange Peceros Quispe, Herma Luz Cueva Torres, Edgar Odón Cruz Acuña and Lucinda Rojas Landa.

## V. CONCLUSIONS

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<sup>216</sup> Inter-Am. Ct. H.R., *Case of Castillo Páez. Reparations* (art. 63.1 American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, para. 88. See also Inter-Am. Ct. H.R. *Case of the Pueblo Bello Massacre*. Judgment of January 31, 2006. Series C No. 140, para. 154.

<sup>217</sup> Inter-Am. Ct. H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148, para. 262. See also Inter-Am. Ct. H.R., *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 146.

<sup>218</sup> Inter-Am. Ct. H.R., *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 104; Inter-Am. Ct. H.R., *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C No. 148, para. 261. See also, Inter-Am. Ct. H.R., *Case of the “Mapiripán Massacre”*. Judgment of September 15, 2005. Series C No. 134, para. 145; Inter-Am. Ct. H.R., *Case of the Pueblo Bello Massacre*. Judgment of January 31, 2006. Series C No. 140, para. 145; Inter-Am. Ct. H.R., *Case of the Moiwana Community*. Judgment of June 15, 2005. Series C No. 124, para. 94.

228. Based on the foregoing considerations of fact and law, the Inter-American Commission concludes that the Peruvian State is responsible for:

a) The violation of the right to life enshrined in Article 4(1) of the American Convention, in relation to Article 1(1) of that instrument, to the detriment of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza.

b) The violation of the rights to due process guarantees and judicial protection enshrined in Articles 8 and 25 of the American Convention, in relation to the obligations set out in Article 1(1) of that instrument, to the detriment of the next of kin of the executed victims, namely Edgar Cruz Acuña and Herma Luz Cueva Torres, namely Florentín Peceros Farfán, Nemecia Pedraza, Jenifer Solange Peceros Quispe, Herma Luz Cueva Torres, Edgar Odón Cruz Acuña and Lucinda Rojas Landa.

c) Failure to comply with Article 2 of the American Convention in relation to Articles 8 and 25 of that instrument.

d) The violation of the right to personal integrity enshrined in Article 5(1) and 5(2) of the American Convention, in relation to Article 1(1) of that instrument to the detriment of the next of kin of the executed victims.

## **VI. RECOMMENDATIONS**

A. In light of the foregoing conclusions,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RECOMMENDS THE STATE OF PERU,**

1. To make adequate reparations for the human rights violations declared in the instant report in both their material and moral aspects.

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

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

4. Adopt the necessary measures to prevent a future recurrence of events such as these, in accordance with the duty of prevention and guarantee of the human rights enshrined in the American Convention. In particular, implement ongoing human rights programs in Armed Forces and National Police training schools.