

INTER-AMERICAN COURT OF HUMAN RIGHTS

CESTI HURTADO CASE

JUDGMENT OF SEPTEMBER 29, 1999

In the Cesti Hurtado case,

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

Antônio A. Cançado Trindade, President
Máximo Pacheco-Gómez, Vice President
Oliver Jackman, Judge
Alirio Abreu-Burelli, Judge
Sergio García-Ramírez, Judge and
Carlos Vicente de Roux-Rengifo, Judge

also present,

Manuel E. Ventura Robles, Secretary and
Renzo Pomi, Deputy Secretary;

pursuant to Articles 29 and 55 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers the following judgment in the instant case.

* Judge Hernán Salgado-Pesantes, who presided the Court until September 16, 1999, withdrew from taking part in the preparation and adoption of this Judgment on that date.

I BACKGROUND TO THE CASE

1. On January 9, 1998, invoking the provisions of Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed an application with the Court against the Republic of Peru (hereinafter "the State", "the Peruvian State" or "Peru"), derived from petition No. 11,730, which the Secretariat of the Commission had received on March 7, 1997.

2. The Commission declared that the purpose of the application is that the Court should decide whether, in the case of Gustavo Adolfo Cesti Hurtado, the State violated Articles 5.1, 2 and 3 (Right to Humane Treatment); 7.1, 2, 3 and 6 (Right to Personal Liberty); 8. 1 and. 2 (Right to a Fair Trial); 11 (Right to Privacy); 21 (Right to Property); 25.1 and 25.2.a and c (Right to Judicial Protection); and 51.2, all the foregoing in relation to Article 1 (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects) of the Convention. Although the Court had been requested to pronounce judgment on a possible violation by the State of Article 17 (Rights of the Family), the Commission did not refer to this point again nor did it provide any arguments, consequently the Court did not pronounce judgment in this respect.

3. According to the Commission's submission, as a result of the violation of the rights indicated, Gustavo Cesti Hurtado was included in an action under the military justice system, in the course of which he was arrested, deprived of his liberty and sentenced, despite the existence of a final decision in a habeas corpus action ordering that the alleged victim should be separated from the proceedings under the military justice system and that his freedom should be respected.

4. Furthermore, the Commission requested that the Court should
- a. declare that the State violated Article 51.2 of the Convention, by not respecting the recommendations made in Report No. 45/97 of October 16, 1997;

- b. require Peru to punish those responsible for the violations against the victim;
 - c. declare that the State should execute the decision of the Public Law Chamber of Lima of February 12, 1997, and that it should liberate the alleged victim immediately and unconditionally; and
 - d. declare the nullity and the lack of legal effects of the proceeding against the alleged victim under the Peruvian military justice system, "thus annulling the judgment and all the interlocutory decisions that limit [his] personal and property rights".
5. Lastly, the Commission requested

[t]hat the Peruvian State should remedy and pay compensation to the victim for the time that he has been unlawfully detained and for the damage caused to his personal honor by treating him as a prisoner, for embargoing his assets, for the remuneration that he has not perceived by being unable to exercise his right to work while he was unjustly detained and for the anxiety caused by being obliged to receive medical treatment that he had not chosen

[and that]

the Peruvian State should be condemned to pay the costs of this action.

II PROCEEDING BEFORE THE COMMISSION

6. On March 7, 1997, the Secretariat of the Commission received a complaint made by Carmen Judith Cardó Guarderas in favor of her husband, Gustavo Adolfo Cesti Hurtado. On March 10, 1997, the Commission informed the State of the complaint and requested it to present the corresponding information within 90 days.

7. On April 25, 1997, as a precautionary measure, the Commission requested Peru to report whether the decision issued in the petition for a writ of habeas corpus filed by Gustavo Adolfo Cesti Hurtado had been complied with "in all its parts" and, if so, what measures would be adopted in this respect. Furthermore, it requested the State to submit information on the medical attention that Gustavo Adolfo Cesti Hurtado had received.

8. On July 9, 1997, the State presented "consolidated information" on the instant case, which, according to the Commission, contained "a summary of the answers presented in previous communications".

9. On September 12, 1997, the Commission made itself available to the parties to seek a friendly settlement and requested them to respond within 15 days. The State did not reply to this proposal.

10. On October 16, 1997, during its 97th session, the Commission approved Report No. 45/97, which was transmitted to the State on October 30 that year. In this Report, the Commission concluded that

1. [t]he Peruvian State is responsible for violating the right to personal freedom of Gustavo Adolfo Cesti Hurtado who is detained in the military prison of Simón Bolívar barracks in Lima; this right is protected by Article 7.1 of the American Convention[.]

2. [t]he Peruvian State is responsible for violating the right to due process of Gustavo Adolfo Cesti Hurtado, by submitting him to a tribunal that was not competent to decide on his rights and by depriving him of his personal freedom; these rights are embodied in Articles 8.1, and 7.6 of the Convention, respectively [.]

3. [t]he Peruvian State is responsible for violating the right to privacy of Gustavo Adolfo Cesti Hurtado, by resolving that he was guilty of committing a crime as the result of an illegal process, right which is embodied in Article 11 of the Convention[.]

4. [t]he Peruvian State is responsible for the failure to comply with the content of the habeas corpus decision issued by the Public

Law Chamber of Lima in favor of Gustavo Adolfo Cesti Hurtado, in an unappealable and final instance, thus violating his right that the decisions in his favor of the simple and prompt recourses to which he has a right, as established in Article 25.1 and 25.2.a and 25.2.c of the American Convention on Human Rights, should be executed [;]

5. [t]he Peruvian State is responsible for violating the right embodied in Article 21 of the Convention, against Gustavo Adolfo Cesti Hurtado[; and that]

6. [t]he Peruvian State has not allowed Gustavo Adolfo Cesti Hurtado to receive appropriate medical treatment, which is incompatible with Article 5 of the Convention.

Furthermore, in the aforementioned Report, the Commission made the following recommendations to the State:

1. [that it should execute] immediately the habeas corpus decision issued by the Public Law Chamber of Lima on February 12, 1997, in favor of Gustavo Adolfo Cesti Hurtado and, consequently, that [it should order] his liberty, leave without effect the proceeding initiated against Gustavo Adolfo Cesti Hurtado under the military justice system and the conclusions reached by this proceeding [; and]

2. [that it should compensate] Gustavo Adolfo Cesti Hurtado for the consequences of the wrongful detention, the irregular proceeding and the questioning of his honor to which he was submitted.

The Commission granted Peru a period of one month to comply with these recommendations.

11. On November 25, 1997, the State rejected the Report of the Commission and requested that the case should be definitively filed.

12. On December 22, 1997, the Commission decided to submit the case to the Court.

III PROCEEDING BEFORE THE COURT

13. The Commission presented the application to the Court on January 9, 1998. In it, it appointed Oscar Luján Fappiano as its delegate, and Jorge E. Taiana, Executive Secretary, and Christina M. Cerna as its lawyers, with Alberto Borea Odría as their assistant.

14. On January 19, 1998, the Secretariat of the Court (hereinafter "the Secretariat") informed the Commission that, following preliminary examination of the application, the President of the Court (hereinafter "the President") had decided that it was not possible to proceed to notify the State since some of the documents that appeared on the list of evidence had not been submitted to the Court. The President granted the Commission a period of 20 days to correct this defect, pursuant to the provisions of Article 34 of the Rules of Procedure. On January 21, 1998, the Commission complied with the requirement of the President.

15. The State was notified of the application on January 22, 1998. At this time, the annexes to the application were forwarded to the State, with the sole exception of the two videotapes, corresponding to annexes "B 51" and "B 54", which were forwarded on February 11 that year.

16. Pursuant to Article 35.1.e of the Rules of Procedure, the application was notified to the alleged victim in the instant case on February 11, 1998.

17. On February 20, 1998, Peru informed the Court that it had appointed David Pezúa Vivanco as *ad hoc* Judge; he subsequently resigned from this office (*infra* 24).

18. On March 20, 1998, the State appointed Jorge Hawie Soret as its agent in the instant case and submitted the following preliminary objections:

- (1) the remedies under domestic jurisdiction had not been exhausted when the [Commission] agreed to process the petition of the alleged victim; and inappropriate legal action [;]

- (2) incompetence and jurisdiction[;]
- (3) *res judicata*[; and]
- (4) lack of a previous claim before the Commission.

Furthermore, the State requested the Court to rule that the application should be filed.

19. On April 20, 1998, the Commission submitted its observations, requesting that the Court should reject the preliminary objections that had been presented "in all of their parts".

20. On May 29, 1998, the State submitted its reply to the application in which it refuted the claims of the Commission. Peru declared that the decision issued in the petition for a writ of habeas corpus, referred to in the application submitted by the Commission, was illegal, non-executable and null *ipso jure*, since the alleged victim was detained and sentenced as the result of an order issued by a competent jurisdictional body. With regard to the other allegations of the Commission, the State declared that it had never violated the personal integrity of the alleged victim, who enjoyed better conditions than other prisoners in Peru, and that Gustavo Cesti Hurtado was judged under military jurisdiction because the crimes for which he was found guilty were planned and executed in military installations, together with other officers on active service, resulting in the misappropriation of monies belonging to the military establishment. Moreover, the State declared that, in the case of Gustavo Cesti Hurtado, the right to a fair trial and due process, and the rights to privacy and to property had been respected. Lastly, the State declared that, in the judgments pronounced in cases against Peru, the Court had attacked the sovereignty of the country and that the application presented by the Commission in this case rendered its system of laws invalid and attempted to destabilize its constitutional institutions.

21. The public hearing on preliminary objections was held at the seat of the Court on November 24, 1998. During the hearing, the expert witnesses, Samuel Abad Yupanqui and Valentín Paniagua Corazao, gave their reports (*infra* 62). Moreover, subsequent to the hearing, the Commission presented seven documents on the merits of the case (*infra* 54).

22. On November 27, 1998, the State presented copies of 29 documents on the merits of the case (*infra* 46).

23. On December 9, 1998, the Court requested the State to submit an authenticated copy of a judgment of the Peruvian Constitutional Court on June 19, 1998, regarding a petition for habeas corpus presented by Carlos Alfredo Villalba Zapata, and also of a report containing "a detailed description of all the measures taken by the State to comply with the provisions of the said judgment and their effects in the domestic sphere". The Court requested these documents because it considered that they would be useful for the examination of the instant case. On January 11, 1999, Peru presented an authenticated copy of the judgment, but did not present the respective report. On January 18, 1999, the State forwarded some observations on the aforementioned judgment to the Court.

24. On December 10, 1998, David Pezúa Vivanco presented his resignation as *ad hoc* Judge in this case to the Court, because it was incompatible with his position as Executive Secretary of the Executive Committee of the Peruvian Judiciary. In this regard, in a plenary decision on January 19, 1999, the Court resolved

1. [t]o take note of the resignation of David Pezúa Vivanco from his appointment as *ad hoc* Judge in the instant case [; and]
2. [t]o continue hearing the case with its actual composition.

25. The same day, the Commission submitted its observations on the 29 documents that the State had presented on November 27, 1998, to the Court (*supra* 22).

26. On January 27, 1999, the State requested the Court to "rule that the Government of Peru should proceed to appoint a new *ad-hoc* Judge". On January 29, 1999, the Court informed Peru that it should make this appointment within the following 30 days. On March 3, 1999, the State appointed José Alberto Bustamante Belaúnde as *ad hoc* Judge.

27. On March 22, 1999, the President invited the State and the Commission to a public hearing to be held at the seat of the Court on May 24, 1999, in order to hear the declarations of Javier Velásquez Quesquén and Heriberto Benítez Rivas, witnesses presented by the Inter-American Commission, and the reports of Percy Catacora Santisteban and Jorge Chávez Lobatón, experts presented by the State. Moreover, the President instructed the Secretariat to inform the parties that they could present their final oral summing up on the merits of the case immediately after this evidence had been heard.

28. On April 12, 1999, the witness Javier Velásquez Quesquén requested the Court to excuse him from appearing, since his parliamentary work prevented him from leaving Peru and on April 19, 1999, the Commission requested that José Carlos Paredes Rojas should be called to replace him. On April 23, 1999, the President excused Javier Velásquez Quesquén and summoned José Carlos Paredes Rojas to give testimony on the facts and causes of the detention of Gustavo Adolfo Cesti Hurtado, and on the facts relating to non-compliance with habeas corpus.

29. On May 19, 1999, the witness, José Carlos Paredes Rojas, requested the Court to excuse him from appearing, because his work as a journalist in Peru prevented him from attending the public hearing on the merits of the case.

30. On May 24, 1999, the Court held a public hearing to receive the declarations of the witnesses and the expert presented by the parties.

There appear before the Court

for the State of Peru:

Jorge Hawie Soret, Agent;
Walter Palomino Cabezas, Advisor;
Sergio Tapia Tapia, Advisor; and
Raúl Talledo, Advisor.

for the Inter-American Commission:

Oscar Luján Fappiano, Delegate;
Christina Cerna, Lawyer; and
Alberto Borea Odría, Advisor.

witness presented by the Inter-American Commission:

Heriberto Benítez Rivas;

witness presented by the State:

Percy Catacora Santisteban;

and as an expert presented by the State:

Jorge Chávez Lobatón.

31. Percy Catacora Santisteban and Jorge Chávez Lobatón were presented by the Peruvian State to declare as experts. However, on May 24, 1999, the Court adopted a decision resolving that Percy Catacora Santisteban would declare as a witness.

32. On July 13, 1999, within the established period, the Commission submitted its written summing up.

33. On September 9, 1999, the State submitted its summing up. As this presentation was manifestly time-barred (the time limit expired on July 11, 1999), the Court abstained from considering it.

34. On August 12, 1999, the *ad hoc* Judge for the case, José Alberto Bustamante Belaúnde, withdrew from this appointment "due to the irreversible incompatibility that [he found] between the normal, fluid and irrecusable exercise of this appointment and [his] publicly known posi-

tion with regard to the decision of the Peruvian Government to withdraw from the contentious jurisdiction of the Court"^{1,2}.

IV

PROVISIONAL MEASURES ADOPTED IN THE CASE

35. On July 17, 1997, prior to presenting the application, the Inter-American Commission submitted to the Court a request for the adoption of provisional measures in the instant case, invoking Article 63.2 of the Convention and Article 25 of the Rules of Procedure. In this document, the Commission requests the Court that

it [should] order the Illustrious Government of Peru to comply with the judgment of the Public Law Chamber of the Superior Court of Justice of Lima in the habeas corpus action, without prejudice to the investigation being continued before the competent judicial organ in order to determine any criminal responsibility on the part of Gustavo Cesti Hurtado.

36. In a decision issued on July 29, 1997, the President requested the State to adopt "without delay, any measures [that may be] necessary to ensure the physical, mental and moral safety of Gustavo Cesti Hurtado,

1 In a note dated July 16, 1999, received by the Secretariat of the Court on July 27, 1999, the General Secretariat of the Organization of American States (OAS) informed the Court that, on July 9, 1999, Peru had deposited an instrument in which it declared that "according to the American Convention on Human Rights, the Republic of Peru withdraws[drew] the declaration that the Peruvian Government had at one time made, recognizing the optional clause of submission to the contentious jurisdiction of the Inter-American Court of Human Rights". Moreover, the Court received information verifying declarations made by the *ad hoc* Judge in the case, José Alberto Bustamante Belaúnde, in support of the position adopted by Peru.

2 Heriberto Manuel Benítez Rivas, acting as *amicus curiae*, presented a document on November 23, 1998. The same day, the Center for Legal and Social Studies (CELS) and the Center for Justice and International Law (CEJIL), acting as *amici curiae*, presented a document to the Court.

so that any provisional measures that the Court might take, if appropriate, [may] have the relevant effects".

37. On September 11, 1997, the Court ratified the resolution of its President of July 29, 1997, based on the following consideration, among others

[t]hat the facts and circumstances raised by the Commission imply that there is a direct link between the Commission's request for Gustavo Cesti Hurtado's release, in compliance with the order of habeas corpus issued by the Public Law Chamber of the Superior Court of Lima, and the substance of the merits of the case laid before the Inter-American Commission, and that it is for the Commission [to decide] at this stage. To accept the application of the Commission as it is submitted, would mean that the Court could advance criteria on the merits of a case that is not yet before it.

Furthermore, the Court requested the State to maintain the measures necessary to ensure the physical, mental and moral safety of Gustavo Cesti Hurtado.

38. On January 9, 1998, the same day that the application in the instant case was submitted to the Court (*supra* 1 and 13), the Commission presented a second request to the Court for the adoption of provisional measures with regard to Gustavo Cesti Hurtado. In such document the Commission requested the Court to order the release of both the victim and his patrimony.

39. On January 21, 1998, the Court issued a decision in which it declared that, in order to decide on the applications of the Commission, it would require additional information to that which it then possessed. Moreover, it requested the State to maintain the provisional measures to ensure the personal safety of Gustavo Cesti Hurtado.

40. At the date of the deliberations on this judgment, the State had presented nine reports on the provisional measures adopted and the Commission had presented its observations on eight of these.

V COMPETENCE

41. The Court is competent to hear the instant case. Peru has been a State Party to the American Convention since July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981.

VI THE EVIDENCE

DOCUMENTARY EVIDENCE

42. In annex to the written complaint, the Commission presented copies of documents relating to:

- a. the identity and activities of Gustavo Cesti Hurtado³;
- b. the criminal complaint against Gustavo Cesti Hurtado⁴;
- c. the arrest and detention of Gustavo Cesti Hurtado⁵;

3 Cfr. Copy of the Electoral Card of Gustavo Adolfo Cesti Hurtado; copy of a contract dated November 2, 1993, for advisory services on insurance, between the Brigade General Logistics Command (COLOGE) and Gustavo Adolfo Cesti Hurtado, copy of a public document registering the incorporation of the company Top Security Asesores y Corredores de Seguros S.A.

4 Cfr. Copy of official communication No. 342 CL-K1/20.04 of November 25, 1996, signed by the Commander General of COLOGE, Luis Mayaute Ghezzi, addressed to the Division General, President of the Supreme Council of Military Justice, copy of a decision of the Court-Martial of the Supreme Council of Military Justice, of December 23, 1996.

5 Cfr. Copy of the decision of the Examining Magistrate of the Supreme Council of Military Justice, of January 17, 1997, copy of the article entitled "For losses of one million fifty thousand dollars. Military court detains Army broker", published on page 13 of the newspaper, *La República*, on Saturday, March 1, 1997; copy of the article entitled "Former Army advisor arrested", published in the newspaper, *El Comercio*, on Saturday, March 1, 1997, no page number indicated; decision of the Examining Magistrate of the Supreme Council of Military Justice, of March 8, 1997.

- d. the proceeding to which Gustavo Cesti Hurtado was submitted before the military court⁶;
- e. the medical treatment and health of Gustavo Cesti Hurtado⁷;

6 *Cfr. Copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Supreme Council of Military Justice on February 25, 1997, with a received stamp dated February 27, 1997, copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Supreme Council of Military Justice on March 19, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Supreme Council of Military Justice on March 21, 1997, with receipt dated March 24, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Court-Martial of the Supreme Council of Military Justice on March 26, 1997, with a received stamp dated April 1, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Court-Martial of the Supreme Council of Military Justice on April 2, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Court-Martial of the Military Justice Council on April 6, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Review Chamber of the Military Court on April 20, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Review Chamber of the Military Court on April 30, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Supreme Council of Military Justice on June 16, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Review Chamber of the Military Court on June 30, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Court-Martial of the Supreme Council of Military Justice on September 18, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Court-Martial of the Supreme Council of Military Justice on October 6, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Court-Martial of the Supreme Council of Military Justice on October 21, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Court-Martial of the Supreme Council of Military Justice on October 30, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Court-Martial of the Supreme Council of Military Justice on November 5, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Court-Martial of the Supreme Council of Military Justice on November 20, 1997; copy of three newspaper articles; copy of the official document dated May 20, 1997, notifying Gustavo Adolfo Cesti Hurtado of the decision of the Supreme Council of Military Justice.*

7 *Cfr. copies of 11 receipts from the Central Military Hospital and copy of the rates for hospital care [Directive No. 01 CP-AYU-2 of April 1990]; copy of the request addressed by Gustavo Adolfo Cesti Hurtado to Doctor Baltazar Alvarado, Director of the Central Military Hospital on June 24, 1997; copy of the psychological report prepared by Doctor Luis Arata Cuzcano on November 26, 1997; copy of a medical report issued by Doctor César Segura Serveleon on May 30, 1997; copy of a medical report issued by Doctor César Segura Serveleon on June 10, 1997; copy of the notification of the decision of the Court-*

- f. the judgment pronounced by the military court against Gustavo Cesti Hurtado⁸;
- g. the petition for habeas corpus filed by Gustavo Cesti Hurtado before the Public Law Chamber of the Supreme Court of Justice of Lima⁹;

Martial of the Supreme Council of Military Justice of November 20, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Court-Martial of the Supreme Council of Military Justice on December 4, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Court-Martial of the Supreme Council of Military Justice on November 20, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Court-Martial of the Supreme Council of Military Justice on November 5, 1997; copy of legal notification No. 1237 V.I.CSJM.3.S. of November 4, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Court-Martial of the Supreme Council of Military Justice on October 30, 1997; copy of legal notification No. 717 V.I.CSJM.3.S. of June 18, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Examining Magistrate of the Military Court on June 16, 1997; copy of the report issued by the Bar Association of Lima on December 10, 1997, addressed to Carmen Cardo Guarderas de Cesti.

8 *Cfr. Copy of official communication No. 186-SG-CSJM, addressed by the President of the Court-Martial of the Supreme Council of Military Justice to the Provost General of the Peruvian Army on April 14, 1997; decision of the Supreme Council of Military Justice, issued by the Review Chamber on May 2, 1997; copy of seven newspaper articles.*

9 *Cfr. record of the petition for habeas corpus filed by Gustavo Adolfo Cesti Hurtado before the Public Law Chamber of the Superior Court of Justice of Lima, which includes a copy of the decision of the Public Law Chamber of Lima of December 13, 1996; copy of the petition for habeas corpus filed by Gustavo Adolfo Cesti Hurtado before the Public Law Chamber on January 31, 1997; official documents notifying decision No. 1 of the Permanently Sitting Criminal Court of January 31, 1997, to the Public Prosecutor of the Defense Ministry; copy of the decision of the Thirtieth Criminal Court of Lima of February 3, 1997; copy of the record of the declaration made by Colonel Jorge Molina Huamán, Secretary General of the Supreme Council of Military Justice on February 3, 1997; copy of the notification of appearance signed by Gregorio Huerta Tito, Deputy Public Prosecutor of the Peruvian Army on January 4, 1997; copy of the notification of appearance signed by Mario Cavagnaro Basile, Public Prosecutor in charge of judicial affairs of the Ministry of the Interior of February 3, 1997; copy of the decision of the Public Law Chamber of February 12, 1997, in proceeding 335-97; official documents notifying the decision of the Public Law Chamber of February 12, 1997, in proceeding 335-97 to the Public Prosecutor of the Peruvian Army and to the Public Prosecutor of the Ministry of the Interior.*

- h. the effects of the decision in the habeas corpus action filed by Gustavo Cesti Hurtado¹⁰;
- i. the out-of-court steps taken by Gustavo Cesti Hurtado, members of his family and other persons¹¹;
- j. the complaint against the members of the Supreme Council of Military Justice, made by the Thirtieth Criminal Court of Lima¹²;

10 Cfr. copy of the notification of the decision of the Examining Magistrate of the Supreme Council of Military Justice of February 26, 1997, to the President of the Public Law Chamber of the Superior Court of Justice of Lima, executed on March 3, 1997; copy of the decision of the Public Law Chamber of the Superior Court of Justice of Lima of March 6, 1997; copy of the decision of the Thirtieth Criminal Court of Lima of March 13, 1997; copy of the official communication of the Judge of the Thirtieth Criminal Court of Lima to the President of the Supreme Council of Military Justice of March 13, 1997; copy of the act of verification of the Thirtieth Criminal Court of Lima of 15:30 hours on March 14, 1997; copy of the act of verification of the Thirtieth Criminal Court of Lima of 16:45 hours on March 14, 1997; copy of the act of verification of the Thirtieth Criminal Court of Lima of 10:35 hours on March 17, 1997; copy of the decision of the Thirtieth Criminal Court of Lima of March 18, 1997; copy of the official communication signed by Pedro Infantes Ramírez on March 18, 1997; copy of official communication No. 01-97-S-AS-HC of the Thirtieth Criminal Court of Lima dated March 18, 1997; copy of the decision of the Thirtieth Criminal Court of Lima of March 19, 1997; copy of the note signed by Sebastian J. Amado Sánchez, Secretary of the Thirtieth Criminal Court of Lima on March 19, 1997; copy of the decision of the Court-Martial of the Supreme Council of Military Justice of March 18, 1997; copy of official communication No. 175-S-CSJM of the Supreme Council of Military Justice on March 19, 1997.

11 Cfr. letter addressed by Gustavo Adolfo Cesti Hurtado to the Peruvian Public Defender on February 28, 1997; copy of Decision No. 012-97/DP of the Public Defender; copy of two letters addressed to the President of the Republic; copies of letters addressed by the University Human Rights Network to the President of the Human Rights Committee of the Congress of the Republic on December 10, 1997, to the Dean of the Bar Association of Lima on December 4, 1997, and to the President of the Congress of the Republic, the President of the Supreme Council of Military Justice, the President of the Supreme Court of Justice and the President of the Republic on November 25, 1997; copy of a report issued by the Human Rights Committee of the Bar Association of Lima on September 5, 1997.

12 Cfr. copy of the decision of the Thirtieth Criminal Court of Lima of March 20, 1997; copy of official communication No. 538-97-AP-FN, addressed by Miguel Aljovín

- k. the complaint against Miguel Aljovin Swayne, Prosecutor General, made by the Supreme Council of Military Justice¹³;
- l. the complaint against the judges, Sergio Salas Villalobos, Juan Castillo Vásquez and Elizabeth Roxana MacRae Thays, made by the Prosecutor General of the Supreme Council of Military Justice¹⁴;
- m. general information on the Peruvian Judiciary¹⁵;

Swayne, Prosecutor General, to Nelly Calderón Navarro, Supreme Prosecutor for actions under administrative law of April 30, 1997; decision of the Supreme Court of Justice of Peru of May 19, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Second Transitory Chamber of the Supreme Court of Justice of the Republic on May 21, 1997; copy of the decision of the First Transitory Criminal Chamber of the Supreme Court of Justice of the Republic of June 6, 1997; copy of the letter addressed by Alberto Borea Odría to the First Transitory Criminal Chamber of the Supreme Court of Justice of the Republic on June 25, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Special Criminal Chamber of the Supreme Court of Justice of the Republic on June 17, 1997; copy of the letter addressed by Gustavo Adolfo Cesti Hurtado to the Special Criminal Chamber of the Supreme Court of Justice of the Republic on July 25, 1997.

13 *Cfr. copies of 18 newspaper articles regarding the complaint of the Supreme Council of Military Justice against the Prosecutor General.*

14 *Cfr. copy of official communication No. 374-97-(Case No 167-97-CC)-MP-F.SUPR.C.I., of the Supreme Prosecutor for Internal Supervision of the Office of the Public Prosecutor, of April 3, 1997; copy of the complaint made by the General Prosecutor of the Supreme Council of Military Justice to the President of the Executive Committee of the Office of the Public Prosecutor, of March 7, 1997; copy of the extended complaint of March 7, 1997, made by the Prosecutor General of the Supreme Council of Military Justice to the President of the Executive Committee of the Office of the Public Prosecutor, dated March 25, 1997; copy of decision No. 3122 of the Office of the Supreme Prosecutor for Internal Supervision of the Office of the Public Prosecutor, of July 15, 1997; copy of the publication of decision No. 795-97-MP-CEMP of the Executive Committee of the Office of the Public Prosecutor, published in *El Peruano* on Thursday, September 4, 1997, page 152387.*

15 *Cfr. article in the magazine *Caretas* of November 20, 1997, p. 12, 13, 77 and an unnumbered page; copies of the article published in the daily newspaper, *El Comercio*, on Saturday, July 26, 1997, page A8; copies of 41 newspaper articles; copy of two articles pub-*

- n. Peruvian legislation of relevance in the instant case¹⁶;
- o. general information on the Peruvian military justice system¹⁷; and
- p. the proceedings of the case before the Inter-American Commission¹⁸.

43. The documents presented by the Commission were not disputed or questioned, nor was their authenticity put in doubt, therefore the Court accepts them as valid.

lished in the daily newspaper, El Comercio, on June 24 and 25, 1997, pages A8 and A6, respectively; copy of administrative decisions Nos. 001-97-SC and S-CSJ, which "Create corporate transitory chambers and courts specialized in public law and in matters relating to actions under administrative law in the Judicial District of Lima"; copy of administrative decision No. 393-CME-PJ, which "[a]ppoints members of the Permanent and Transitory Chambers of the Supreme Court of Justice..

16 *Cfr. copy of the 1993 Political Constitution of Peru, Articles 1, 139 sub-sections 1 to 5, 169 and 173; copy of Legislative Decree No. 752, that adopts the Law on the Military Status of Army, Navy and Air Force Officials, Articles 12, 23 and 53; copy of Law No. 23,506, "Law of Habeas Corpus and Amparo", Articles 21 and 39; copy of Law No. 26,435, "Organic Law of the Constitutional Tribunal", Article 41; copy of Legislative Decree No. 052, "Organic Law of the Office of the Public Prosecutor", Article 12; copy of the Legislative Decree that adopts the new text of the General Law on Banking, Financial and Insurance Institutions, Articles 494 and 495; copy of Law No. 26,702, "Law that adopts the General Law of the Financial System and the Insurance System and the Organic Law of the Superintendent of Banking and Insurance", Articles 340 and 341; Code of Military Justice of Peru, Articles 369 and 519.*

17 *Cfr. article in the weekly legal journal "Vistos" of April 16, 1997, front cover and p. 2, 5, 6 and 7; copy of 15 newspaper articles.*

18 *Cfr. copy of the document with the complaint addressed by Carmen Judith Cardó Guarderas de Cesti to the Secretary General (sic) of the Inter-American Commission on Human Rights; copy of official communication No. 7-5-M/243 of the Permanent Representation of Peru before the Organization of American States; request for precautionary measures issued by the Inter-American Commission on April 25, 1997; copy of report No. 45/97, issued by the Inter-American Commission; proceeding before the Inter-American Commission.*

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44. In contesting the application, Peru presented copies of three documents on:

- a. the complaint against the members of the Supreme Council of Military Justice¹⁹; and
- b. the complaint against the members of the Public Law Chamber of the Supreme Court of Justice of Lima²⁰.

45. The documents listed, presented by the State, were not contested nor objected to, neither was their authenticity put in doubt, so that the Court accepts them as valid.

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46. On November 27, 1998, the State presented copies of 29 documents, which, it said, were related to matters of competence in the instant case²¹.

19 *Cfr. copy of the decision of the Supreme Court of Justice of May 19, 1997; copy of the decision of the Special Chamber of the Supreme Court of Justice of July 30, 1997.*

20 *Cfr. copy of the decision of the Supervisory Office for Judges of the Supreme Court of Justice of the Republic of July 25, 1997 in investigation No. 25-97.*

21 *Cfr. copy of the decision of the Public Law Chamber of February 12, 1997 in proceedings No. 335-97; copy of report No. 1732-97-2a.FSP-MP of the Council of War of the Army's First Judicial Zone of April 28, 1997; copy of the decision of the Criminal Chamber of June 27, 1997; copy of the decision of the Public Law Chamber of Lima of December 13, 1996; copy of opinion No. 1805-97-1FSP-MP of the Criminal Chamber of the Superior Court of Ayacucho of April 28, 1997; copy of the decision of the Criminal Chamber of the Supreme Court of Justice of June 27, 1997; copy of the decision of July 15, 1997, the author is not identified; copy of the official communication signed by the Deputy Prosecutor General of the Supreme Council of Military Justice on June 16, 1997, opinion No. 731, case No. 014-*

47. Article 43 of the Rules of Procedure establishes that

[i]tems of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto and, where appropriate, in the communication setting out the preliminary objections and in the answer thereto. Should any of the parties allege *force majeure*, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing party is guaranteed the right of defense.

V-97; copy of the opinion signed by the Auditor General of the Supreme Court of Military Justice of July 4, 1997, opinion No. 1465, case No. 014-V-97; copy of the decision of the Supreme Court of Justice of November 18, 1997; copy of the decision of the First Transitory Criminal Chamber of the Supreme Court of Justice of August 7, 1997; copy of opinion No. 2606-97-1 FSP-MP issued by the Supreme Criminal Prosecutor of the Office of the First Supreme Criminal Prosecutor on June 23, 1997; copy of opinion No. 2526-97-2FSP-MP, issued by the Supreme Prosecutor of the Office of the Second Supreme Criminal Prosecutor on July 1, 1997; copy of the decision of the Criminal Chamber of the Supreme Court of Justice of August 19, 1997; copy of the decision of the Criminal Chamber of the Supreme Court of Justice of September 2, 1997; copy of opinion No. 2514-97-2FSP-MP, issued by the Deputy Supreme Prosecutor in charge of the Office of the Second Supreme Criminal Prosecutor on August 7, 1997; copy of opinion No. 3389-97-1FSP/MP, issued by the Supreme Criminal Prosecutor of the Office of the First Supreme Criminal Prosecutor on September 5, 1997; copy of the decision of the Criminal Chamber of the Supreme Court of Justice of October 14, 1997; copy of Decree-Law No. 23,214, Code of Military Justice; Articles 328 to 366; copy of the decision of Criminal Chamber "B" of May 26, 1998; copy of opinion No. 071-98-MP-FN-4a FSP, issued by the Provisional Supreme Prosecutor Specialized in the Crime of Terrorism, of April 30, 1998; copy of opinion No. 4329-97-MP-FN-2a FSP, issued by the Supreme Prosecutor of the Office of the Second Supreme Criminal Prosecutor on November 28, 1997; copy of the decision of Criminal Chamber "C" of the Supreme Court of Justice of April 28, 1998; copy of report No. 4010-97-I-FSP-MP, issued by the Supreme Criminal Prosecutor of the Office of the First Supreme Criminal Prosecutor of November 11, 1997; copy of the decision of Criminal Chamber "C" of the Supreme Court of Justice of April 20, 1998; copy of the decision of the First Transitory Criminal Chamber of March 5, 1998; copy of opinion No. 3471-97-MP-FN-2a FSP, issued by the Supreme Prosecutor of the Office of the Second Supreme Criminal Prosecutor on September 10, 1997; copy of the decision of the Criminal Chamber of the Supreme Court of Justice of December 9, 1997.

This provision confers an exceptional character on the possibility of admitting items of evidence at times other than those indicated. This exception would be applicable only should the applicant allege *force majeure*, serious impediment or supervening events.

48. During the public hearing on preliminary objections, the State declared that it would submit to the Court copies of "repeated jurisprudence" on the subject matter of the instant case. However, neither on that occasion, nor in its presentation brief of November 27, 1998 (*supra* 46), did the State make any statement on the reasons for the extemporaneous presentation of these items of evidence. Therefore, the Court will consider whether the circumstances that determined the late presentation can be considered exceptional in order to justify their admission and whether the evidence offered is related to the subject matter of the application in this case, based on the available elements.

49. The Court examined the 29 documents presented by the State. Of these, 28 correspond to judicial decisions, while the twenty-ninth is a copy of the Peruvian Code of Military Justice.

50. With regard to the judicial decisions, the Court has verified that, without exception, they were issued before the date on which Peru presented its reply to the application. Furthermore, of these documents, the only ones that are relevant to the subject matter of this case are the first and the fourth²². However, the Court has verified that the Commission had added copies of these documents to the file as annexes to its application (*supra* 42 and 25), and they have already been added to the pool of evidence in the case; consequently, it is unnecessary to incorporate them for a second time.

51. The other documents presented by the State do not refer to facts that will be examined by the Court in the Cesti Hurtado case, according

22 *Cfr.* copy of the decision of the Public Law Chamber of February 12, 1997 in proceeding 335-97; and copy of the decision of the Public Law Chamber of Lima of December 13, 1996.

to the text of the corresponding application. Indeed, although the State declared that they are "photocopies of contradictory decisions of the Public Law Chamber, signed by the same judges [who declared the petition for a writ of habeas corpus filed by Gustavo Cesti Hurtado with merit]", the Court has verified that, with the exception of the first and fourth document that have already been mentioned, twelve of the documents are not judicial decisions. The remaining fourteen documents are copies of judicial decisions, none of which were issued by the Public Law Chamber.

52. In this respect, the exceptional circumstances that would justify the late presentation of this documentation have not been demonstrated, so that it would be inappropriate to admit it.

53. The remaining document, a copy of the Peruvian Code of Military Justice²³ is considered useful to decide the instant case; therefore, it is added to the pool of evidence, pursuant to the provisions of Article 44.1 of the Rules of Procedure.

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54. On November 24, 1998, after the public hearing on preliminary objections, the Inter-American Commission presented copies of seven documents²⁴.

23 Cfr. copy of Decree-Law No. 23,214, Code of Military Justice (Articles 328 to 366).

24 Cfr. copy of the volume entitled "Defensoria del Pueblo: Serie Informes Defensoriales - Informe No. 6: "Lineamientos para la reforma de la justicia militar en el Perú"", Lima, 1998; copy of the volume entitled "Defensoria del Pueblo - Primer informe del Defensor del Pueblo al Congreso de la República 1996 - 1998 Perú - Al servicio de la ciudadanía", 1998; copy of the volume entitled "Revista de la Defensoria del Pueblo - Debate Defensorial" No. 1, September 1998; copy of the volume entitled "Defensoria del Pueblo - Incumplimiento de Sentencias por parte de la administración estatal", Lima, October 1998; copy of the judgment of the Constitutional Tribunal of July 2, 1998, published in El Peruano on September 29, 1998; copy of a newspaper cutting from El Comercio of October 7, 1998, entitled "Justicia Militar y habeas corpus", by Samuel B. Abad Yupanqui; and copy of the judgment of June 19, 1998, published in El Peruano on September 30, 1998.

55. The Commission presented the first six documents because they had been offered to the Court by the expert, Samuel Abad Yupanqui, when he gave his expert report (*infra* 62). The Court has verified that these six cases are volumes or articles published subsequent to the application, which are of interest for examining the declarations of the expert. Accordingly, it is pertinent to add them to the pool of evidence in the case.

56. The seventh document mentioned is simply a copy of a judgment. The Court subsequently requested the State to present an authenticated copy of the same document (*supra* 23), and Peru complied with this request (*infra* 57). It is therefore unnecessary to add the copy presented by the Commission to the pool of evidence.

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57. On January 11, 1999, at the request of the Court, the State presented an authenticated copy of the judgment pronounced by the Constitutional Court, on June 19, 1998, in the petition for habeas corpus filed by Carlos Alfredo Villalba Zapata (*supra* 23)²⁵.

58. The Commission did not contest the document presented by the State, nor was its authenticity doubted, so that it is appropriate to rule that it should be incorporated into the pool of evidence in the case.

TESTIMONY

59. The declarations of the witnesses, Benítez Rivas and Catacora Santisteban, were not contested during the proceedings and, accordingly, the Court added them to the pool of evidence in the case. In continuation, the Court summarizes these declarations.

²⁵ Cfr. authenticated copy of the judgment pronounced by the Jurisdictional Plenary of the Constitutional Court of Peru on June 19, 1998 in proceeding No. 585-96-HC/TC

a. Testimony of Heriberto Benítez Rivas, Chairman of the Human Rights Committee of the Bar Association of Lima

Heriberto Benítez is a lawyer by profession and Chairman of the Human Rights Committee of the Bar Association of Lima. As is the case of almost all the Bar Associations in Peru, the organization to which he belongs is familiar with the Cesti Hurtado case. The Committee he chairs issued an opinion in which it asserted that, as habeas corpus had not been respected, Gustavo Cesti Hurtado was arbitrarily detained. This opinion was elevated to the Board of Directors of the Bar Association of Lima, the highest authority of the Association, which approved it unanimously, so that it constituted an institutional opinion, which all lawyers were obliged to accept.

The witness declared that the Executive Commission on Human Rights of the Bar Association of Lima had communicated with the Supreme Court of Justice of Peru, with the Office of the Public Defender and with human rights organizations concerned by the situation of Gustavo Cesti Hurtado. It has also addressed the Supreme Council of Military Justice, requesting it to comply with the habeas corpus, but it has never obtained an answer.

It had also resorted to the following international organizations seeking support to ensure compliance with the writ of habeas corpus: United Nations agencies; Amnesty International; the International Union of Lawyers; the European Parliament; the Human Rights Committee of the Mexican Chamber of Deputies; other Bar Associations, such as those of Guatemala and Puerto Rico; and organizations such as CODEHUCA, Americas Watch, Washington Law, Washington Office, etc.

The witness declared that the Bar Association had found it "extremely difficult... to communicate personally [with Gustavo Cesti Hurtado] in order to get a real feeling of what he has been suffering". He mentioned that he had not been allowed to enter the Simón Bolívar Barracks, where Gustavo Cesti Hurtado was imprisoned. The witness was only able to speak with him for 10 to

15 minutes on one occasion, after which it was not possible to speak with him again.

With regard to habeas corpus, the witness declared as follows:

a decision already exists that meets all legal requirements, pronounced by a judge with general jurisdiction, it has even been published in the official gazette 'El Peruano' but, to date, there has been resistance to comply with this constitutional action of habeas corpus and I insist that this situation is of considerable concern to Peruvian lawyers. This judgment should have been complied with already, and this non-compliance has given rise, not only to the responsibility of the judges who applied resistance, but it has even signified that a totally irregular process has subsequently been initiated, which violates constitutional and procedural guarantees and which has caused a person to be deprived of his liberty up until now.

b. Testimony of Percy Catacora Santisteban, Major General in the Peruvian Air Force

Percy Catacora Santisteban is a lawyer and a Major General in the Peruvian Air Force.

According to the witness, the concept of the independence of military justice consists in a series of "principles and rights of the jurisdictional function [such as] the unity and exclusivity of the jurisdictional function. There is not, nor can there be, any independent jurisdiction, except for the military and arbitrational jurisdiction". Military justice is completely independent, so that interference from other organs, be they judicial or administrative, is not allowed. Since the military justice system is independent, the officials who work in it are also autonomous and independent. Article 192 of the Code of Military Justice sanctions whosoever attempts or aspires to direct or determine the conduct of a military proceeding or of a military judge.

Percy Catacora defined the autonomy of military justice as follows: "the judicial official does not depend on other outside higher, political, administrative instances... there can be no... interference because, to the contrary, if the authorities do not respect the autonomy of jurisdictional institutions, the Nation's legal system is harmed". The habeas corpus granting Gustavo Cesti Hurtado his liberty and lifting his impediment to travel abroad implied manifest interference in the autonomy and independence of the military justice system.

With regard to *res judicata*, he stated that for this figure to exist in a military procedure, all that is required is a jurisdictional decision by military judges, without the participation of the judge of general jurisdiction through the consultation mechanism. Under the military justice system, final judgments are not consulted with any outside body and even less with the ordinary jurisdiction. They become enforceable when they are appealed or reviewed before the Supreme Council of Military Justice. In the military justice system, a final judgment may be annulled by the court itself, but only in specific circumstances and with special requirements, through an extraordinary appeal for review of final judgment.

The witness stated that he was familiar with the Cesti Hurtado case, as he had been involved in it as a member of the Court-Martial. In his opinion, the habeas corpus violated the principles of independence and autonomy of the military justice system. Basically, this recourse related to a jurisdictional dispute and the Supreme Court of the Republic was the technical organ that settled jurisdictional conflicts. In this respect, he mentioned that doctor Elcira Vásquez, who was in charge of the Supervisory Office for Judges of the Supreme Court, penalized members because they had exceeded their responsibilities. Furthermore, she mentioned that "a petition for habeas corpus is not in order when a preliminary investigation has been opened against the petitioner", that is, when a judicial action is under way.

The witness declared that the officials of the military justice system could not carry out the order in the habeas corpus decision since, if

they had done so, they would have suffered a series of consequences, such as being sanctioned or even indicted under the military justice system. In these circumstances, Gustavo Cesti Hurtado had various simple and prompt recourses, such as: if the defendant did not acknowledge his guilt and denied his legal relationship with the facts, he could offer a sufficient provisional guarantee to obtain release on bail; he could have filed a plea as to the jurisdiction of the court before the judge or tribunal that was considered incompetent and, lastly, he could have taken steps in the ordinary jurisdiction to initiate a jurisdictional dispute by requesting that proceedings should be opened and filing a jurisdictional dispute. Gustavo Cesti Hurtado could not request release on bail because he was subject to an embargo, but he could have taken advantage of the guarantees mentioned above. If he had obtained release on bail he could have contested the jurisdiction.

The witness stated that Peruvian military justice applies the Constitution, the laws of Peru, international treaties, and the Geneva Convention and its protocols. Furthermore, it applies the United Nations International Covenant on Civil and Political Rights, whenever it benefits the administration of military justice. Military justice is subordinate to the constitutional order to defend sovereignty, territory and territorial integrity, and to ensure discipline.

Military judges are nominated by the superior officers and are appointed by Supreme Decision; this means that they are appointed by the President of the Republic, who is the Commander in Chief of the Armed Forces.

The witness declared that Gustavo Cesti Hurtado was a retired member of the armed forces, which is the situation of an officer who is not on active duty or in reserve, but definitively separated from the service. He mentioned that he is aware of Article 12 of the Law on Military Status, which establishes that only officers on active duty or in reserve are subject to the Code of Military Justice, and that this law does not consider that retired officers fall within

this jurisdiction. However, he stated that this law is clearly administrative in nature, basing his reply on the following arguments: "both officers on active duty and officers in reserve are subject to the Code of Military Justice and to the Investigation Councils, and the Investigation Councils are administrative bodies that prosecute officers for misdemeanors or crimes and, if the fact has been proved, they make a recommendation and this recommendation is that the transgressor is made known to or accused under the military justice system". The witness pointed out that retired officers are not mentioned, because a retired officer is not subject to the Investigation Councils.

When questioned on whether military justice applies Article 169 of the Constitution, which establishes that the persons who are subject to the military justice system are those who occupy a military function, the witness responded that it depended on the circumstances and, as an example, quoted fraud, saying that in the case of a fraud committed within a military barracks there is a functional relationship. In particular, he asserted:

[W]e are faced with the case of a person who enjoyed the complete confidence of the army and who had powers of decision on the financial resources of the barracks, which are State resources. So that, together with a member of the armed forces he took monies from the public purse for personal ends, breaking a series of administrative regulations. Hence, this was intimately linked to function. The crime of fraud... is contemplated in the ordinary Criminal Code, but it is also contemplated in the Code of Military Justice, and this is sacred for the military justice system and also for the administrative body, because the monies were for national defense purposes.

The witness declared that the habeas corpus decided in favor of Gustavo Cesti Hurtado was not *res judicata*, since it did not apply to the military jurisdiction. When asked whether the military justice system can refuse to comply with habeas corpus decisions classed

as *res judicata*, he replied that it depended on the circumstances, such as in the present case, in which this decision breached legal provisions and exceeded Article 361 of the Code of Military Justice, according to which the Supreme Court is the only body that may resolve conflicts of jurisdiction. The witness insisted that habeas corpus is not applicable under the military justice system because this system is based on judicial decisions and strictly ordinary proceedings

EXPERT EVIDENCE

60. The report by the expert, Jorge Chávez Lobatón, was not contested during the proceedings and, therefore, the Court added it to the pool of evidence in this case.

61. In continuation, the Court summarizes the expert's report:

a. Report of Jorge Chávez Lobatón, Secretary General of the Supreme Council of Military Justice

Jorge Chávez Lobatón was summoned by the Court, at the request of the State, to submit a report on the Organic Law of Military Justice, the Code of Military Justice and the exceptions that render military jurisdiction invalid. He is a lawyer by profession with the rank of Colonel in the Peruvian Air Force. He is currently Secretary General of the Supreme Council of Military Justice.

With regard to the Organic Law of Military Justice, the expert referred to several of its 103 articles, as follows:

i. Article 2 indicates that the Military Justice Tribunals are responsible for preserving order, morality and discipline within the armed forces;

ii. Article 3 establishes that military justice is autonomous and that, in the exercise of its functions, its members do not depend on any administrative authority, but on higher-ranking judicial bodies;

- iii. Article 1 describes the authority to administer military justice, which, in time of peace, is exercised by the Supreme Court of Justice, in the first place and, secondly, by the Supreme Council of Military Justice, the Courts-Martial, the Superior Councils, and the trial judges;
- iv. Article 4 states that it corresponds to the Supreme Court to settle the jurisdictional disputes that may arise among military and ordinary courts;
- v. Article 5 establishes that the Supreme Council of Military Justice has jurisdiction throughout the Republic over the police and the armed forces and has its seat in the capital of the Republic. It is composed of ten members, five of whom are lawyers who belong to the Military Juridical Corps and five are career officers. Military justice requires the support of this joint tribunal that, on the one hand, has expertise in military matters and, on the other, expertise in legal matters;
- vi. Article 10 establishes that, on matters that are initially considered by the Supreme Council, it has competence to judge generals and admirals of the armed forces and their counterparts in the police force;
- vii. Article 12, sub-section 10, states that it is the Supreme Council that initially considers military cases against generals and admirals, even when other officers of a lower rank are involved in the proceeding, which means that "when an ordinary proceeding against a general is established, this general "pulls in" all the officers of a lower rank;
- viii. Article 62 regulates the structure of military justice, which is composed of lawyers and also of armed forces officers, since it is a joint tribunal.

The expert stated that when a lawyer of the Military Juridical Corps who works in a special legal field is posted elsewhere, the chief mili-

tary justice authority must make the proposal, since such changes cannot be made arbitrarily by the military commands.

With regard to the Code of Military Justice, he declared that it is a substantive and procedural code. One part of it defines the crimes and the other describes the procedures. This Code sets out who is considered to be a member of the armed forces, and establishes that a military criminal proceeding may be opened against such a person. In particular, Article 320 establishes that military jurisdiction is applicable by reason of the crime or of the rank. While Article 321 states that "for the effects of this Code, members of the armed forces are those persons who have a military rank or who are on military service, according to the Organic Laws of the armed forces and the police forces, which govern personnel from the different services".

The expert stated that, according to the Law on Military Status, an officer never loses his rank, which he retains while he lives. This law establishes that there are officers on active duty, in reserve and in retirement. Thus, a person who is retired is an officer - a retired officer - and this military rank can only be taken away by a judicial decision. If no such judicial decision exists, a person will retain his military rank until the day he dies. He declared that a retired officer has a military rank because the law says so. Accordingly, he concluded that military justice is competent to judge a retired captain as he has a military rank.

The expert stated that according to Article 326 of the Code of Military Justice, the military jurisdiction is also competent *ratione loci*. Furthermore, he declared that the crime of fraud is contemplated and sanctioned in the Code of Military Justice, specifically in Article 279.

With regard to the measures to challenge jurisdiction and render it invalid, the expert declared that a military judge may cease to hear a proceeding against a member of the armed forces through a jurisdictional dispute, elevating the matter to the Supreme Court of

Justice (which has the last word in this regard) and requesting the Supreme Court to decide whether the case should be heard by ordinary or military justice. There are two procedures to invalidate jurisdiction: disputing jurisdiction and a plea as to the jurisdiction of the court. The defendant himself may request that jurisdiction should be invalidated by filing a jurisdictional dispute or by presenting exceptions against the criminal action, within the judicial proceeding; there are four exceptions: a plea as to the jurisdiction of the court, prescription, *res judicata* and amnesty. The plea as to the jurisdiction of the court is only in order during pre-trial proceedings.

According to the expert, a plea as to the jurisdiction of the court is not a very long procedure. If the judge considers it necessary, he opens it to evidence for a period of three days, and once this has expired, he elevates the file to the Council with the corresponding report; hence, this is a prompt and simple recourse. The Council takes a decision in the normal period that any tribunal has to take a decision, which may be from 8 to 15 days at most.

As regards the Cesti Hurtado case, he stated that when Gustavo Cesti Hurtado realized that he was being submitted to a proceeding with an order of appearance, he could have challenged the jurisdiction through a plea as to the jurisdiction of the court or he could have filed a jurisdictional dispute. On receiving the notification, he could have gone before the competent judge, filing a jurisdictional dispute and requesting that the proceeding against him should be transferred to the ordinary jurisdiction.

According to the expert, there is a prompt and simple recourse to obtain freedom, even when there is an order for pre-trial detention. This is the request for release on bail and it is filed when pre-trial detention has been ordered. However, according to Article 536, "in no case, is release on bail in order in crimes against the public domain, such as this specific case, which involves civil responsibility, while... the defendant shall not have reintegrated the amount defrauded or furnished sufficient bail". From the foregoing, it is

evident that, having been accused of the crime of fraud, Gustavo Cesti Hurtado had to present sufficient bail or reintegrate the amount defrauded in order to obtain release on bail.

The expert mentioned that the military tribunals apply international conventions, such as the Geneva Conventions and the Human Rights Conventions.

With regard to Article 12 of the Law on Military Status, which establishes that officers on active duty and in reserve are subject to the terms of the Code of Military Justice and to the Investigation Councils, the expert declared that this is clearly an administrative law because it regulates the administrative status of an officer. "[I]n the chapter relating to retired officers... it does not say that military justice does not apply to a retired officer".

Regarding petitions for a writ of habeas corpus, these are not admissible against a judicial decision resulting from an ordinary proceeding. Moreover, according to Article 16 of the Law of Habeas Corpus, this action is not in order during pre-trial proceedings against the petitioner or when the latter has been brought to trial for the facts that originate the habeas corpus petition.

To the question of whether the military authority may fail to consider and apply a judgment pronounced by the Judiciary, the expert answered that Article 3 of the Organic Law of Military Justice establishes that military justice is autonomous and independent, because it is constitutional justice, contemplated in the Constitution.

Lastly, the expert declared that he had been able to examine the proceedings of the jurisdictional disputes that were forwarded to the Court by the Peruvian State, and he stated that the procedure used in these proceedings is not the appropriate one for filing jurisdictional disputes, since these should be filed before the judge who considers that he has jurisdiction, not before the military justice system, saying that the latter is not the competent jurisdiction.

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62. In its decision on preliminary objections, the Court resolved that it would duly integrate the reports of the experts, Samuel Abad Yupanqui and Valentín Paniagua Corazao (*supra* 55), on the issue of the exhaustion of domestic remedies, into the pool of evidence. In continuation, the Court summarizes these reports:

a. Report of the expert, Samuel Abad Yupanqui, Professor of Constitutional Law at the Catholic University of Peru and Defense Counsel specialized in constitutional affairs for the Office of the Peruvian Public Defender

Samuel Abad Yupanqui was summoned by the Court, at the request of the Commission, to present a report on the habeas corpus decision and its immutability, finality and consent from the standpoint of constitutional and procedural law. In this regard, he stated that the Office of the Public Defender had considered a complaint presented in the Cesti Hurtado case and described the steps taken as a result of this and, in particular, the motives for decision 012 of the Public Defender, issued in 1997, which has been added to the pool of evidence (*supra* 55), and the reasons for filing an *amicus curiae* brief before this Court. The expert also described some judicial decisions in habeas corpus actions and, in particular, referred to the judgment pronounced on June 19, 1998, by the Constitutional Tribunal in the petition for habeas corpus filed by Carlos Alfredo Villalba Zapata (*supra* 56) and to the similarity of the facts that motivated it to those of the instant case.

Samuel Abad Yupanqui stated that habeas corpus is in order against the acts of any authority, including competent civil or military authorities; that, according to Article 173 of the Peruvian Constitution, retired members of the armed forces are considered to be civilians and, consequently, may not be submitted to military

jurisdiction; that, in the case of Gustavo Cesti Hurtado, there is no pronouncement from the Constitutional Tribunal because access to this instance is reserved for when the petition for habeas corpus is rejected and, therefore, the favorable decision of the appellate procedure exhausted the proceedings; and that, according to Article 15 of Law 23,506, the pronouncement in favor of Gustavo Cesti Hurtado in the petition for habeas corpus has the force and effect of *res judicata*. Likewise, the expert stated that, faced with detention by an allegedly incompetent authority, a person may choose between a jurisdictional dispute and filing a petition for habeas corpus and that, in order to file the latter, there is no need to previously exhaust the jurisdictional dispute.

During the examination by the State, the expert declared that no authority has the powers to refuse to execute a writ of habeas corpus; that once this has been issued, it is not in order to recommend filing a jurisdictional dispute; that habeas corpus is in order when the provisions of the Constitution are not respected, and this includes violation of due process; and that, in the proceedings against Gustavo Cesti Hurtado under the military justice system, due process was affected by submitting him to an incompetent tribunal. Likewise, the expert stated that the Office of the Public Defender had recommended that the writ of habeas corpus issued in favor of Gustavo Cesti Hurtado should be executed "without prejudice to investigations continuing before the competent jurisdictional body"; and that, with the exception of cases when the death penalty is imposed, the Peruvian Constitution prevents the Supreme Court from reviewing a judgment pronounced by military tribunals.

Lastly, the expert declared that non-compliance with a writ of habeas corpus constitutes an offense of resisting and disobeying authority, regulated by Article 368 of the Criminal Code.

b. Report of the expert, Valentín Paniagua Corazao, Professor of Constitutional Law at the Catholic University, the Sacred Heart Women's University and the University of Lima;

former President of the Chamber of Deputies, former Minister of Justice and former Minister of Education of Peru

Valentín Paniagua Corazao was summoned by the Court, at the request of the Commission, so that he could present a report on the writ of habeas corpus and its immutability, finality and consent from the standpoint of constitutional and procedural law. The expert described Peruvian legislation on the constitutional and jurisdictional control of State acts and the binding nature of the decisions of the Constitutional Tribunal with regard to writs of habeas corpus which must be recognized by the military tribunals, because the latter are subject to the control of the Constitution. Likewise, the expert declared that, in cases of harm or threat to personal freedom by the tribunals, the appropriate recourse would be the petition for habeas corpus, contemplated in Article 12 of Law 23,506; that, although jurisdictional dispute exists in Peruvian legislation, it is not requirable, either constitutionally or legally, and it constitutes an optional parallel route; and that, in accordance with Article 173 of the Constitution, the military jurisdiction is competent to judge civilians only in cases of crimes of treason, terrorism and breach of the law of obligatory military service.

The expert, Valentín Paniagua Corazao, added that an alleged crime of fraud, such as that imputed to Gustavo Cesti Hurtado, falls outside the terms of military jurisdiction; that if a judge is not competent to issue a provisional order of arrest, neither is he competent to judge or convict; and that, in the case of Gustavo Cesti Hurtado, the writ of habeas corpus definitively exhausts the instance, having the force and effect of *res judicata*. Likewise, he declared that the Constitution commits the President of the Republic to complying with judgments pronounced by the Judiciary and seeing that they are complied with, and that no person may delay the execution of judgments or impede their execution; that judgments pronounced with regard to petitions for habeas corpus "may not be revised" and "exceptions may not be presented to them", constitute *res judicata* only if they are favorable to the claimant, must be published in order to raise awareness and "confidence in the Constitution" in society,

and "may not be appealed". With regard to the military justice system, the expert advised that, according to the Constitution, civilians are excluded from its scope of competence and its only purpose is to prosecute and punish the so-called "service-related crimes".

During the examination by the State, the expert declared that there is an impediment to filing a petition for habeas corpus and a jurisdictional dispute simultaneously because, according to the Law of Habeas Corpus and Amparo, actions to protect rights are not admissible if the victim elects the parallel route; that, once the action to protect rights has concluded, there is no impediment to filing a jurisdictional dispute, but that the victim would not be obliged to do so because he would already enjoy juridical freedom and is not obliged to do what the law does not require. The expert concluded that "it would be irrational that, having achieved the most effective means of defending personal freedom, he would wish... to submit himself... to an absolutely useless and unnecessary procedure...". Lastly, the expert stated that the petition for habeas corpus is filed not only against a violation, but also against the threat of the violation of a right, that it constitutes the most effective means to ensure the legal protection of the right threatened, and that, although it is true that Article 139 of the Constitution establishes that no person may interfere in judicial proceedings that are under way, it is also certain that judges are obliged to defend the principle of the judge with general jurisdiction and the jurisdiction ordained by law, so that, if there is opposition between these obligations, "the option is absolutely inevitable in favor of the person who has been deflected from the jurisdiction previously established by law".

In reply to questions from members of the Court, the expert declared that Article 105 of the 1979 Constitution enshrined the principle that treaties and agreements signed by Peru form part of national law and have constitutional rank and that the 1993 Constitution eliminated this provision and, in its place, established that the courts are obliged to interpret Peruvian constitutional law in the light of international human rights law.

VII REGARDING THE FACTS

63. Having examined the documents, the declarations of the witnesses, the reports of the experts, and also the statements of the State and of the Commission during the proceedings, the Court considers that the following relevant facts have been proved:

SPECIFIC FACTS REGARDING THE INSTANT CASE

64. Gustavo Adolfo Cesti Hurtado, is a Peruvian citizen who retired from the Army in 1984 and who, at the time of the facts, was Manager of the private firm "Top Security". This firm advised the Logistics Command of the Peruvian Army (hereinafter "COLOGE") on insurance matters.

A. The complaint against Gustavo Cesti Hurtado

65. On November 25, 1996, the Commander General of COLOGE formulated a criminal complaint before the President of the Supreme Council of Military Justice against four military officers and against the alleged victim for a crime against the duty and dignity of the service and for the crime of fraud. On December 23, that year, the Court-Martial of the Supreme Council of Military Justice decided to prepare a case against Gustavo Cesti Hurtado, among others, for the crimes of disobedience against the duty and dignity of the service, negligence and fraud.

66. On January 9, 1997, the Supreme Council of Military Justice summoned Gustavo Cesti Hurtado to make a preliminary statement on January 15, 1997. Gustavo Cesti Hurtado did not appear to make a declaration and, therefore, on January 17, 1997, the Supreme Council of Military Justice changed the order of appearance and ordered his remand in custody, his capture and the impediment to his leaving the country.

B. Habeas corpus procedure

67. On January 31, 1997, the alleged victim filed a petition for a writ of habeas corpus before the Public Law Chamber of the Superior Court of

Justice of Lima, in the text of which he stated that his right to personal liberty was threatened by the order of arrest and the impediment to leave the country which had been issued against him by the Supreme Council of Military Justice. Likewise, Gustavo Cesti Hurtado declared that "a civilian..., does not have to be included in or have his rights limited by the orders of a military judge".

68. On January 31, 1997, the Permanently Sitting Criminal Court of the Judicial District of Lima agreed to process the petition for habeas corpus filed by the alleged victim, summoned the Examining Magistrate of the Supreme Council of Military Justice and ordered that a summary investigation should be held. On February 3, 1997, the Judge of the Thirtieth Criminal Court of Lima took over the case, and the same day, personnel of her Court took a declaration from the Secretary General of the Supreme Council of Military Justice, in the absence of the Examining Magistrate of this body.

69. In his declaration, this official stated that the alleged victim

falls under the competence of the jurisdictional organ of the special Military Justice System, since he has a military rank, because, according to Article one hundred and seventy-four of the Constitution, military ranks are for life and can only be withdrawn from their holders by a judicial decision[;] consequently, the retired officer in question may not allege threat or violation of his personal liberty.

Moreover, he stated that if the defendant considered that the military justice system was not competent to judge him, he had the right to file a jurisdictional dispute that would be decided by the Supreme Court.

70. On February 4, 1997, the Judge of the Thirtieth Criminal Court of Lima declared the petition for habeas corpus filed by Gustavo Cesti Hurtado without merit, considering that it could not be invoked in an ordinary proceeding and that the arguments on the incompetence of the military justice system should be settled "in another type of defense measure related to jurisdiction". Gustavo Cesti Hurtado appealed this decision on February 5, 1997, when he made the following declaration:

I am not referring to irregularities within the proceeding BUT TO AN IRREGULAR PROCEEDING, which consisted in submitting me to the military justice system, although I am RETIRED, when Article 173 of the Constitution establishes that member of the armed forces are prosecuted under this jurisdiction for service-related crimes. As a retired member of the armed forces, I have no service-related responsibilities (Article 53 of Legislative Decree 752) and only those who are on active service or in reserve may be submitted to the military justice system (the aforementioned Legislative Decree 752 or the Law on Military Status). Therefore, it is not with appeals or with pleas as to the jurisdiction of the court that the imminent danger of my arrest by an incompetent jurisdiction can be remedied.

71. On February 12, 1997, the Public Law Chamber, in decision No. 97, revoked the appealed decision and upheld the petition for habeas corpus filed by Gustavo Cesti Hurtado. The Public Law Chamber based its decision on the following reasoning, among others:

[...] according to the provisions of Article 173 of the Political Constitution of Peru, in cases of service-related crime, members of the Armed Forces are submitted to the Code of Military Justice and to the respective jurisdiction, while civilians are excluded from this jurisdiction, except in cases of terrorism and high treason, which is not the present case. Therefore, constitutional law essentially contains two conjunctive and inseparably interrelated presumptions which will determine submission to special jurisdiction, and these are: a) the subject is an active member of the armed forces and b) the military fact; SEVENTH: In order to consider whether both presumptions exist, we should recall that constitutional law makes special reference to the type of function that the person on active duty exercises and that, it is as a consequence of this that a crime typified in the Code of Military Justice occurs. This means that, of necessity, the said person must be carrying out functions as set forth in Article 321 of the Code of Military Justice; [...] NINTH: Consequently, we can determine that in order to submit a person to the military justice system there must be a linking fact directly related to the person under investigation, that is, the military fact that is

imputed or that also implies disrespect for the dignity of the Armed Forces; TENTH: In the present case, the status of the petitioner Gustavo Adolfo Cesti Hurtado as an officer with the rank of retired Peruvian Army Captain has been proved. Therefore, according to the analytical and comparative study of the elements examined, his participation in the facts which are the subject of the action filed under the military justice system are of an ordinary substantive type. Consequently, in view of the personal status and the substantive type which have been determined, it follows that this civilian cannot be submitted to a special proceeding under the military justice system with an order of arrest because he does not meet the constitutional requirements to be considered an active member of the armed forces as set forth in Article 173 of the Constitution since he was not carrying out work or functions as a member of the armed forces in connection with the facts that are attributed to him, and the principle of the extension of military jurisdiction is not applicable in the present case; ELEVENTH: This being so, and being immune from the proceeding filed under the military justice system, the order of arrest issued against the petitioner, referred to in the third whereas clause, implies an imminent threat to his constitutional right to liberty, so that this panel of judges with constitutional competence must re-establish this right which has been violated; in the understanding that the liberty of the person is the supreme expression of the very essence of the human being, and all the fundamental concepts to achieve social peace and the reign of the rule of the law are addressed to this end, according to the provisions of the Universal Declaration of Human Rights; TWELFTH: In view of the foregoing, as the institution of habeas corpus relates to the protection of the personal liberty of each person, providing protection from coercive acts carried out by any person or entity of any rank or level of authority or competence that violate the right to liberty, it is the appropriate procedure given its legal status as a constitutional guarantee that can be processed immediately and, accordingly, it is applicable in the present case [...]

As a consequence of the arguments transcribed above, the Public Law Chamber ordered

that the order of arrest and the impediment to leave the country should be lifted immediately and also that the proceeding against Gustavo Adolfo Cesti Hurtado should be ceased.

This decision was notified to the Public Prosecutor of the Peruvian Army and the Public Prosecutor of the Ministry of the Interior of Peru on February 18, 1997.

72. On February 26, 1997, the Examining Magistrate of the Supreme Council of Military Justice declared that the decision of the Public Law Chamber was inapplicable, and he communicated this decision to the Chamber on March 3 that year.

73. By a decision of March 6, 1997, the Public Law Chamber of the Superior Court of Justice of Lima qualified the decision of the Examining Magistrate of the Supreme Council of Military Justice as a "unilateral and out-of-court act, totally alien to the habeas corpus procedure"; it declared that the said decision did not constitute "a legal action of any kind that... [might be] capable of altering or invalidating the decision of the Public Law Chamber"; that all authorities are obliged to comply with judicial decisions; and that none of them may set aside judicial decisions with the force and effect of *res judicata*, modify their content or delay their execution, without incurring responsibility.

C. Detention of Gustavo Cesti Hurtado

74. On February 27, 1997, Gustavo Cesti Hurtado requested the Examining Magistrate of the Supreme Council of Military Justice to lift the order for his arrest and the impediment to leave national territory and to suspend the criminal action initiated against him under the military justice system, in compliance with the decision of the Public Law Chamber,

75. On February 28, 1997, Gustavo Cesti Hurtado was arrested and imprisoned.

D. The criminal action against Gustavo Cesti Hurtado under the military justice system

76. On March 8, 1997, having taken the preliminary statement of the alleged victim, the Examining Magistrate of the Supreme Council of Military Justice ordered his detention in the Military Prison of the Bolivar Barracks, Pueblo Libre.

77. On March 13, 1997, the Judge of the Thirtieth Criminal Court of Lima notified the President of the Supreme Council of Military Justice that he should order the immediate liberty of Gustavo Cesti Hurtado, lift the impediment to leave the country and suspend proceedings under the military justice system. The following day, personnel of the Thirtieth Court went to the Bolivar Barracks and confirmed that Gustavo Cesti Hurtado was still detained and that the order directing that he should be liberated had not been executed, although there was evidence that, contrary to the affirmations of the Chief of the Bolivar Barracks, the Supreme Council of Military Justice had received the injunction of the Criminal Court Judge.

78. On March 18, 1997, the Judge of the Thirtieth Criminal Court of Lima ordered that the President of the Supreme Council of Military Justice should again be informed that Gustavo Cesti Hurtado should be granted immediate liberty, the impediment for him to leave the country lifted and the proceedings initiated against him suspended. The same day, the Court-Martial of the Supreme Council of Military Justice resolved that it would not obey the injunction of the Thirtieth Criminal Court since the decision of the Public Law Chamber of February 12, 1997, had been declared inapplicable by the Examining Magistrate of the Supreme Council of Military Justice (*supra* 72).

79. On March 24, and April 1 and 6, 1997, Gustavo Cesti Hurtado enjoined the Examining Magistrate of the Supreme Council of Military Justice to liberate him, in compliance with the decision of the Public Law Chamber.

E. The imprisonment of Gustavo Cesti Hurtado

80. On April 14, 1997, the Court-Martial of the Supreme Council of Military Justice pronounced judgment against the alleged victim, condemning him to seven years imprisonment.

81. On April 20, 1997, Gustavo Cesti Hurtado requested the Review Chamber of the Supreme Council of Military Justice to liberate him, in compliance with the decision of the Public Law Chamber and, before that instance, he also questioned the merits of the guilty verdict pronounced against him.

82. On May 2, 1997, the Supreme Council of Military Justice, sitting as a Review Chamber, modified the judgment of the Court-Martial with regard to the term of imprisonment imposed on Gustavo Cesti Hurtado, which it set at four years, and the amount of compensation, which it established at US\$390,000.00 (three hundred and ninety thousand United States dollars) or its equivalent in Peruvian currency.

83. On May 20, 1997, the Examining Magistrate of the Supreme Council of Military Justice ordered Gustavo Cesti Hurtado to make the respective payment, warning him that, to the contrary, his property and assets would be attached without appeal.

84. On June 13, 1997, Gustavo Cesti Hurtado was transferred to the Military Hospital and on June 16 that year he requested to be transferred to the San Lucas Clinic.

85. On October 30, 1997, Gustavo Cesti Hurtado requested that a private doctor should be authorized to enter the prison installations where he was imprisoned; the request was refused on November 5 that year.

86. On December 4, 1997, the President of the Human Rights Committee of the Bar Association of Lima and the President of the Human Rights Committee of the Doctors' Association of Peru went to the Simon Bolivar Barracks in order to visit Gustavo Cesti Hurtado. However, the military authorities did not allow them to see him.

87. At the date of this judgment, the alleged victim continues imprisoned in the Simón Bolívar Barracks, Pueblo Libre District, Lima.

F. The complaint against the members of the Public Law Chamber

88. On March 7, 1997, the Prosecutor General of the military justice system accused the members of the Public Law Chamber who had declared habeas corpus admissible, of prevarication and of usurpation of functions, which is an offense against the public administration, before the Office of the Attorney General.

89. On July 15, 1997, the Senior Prosecutor responsible for the Office of the Supreme Prosecutor for Internal Control in the Office of the Attorney General declared the complaint against the members of the Public Law Chamber without merit; this was confirmed by the Executive Committee of the Office of the Attorney General on September 3, 1997.

90. On July 25, 1997, the Supervisory Office for Judges of the Supreme Court of Justice of the Republic imposed a disciplinary sanction on the members of the Public Law Chamber as it considered that, by ordering that the proceeding under the military justice system should be suspended, the said judges had exceeded their functions and incurred in negligence in the performance of their duties. Moreover, this decision declared that

the decision of the Chamber should have resolved – solely and exclusively – that matters should revert to the situation before the violation or, in this specific case, the threat of violation of the personal liberty of the citizen, Gustavo Adolfo Cesti Hurtado; that is, it should have ordered that the warrant of arrest against him should be lifted as well as the impediment to leave national territory.

However, it made clear that it did not challenge the judicial decision for which the judges were penalized:

the jurisdictional nature of judicial decisions make them inviolable, as they may only be modified by another judicial decision, through the appropriate legal channels, and their functional nature makes the trial judge subject to civil and/or criminal disciplinary responsibility for negligence or fraud in violation of our legal code, and the sanction or penalty imposed does not, in any way, modify the effects of the defective judicial decision.

G. The complaint against the members of the Supreme Council of Military Justice

91. On March 20, 1997, the Judge of the Thirtieth Criminal Court of Lima informed the Public Ministry of the facts that had occurred in the execution of the judgment of habeas corpus pronounced by the Public Law Chamber.

92. On April 30, 1997, the Prosecutor General instructed the Office of the Supreme Prosecutor for Action under Administrative Law to formulate a criminal complaint against the members of the Supreme Council of Military Justice for the crimes of violence and resistance to authority and abuse of authority.

93. On May 7, 1997, the Supreme Prosecutor, Nelly Calderón Navarro, accused the members of the Supreme Council of Military Justice of the crimes of violence and resistance to authority and abuse of authority.

94. On May 19, 1997, Provisional Supreme Magistrate Cerna Sánchez resolved to remit the complaint formulated by the Supreme Prosecutor for Action under Administrative Law against the members of the Supreme Council of Military Justice to the Prosecutor General of the Supreme Council of Military Justice and he transmitted an authenticated copy of the proceedings to the Executive Committee of the Office of the Attorney General so that it could proceed according to its competence. Gustavo Cesti Hurtado presented an appeal against this decision on May 26, 1997, which was not allowed.

95. On July 30, 1997, the Special Chamber of the Supreme Court of Justice confirmed the decision of Provisional Supreme Magistrate Cerna Sánchez of May 19, 1997.

E. The complaint against the Prosecutor General

96. On May 10, 1997, the Supreme Council of Military Justice filed a criminal complaint against Miguel Aljovín, for the crimes of prevarication against the jurisdictional function and abuse of authority.

RELEVANT DOMESTIC LEGISLATION

A. The petition for a writ of habeas corpus

97. Law No. 23,506 ("Law of Habeas Corpus and Amparo") regulates the petition for a writ of habeas corpus in Peruvian legislation. According to this legislation, "[t]he objective of protective measures is to revert matters to the situation before the violation or threat of violation of a constitutional right" (Article 1). The decision can only be appealed if the habeas corpus has been refused (Article 21; *in agreement*, Article 41 of Law No. 26,435 ["Organic Law of the Constitutional Tribunal"]).

98. The habeas corpus action is not admissible, among other reason, "[a]gainst a judicial decision resulting from an ordinary proceedings [and w]hen the aggrieved party elects to have recourse to an ordinary proceedings" (Article 6)²⁶.

B. Guarantee of due process

99. According to Article 139.3 of the Constitution of Peru (hereinafter "Peruvian Constitution"), guarantees of due process and jurisdictional protection correspond to the jurisdictional function. Pursuant to this,

²⁶ *Cfr. copy of Law No. 23,506, "Law of Habeas Corpus and Amparo", Articles 21 and 39; and copy of Law No. 26,435, "Organic Law of the Constitutional Tribunal", Article 41.*

[n]o person may be diverted from the legally established jurisdiction, or submitted to a procedure that differs from those that have been established, or judged by bodies with special jurisdiction or by special commissions created to that effect, whatever their designation.

C. The exercise of the criminal action

100. According to Legislative Decree No. 052 ("Organic Law of the Office of the Attorney General"), the Office of the Attorney General is in charge of criminal actions *de oficio*, at the request of the aggrieved party or through class actions, in the case of crimes of commission or those against which the law expressly allows such actions.

D. Competence of the military justice system

101. According to Article 173 of the Peruvian Constitution, the military justice system is competent to judge members of the armed forces "[i]n cases of service-related crimes" and its provisions are not applicable to civilians, except in the case of crimes of treason, terrorism and infractions of the regulations on obligatory military service.

102. Article 12 of Legislative Decree No. 752 ("Law on the Military Status of Army, Navy and Air Force Officers") establishes that officers on active duty and in reserve are subject to the terms of the Code of Military Justice and to those of the Investigation Councils of each institution. According to Article 23 of this Legislative Decree, the status of an officer can only be: on active duty, in reserve and retired; the latter is defined in Article 53 of this legislation as the status of an officer who is "definitively separated" from service.

E. The execution of judgments with the force and effect of *res judicata*

103. According to Article 139.2 of the Peruvian Constitution,

[... n]o authority may take over cases pending before the jurisdictional body or interfere in the exercise of its functions. Neither

may it invalidate decisions that have the force and effect of *res judicata*, nor curtail proceedings that are underway, nor modify judgments or delay their execution.

VIII PRELIMINARY CONSIDERATIONS

104. Once the Court has defined the proven facts that it considers relevant, it must examine the arguments of the Inter-American Commission and the State in order to determine the international responsibility of the latter for the alleged violation of the American Convention. However, prior to this, the Court considers it necessary to examine various declarations made by the parties in this proceeding.

105. At this time, the first series of declarations that the Court considers it necessary to clarify refer to the innocence or guilt of Gustavo Cesti Hurtado with regard to the crimes that he is alleged to have committed in Peru. In its complaint, the Commission asserts that a number of irregularities in the proceeding under which these alleged crimes were investigated were denounced before it; these included restrictions to the examination of the case file, the issue of decisions in which exonerating elements that had been presented had not been taken into consideration, and the use of "false documents".

106. However, the Commission itself has put on record that "it is aware, when submitting [the] application, that it is not a question of the innocence or guilt of Gustavo Cesti. This must be decided under domestic law..." and, accordingly, it has declared that "despite the abundant evidence that has been presented [to it] by the victim, claiming his innocence..., it has reserved such evidence, since it considers that it does not pertain to this proceeding".

107. The State declared that Gustavo Cesti Hurtado is guilty of having committed serious crimes against military finances, in connivance with officers on active duty.

108. In a previous case, this Court has already clearly established that it is not a criminal court before which an individual's responsibility for crimes committed may be debated²⁷. This declaration may be applied to the instant case, which does not relate to the innocence or guilt of Gustavo Cesti Hurtado in the facts attributed to him in Peru. Accordingly, the Court will restrict itself to determining the juridical consequences of the facts that it finds have been proved, within the framework of its competence.

IX VIOLATION OF ARTICLES 7(6) AND 25(1) AND 2(C)

109. The Commission alleged that the State violated Articles 7(6) and 25(1) and 2(C) of the American Convention by not ensuring that the competent authorities complied with the habeas corpus decision in favor of Gustavo Cesti Hurtado. In this respect, it stated that this decision, dated February 12, 1997, was notified to the members of the military justice system who, despite repeated requests by the alleged victim, the Public Defender and the Inter-American Commission, refused to execute it and convicted Gustavo Cesti Hurtado.

110. The Commission added that the provision of Article 25 of the Convention is applicable to proceedings under the military justice system, that the simple and prompt recourse referred to is in order before any authority, official or person, and that no exception exists that excludes military judges from the terms of this provision, either in the Convention or the Peruvian Constitution. Likewise, the Commission requested the Court to order the State to execute immediately the decision issued in the habeas corpus procedure and liberate the victim immediately and unconditionally (*infra* 190.a).

111. The State declared that the petition for a writ of habeas corpus filed by Gustavo Cesti Hurtado had been malicious, because he knew that

²⁷ *Suárez Rosero case*, Judgment of November 12, 1997. Series C No. 35, para. 37.

the law regulating this action "only allows it to be filed against an arbitrary arrest, and not when the arrest is the consequence of a motivated judicial order emanating from an ordinary proceeding", such as the one filed against him. Furthermore, the State asserted that the favorable decision issued by the Public Law Chamber in the habeas corpus procedure was "illegal, non-executable and null *ipso jure*". According to the State, this argument is confirmed by the fact that the judges who comprise that body were sanctioned for their decision.

112. Moreover, the State declared that when the petition for habeas corpus "concluded", the provisional order of arrest had been "subsumed" by the judgment pronounced by the military justice system and that, in no way, can it be said that this protective measure invalidates the effects of a sentence imposed in judgment.

113. Lastly, the State asserted that, according to constitutional provisions, the petition for habeas corpus is not appropriate to protect the right "not to be changed from a predetermined jurisdiction or from the principle of the judge with general jurisdiction", since such guarantees may only be protected by filing a writ of amparo.

114. The plaintiff would not have obtained his freedom by this action, but rather the proceeding would have been sent to the competent jurisdiction or "measures to challenge jurisdiction" would have been proposed to him. According to the State's argument, Gustavo Cesti Hurtado had not filed a writ of amparo because, by this means "it was not possible to order... freedom; however, freedom can be ordered with a writ of habeas corpus".

115. Peru added that "it is unthinkable to establish the dangerous precedent that a preventive order of arrest can be invalidated for reasons of jurisdiction, by considering that it has been issued by an incompetent organ".

116. In its final arguments, the Commission maintained that the Peruvian State had not respected its international obligations, since the military authorities did not comply with the writ of habeas corpus. This

lack of compliance violated the effective judicial protection embodied in Article 25 of the Convention, which establishes the obligation to ensure that the competent authorities shall apply any remedy when granted.

117. The Commission added that the Convention is violated if a remedy is not binding on the authorities or if it is subordinated to procedural requirements that make it inapplicable, such as in the case of a jurisdictional dispute. It also stated that "[t]he principles of judicial protection and procedural legality include not only the right to the execution of final judgment but also respect for the finality of such judgments and the inviolability of the juridical situations that they determine, because if the substantive issue should be disregarded, whatever was finally decided at the end of the proceeding would also be rendered ineffective.

118. In its final arguments, the State contended that the habeas corpus decision in favor of Gustavo Cesti Hurtado was "illegal, contradictory, invalid". It stated that, in the instant case, habeas corpus was not in order in view of the express provisions of the Law of Habeas Corpus and Amparo No. 23,506 and the complementary Law No. 25,398, which prohibit – or at least declare the illegality of the petition for habeas corpus in this type of case. The State alleged that if anyone issues an illegal decision, there is no obligation to comply with it, because habeas corpus is not the appropriate means of invalidating jurisdiction.

119. The State added that the procedure used and the decision issued by the judges who heard the petition for protective measure were defective, as the only organ competent to decide on a jurisdictional dispute between the ordinary jurisdiction and the military justice system is the Supreme Court of Justice. Lastly, the State declared that, apart from being illegal, the habeas corpus decision could not be executed physically because Gustavo Cesti Hurtado was not detained, but at liberty.

120. The Court observes, in the first place, that the decision of the Supervisory Office for Judges of the Supreme Court sanctioning the judges of the Public Law Chamber does not challenge their decision itself. In the second place, regarding the State's argument that when the aforementioned Public Law Chamber pronounced judgment on the peti-

tion for habeas corpus, judgment had already been pronounced under the military justice system, the Court considers that this statement is contrary to the proven facts in the instant case. Indeed, it has been shown that the final judgment in the petition for habeas corpus was pronounced on February 12, 1997, and communicated to the military justice system on February 18, 1997, before Gustavo Cesti Hurtado was arrested. Contrary to what the State has declared, the judgment of first instance in the military proceedings was not pronounced until two months later, on April 13, 1997. Consequently, the State's argument is not admissible.

121. Article 25 of the American Convention establishes that everyone has the right to a simple and prompt recourse or any other effective recourse to a competent court or tribunal. The Court has declared that this provision

is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.

Article 25 is closely linked to the general obligation in Article 1.1 of the American Convention, in that it assigns duties of protection to the States Parties through their domestic legislation. The purpose of habeas corpus is not only to guarantee personal liberty and humane treatment, but also to prevent disappearance or failure to determine the place of detention and, ultimately, to ensure the right to life²⁸.

122. With regard to this protection, Article 7(6) of the American Convention states that

[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his

28 *Castillo Páez case*, Judgment of November 3, 1997. Series C No. 34, para. 82 and 83.

release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

123. The Court has already said that a detained person must be ensured the right to petition for habeas corpus at all times, even when being held in exceptional circumstances of solitary confinement established by law²⁹. As has been confirmed, this protection is stipulated in Peruvian legislation, which states that its aim is "to revert matters to the situation before the violation or threat of violation of a constitutional right".

124. The Court has also verified that Peruvian legislation accepts that the petition for habeas corpus may be filed against acts of judicial authorities, except if they are the result of an ordinary proceedings. The legal exception referring to "ordinary proceedings" should not be interpreted to mean that there is an impediment to filing protective measures against any type of judicial decision, since such an interpretation would contradict the provisions of the Peruvian Constitution itself, in Article 200.1, which states that the petition for habeas corpus is in order against any authority, official or person who violates or threatens personal liberty or related constitutional rights.

125. This Court shares the opinion of the Commission that the right established in Article 7.6 of the American Convention is not complied with merely by the formal existence of the recourses that it stipulates. Such recourses must be effective because, according to Article 7.6, their purpose is to obtain a prompt decision "*about the legality* [of the] *arrest or [the] detention*" and, should these have been illegal, the execution of an order of liberty, also without delay. Moreover, the Court has declared that

29 *Suárez Rosero case*, Judgment of November 12, 1997. Series C No. 35, para. 59.

the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy that proves illusory because of the general, conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments³⁰.

126. The Court considers that it has been demonstrated that the petition for habeas corpus, as it exists in Peruvian law, meets the requirements established in Article 25 of the Convention, because it clearly constitutes "a simple and prompt recourse [...] against acts that violate [the] fundamental rights" of the petitioner. Moreover, Peru is one of the countries "whose laws establish that anyone who is threatened with being deprived of his liberty shall be entitled to have recourse to a competent judge or tribunal in order that it may decide on the lawfulness of such threat", in the words of Article 7.6 of the Convention.

127. There is no dispute that when Gustavo Cesti Hurtado tried to make use of this remedy, there was an objective threat to his liberty in the form of an accusation pending against him under military justice. The Court may also suppose that, when the Public Law Chamber adopted its decision in favor of the petition for habeas corpus filed by Gustavo Cesti Hurtado on February 12, 1997, it took into consideration the allegations made by the Secretary General of the Supreme Council of Military Justice

30 *Judicial guarantees in states of emergency* (Articles. 27.2, 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9.

on February 3, 1997, that the plaintiff had been included "under the competence of the jurisdictional organ of the special Military Justice System" (*infra* 69), and found such allegations without merit.

128. In particular, this Court has taken note of the opinion of the Public Law Chamber (*supra* 71) according to which, in view of the provision in Article 103 of the Peruvian Constitution, Gustavo Cesti Hurtado was not subject to military jurisdiction regarding the charges of which he was accused. The Public Law Chamber decided that the subject matter of the charges fell within ordinary jurisdiction ("they are of an ordinary substantive type"); moreover, in the absence of the constitutional requirements for Gustavo Cesti Hurtado to be considered a member of the armed forces on active duty ("an active member of the armed forces"), he could not be subjected to arrest or trial under the military justice system. The Public Law Chamber also maintained that the petition for habeas corpus was the appropriate means of protecting the freedom of Gustavo Cesti Hurtado against "coercive acts carried out by any person or entity of any rank or level of competence".

129. This Court has also taken into consideration the decision of the Constitutional Tribunal of June 19, 1998, in the case of Carlos Alfredo Villalba Zapata (Case 585-96-HC TC), in which, with reference to a very similar situation, it maintained a similar opinion about the pertinence of habeas corpus as a means of protecting the liberty of a retired military officer and about the appropriate jurisdiction to hear charges brought in relation to the alleged perpetration of common-law crimes. In that case, the Constitutional Tribunal revoked the decision of the Public Law Chamber that declared habeas corpus inadmissible and, "revising it", declared it with merit. Furthermore, in its reasoning, the Tribunal stated that retired members of the armed forces are "excluded from the possibility of perpetrating service-related crimes" because

on recovering the full exercise of their civil rights, as established in Article 70 of Legislative Decree 752, Law on the Military Status of Army, Navy and Air Force Officers, they no longer belong to the armed forces, and therefore the constitutional legal regime in force for civilian cases applies to them.

The decision taken by the Public Law Chamber on the situation of Gustavo Cesti Hurtado concluded the matter that concerns this Court in relation to Articles 7 and 25 of the Convention, because a tribunal with competence on protective measures adopted a final, unappealable decision conceding habeas corpus to the petitioner and protecting him from the objective threat to his liberty resulting from procedures initiated under military jurisdiction. This decision does not impede the competent authorities, if appropriate, from taking decisions on the criminal responsibility of Gustavo Cesti Hurtado with regard to the illegal acts attributed to him. Such decisions do not concern the Court, but rather the competent domestic tribunals.

130. As the Peruvian State has alleged, Peruvian legislation embodies recourses other than habeas corpus to settle jurisdictional disputes between different judicial organs. However, it is also certain that, according to the American Convention and Peruvian legislation itself, the judge of the petition for habeas corpus has the latitude to deal with the competence of the official who has ordered deprivation of liberty. Indeed, in the context of the facts of the instant case, the judicial authority responsible for deciding on habeas corpus should have examined the information available in order to define whether the intended arrest was arbitrary. This information necessarily included the competence of the authority who issued the order of arrest, taking into consideration the alleged facts and the circumstances of the person to whom they were attributed and, consequently, the regularity of the proceedings under which the order would be issued.

131. In the instant case, it is also necessary to consider that the recourse of habeas corpus was presented against a threat of arrest, not with regard to an actual deprivation of liberty, and that it was finally resolved, before the arrest of Gustavo Cesti Hurtado occurred. This means that the whole cycle of the recourse procedure was completed before the proceedings initiated by the special military justice system had started to take practical effects on the situation of the said Gustavo Cesti Hurtado.

132. Besides, it should be indicated that the habeas corpus decision never deprived the military justice system of the possibility of insisting on

its own competence, through the adequate legal channels, in order to duly resolve the dispute.

133. The Peruvian State violated the rights protected in Articles 7.6 and 25 of the Convention by not ensuring that the decision of the Public Law Chamber in favor of Gustavo Adolfo Cesti Hurtado was executed appropriately.

X

VIOLATION OF ARTICLE 7(1), (2) AND (3)

134. In its application, the Commission stated that Peru had violated Article 7(1), (2) and (3) of the Convention in relation to Gustavo Cesti Hurtado, because it had been shown that the victim "had been unduly deprived" of his liberty under the domestic proceeding.

135. The State declared that Gustavo Cesti Hurtado, who was deprived of his liberty under a judicial order, never presented a jurisdictional dispute, so that there was a statutory extension of the competence of the jurisdiction that judged him. Moreover, Peru stated that the victim did not request the benefit of provisional liberty and did not file a plea as to the jurisdiction of the court nor an appeal against the order of arrest. Therefore, according to the State, the order of arrest against Gustavo Cesti Hurtado continued with its "inherent defect" and, subsequently, after the first appeal in an ordinary criminal proceeding had been completed, the respective judgment was pronounced.

136. In its final arguments, the Commission stated that, although habeas corpus had been declared admissible, establishing that the competent jurisdiction was the ordinary jurisdiction, the proceeding before the military justice system continued and Gustavo Cesti Hurtado "was condemned and today is serving a four-year sentence, of which he has already served two long years. These are the consequences of having protested against the decision". Moreover, the Commission declared that there is no doubt that habeas corpus is the appropriate means of resolving a violation of personal liberty and an illegal procedure.

137. It added that, as Gustavo Cesti Hurtado did not file a jurisdictional dispute, he remains in prison, since military justice refuses to apply *de oficio* an "uncontested jurisprudence" that "declares the competence of the ordinary jurisdiction when it is not a case of service-related crimes committed by members of the armed forces on active duty". The requirement to have recourse to a jurisdictional dispute "would be an excessive, unreasonable obstacle to the exercise of the fundamental right, which is disproportionate and, therefore, not adapted to the intention and objective of the Convention". Lastly the Commission stated that "when there is a hypothetical conflict between laws, the one which is most favorable to the fundamental right in question should be applied and, when there is a doubt, it should also be in favor of the right to liberty because liberty is the 'prius' of law".

138. In its final arguments, the State repeated that Gustavo Cesti Hurtado, as any person prosecuted under military jurisdiction, could have opted for presenting a jurisdictional dispute or requested provisional liberty. Moreover, it stated that the habeas corpus recourse was not appropriate, since "it derives from the very nature of the protective measure that if a parallel action might be effective and the procedure is not so overlong that it would be ineffective for the plaintiff, he should have recourse to the latter, because the nature of the protective measure is that it is the final legal recourse against arbitrariness". Moreover, the State argued that the Public Law Chamber's order to liberate Gustavo Cesti Hurtado and suspend the proceeding against him could not be executed because, when this order was adopted, on the one hand, Gustavo Cesti Hurtado "had not put his affairs in order" and, on the other, there was no proceeding to suspend, because Gustavo Cesti Hurtado was not detained and thus there was no "*corpus*" to bring before the Public Law Chamber.

139. Article 7(1), (2) and (3) of the American Convention establishes that

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the

constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

140. The Court has said that no person may be

deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect)³¹.

141. In addition to the considerations already set forth in this judgment (*supra* 123 to 133), on the alleged violation of Article 7(1), (2) and (3), the Court should indicate that the Public Law Chamber specifically ordered that:

a) the order of arrest against Gustavo Cesti Hurtado should be revoked;

b) the restriction to travel abroad imposed on Gustavo Cesti Hurtado should be lifted, and

c) the procedures under military jurisdiction should be suspended.

It is evident that the military authorities defied the order of the Public Law Chamber in its entirety and proceeded to detain, prosecute and convict Gustavo Cesti Hurtado, in flagrant violation of a clear order issued by a competent tribunal.

142. As this Court has already determined, the petition for habeas corpus filed by Gustavo Cesti Hurtado fulfills all the requirements set

31 *Gangaram Panday case*, Judgment of January 21, 1994. Series C No. 16, para. 47.

forth in the Convention, which establishes an appropriate method to ensure the liberty of the affected person. Once Gustavo Cesti Hurtado sought and obtained the pertinent remedy, the existence of other remedies became irrelevant – even if it could be shown that they were equally effective.

143. As a result of the refusal of the military authorities to obey and execute the legitimate order of the Public Law Chamber and of the subsequent detention, prosecution and sentencing of Gustavo Cesti Hurtado, the State violated his right to personal liberty as guaranteed in Article 7(1), (2) and (3) of the Convention.

XI

VIOLATION OF ARTICLE 8(1) AND (2)

144. As stated by the Commission in the text of the application, since Gustavo Cesti Hurtado is considered a retired member of the armed forces, with no military function, Peruvian legislation considers him a private citizen. Moreover, under Peruvian legislation, the service contract between Gustavo Cesti Hurtado's firm and COLOGE does not constitute a relationship that would justify treating the victim as a member of the armed forces. Consequently, submitting Gustavo Cesti Hurtado to an action before military judges would constitute a liberal interpretation of the military jurisdiction and would violate his right to be submitted to a competent judge and jurisdiction and his right to be judged by an impartial judge.

145. The Commission also argued that the State continued to violate the rights of the victim by persisting in the action under the military justice system and pronouncing a judgment that did not result from a due process and that, if there was a complaint about the victim's conduct, the State had the obligation to file the corresponding charge under the ordinary jurisdiction. The Commission concluded that none of the results of the proceeding against Gustavo Cesti Hurtado under military jurisdiction "should have juridical effect".

146. In this respect, Peru stated in its answer to the application that Gustavo Cesti Hurtado

did not lose his military status and, anyway he was in the reserve when he performed functions in the Logistics Command of the Army, responsible for the insurance area, so that, according to Article 168 of the Constitution of Peru, he was subject to "the respective laws and regulations", one of which is the Code of Military Justice, and pursuant to the latter he was prosecuted and sentenced.

The State added that the crime for which Gustavo Cesti Hurtado was accused had been carried out against military finances and in connivance with officers on active duty, that it was committed when he performed functions in COLOGE and when he was subordinate to the General Officer who commanded this unit and, moreover, that he had an office and authorized access. Therefore, Peru believes that the organ that issued the order of arrest against Gustavo Cesti Hurtado was competent to do so and its competence was not invalidated or disputed, so that there was a statutory extension of jurisdiction.

147. Furthermore, the State asserted that the proceedings against Gustavo Cesti Hurtado respected the Constitution, the Organic Law of Military Justice and procedural principles that offer full guarantees "to both the defendant and the convicted person". It repeated that if Gustavo Cesti Hurtado considered that he had been judged by an incompetent jurisdiction, he should have presented a jurisdictional dispute or a plea as to the jurisdiction of the court or a writ of amparo, which the said constitutional law allows.

148. In its final arguments, the Commission declared that, according to the Constitution, when an officer retires, he exercises his political rights and obligations without any limitation. One of the civil rights of all persons is the right to be judged by a competent, impartial judge, established by law and not to be diverted from the appropriate jurisdiction, and these rights "are violated when military officers attempt to judge retired members of the armed forces". Moreover, the military jurisdiction is an

exceptional justice, as the ordinary jurisdiction is the general rule; this implies that military justice should be liable to restrictive interpretation and, in case of doubt, the ordinary jurisdiction should be chosen.

149. In its final arguments, the State indicated that Gustavo Cesti Hurtado was heard by a judge with general jurisdiction, with regard to whom none of the grounds for impediment that are specifically established in the Code of Military Justice existed; that the facts denounced were defined in the law as crimes; that the preliminary declaration was taken in the presence of defense counsels, and that he had extensive guarantees and plurality of instances, which shows that due process was respected throughout the proceedings.

150. Article 8 of the Convention establishes that

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 - b. prior notification in detail to the accused of the charges against him;
 - c. adequate time and means for the preparation of his defense;

- d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- g. the right not to be compelled to be a witness against himself or to plead guilty; and
- h. the right to appeal the judgment to a higher court.

151. Regarding the proceeding against Gustavo Cesti Hurtado under an organ of military justice, the Court observed that, when this proceeding was opened and heard, his status was that of a retired member of the armed forces and, therefore, he could not be judged by the military courts. Consequently, the proceeding to which Gustavo Cesti Hurtado was submitted violated the right to be heard by a competent tribunal, according to Article 8(1) of the Convention.

152. The State maintains that the procedural rights set forth in Article 8(2) of the Convention were scrupulously observed. The Commission does not contradict this claim. Consequently, as the allegations regarding the violations of Article 8(2) of the American Convention have not been proved, the Court must reject them.

XII

ON ARTICLE 5(2)

153. In the text of the application, the Commission declared that Gustavo Cesti Hurtado suffers from serious heart problems and that, by

not allowing him to be treated by the doctor of his choice, the State violated the provision of Article 5(2) of the Convention. To justify its allegation, the Commission argued that

[i]f a person has the right to be defended by a lawyer of his choice, with even more reason, he has the right to be treated medically by the doctor of his confidence, because it would be very simple to eliminate a person by giving an incorrect diagnosis or prescribing him contraindicated medicines that could produce collapse in patients.

154. Moreover, the Commission requested that the victim should be compensated "for the irregular situation that he has had to undergo by being treated by persons in whom, medically, he has no confidence".

155. In this regard, the State declared that "it has always respected [the rights to physical safety of persons]" and that the Commission had not mentioned which specific acts had produced the violation. Furthermore, the State asserted that Gustavo Cesti Hurtado enjoys special treatment in compliance with the orders of the Court itself, is subject to medical evaluations, and has a series of amenities enjoyed by no other prisoner in Peru.

156. In its final arguments, the Commission declared that Gustavo Cesti Hurtado had suffered anxiety by being obliged to receive medical treatment that he had not chosen.

157. In its final arguments, the State declared that Captain Cesti Hurtado has received due and adequate medical attention in the Military Hospital, where he goes to the dentist and the doctor every week. All the specialized examinations that he requested due to his heart problems have been carried out in the Military Hospital. However, it was not possible to agree to his request to be treated in a private clinic because it was necessary to avoid making distinctions between prisoners.

158. The Court observed that the substance of this alleged violation was closely connected to the objective of the provisional measures adopted in

favor of Gustavo Cesti Hurtado. Therefore, it will study the allegations of the parties in the light of the information contained in the State's latest reports (*supra* 40) and the observations that the Inter-American Commission has presented on them.

159. Article 5(2) of the American Convention stipulates that

[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

160. The Court considers that, based on the evidence in the proceedings, it has not been shown that the treatment received by Gustavo Cesti Hurtado during his detention has been inadequate. The Commission's allegation that the State violated his rights as established in Article 5(2) of the Convention must therefore be rejected.

XIII VIOLATION OF ARTICLES 1 AND 2

161. The Commission included in its application a declaration on the rights protected by Articles 5.1, 2 and 3, 7.1, 2, 3 and 6, 8.1 and 2, 11, 17, 21, 25.1 and 2.a and c and 51.2 of the Convention and stated that this protection was afforded "in harmony with Articles 1 and 2 of the said instrument.

162. Peru qualified this statement as a "generic accusation", and, in this regard, alleged that "by being a signatory of the Convention, it complies with all its provisions". It added that the Court "on repeated occasions... through the various judgments in cases instituted [against Peru] has attacked its sovereignty" and that this application would

invalidate the system of laws of the Peruvian State and be an attempt to destabilize institutions that were constitutionally valid; and that although it is certain that human rights, as they are conceived, do not fall exclusively within the domestic jurisdiction of

States, since they may be dealt with by a supranational jurisdiction, it is also true that the abuse of this right may even interfere in or tend to affect the legal capacity of the State. Consequently, this generic accusation [of the violation of the obligation of States Parties to respect the provisions of the Convention] has no real or objective support.

163. In its final arguments, the Commission stated that those who should enjoy the fundamental rights are the people and the State is obliged to recognize and ensure these rights. These rights are only the manifestation, in daily life, of the intrinsic freedom of each human being. If the domestic system of laws does not provide a sufficient guarantee for the rights protected by the Convention, then there is a breach of the Convention, which establishes provisions that may be broadened but not restricted.

164. In its final arguments, the State declared that it has not failed to respect the international rules of the American Convention. "[T]he State is certain that there has not been a breach or a failure in its international obligation since, in this case, the jurisdictional dispute was not aired before the competent authority, and the competent authority to hear matters relating to habeas corpus and arbitrary detentions was the Supreme Court and not a Public Law Chamber".

165. Articles 1 and 2 invoked by the Commission are as follows:

Article 1. Obligation to Respect Rights

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

2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or liberties referred to in Article 1 is not already ensured by legislative or other provisions, the States [P]arties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or liberties.

166. The Court has maintained that States Parties to the Convention may not order measures that violate the rights and freedoms recognized therein³². Neither may States fail to take measures of a legislative nature "or of any other nature that might be necessary to make such rights and freedoms effective", in the terms of Article 2 of the Convention. These measures are necessary to "ensure [the] free and full exercise" of these rights and freedoms, in the terms of Article 1.1 of this instrument.

167. In the *Garrido and Baigorria case* (1998)³³, the Court clearly stated that the American Convention "establishes the obligation of each State Party to adapt domestic law to the provisions of that Convention, so as to ensure the rights embodied therein". In the same judgment, the Court said that

[t]his obligation of the State Parte implies that the domestic legal measures must be *effective*. This means the State must adopt all measures necessary so that provisions contained in the Convention have full force and effect within its domestic legal system. Those measures are effective when the community, in general, adapts its conduct to conform to the principles of the Convention and when, if those principles are breached, the penalties provided for therein are effectively applied.

32 *Suárez Rosero case*, Judgment of November 12, 1997, Series C, N° 35, para. 97.

33 *Garrido and Baigorria case, Reparations* (Article 63.1 of the American Convention on Human Rights), Judgment of August 27, 1998. Series C No 39, para. 68 and 69.

168. This Court has already stated that the Peruvian State violated Article 25 of the Convention (*supra* 133) which, in its paragraph 2.c, establishes the commitment of the States to "ensure that the competent authorities shall enforce... [simple and rapid] remedies when granted" to protect individuals against acts that violate their fundamental rights. The Court considers that the Peruvian State has not ensured Gustavo Cesti Hurtado's enjoyment of his rights and freedoms by refusing, through its military authorities, to comply with a legitimate order issued by a competent tribunal, nor has it adopted the necessary measures to this end.

169. With regard to the allegations of the State that the Court has attacked the sovereignty of Peru in various judgments pronounced in cases brought against the State, the Court considers it relevant to repeat what it stated in the judgment on preliminary exceptions in the *Castillo Petruzzi et al case*.³⁴

[...] the Court must recall that Peru signed and ratified the American Convention on Human Rights. Consequently, it accepted the treaty obligations set forth in the Convention with respect to all persons subject to its jurisdiction without any discrimination. It is not necessary to state that Peru, like the other States Parties to the Convention, accepted the obligations precisely in the exercise of its sovereignty.

On becoming a State Party to the Convention, Peru accepted the competence of the organs of the Inter-American system for the protection of human rights, and therefore obligated itself, also in the exercise of its sovereignty, to participate in proceedings before the Commission and the Court and to assume the obligations that derive from them and from the general application of the Convention.

34 *Castillo Petruzzi et al case*, Preliminary Objections, Judgment of September 4, 1998. Series C No. 41, para. 101 and 102.

170. In conclusion, the Court declared that the negative of the Peruvian military authorities to obey and execute the legitimate order of the Public Law Chamber is a violation of Articles 1.1 and 2 of the Convention.

XIV ON ARTICLE 11

171. The Commission stated that the State violated the victim's right to honor by presenting him as a criminal and accepting his guilt as a fact, even when he was not convicted under a due and proper proceeding. Furthermore, the Commission declared that, in the case of Gustavo Cesti Hurtado, good reputation and honor are particularly essential as he works in the insurance and business sector. Moreover, the Commission requested that the Court should decree a series of measures to compensate him, in regard to the alleged violation (*infra* 190.c).

172. The State rejected the allegations of the Commission. In this regard, it declared that "it never offends persons" and that it brought the criminal proceeding against Gustavo Cesti Hurtado in exercise of its responsibilities. It observed that this proceeding has been of a confidential nature and, lastly, it stated that, in Peru, a person's privacy and honor are legally protected and that any person who considers that he or she has been offended should invoke this protection.

173. On this point, Peru also declared that, by presenting the application, the Commission was implicitly converting it into a "Nation without law", and made some observations about the country's credibility in international financial circles. According to the State, "[i]t is paradoxical that the international community trusts the Peruvian system of laws, which protect human rights, while the [Commission] accuses it of facts that, in any case, have an ideological bias".

174. In its final arguments, the Commission repeated that the proceeding under which Gustavo Cesti Hurtado was judged was not an ordinary proceeding.

175. In its final arguments, the State alleged that there were admissible presumptions of the responsibility of Gustavo Cesti Hurtado; however, his right to be presumed innocent had always been ensured.

176. Article 11 of the Convention establishes that

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

177. The Court considers that a judicial proceeding does not constitute, in itself, an unlawful attack on the honor or dignity of a person. The proceeding serves to resolve a dispute, even though it may indirectly cause annoyance to those who are subject to the prosecution. Moreover, it is almost inevitable that this should be so; to the contrary, the practice of contested lawsuits would be totally excluded. Furthermore, the punishment applied at the end of such a proceeding is not designed to harm those personal values, in other words, it does not attempt to discredit the person convicted, as occurs in the case of infamous punishment, which specifically suspends this intention. Accordingly, the Court considers that, in the instant case, it has not been proved that the Peruvian State violated, *per se*, Article 11.

178. Moreover, the Court considers that any effects on the honor and good reputation of Gustavo Cesti Hurtado that might result from his detention, prosecution and conviction by the military justice system, would derive from the violation of Articles 7, 8 and 25 of the Convention, which have already been allowed by the Court in this judgment. These effects could be considered in the reparations stage.

XV

ON ARTICLE 21

179. The Commission maintained that the State violated the right to property of the victim, because the embargo on his property was not a consequence of due process neither was it ordered by a competent and impartial judge. Moreover, the Commission stated that, by keeping the victim imprisoned, Peru had violated his "right to work", which resulted in indirect damages.

180. In this regard, Peru alleged that the right to property of Gustavo Cesti Hurtado "has never been violated" and that the arguments of the Commission were not "corroborated" by the facts of the case. Likewise, it made some observations on the fact that neither did the payment to which the victim was condemned constitute a violation of the right to property.

181. Furthermore, the State alleged that it had not unduly embargoed, confiscated or expropriated the assets of Gustavo Cesti Hurtado, it had not ordered that he should cease to receive his remuneration's and that "it had only made effective the precautionary measures designed to ensure compliance with a possible order of compensation or of reparation, as occurred in the... criminal proceeding".

182. Article 21 of the Convention establishes that

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

183. The Court considers that, in the context of Article 21 of the American Convention, it was not proved that there had been a violation, *per se*, of the right to property of Gustavo Cesti Hurtado. The effects on his assets or on his ability to work that his detention, prosecution and conviction may have produced would derive from the violation of Articles 7, 8 and 25 of the Convention; therefore, the Court reserves its decision on such effects until the reparations stage, in such event.

XVI ON ARTICLE 51(2)

184. Based on the principle *pacta sunt servanda*, the Commission requested the Court to declare that the State violated Article 51(2) of the Convention by not complying with the recommendation made by the Commission in its Report No. 45/97, of October 16, 1997 (*supra* 4).

185. The State argued that if it was condemned for this reason, the Court would be granting the reports and conclusions of the Commission a "level of infallibility" and that this would not be correct as such reports may be contested, contradicted "and even invalidated, in view of the fundamental rights of States Parties, including the right to defend themselves".

186. The Court has said previously³⁵ that, in accordance with the principle of good faith, embodied in Article 31.1 of the Vienna Convention on the Law of Treaties, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to apply the recommendations of a protective organ such as the Inter-American Commission, which is indeed, one of the principal organs of the Organization of American States whose function is "*to promote the observance and defense of human rights*" in the hemisphere (OAS Charter, Articles 52 and 111)³⁶.

35 *Loayza Tamayo case*, Judgment of September 17, 1997. Series C No. 33, para. 80.

36 *Loayza Tamayo case*, *supra* 186, para. 80.

187. Likewise, Article 33 of the American Convention states that both the Inter-American Commission and the Court have competence "*with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention*", which means that, by ratifying the said Convention, States Parties commit themselves to apply the recommendations made by the Commission in its reports³⁷.

188. However, it should be remembered that Article 51 of Convention establishes that:

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.
2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

[...]

189. According to the provisions of this Article, the opinions and conclusions of the Commission and the establishment of a period for the State to comply with the recommendations, are issued only when the case has not been submitted to the consideration of the Court. Consequently, the Court has previously stated that the alleged violation of Article 51.2 of the Convention may not be argued in cases that are submitted to it. In the instant case, submitted to the Court in the application presented by the Commission, the acts set forth in Article 51.2 were not executed, so

³⁷ *Loayza Tamayo case, supra* 186, para. 81 and Blake case, Judgment of January 24, 1998. Series C No. 36, para. 108.

that it is unnecessary for the Court to consider the alleged violation of this Article by the State.

XVII APPLICATION OF ARTICLE 63(1)

190. In its application, the Commission requested the Court

a. that it should declare that the Peruvian State should execute the writ of habeas corpus issued by the Public Law Chamber of Lima of February 12, 1997, and, consequently, grant Gustavo Cesti Hurtado immediate and unconditional liberty (*supra* 4);

b. that it should annul the whole proceeding against the victim by the Peruvian military tribunals as well as all the effects of the judgment that was pronounced in this irregular proceeding (*supra* 4);

c. that it should order publication, at the State's cost, of declarations in which "it is made clear that the victim should not be considered guilty of committing any crime in view of the irregularity of the proceeding to which he was submitted" (*supra* 5 y 171). According to the Commission's application, the publication of these declarations should conform to the following rules:

i) in the written media that reported the alleged guilt of the victim, a one-page declaration must be published and

ii) in the national radio and television news programs, communiqués of at least three minutes must be broadcast reporting that the victim should not be considered a criminal and that he is innocent pursuant to the presumption of innocence;

d. that Peru should compensate the victim economically for the harm inflicted on his honor and good reputation by treating him as a criminal, prejudicing the normal course of his life including the

work and financial aspect, and that the State should be condemned to pay the costs of this proceeding (*supra* 5 y 171);

e. that any lien imposed on the property of the victim as a consequence of the irregular proceeding against him should be lifted and that he should be paid compensation for the embargo of his funds and other properties and for the loss of assets suffered by being prevented from exercising his "right to work" (*supra* 5 y 179), and

f. that the State should punish those responsible for the violations against the victim (*supra* 4.b).

191. The State rejects the Commission's demands and, in this respect, states,

a. that the immediate execution of the decision issued in favor of Gustavo Cesti Hurtado in the petition for habeas corpus (*supra* 111, 118 and 138) is a "legal impossibility", as Gustavo Cesti Hurtado has been sentenced by a decision with the force and effect of *res judicata* and that, if the Court accepts this application, "it would result in procedural chaos, destabilizing the system of laws of the Peruvian State, which it would oblige to disregard the judgment of the tribunal to whose competence it submits under international law, by presuming the existence of an international system of laws". Moreover, the State recalled that the decision issued in the petition for habeas corpus "had ceased to be valid, because Capt. (r) CESTI HURTADO, is no longer under the effects of the detention, the validity of which he challenged with the said petition, but sentenced to imprisonment by a decision which, we repeat, has the force and effect of *res judicata*";

b. that the demand that the effects of the proceeding against Gustavo Cesti Hurtado should be annulled (*supra* 20) is "extravagant and constitutes an attack on the sovereignty of the Peruvian State" because it is impossible to annul a judgment that has the nature of *res judicata*, in particular, when it is considered that

Gustavo Cesti Hurtado did not bring the due actions to question the competence of the military justice system;

c. that the claim that the victim should be compensated (*supra* 5) lacks merits, since the State has not violated any of his rights;

d. that the claim that those responsible for the violations against Gustavo Cesti Hurtado should be punished (*supra* 4.b) was not included in the report issued by the Commission in the instant case, so that it is not viable and that, when the military judges who heard the proceeding against Gustavo Cesti Hurtado were denounced, the Supreme Court of Justice of the Republic stated "that they acted legitimately, in accordance with their functions"; and

e. that it is not possible to resolve to assess costs in favor of the Commission (*supra* 5) because its claims are without merit in the instant case.

192. Article 63.1 of the American Convention establishes that

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

193. Regarding the Commission's first claim, the Court has declared in this judgment that the petition for habeas corpus filed by Gustavo Cesti Hurtado met all the requirements established by the Convention (*supra* 126) and that the State is obliged to comply with it. Consequently, the Court considers that the State must execute the habeas corpus decision issued by the Public Law Chamber of Lima on February 12, 1997.

194. Regarding the Commission's second claim, the Court considers that the proceeding against Gustavo Cesti Hurtado under the military justice

system was irregular. The Court has already declared, in this judgment, that the proceeding to which Gustavo Cesti Hurtado was submitted is a violation of his right to be heard by a competent tribunal, under Article 8.1 of the Convention (*supra* 151). Based on the foregoing, the Court considers that the proceeding against Gustavo Cesti Hurtado under the military justice system is incompatible with the Convention, so that it considers it in order to rule that the State must annul this proceeding and all the effects derived from it.

195. With regard to the Commission's third claim, the Court considers that the possible publication, at the cost of the State, of communiqués in which "it is made clear that the victim should not be considered guilty of committing any crime in view of the irregularity of the proceeding to which he was submitted", represents a measure of reparation to be considered during the corresponding stage.

196. As for the Commission's fourth claim, the Court considers that reparation of the consequences of the violation of the specific rights in the instant case is in order; this should include a fair compensation and the payment of any expenses that the victim incurred as a result of measures relating to this proceeding.

197. With regard to the Commission's fifth claim, the Court considers that the consequences on the assets of Gustavo Cesti Hurtado due to his detention, prosecution and conviction, in particular, the embargo on his property, is a matter to be considered at the reparations stage.

198. In order to decide on reparations, the Court will require further information and evidence in addition to that which has been provided; accordingly, it orders that the corresponding procedural stage should be opened, and to this effect, authorizes its President to duly adopt any necessary measures.

XVIII

OPERATIVE PARAGRAPHS

199. Therefore,

THE COURT,

DECIDES

unanimously

1. to rule that the Peruvian State violated Articles 7.6 and 25 of the American Convention on Human Rights with regard to Gustavo Adolfo Cesti Hurtado, in the terms established in paragraphs 123 to 133 of this judgment, and to order that the decision of the Chamber of Public Law of Lima on the petition for habeas corpus filed by Gustavo Adolfo Cesti Hurtado, of February 12, 1997, should be complied with;
2. to rule that the Peruvian State violated Article 7.1, 2 and 3 of the American Convention on Human Rights with regard to Gustavo Adolfo Cesti Hurtado, in the terms established in paragraphs 140 to 143 of this judgment;
3. to rule that the Peruvian State violated Article 8.1 of the American Convention on Human Rights with regard to Gustavo Adolfo Cesti Hurtado, in the terms established in paragraph 151 of this judgment;
4. to rule that, in the instant case, it was not proved that the Peruvian State violated Article 8.2 of the American Convention on Human Rights with regard to Gustavo Adolfo Cesti Hurtado, in the terms established in paragraph 152 of this judgment;
5. to rule that, in the instant case, it was not proved that the Peruvian State violated Article 5.2 of the American Convention on Human Rights with regard to Gustavo Adolfo Cesti Hurtado, in the terms established in paragraph 160 of this judgment;
6. to rule that the Peruvian State violated Articles 1.1 and 2 of the American Convention on Human Rights with regard to Gustavo Adolfo Cesti Hurtado, in the terms established in paragraphs 166 to 170 of this judgment;

7. to rule that in the instant case it was not proved that the Peruvian State violated Articles 11 and 21 of the American Convention on Human Rights with regard to Gustavo Adolfo Cesti Hurtado, in the terms established in paragraphs 177, 178 and 183 of this judgment;
8. to rule that the proceeding against Gustavo Adolfo Cesti Hurtado under the military justice system is incompatible with the American Convention on Human Rights and to order the State to annul this action and all the effects that may derive from it;
9. to rule that the Peruvian State is obliged to pay fair compensation to Gustavo Adolfo Cesti Hurtado and to indemnify him for any expenses that he may have incurred in steps related to this proceeding, and
10. to order that the reparations stage should be opened and to authorize its President to duly adopt the appropriate measures.

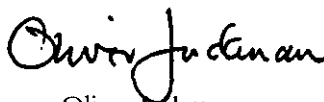
Done in English and Spanish, the Spanish text being authentic, in San Jose, Costa Rica, this twenty-ninth day of September nineteen hundred and ninety-nine.



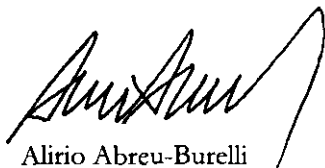
Antônio A. Cançado Trindade
President



Máximo Pacheco-Gómez



Oliver Jackman



Alirio Abreu-Burelli



Sergio García-Ramírez



Carlos Vicente de Roux-Rengifo



Manuel E. Ventura-Robles
Secretary

So ordered,



Antônio A. Caçado Trindade
President



Manuel E. Ventura-Robles
Secretary