

INTER-AMERICAN COURT OF HUMAN RIGHTS

CANTORAL BENAVIDES CASE

JUDGMENT OF AUGUST 18, 2000

In the Cantoral-Benavides Case,

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

Antônio A. Cançado Trindade, President
Máximo Pacheco-Gómez, Vice President
Hernán Salgado-Pesantes, Judge
Oliver Jackman, Judge
Alirio Abreu-Burelli, Judge
Sergio García-Ramírez, Judge
Carlos Vicente de-Roux-Rengifo, Judge, and
Fernando Vidal-Ramírez, Judge *ad hoc*

also present:

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

pursuant to Articles 29 and 55 of its Rules of Procedure (hereinafter "the Rules of Procedure"), renders the following judgment on the present case.

I INTRODUCTION OF THE CASE

1. The Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission"), in filing the application, invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Article 26 *et seq.* of the Rules of Procedure then in force.¹ In filing said application, the Commission asked the Court to decide whether the State of Peru (hereinafter "the State" or "Peru") had violated the following Articles of the Convention: 1(1) (Obligation to Respect Rights), 2. (Domestic Legal Effects), 7(1) to 7(6) (Right to Personal Liberty), 5 (Right to Humane Treatment), 8(1), 8(2), 8(2)d), 8(2)f), 8.2.g), 8(3) and 8(4) (Right to a Fair Trial) and 25 (Right to Judicial Protection), and Articles 2 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter "Inter-American Convention Against Torture"). According to the application, these violations were suffered by Mr. Luis Alberto Cantoral-Benavides due to the unlawful deprivation of his liberty, following his arbitrary detention and incarceration, cruel, inhuman and degrading treatment, violation of the judicial guarantees, and double jeopardy based on the same facts. In its final written brief, the Commission added the alleged violation of Articles 8(2)c), 8(5) and 9 of the American Convention, and 6 of the Inter-American Convention Against Torture.

II JURISDICTION

2. The Court has jurisdiction to hear the present case. Peru has been a State Party to the American Convention since July 28, 1978, and accepted the jurisdiction of the Court on January 21, 1981. Also, Peru has been a State Party to the Inter-American Convention Against Torture since March 28, 1991.

1 Rules of Procedure approved by the Court at its Twenty-third Regular Session, held January 9 -18, 1991; amended on January 25, 1993; July 16, 1993; and December 2, 1995.

III

PROCEEDINGS BEFORE THE COMMISSION

3. On April 18, 1994, a petition was transmitted via fax to the Inter-American Commission relevant to the facts of this case, and on April 20, 1994, the original copy of the petition was received at the Secretariat. On August 24, 1994, the Commission forwarded to the State the pertinent parts of the petition, pursuant to Article 34 of its Rules of Procedure.
4. On September 7, 1994, the State requested that the Commission refrain from taking up the present case because "the time period for filing the petition had expired, as it had been filed after the period of six months established by Article 46(1)b. of the American Convention."
5. On November 25, 1994, the petitioners informed the Commission that the decision of the Supreme Court of Peru regarding the appeal for annulment of the judgment of October 10, 1994, rendered by the "faceless special tribunal of the regular court system" was pending.
6. On February 15, 1995, the State asserted that the Commission did not have jurisdiction to consider the case due to the "non-exhaustion of domestic remedies." On March 2, 1995, the Commission, in response to the State, noted that it was not possible to raise that objection in "the situation in which a person who has been tried and acquitted by a military court for the crime of 'Treason against the Fatherland' then finds himself being tried and in the process of being judged by the regular court for the same facts, under the legal title of the crime of 'Terrorism'."
7. On March 5, 1996, the Commission approved Report No. 15-A/96. The following day, the Commission, in accordance with Article 48(1)f. of the American Convention, put itself at the disposal of the parties to explore the possibility of arriving at a friendly settlement, deciding not to notify them of the report until they had responded to its offer. The petitioners were willing to take part in the suggested proceeding under certain conditions. The State, for its part, requested, on April 1, 1996, an extension to respond to the possibility; however, despite having obtained the extension, it did not respond to the Commission's offer.

8. On May 8, 1996, the Commission transmitted to the State Report No. 15-A/96, which in its operative paragraphs resolved:

1. To declare that the Peruvian State is responsible for the violation of Luis Alberto Cantoral-Benavides' rights to personal liberty, humane treatment and a fair trial as set forth in Articles 7, 5 and 8 of the American Convention on Human Rights, all in accordance with the failure to comply with the obligations set forth in Article 1(1).

2. To recommend to the Peruvian State that, in consideration of the examination of the facts and law made by the Commission, it immediately release Luis Alberto Cantoral-Benavides upon receiving notification of this report.

3. To recommend to the Peruvian State that it pay compensation to the claimant in the instant case, for the injury caused as a result of the denounced facts which have been verified by the Commission.

4. To request that the Government of Peru inform the Inter-American Commission on Human Rights, within a period of forty-five (45) days, of any measures it has taken in the instant case in accordance with the recommendations contained in paragraphs 2 and 3 above.

5. To submit the present case to the Inter-American Court of Human Rights, if, within the period established in the preceding paragraph, the State of Peru does not implement the recommendations made by the Commission.

9. On July 5, 1996, by means of note No. 7-5-M/204, the State transmitted to the Commission a copy of the report prepared by a task force comprising representatives of various ministries of the State, in which it stated that during the processing of the case it had indicated several times that there were ongoing judicial proceedings, and that, therefore, domestic remedies had not been exhausted. Moreover, it asserted that there

had been a lapse in the right invoked pursuant to Article 46(1)b. of the Convention. Finally, it maintained that it was not possible to respond to the recommendations contained in Report No. 15-A/96.

IV PROCEEDINGS BEFORE THE COURT

10. The application corresponding to this case was submitted to the Court on August 8, 1996. The Inter-American Commission named Carlos Ayala Corao and Jean Joseph Exumé as its delegates; Domingo E. Acevedo as its attorney; and as its assistants Iván Bazán-Chacón, Rosa Quedena, José Miguel Vivanco, Viviana Krsticevic, Ariel Dulitzky and Marcela Matamoros, who, according to information from the Commission to the Court, would also act as representatives of the victim. By note of June 18, 1998, Mrs. Matamoros informed the Court that she would not participate in the present case.

11. By note of August 21, 1996, the Secretariat of the Court (hereinafter "the Secretariat"), after the President of the Court (hereinafter "the President") had made a preliminary review of the application, notified the State of same.

12. On September 6, 1996, the State informed the Court that it had appointed Mario Cavagnaro-Basile as its agent. On June 4, 1998, it named Walter Palomino-Cabezas as its alternative agent.

13. On September 20, 1996, the State raised seven preliminary objections and asked the Court to admit them or, alternately, to join them to the merits. Peru also requested additional time to "interpose new objections in addition to the earlier ones," which was not granted by the Court.

14. On October 4, 1996, the State named Mr. Fernando Vidal-Ramírez as Judge *ad hoc*.

15. On December 12, 1996, the State submitted its answer to the application.

16. On March 18, 1997, the Court, at the behest of the Commission, asked the State for the report on the personal search of Luis Alberto Cantoral-Benavides conducted on February 6, 1993, and for police affidavit No. 049 DIVICOTE 3 – DINCOTE, of February 26, 1993. On May 19, 1997, the State submitted the aforementioned report, and, on April 10, 1997, asked that, in the interest of judicial economy, the affidavit that had been submitted in the Loayza-Tamayo case be incorporated into the present case. On April 14, 1997, the President issued a favorable ruling on this request.

17. In briefs dated May 19 and June 23, 1997, the State reported that Mr. Luis Alberto Cantoral-Benavides had requested, on October 9, 1996, a pardon from the ad hoc Commission created under Law No. 26.655. Said Commission was responsible for studying and evaluating cases and proposing that the President of the Republic, in exceptional circumstances, pardon those convicted of the crimes of terrorism or treason against the fatherland. Said Commission recommended that Cantoral-Benavides be granted this benefit. On July 15, 1997, the State reported that said pardon had been granted in Supreme Decision 078-97-JUS, of June 24, 1997. Inasmuch as Mr. Cantoral-Benavides had been released from prison, it asked the Court to dismiss the case. The State re-submitted this request on November 4, 1997 and April 24, 1998.

18. On October 16, 1997, the Commission submitted its comments on the State's request for dismissal, and asked the Court to declare it inadmissible.

19. On June 8, 1998, the Court decided to postpone consideration of the State's "request for dismissal" until after the public hearing on preliminary objections.

20. On June 18, 1998, the Court decided "[t]o deny the request for dismissal presented" by the State, and to continue processing the case.

21. On August 21 and November 9, 1998, the Secretariat asked the State to re-submit some of the documents it had presented as direct evidence in its answer to the application, which were found to be illegible. On December 23, 1998, the State submitted several of the documents that

had been requested, some of which were still found to be illegible. On January 22, 1999, the State again presented some of the documents that had been requested.

22. On August 18, 1998, the State was asked to provide the following documentation as additional evidence, in accordance with Article 44 of the Rules of Procedure: a duly certified copy of the judicial document showing the date on which the alleged victim was officially notified of the judgment rendered on September 24, 1993, and a copy of the law that governs all procedural aspects of the extraordinary motion for review, both in the military and the regular jurisdiction.

23. On September 3, 1998, the Court dismissed the preliminary objections interposed by the State.

24. On February 16, 1999, the Secretariat again asked the State to submit the documentation requested in its note of August 18, 1998, and requested a copy of the brief in which the petitioners presented an extraordinary motion for review of the judgment rendered by the Supreme Council of Military Justice on September 24, 1993, and of the decision issued by the Supreme Court of Peru on October 22, 1993.

25. On February 16 and June 22, 1999, the Commission proposed Mr. Luis Guzmán-Casas as a witness, indicating that he was incarcerated at the "Miguel Castro-Castro" prison at the time, and asked the Court to order that his statement be taken in Peru, in said facility.

26. On April 5, 1999, the State submitted part of the documentation requested by the Secretariat in its note of February 16, 1999.

27. On June 28, 1999, the Court requested authorization from the State to question the witness Luis Guzmán-Casas at the "Miguel Castro-Castro" prison in Peru, where he was incarcerated. To date, the State has not responded to this request.

28. On August 4, 1999, the President summoned the Inter-American Commission and the State to a public hearing on the merits, to be held at

the seat of the Court on September 20, for the purpose of taking the statements of the witnesses and the expert proposed by the Commission. Also, the President instructed the Secretariat to inform the parties that they would be able to present their final oral arguments on the merits of the case immediately after such evidence was received.

29. On September 10, 1999, the State informed the Court that it was materially impossible to summon the witness identified as "Naval Investigating Judge identified with code No. BT-10003000," since his name and surnames were unknown, and because his identity was secret in accordance with Article 15 of Decree Law No. 25.475.

30. On September 20 and 21, 1999, in a public hearing on the merits, the Court took the statements of the witnesses and the expert proposed by the Inter-American Commission, and heard the Commission's oral arguments.

Appearing before the Court were:

for the Inter-American Commission on Human Rights:

Domingo E. Acevedo, delegate;
Viviana Krsticevic, assistant;
María Claudia Pulido, assistant;
Carmen Herrera, assistant; and
Iván Bazán, assistant.

As witnesses proposed by the Inter-American Commission:

Luis Alberto Cantoral-Benavides;
Gladys Benavides-de-Cantoral;
Susana Villarán-de-la-Puente;
María Elena Castillo;
Pedro Telmo Vega-Valle;
Víctor Álvarez-Pérez;
Elba Greta Minaya-Calle;
Rosa María Quedena-Zambrano; and
Julio Guillermo Neira.

As the expert proposed by the Inter-American Commission:

Arsenio Oré-Guardia.

The State did not participate in the public hearing, despite having been summoned. Also absent was the Naval Investigating Judge identified with the code number BT-10003000, proposed as a witness by the Commission (*supra* para. 29).

31. On March 3, 2000, the Secretariat, on instructions from the President, informed the State and the Commission that they would have until April 11, 2000, to submit their final written briefs on the merits of the case.

32. On March 6, 2000, the Court, pursuant to the powers conferred upon it in Article 44 of its Rules of Procedure, decided to incorporate into the evidence of this case the following evidence produced in the Loayza-Tamayo case: the legal provisions related to the crimes of terrorism and treason against the fatherland (*infra* para. 38); five testimonies given in Peru; two testimonies (*infra* para. 38) and three expert testimonies (*infra* para. 38) given before the Court in a public hearing on the merits which began on February 5, 1997; and one testimony (*infra* para. 38) given before the Court at the public hearing on reparations which began on June 9, 1998. It also asked the State for information relative to any petition(s) regarding torture that Mr. Cantoral-Benavides had submitted to Peruvian authorities, and an official document stating the date on which he was released. Said information was submitted by the State on April 10, 2000. Also, on March 27, 2000, the President of the Court asked the State to provide as additional evidence, under the powers referenced above, the files related to the military and civilian trials of Luis Alberto Cantoral-Benavides for the crimes of treason against the fatherland and terrorism.

33. On March 27, 2000, the Court asked the Secretary General of the Organization of American States (hereinafter "OAS") for information as to whether the State had informed the OAS of a state of emergency or suspension of guarantees decreed between February 3, 1993 and October

6, 1995. On May 10, 2000, the Director of the International Law Department of the General Secretariat of the OAS, Mr. Jean-Michel Arrighi, informed the Court that no notification had been received from the Peruvian State regarding a suspension of guarantees on the dates cited. On May 31, 2000, the Secretary General of the OAS, Mr. César Gaviria, sent information related to the notification by the State of the suspension of guarantees in Peru during several periods (*infra* para. 42.). On June 2, 2000, the State submitted its comments on the note dated May 10 of this year.

34. On April 11, 2000, the Commission filed its final written briefs. The State did not file final written briefs.

35. On May 23, 2000, the State filed, beyond the time allowed for same, a certified copy of the files of the criminal trial of Luis Alberto Cantoral-Benavides and others for the crime of terrorism, as part of the additional evidence requested on March 27 of this year.

V

DOCUMENTARY EVIDENCE

36. As appendices to the application, the Commission submitted copies of 27 documents contained in 23 appendices.²

² *cf.* appendix I, Report No. 15-A/96 case 11.337, of March 5, 1996; appendix II, judgment of the Special Naval Court, of March 5, 1993; appendix III, Prosecutor's Report, of March 12, 1993; appendix IV, judgment of the Special Naval War Council, of April 2, 1993; appendix V, judgment of the Special Tribunal of the Supreme Council of Military Justice for Matters Related to Treason Against the Fatherland, of August 11, 1993; appendix VI, official letter 026-JIE-011-93-TP from the Special Naval Investigating Judge, of August 20, 1993; official letter 604-IX-RPNP/JAJ-DEPS-Ica, from the Director of the E.P.I., dated September 27, 1993 and addressed to Mrs. Elba Greta Minaya-Calle, Provisional Judge of the First Criminal Court of Lima; decision of the Special Naval Investigating Judge, of August 17, 1993, and judgment of the First Criminal Court of Lima, of September 21, 1993; appendix VII, judgment of the Full Special Tribunal of the Supreme Council of Military Justice, of September 24, 1993; appendix VIII, writ of the 43rd Criminal Court of Lima, dated October 8, 1993; appendix IX, opinion of January 7, 1994, and writ of the Criminal Judge of Lima, of December 29, 1993; appendix X, judgment of the Special Crimi-

37. As appendices to the answer to the application, the State submitted copies of 46 documents.³

nal Branch of the Superior Court of Lima, of October 10, 1994; appendix XI, judgment of the Supreme Court of Peru, of October 6, 1995; appendix XII, note from the Permanent Mission of Peru to the Organization of American States, of September 7, 1994; appendix XIII, Report No. 057-95-JUS/CNDH-SE-DPDDH, from the Director for the Promotion and Dissemination of Human Rights, of May 3, 1995, to the Executive Secretariat of the National Council on Human Rights; appendix XIV, note from the Ecumenical Foundation for Development and Peace (FEDEPAZ), of November 14, 1995, to the Inter-American Commission on Human Rights; appendix XV, report prepared by the task force comprising representatives of the Ministries of Justice, Interior, Defense and Foreign Relations, as well as the Office of the Public Prosecutor and the Judicial Branch of Peru, of June 1996; appendix XVI, Decree Law No. 25.659, of August 13, 1992; appendix XVII, statement from Luis Alberto Cantoral-Benavides while at the holding cells of the Palace of Justice in Lima, given at 11:00 a.m. on May 5, 1993; appendix XVIII, official letter No. 4030-93-MP-FN from the Office of the Public Prosecutor National Prosecutor, dated December 9, 1993, and addressed to the Third Vice President of the Congress; appendix XIX, Report on torture in Peru and other cruel, inhuman and degrading types of treatment or punishment, January 1993 to September 1994, prepared by the National Coordination Office for Human Rights; appendix XX, newspaper article entitled "Confesion a Golpes" by Maria Elena Castillo; appendix XXI, newspaper article entitled "Caen 14 Senderistas que mataron ocho soldados y dinamitaron 2 Comisarias," newspaper La Nacion - Lima, Saturday, February 27, 1993; appendix XXII, contained no documentation; appendix XXIII, decision of the Special Naval War Council, of September 14, 1993, and appendix XXIV, writ of October 31, 1995.

³ *cf.* brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Criminal Judge of the 43rd Criminal Court of Lima, of October 13, 1993; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Criminal Judge of the 43rd Criminal Court of Lima, of October 25, 1993; statement made by Luis Alberto Cantoral-Benavides before the 43rd Criminal Court of Lima during the investigation stage, December 1, 1993; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Criminal Judge of the 43rd Criminal Court of Lima, received December 8, 1993; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Criminal Judge of the 43rd Criminal Court of Lima, of December 14, 1993; brief from Luis Alberto Cantoral-Benavides' attorney, addressed to the Special Criminal Judge of the 43rd Criminal Court of Lima, of December 15, 1993; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Branch of the Superior Court of Lima, of February 16, 1994; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Branch of the Superior Court of Lima, of January 27, 1994; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Branch of the Superior Court of Lima, of February 2, 1994; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Branch of the Superior Court of Lima, of

38. The evidence produced in the Loayza-Tamayo case was incorporated into the evidence of the present case, as additional evidence (*supra* para. 32).⁴

January 27, 1994; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Branch of the Superior Court of Lima, dated January 26, 1994; letters of notification/ Superior Court of Lima, File 634-93, of June 24, July 18 and 22, 1994; written record of the hearing held at the Special Criminal Court at Santa Monica prison on July 26, 1994, in which Luis Alberto Cantoral-Benavides' statement was taken; minutes from August 3, 10, 20 and 24, at Santa Monica, and September 3, 6, 16 and 19, 1994, at the Castro-Castro prison, which contain the continuation of the hearing; letter of notification/ Superior Court of Lima, File 634-93, of August 5, 1994; letter of notification/ Superior Court of Lima, File 634-93, dated June 24, 1994; conclusions prepared by the defense in the trial of Luis Alberto Cantoral-Benavides for the alleged commission of the crime of terrorism, from Víctor Álvarez-Pérez, of September 1994; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Branch of the Superior Court of Lima, of September 6, 1994; brief from Luis Alberto Cantoral-Benavides lawyer, addressed to the Special Branch of the Superior Court of Lima, of September 5, 1994; expert handwriting opinion issued by Julio Guillermo Neira-Castro, of September 5, 1994; judgment of the Special Branch of the Superior Court of Lima, of October 10, 1994; judgment of the Supreme Court of Peru, of October 6, 1995; Supreme Decree No. 006-93 DE/CCFF:AA, of January 19, 1993, published January 22, 1993, which extends the state of emergency in the Department of Lima and the Province of Callao; report of search of residence, of February 6, 1993; report of personal search, of February 6, 1993; statement from Luis Alberto Cantoral-Benavides, at 10:30 a.m. on February 12, 1993, at the offices of DIVICOTE-3 DINCOTE; statement made by Luis Alberto Cantoral-Benavides on February 28, 1993, before the Special Naval Investigating Judge, during the investigation stage; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to Special Naval War Council, of March 19, 1993; official letter from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special War Council, of April 12, 1993; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Naval Investigating Judge, of March 4, 1993; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Branch of the Supreme Council of Military Justice, of May 17, 1993; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Branch of the Supreme Council of Military Justice, of May 28, 1993; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the National Prosecutor, Office of the Public Prosecutor of June 7, 1993; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Branch of the Supreme Council of Military Justice, of July 22, 1993; certification from the person in charge of the Meeting of the Parties at the Special Branch for Terrorism of the Supreme Court of Peru, of November 6, 1996; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to the Special Navy Judge, of August 24, 1993; medical certificate 5313-L, dated February 8, 1993, related to examination of Luis Alberto Cantoral-Benavides, and letter of notification of detention of Luis Alberto Cantoral-Benavides.

⁴ *cf.* the following legal provisions relate to the crimes of terrorism and treason against the fatherland: Code of Criminal Procedure (Law No. 9024); Organic Law of Military

39. At the request of the Court, the State submitted documentation related to the internal processing of the case (*supra* paras. 16, 17 and 26).⁵

40. Certain documentation related to the internal processing of the case, beyond that called for in Article 43 of the Rules of Procedure, was

Justice (Decree Laws Nos. 23.214 and 23.201); Organic Law of the Tribunal of Constitutional Guarantees (Law No.23.385); Peruvian Constitution of Peru of 1979; Peruvian Constitution of 1993; Law on Habeas Corpus and Civil Rights Protection (Decree Law No. 23.506); Decree Law No. 24.150, regarding the rules that must be obeyed in states of emergency when the armed forces assume control of internal order in all or part of the national territory; Fundamental Law of the Government of National Emergency and Reconstruction (Decree Law No. 25.418); Decree Law No. 25.499, which establishes the terms for granting the benefits of commutation, exemption, remission, and mitigation of the sentences imposed on those liable in the commission of crimes related to terrorism; Decree Law No. 25.708, regarding procedural rules in trials for crimes related to treason against the fatherland; Decree Law No. 25.728, which empowers the jurisdictional organs to convict in absentia those liable for the crimes of terrorism and treason against the fatherland; Decree Law No. 25.744, referring to the rules applicable to the police investigation, the investigation stage of the proceedings and the trial itself, as well as the serving of the sentence for the crimes of treason against the fatherland contained in Decree Law No. 25.659, Law No. 26.248, which modifies Decree Law 25.659; Regulations of the Law of Repentance (Supreme Decree No. 015-96-JUS); testimonies of Luis Guzmán-Casas, Luis Alberto Cantoral-Benavides, Juan Alberto Delgadoillo, Pedro Telmo Vega-Valle, and Mrs. María Elena Loayza-Tamayo, given in Peru in the Loayza-Tamayo Case; testimonies of Víctor Álvarez-Pérez and Iván Bazán-Chacón, and from the experts Julio Maier, León Carlos Arslanian and Héctor Faúndez-Ledezma, given before the Court beginning on February 5, 1997, in the Loayza-Tamayo Case; and testimony from Mrs. María Elena Loayza-Tamayo, given before the Court beginning June 9, 1998, in the Loayza-Tamayo Case, Reparations.

5 *cf.* police affidavit No. 049 DIVTCOTLI-3-DINCOITE, of February 25, 1993; report of personal search of Luis Alberto Cantoral-Benavides, of February 6, 1993; official letter CAH-ST-97-135, of May 16, 1997, from the General Coordinator of the *ad hoc* Commission created under Law 26.655, to the Public Prosecutor responsible for the legal affairs of the Ministry of the Interior and in Charge of Special Affairs Related to Terrorism, regarding the processing of the pardon of Luis Alberto Cantoral-Benavides; and a note from the Legal Secretary WB-700229, in which he reported the judgment rendered by the Special Tribunal of the Supreme Council of Military Justice in the case of Luis Alberto Cantoral-Benavides.

submitted by the State even though it had not been requested by the Court. (*supra* para. 26).⁶

41. The State presented, as part of the additional evidence requested, two notes and a certified copy of the files of the criminal trial of Mr. Luis Alberto Cantoral-Benavides and others for the crime of terrorism (*supra* para. 35).⁷

42. The Secretary General of the OAS submitted documentation related to the notification of the suspension of guarantees by the Peruvian State (*supra* para. 33).⁸

6 *cf.* judgment rendered by the Supreme Council of Military Justice for Matters Related to Treason Against the Fatherland, of August 11, 1993; brief from the Special Deputy General Prosecutor, of September 3, 1993; judgment rendered by the Special Tribunal of the Supreme Council of Military Justice for Matters Related to Treason Against the Fatherland, of September 24, 1993; and the following notes, which are not related to the case: a note, dated August 26, 1993, from Luis Alberto Cantoral-Benavides' lawyer, official letter No. 41-93-A, dated November 18, 1993; and a note from the Legal Secretary WB-700229, in which he reported the judgment rendered by the Special Tribunal of the Supreme Council of Military Justice in the case of Mr. Julio Ortiz Martínez.

7 *cf.* official letter No. 093-2000-MP-FN-3RDF.S.C.L., dated March 23, 2000, from the Third Superior Civil District Attorney's Office of Lima to the Executive Secretary of the National Council on Human Rights; a certification from the Executive Office of the Penitentiary Record Center of the National Penitentiary Institute of the Ministry of Justice, of March 6, 2000; and the file of the criminal trial for the crime of terrorism, volumes A, B, C, D, and E.

8 *cf.* copies of the notes received at the General Secretariat of the OAS in the period between January 1993 and October 1995, reporting on the declaration and extension of states of emergency in the Peruvian State, via the following supreme decrees: No. 020 DE/CCFFAA; No. 004-94-DE/CCFFAA, dated January 13, 1994; No. 014-94-DE/CCFFAA, published February 19, 1994; No. 020-94-DE/CCFFAA and No. 021-94-DE/CCFFAA, published February 18, 1994; No. 035, of May 10, 1994; No. 061, published July 16, 1994; No. 062, published July 18, 1994; No. 093, published November 13, 1994; No. 003, published January 12, 1995; No. 077-DE/CCFFAA; No. 078-DE/CCFFAA; No. 079-DE/CCFFAA; No. 083-DE/CCFFAA; No. 084-DE/CCFFAA; No. 085-DE/CCFFAA; No. 086-DE/CCFFAA; No. 088-DE/CCFFAA; No. 089-DE/CCFFAA; No. 092-DE/CCFFAA; No. 093-DE/CCFFAA; No. 094-DE/CCFFAA; No. 095-DE/CCFFAA; No. 100-

VI ORAL AND EXPERT EVIDENCE

43. The Court received, in the public hearings held on September 20 and 21, 1999, the statements of the witnesses and the expert proposed by the Inter-American Commission. Said statements are summarized below, in the order in which they were given:

a. Testimony of Luis Alberto Cantoral-Benavides, alleged victim in the case.

The witness was convicted in Peru for the crime of treason against the fatherland. He was arbitrarily detained at his home by members of the National Police of Peru – National Anti-Terrorism Bureau (hereinafter "DINCOTE") - dressed as civilians, in the early morning hours of February 6, 1993. He was shown no warrant from a competent authority to conduct the search or arrest him. The police were looking for his older brother, José Antonio Cantoral-Benavides, but when they could not find him, they arrested Luis Alberto. At the time he was detained he was made to sign a document identifying all items confiscated, but was not shown the contents of the document. They took him to his aunt's house in hopes of finding his brother José Antonio, who was not there either. His twin brother, Luis Fernando, offered to accompany him to the police station to find out what was going on. After both were blindfolded and handcuffed, a hood was placed over their heads and they were taken to DINCOTE headquarters, along with other detainees.

He was held incommunicado at DINCOTE for eight or nine days, and was not permitted to see a lawyer. Detainees were held in a large room, blindfolded and with their hands tied. It was not until some 15 days after his detention, when he gave his statement to the police, that he first had

DE/CCFFAA; No. 101-DE/CCFFAA; No. 058, published September 9, 1995; No. 059, published September 9, 1995; No. 073, published November 4, 1995; No. 074, published November 5, 1995; No. 075, published November 6, 1995; No. 078-DE/CCFFAA; and a note of September 27, 1994, which contains a list of the provinces and/or departments under a state of emergency at the time.

access to the lawyer who had been assigned to his case; he was never allowed to meet with his lawyer in private.

He was held there for close to one month, until March 4 or 5, blindfolded and handcuffed just like all the other detainees; when they were interrogated, the police subjected them to physical and psychological torture. One night they took him, his brother and another person to the beach; they took his brother out of the car and began to torture him; as he listened he became filled with fear. Then they took him from the car, threw him to the sand and began beating him. Still blindfolded, they began to slap him around the ears, telling him that they were going to throw him in the water just as they had done with his brother. He told them he didn't know what his brother had done and that he was not guilty of anything. The "psychological torture was too much for me to bear."

During his detention at DINCOTE, he was brought before the press wearing a striped prison uniform, and was publicly charged with terrorism as a member of Sendero Luminoso (Shining Path). A so-called "legal doctor" examined him one time, but only superficially. Also, they forced him to sign a document in which he admitted that he was guilty of the crime of treason against the fatherland. He was also held at the veterinary section of a naval base. He was arraigned under the military jurisdiction and they began the investigation stage of the trial for the crime of treason against the fatherland at the veterinary section. He did not have access to a lawyer he could trust. He was assigned a lawyer, who was not present when his statement was taken. At the veterinary section of the naval base, all members of the court were military personnel, who wore hoods, dark glasses, side arms and military uniforms; his court-appointed lawyer was also dressed in a military uniform.

Later, he was transferred to the holding cells at the Palace of Justice of Lima, where conditions were unsanitary. While being transferred to these cells he was beaten again. Upon his arrival, he received no medical attention. While there, he gave a statement in the presence of his lawyer, Víctor Álvarez, on May 5, 1993, a statement he confirmed in the hearing before the Court. Then he was taken for trial before the military jurisdiction, which acquitted him in the first instance. Then he was transferred to

the Cristo Rey prison in Cachiche, Ica, where he was also mistreated by those in charge, leading to serious physical injury. He was made to lie face up in the sun for hours and was not allowed to open his eyes; he was forced to stand in line to receive a beating with a club; when electrical current was applied to his waist, he was thrown to the floor, which was covered with water and kerosene; his body was covered with blood, and even though he could not move one of his arms, he had to drag himself back to his cell; he was never seen by a doctor. While there, he was never notified of his acquittal in August 1993 by the Supreme Council of Military Justice.

His twin brother, who had been sentenced to 30 years in prison in the first instance by the military court, was released; actually, they should have released Luis Alberto. His lawyer, Dr. Víctor Álvarez, filed a writ of habeas corpus, which was rejected on two occasions. While he was awaiting a decision, naval officers interrogated him regarding his brother's whereabouts, first offering him freedom and later telling him they had new evidence against him. This evidence consisted of a hand-drawn sketch and some diagrams showing the placement of bombs, which, allegedly, he had prepared along with another detainee, Margarita Clarivel Mateo, a person Cantoral did not know. At DINCOTE, he gave handwriting samples to be compared with the writing on the documents. Later he learned that, on the basis of this evidence, his case was remitted to a regular court, for a new trial, which meant that he had to be transferred to Lima. During the new trial, his lawyer was also Dr. Víctor Álvarez, who requested that an expert witness for the defense analyze the handwriting, which turned out not to be that of Cantoral-Benavides.

During said trial, he was accused of participating in the placement of bombs and of allegedly training university students, and was sentenced to 20 years in prison. He was transferred to the "Miguel Castro-Castro" prison, where he remained for almost three and one-half years. Prisoners were held incommunicado in very small cells (3 per cell) for 23 and one-half hours per day, and allowed out into the sunlight for only 30 minutes a day. They were allowed to visit with relatives for one half hour per month, but were separated from them by fences that made communication difficult at best, and the prison was very overcrowded. He was

allowed to have contact with his lawyer for only five minutes, separated by the same fence, and always under the watchful eyes of a guard and within earshot of the other prisoners and their lawyers.

Once his lawyer explained the situation to him, and realizing that there was no other way to gain his release, he requested a pardon, even though he understood that a person who is pardoned does not have his criminal record expunged. The processing of the pardon took more or less a year. As a result of the pardon, he was released on June 25, 1997. He was not compensated in any way for the more than four years he was imprisoned, nor was his record expunged. In addition, his imprisonment caused him psychological trauma and made it much more difficult for him to rejoin society.

He was threatened during his incarceration at the naval base and while being taken to the hearing before the Board of Pardons, and has been the object of threats since his release. His family has also been threatened. He turned to Amnesty International, which helped him get from Peru to Brazil, where he currently resides. He is afraid to return to his homeland, and fears for his family. He has received no psychological treatment.

b. Testimony of Susana Villarán-de-la-Puente, journalist and member of the Board of Directors of the National Coordination Office for Human Rights.

In the 1980s, the State repressed subversive terrorist groups such as Sendero Luminoso and the Movimiento Revolucionario Tupac Amaru, MRTA, through forced disappearances and extrajudicial executions. In 1992, the State shifted from these practices to arbitrary arrests and systematic torture, according to the National Coordination Office for Human Rights. These practices coincided with the implementation of the so-called anti-terrorism laws, all of which violated the principle of due process in some way. People being detained did not denounce the torture for fear of reprisal. The witness mentioned certain cases of torture and self-incrimination or "coerced confessions" which she covered as a journalist. The National Coordination Office for Human Rights stated in a report that torture had been practiced on a systematic basis for the 10

last years. "We have gathered 4,601 complaints in the last ten years, and 3,868 people detained for terrorism or treason against the fatherland have been tortured." In violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners, the anti-terrorism laws created very harsh prison conditions for those being held for terrorism and treason against the fatherland. There were many cases of people being detained and tried under the anti-terrorism laws who later were found to be innocent; in an attempt to right this situation, a law was passed creating the ad hoc Commission charged with studying the proposed pardons submitted to the President of the Republic. In her opinion, this law was not an effective solution, since it did not even call for the financial compensation of those pardoned.

c. Testimony of Pedro Telmo Vega-Valle, co-defendant of Luis Alberto Cantoral-Benavides.

He was convicted in Peru for the crime of treason against the fatherland. He was detained at his home by members of the DINCOTE on January 9, 1993, because they had linked him to the Sendero Luminoso terrorist organization. He was taken to DINCOTE, where he was held for 27 days. While there, he was held incommunicado, and spoke with a lawyer for the first time 15 days after his detention. He was interrogated and taken to the beach, where he was stripped and subjected to what is known as the "palanca." In this maneuver, "the detainee is forced to lie facing down. The hands are then forced over the head, pushing the face into the sand. Next, they wrapped him in blankets like a mummy and put him in the ocean in an attempt to drown him." They beat him until he lost consciousness. When he gave his statement to the police, he could not denounce the torture because he was only permitted to answer the questions asked of him.

On January 15, 1993, he was brought before the press wearing a striped prison uniform and accused of being a criminal. He was tried by the Naval Tribunal for the crime of treason against the fatherland and sentenced to 30 years, under the same judgment in which Luis Alberto Cantoral-Benavides was convicted. After being at DINCOTE, he was transferred to the veterinary section of the Army base in Chorrillos, and held

in what essentially were stalls for horses and pens for dogs, where he remained for some ten days. Next, he was taken to the holding cells at the Palace of Justice of Lima, where he was held for four months and met Luis Alberto Cantoral-Benavides and his twin brother, Luis Fernando. Subsequent to his conviction, he was transferred to the Cristo Rey prison in Cachiche, Ica, along with Luis Alberto Cantoral-Benavides. Under a judgment rendered on August 10, 1993, the Supreme Council of Military Justice ordered his release, which took place on August 25, 1993. After his release, the same judge that had ordered his release, summoned him. He was detained on September 8, 1993. He was taken to the Rospigliosi Castle and then to the DINCOTE, and from there to the holding cells at the Palace of Justice of Lima, where he remained for three or four months. An attorney from the Ecumenical Foundation for the Development of Peace (hereinafter FEDEPAZ) filed a writ of habeas corpus on his behalf and that of two other people, which was studied by a judge named Elba Greta Minaya-Calle and rejected. He was tried again for the same facts in the regular jurisdiction. He was acquitted in both jurisdictions and released on January 28, 1998, based on a judgment rendered by the Supreme Court of Peru. He received no compensation whatsoever for his arbitrary detention, and only once denounced the torture he was subjected to, but no written record was made of his testimony.

d. Testimony of María Elena Castillo, journalist, La Republica newspaper, Lima, Peru.

When implementation of the anti-terrorism laws began in 1992, complaints began to come in from people who had been accused, without evidence, of terrorism or treason against the fatherland, prompting the press to investigate the issue of the innocent in prisons. Many of the complaints received by the press, in the context of the struggle against subversion, dealt with the conviction of innocent people and with illegal treatment and torture attributable to the police when conducting interrogations and to the military when making arrests. In many cases, torture could not be proven because the person affected did not denounce it out of fear or because of threats to him or his family, or because the existing evidence was insufficient. To a certain extent, the anti-terrorism laws

contributed to this situation, since lawyers were not given free access to prisons and the work of prosecutors was made very difficult. Members of the security forces were investigated for these facts, but she has no knowledge of any sanctions actually being applied. In any case, with the approval of the Amnesty Law of 1995, such acts could no longer be punished. This law granted amnesty to all the members of the security forces and civilians who were the subject complaints, investigations, trials or convictions, for acts committed in the struggle against terrorism. She learned of Luis Alberto Cantoral-Benavides' case, and the conditions surrounding his arrest, from the case involving María Elena Loayza-Tamayo. People come out of prison with their lives turned upside down, with their families in crisis, and without work. Since the State does not compensate those who have been pardoned, there was no compensation for Mr. Benavides.

e. Testimony of Víctor Álvarez-Pérez, Luis Alberto Cantoral-Benavides' defense lawyer

He became Luis Alberto Cantoral-Benavides' defense lawyer in April 1993. When he took the case, it was in the military jurisdiction and two judgments had already been rendered: one, from the Naval Investigating Judge, and another, from the Superior War Council, in which his client had been acquitted of the crime of treason against the fatherland. When Luis Alberto Cantoral-Benavides was arrested, there was no outstanding warrant for his arrest, he was not being sought, and he had not been accused. In the indictment read by the Military Prosecutor for the crime of treason against the fatherland, Cantoral-Benavides was accused of belonging to the Movimiento de Socorro Popular – of Sendero Luminoso – and of being one of the leaders of this subversive group. It was difficult to mount a defense; in force at the time was Law 25.475, which prohibited lawyers from defending more than one person being tried for the crimes of treason against the fatherland and terrorism; the documentation on the trial was voluminous, containing information on more than 20 defendants; he was given one day to read the file, but actually only had one afternoon to do so, which means he could not study it in detail, making it impossible to mount a proper defense. In the hearing before the Supreme Council of Military Justice, he was given 15 minutes to present

his oral argument. He was taken to the venues of the other military trials blindfolded and with a hood over his head. When Mr. Cantoral-Benavides was transferred to the prison in Ica, the witness had to travel great distances to visit with his client, and to be present when he gave his statement. There, he was able to meet with his client in person, but a policeman was only a few meters away. When Cantoral-Benavides was transferred to the "Miguel Castro-Castro" prison in Lima, there was what is known as a "locutorio," which is very small room where the lawyer can speak with his client through a thick glass window, making it necessary for them to shout or write messages on a piece of paper, since they could hardly hear each other. Five lawyers were next to them talking to five other inmates, which made it even more difficult to carry on a conversation. Lawyers were given 15 minutes, once or twice a week, to meet with their clients.

Mr. Cantoral-Benavides told him, in detail, of the torture he was subjected to. Cantoral had suffered considerable injury, but emphasized that he was more interested in gaining his freedom than in denouncing his mistreatment. However, since he was abused while he was in the prison in Cachiche, the Prosecutor in Ica was asked to investigate this situation. The situation in which Cantoral-Benavides found himself, and his fear of reprisal and psychological trauma, made it very difficult to lodge complaints regarding torture; furthermore, at the time, the crime of torture was not clearly defined in the laws of Peru.

The Supreme Council of Military Justice acquitted Luis Alberto Cantoral-Benavides of the crime of treason against the fatherland and ordered his immediate release in a judgment rendered on August 11, 1993, but it was never carried out. The witness was not notified of the decision and did not find out about it until a month later, when he filed a writ of habeas corpus on behalf of three persons who were being tried in the same proceeding. Immediately, he submitted a writ of habeas corpus on behalf of Mr. Cantoral-Benavides, but it was declared inadmissible, since the judge, while studying the case, found that the Chief Military Prosecutor had presented an extraordinary motion for review of the judgment rendered on August 11, 1993. This was an illegal and unconstitutional motion which was not, and is still not, covered in criminal legislation; review is only per-

mitted in the case of persons who have been convicted. Said motion was based on alleged new evidence related to a handwriting analysis of documents allegedly prepared by Luis Alberto Cantoral-Benavides and others on trial, which led to the judgment of acquittal being reviewed and modified, even though same was *res judicata*. He was not notified of the presentation of this motion for review by the Chief Military Prosecutor.

The Council of Military Justice decided, in a judgment rendered on September 24, 1993, to remit the case to the regular jurisdiction, where the defendant was to be tried for terrorism. Also, it revoked the release order issued on behalf of Cantoral in the judgment of August 11, and interposed, before the Superior Court of Lima, an extraordinary motion for review of the judgment of September 24, which was declared inadmissible by said court. The file was sent to the Provincial Prosecutor for the 43rd District of the regular jurisdiction. He was never informed of this officially, and had to wait until a "meeting of parties" to learn that Luis Alberto Cantoral-Benavides was being accused of terrorism based on the aforementioned handwriting evidence. He did not see the originals of same, and was only allowed to see photocopies when the trial began in the regular courts, because, apparently, this evidence was submitted after the trial in the military jurisdiction had concluded. There, Cantoral-Benavides was charged with preparing the documents in question and belonging to the subversive movement Sendero Luminoso. Since the photocopies were blurry and illegible, he requested the opinion of an expert witness for the defense during the investigation stage of the trial. Handwriting samples were taken during the oral proceeding. This evidence showed that Luis Alberto Cantoral-Benavides had not prepared said documents. The experts who had conducted the first test, which incriminated Luis Alberto Cantoral-Benavides, did not appear before the court to ratify the content of same. Given the discrepancy between the findings of the tests, there should have been a debate between the experts, but this never took place. The same evidence used to convict Luis Alberto Cantoral-Benavides was used to acquit Margarita Clarivel Mateo-Bullón of the same charges, even though both were alleged to have prepared the documents.

Luis Alberto Cantoral-Benavides was finally convicted of the crime of terrorism and sentenced to 20 years in prison, based on the same facts

for which he was tried in the military jurisdiction. The charges against Luis Alberto Cantoral-Benavides were never clear. Also, since the definition of the crimes of treason against the fatherland and terrorism are very similar, there was confusion regarding the charges against his client. The Supreme Court of Peru upheld the judgment of the Superior Court of Lima, based on the same merits. In the judgment, no consideration was given to the allegation of *res judicata* made by the defense. As a lawyer, he faced difficulties in mounting a defense in the ordinary jurisdiction, such as being prohibited, by law, to represent more than one person, or to present any motion on behalf of persons tried for the crimes of treason against the fatherland and terrorism; also, he was not notified when the motions he presented were denied. In the regular jurisdiction, during the investigation phase of the proceedings, the members of the Tribunal did not wear masks or hoods, and it was possible to recognize them, but during the oral proceeding the judges were hidden behind a two-way mirror and spoke through a microphone that distorted their voices. As regards the military judges, when he went to the Supreme Council of Military Justice in the process of preparing the defense, he found five alleged judges, one judge advocate and one prosecutor, who wore military uniforms and ski masks; it was possible to see the eyes of only one or two of them because the others wore dark glasses.

He was not subjected to direct threats or any type of hostility. However, his name was later found on a confidential list of lawyers and journalists that were being investigated by the National Intelligence Service of the Ministry of the Interior of Peru.

f. Testimony of Rosa María Quedena-Zambrano, attorney, Deputy Executive Director of the Ecumenical Foundation for the Development of Peace (FEDEPAZ).

She became aware of Luis Alberto Cantoral-Benavides' acquittal via the presentation of a writ of habeas corpus on behalf of Pedro Telmo Vega-Valle, who was being tried in the same proceeding. Only then did she learn of the judgment of acquittal rendered by the Supreme Council of Military Justice on August 11, 1993, since the habeas corpus had been declared inadmissible based on said judgment. The judge who executed

the judgment made an error when transcribing it; he released three people who had actually been convicted, rather than Luis Alberto Cantoral-Benavides, Margarita Mateo Bullón and Ladislao Amán. Subsequently, orders were given to recapture all three.

A writ of habeas corpus was submitted to the 26th Criminal Court of Lima to require the appearance of the special Naval Investigating Judge identified with the code number BT1000-3000, on behalf of Luis Alberto Cantoral-Benavides and the two other people acquitted in the judgment of August 11, 1993. Said writ was submitted on the grounds that the Supreme Council of Military Justice, on September 24, 1993, modified the earlier judgment only as it referred to Luis Alberto Cantoral-Benavides and Margarita Mateo-Bullón, and ordered that the case be remitted to the ordinary jurisdiction, where they were to be tried for terrorism. Based on this judgment, the new writ of habeas corpus was declared inadmissible.

The extraordinary motion for review presented by the Deputy General Prosecutor, which provided the grounds for the review of the judgment of August 11, 1993, by said Council was illegal; the reasons put forth in same were not admissible as such under the Code of Military Justice, since this case involved a person who had been acquitted and a judgment that could not be reviewed.

In October 1996, a request for a pardon was presented on behalf of Luis Alberto Cantoral-Benavides because it was the only means of obtaining his immediate release, even though he and his mother, initially, refused to go along with the request. The case was presented to the *ad hoc* Commission created in August 1996. After a thorough investigation, he was granted a pardon in June 1997.

It was very difficult to defend persons being investigated or tried for the crimes of terrorism or treason against the fatherland since they were held incommunicado from the time of their arrest. It was difficult to gain access to the files, especially in the military courts, and to interview clients. Many people did not have a defense attorney while on trial, and could not exercise their rights fully.

g. Testimony of Elba Greta Minaya-Calle, former criminal judge of the First Investigation Court of Lima at the time of the events in question.

On September 16, 1993, she was serving as Criminal Judge of the First Investigation Court of Lima, and had jurisdiction to receive writs of habeas corpus. According to the law, criminal judges were not restricted in any way from entering any place they needed to visit, including military facilities, where, at the time, certain restrictions had been imposed by the military in violation of the law.

She was made aware of a writ of habeas corpus interposed on behalf of Pedro Telmo Vega-Valle, Luis Guzmán-Casas and Luis Fernando Cantoral-Benavides on the grounds that they had been arrested arbitrarily; the writ was not executed properly at the Rospigilosi Castle and she had difficulty gaining access to the visitors register. Later, the Supreme Council of Military Justice gave her a copy of the judgment of August 11, 1993, in which she learned, among other things, that Luis Alberto Cantoral-Benavides had been acquitted. However, since he was not named in the writ in question, she could not issue an opinion on the matter. She declared the writ inadmissible in accordance with Article 6(2) of the Law on Habeas Corpus, considering that the arrest had been properly ordered and had not been arbitrary. Later, she found out that there had been a judicial error on the part of the naval judge in charge of imposing sentences; he ordered the release of three persons who had actually been convicted, and left three that had been acquitted behind bars.

She has experienced difficulty in submitting writs of habeas corpus to the military courts; for example, difficulties in entering military facilities. She has been harassed and threatened for attempting to administer justice. In August 1997, after she gave testimony before the Inter-American Court, the Ministry of the Interior ordered that she be investigated for treason against the fatherland and terrorism. Later, she was also investigated by the governing body of the judiciary.

h. Testimony of Julio Guillermo Neira-Castro, retired commandant of the Peruvian police, expert witness for the defense on internal processing.

He referred to the inconsistency of the handwriting evidence used to determine the guilt of Luis Alberto Cantoral-Benavides, since he had been called as an expert witness for the defense in the trial against Cantoral-Benavides for terrorism. The goal was to determine who had prepared the anonymous documents that contained certain street addresses in the city of Lima. According to the police, their evidence showed that Mr. Cantoral-Benavides had written the word "canchas" (sport field or court) which appeared in the document. However, the police had not taken the appropriate handwriting samples, thus making it impossible to determine authorship. Several samples must be taken and the person must be allowed to write freely; Luis Alberto Cantoral Benavides was handcuffed when the samples were taken. The expert witness for the defense studied three documents, one entitled "cronograma," (timetable) a sketch and another entitled "plan de accion," (plan of action) and came to the conclusion that the sketch contained in the document entitled "Volanteo" (distribution of leaflets) was not made by Luis Alberto Cantoral-Benavides. As regards the other documents, it was impossible to determine authorship given the poor quality of the photocopies, which were not even legible and certainly could not be used to establish authorship.

i. Expert testimony of Arsenio Oré-Guardia, an attorney specializing in criminal procedural law.

The phenomenon of terrorism, which was a fact of life in Peru from the 1980s to the mid-1990s, was a new kind of crime for which the Peruvian criminal system was not prepared. This led to the passage of Decree Laws No. 25.475, of May 6, 1992, No. 25.659, of August 13, 1992, and No. 25.708, of September 10, 1992, known as the anti-terrorism laws, which had an impact on the principles of criminal procedural legality and of substantive criminal legality. The implementation of these laws violated the principle of due process. As a common characteristic, Peruvian legislation creates a system that is accusatory and humanitarian and calls for minimal

intervention by the criminal system, which co-exists with a system that is highly inquisitorial and authoritarian, as, for example, in the case of the anti-terrorism laws. Thanks to the implementation of these laws, the role of those in the penal system in the investigation and judgment of crimes changed; in trials for terrorism and treason against the fatherland, the police participated actively in the investigation. Consequently, it is basically up to the police to decide in which court system each case is to be heard, and whether a citizen being investigated is innocent or guilty. In many aspects, the anti-terrorism laws violated the Constitution.

As regards the motion for review, the judgment of the Supreme Council of Military Justice is *res judicata* in the military courts, and cannot be reviewed by a regular court, because this would violate the principle of *non bis in idem*. Judgments of acquittal cannot even be reviewed by the same jurisdiction, and guilty verdicts are reviewed only if specific cause can be shown. For a person acquitted in the military courts to be convicted in the regular courts for the same facts, is a perversion of due process.

j. Testimony of Gladys Benavides López de Cantoral, mother of Luis Alberto Cantoral-Benavides.

She was informed over the phone that two of her sons, Luis Alberto and Luis Fernando Cantoral-Benavides, had been detained on February 6, 1993. The house of her son Luis Alberto, located in La Victoria, in Lima, was a complete mess when she arrived, and a neighbor told her that he had been detained by the police at about three o'clock in the morning. The police were looking for her eldest son Jose Antonio, who, it appeared, had been accused by someone who confessed under duress. Since they did not find him, the police took Luis Alberto, and his twin brother Luis Fernando decided to accompany him. She went to the DINCOTE to look for her sons, where she was told that there was no one there with those last names. It was not until the next day that they confirmed that they in fact were there, but she was not allowed to speak to them because she was told they were being investigated and, therefore, were being held incommunicado. She had difficulties in finding a lawyer willing to defend her sons because of the type of case involved, and because of the cost; she would have to hire two lawyers, since it was ille-

gal for the same lawyer to defend two people. When she was finally able to retain the services of two attorneys, four or five days after the arrest, they were not allowed into the detention facility.

She was finally able to see her sons eight days after their detention, and only on two occasions during their stay at DINCOTE, the last being on February 25, 1993. The next day, they were paraded before television cameras as terrorists. Next, they were taken to the holding cells at the Palace of Justice, where she managed to see them only once, and later to the veterinary section of a naval base. Then they were taken back to the holding cells. Her son Luis Alberto, who was in very poor health, was later transferred to the prison in Ica.

She was not notified of Luis Alberto's transfer to Ica, and was not able to see him until two weeks later. Before being allowed to enter, she was subjected to degrading treatment, which included body searches and, on certain occasions, even vaginal searches. Communication with her sons was difficult at best; she was allowed to visit them only once a month, for one half hour, speaking to them through a fence, with a policeman standing next to him, and another next to her. On one occasion, the prison doctor prescribed some medication for her son Luis Alberto. She reported the mistreatment of her son to the National Prosecutor's Office in Lima, and two months later a prosecutor was sent to investigate said allegations.

Her son was released almost five years after his detention, when the *ad hoc* Commission pardoned him, which was very humiliating because her son was innocent and deserved to be acquitted. During Luis Alberto's detention, the family was threatened and harassed, and were kept under surveillance even after her son was released. Also, the police launched an investigation of the witness's brother, whose telephone was tapped. As a consequence of all this, her health has suffered considerably.

VII ASSESSMENT OF THE EVIDENCE

44. Prior to the examination of the evidence received, the Court will define the general criteria it will apply in assessing the evidence in this

case. Most of these criteria have already been defined in the jurisprudence of this Tribunal.

45. An international tribunal whose purpose is to protect human rights, such as the Inter-American Court, has its own procedures, which distinguish its proceedings from proceedings under domestic law. They are less formal and more flexible than the latter, which does not mean that the Court disregards the legal protection of and procedural balance for the parties.⁹

46. Also, it is necessary to bear in mind that the international protection of human rights must not be confused with criminal justice. When States appear before the Tribunal, they are not engaged in a criminal proceeding. The function of the Court is not to impose punishment on States or persons guilty of violating human rights, but rather to protect victims from such violations, declare States responsible for same internationally, when appropriate, and order said States to provide compensation for the injury caused by the acts in question.¹⁰

47. In addition to direct evidence, be it testimonial, expert or documentary, international courts, as well as domestic courts, can base their judgments on circumstantial evidence, indications and presumptions, provided same lead to sound conclusions regarding the facts. In this regard, the Court has already said that

9 *cf.* *Castillo-Petruzzi et al. Case*. Judgment of May 30, 1999. Series C No. 52, para. 60; *Castillo-Páez Case. Reparations (Art. 63.1 of the American Convention on Human Rights)*. Judgment of November 27, 1998. Series C No. 43, para. 38; *Loayza-Tamayo Case, Reparations (Art. 63.1 of the American Convention on Human Rights)*. Judgment of November 27, 1998. Series C No. 42, para. 38; and *Paniagua-Morales et al. Case*. Judgment of March 8, 1998. Series C No. 37, para. 70.

10 *cf.* *Paniagua-Morales et al. Case, supra* note 9, para. 71; *Suárez-Rosero Case*, Judgment of November 12, 1997. Series C No. 35, para. 37; *Fairén-Garbi and Solís-Corrales Case*. Judgment of March 15, 1989. Series C No. 6, para. 136. *Godínez-Cruz Case*. Judgment of January 20, 1989. Series C No. 5, para. 140; and *Velázquez-Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 134.

in the exercise of its jurisdictional function, and in the process of obtaining and assessing the evidence it needs to decide the cases it hears, it may, in certain circumstances, use both circumstantial evidence and indications or presumptions as a basis for its pronouncements, when consistent conclusions regarding the facts can be inferred from same.¹¹

48. Also, as the Court has pointed out, the criteria used by an international human rights tribunal in assessing evidence are broader, and in determining the international responsibility of a State for the violation of human rights, it has greater flexibility in assessing the evidence placed before it in connection with the pertinent facts, in accordance with the rules of logic and based on experience.¹²

49. In this case, the Court will weigh the value of the documents, testimony and expert opinions presented to it.

50. As regards the documentary evidence submitted by the Commission and by the State, the Court accepts the documents presented, which were not contested or objected to, and, as a result, have been incorporated into the evidence.

51. Regarding the objection of the State to the statement made by Luis Alberto Cantoral-Benavides in the holding cells of the Palace of Justice on May 5, 1993, contained in the answer to the application, this Court has taken into consideration the State's allegation that said declaration "lacks all credibility in terms of form and substance [...] for example, neither the pseudo-interviewer nor the authority before whom it was given is identified." Also, during the public hearing, Mr. Cantoral-Benavides

11 *cf.* *Castillo-Petruzzj et al. Case*, *supra* note 9, para. 62; *Loayza-Tamayo Case, Reparations*, *supra* note 9, para. 51; *Paniagua-Morales et al. Case*, *supra* note 9, para. 72; *Blake Case*, Judgment of January 24, 1998. Series C No. 36, para. 49; and *Gangaram-Panday Case*, Judgment of January 21, 1994. Series C No. 16, para. 49.

12 *cf.* *Blake Case*, *supra* note 11, para. 50; *Castillo-Páez Case*, Judgment of November 3, 1997. Series C No. 34, para. 39; and *Loayza-Tamayo Case*, Judgment of September 17, 1997. Series C No. 33, para. 42.

was asked about said statement, to which he responded that it had been given at the holding cells of the Palace of Justice of Lima in the presence of his lawyer; his lawyer was also asked about said statement, to which he replied that he had recorded it at said holding cells, adding that "what is in the document appears to be a transcription of everything [Luis Alberto Cantoral-Benavides] said to me."

52. This Tribunal, as it has stated on other opportunities, "uses its discretion in assessing the statements presented to it, in writing or by other means. To do this, like any other tribunal, it can make a proper assessment of the evidence following the rule of "reasoned judgment."¹³ In consideration of the above and based on the preceding paragraphs, the Court incorporates into the evidence the statement made by Luis Alberto Cantoral-Benavides referred to in the preceding paragraph, which will be assessed in accordance with the rules of reasoned judgment.

53. The State also objected to the summons of the Naval Investigating Judge identified with the code number BT-10003000, who did not appear to make a statement even though he had been duly summoned. In objecting, Peru alleged that the identity of the judges that participate in trials for the crimes of treason against the fatherland and terrorism is kept secret, in accordance with domestic legislation on the matter.

54. This Court takes note of said objection. However, it holds that the parties must submit to the Tribunal any and all evidence it requests, be it documents, testimony, opinions of experts or other kinds. The States cannot use domestic considerations as a pretext for failing to comply with the demands of this Court, such as the failure of the aforementioned investigating judge to appear at the respective public audience (*supra* para. 30).

55. The parties, and in particular the State, must provide the Tribunal with all the evidence required –as a matter of routine, as additional

13 *cf.* *Castillo-Páez Case, Reparations*, *supra* note 9, para. 40; *Loayza-Tamayo Case, Reparations*, *supra* note 9, para. 57; and *Paniagua-Morales et al. Case*, *supra* note 9, para. 76.

evidence or at the request of a party- so that it may have as many criteria as possible for assessing and reaching sound conclusions regarding the facts. In trials dealing with violations of human rights it often happens that the claimant is not in a position to provide evidence, since same, in many cases, cannot be obtained without the cooperation of the State, which exercises control over the means necessary to clarify events that have taken place in their territories.¹⁴

56. In the present case, in addition to not facilitating the appearance of the aforementioned witness, the State failed on various occasions to provide the following documentation: legislation related to all the procedural aspects of the extraordinary motion for review; a certified copy of the motion for review of the judgment rendered by the Supreme Council of Military Justice; the decision of the Supreme Court of Peru, dated October 22, 1993; the records of the military trial of Luis Alberto Cantoral-Benavides; and documents the State was asked to re-submit because they were illegible. In addition to this, it refused to allow Mr. Luis Guzmán-Casas' testimony to be taken in Peru. Therefore, the Court considers that the State did not fulfill its obligation to help clarify the facts of the case.

57. As regards the medical certificate issued by the Peruvian Institute of Forensic Medicine on February 8, 1993, two days after Cantoral-Benavides' detention, on the basis of which it denied that the alleged victim had been tortured, it is the criteria of the Court that said certificate is not enough to weaken Cantoral-Benavides' version of how he was treated in prison, considering that it only proves the absence of injury at a given moment, probably prior to the mistreatment to which he was submitted. Also, the file contains indications that make it possible to affirm that the medical exam that led to the issuance of the certificate (*infra* 63.g.) was not thorough, and that it constituted little more than a mere administrative formality.

14 *cf.* *Neira-Alegría et al. Case*, Judgment of January 19, 1995, Series C No. 20, para. 65; *Gangaram-Panday Case*, *supra* note 11, para. 49; *Godínez-Cruz Case*, *supra* note 10, paras. 141 and 142; and *Vélazquez-Rodríguez Case*, *supra* note 10, paras. 135 and 136.

58. Regarding the testimony given in the present case, the Court accepts it only to the extent that is in keeping with the purpose of the interrogation proposed by the Commission and, as for the expert opinion of Mr. Arsenio Ore-Guardia, the Court accepts it because it is related to the knowledge of the expert in the field of national or comparative law. With regard to the statement given by Mr. Julio Guillermo Neira, same is incorporated into the evidence as testimonial evidence, since it was proposed as such by the Commission in its application.

59. As for the statement given by Luis Alberto Cantoral-Benavides, the Court considers that, since he is the alleged victim in this case and has a direct interest in same, his comments cannot be assessed in isolation, but rather in light of the whole of the evidence of this proceeding. However, it must be considered that the statements of Mr. Cantoral-Benavides have special value, since it is he who can provide the most information regarding certain facts and alleged violations committed against his person. Taking into consideration the affirmations of the Commission regarding the fact that the accused was held incommunicado, his testimony becomes highly presumptive, since, if this fact could be demonstrated, it would imply necessarily that only Mr. Cantoral-Benavides and the State would have knowledge of the treatment the former received during the corresponding period.¹⁵ Therefore, said statement is incorporated into the evidence, with the reservations expressed.

60. As for the evidence produced in the Loayza-Tamayo case, and incorporated into the evidence of the present case (*supra* para. 38) by decision of the Court, it should be pointed out that same will be assessed within the context of the whole of evidence in this proceeding, and in accordance with the rules of "reasoned judgment."

61. As for the official letter from the Registry of Complaints and Files (RUDE), the certification from the Executive Office of the Penitentiary Record Center of the National Penitentiary Institute, and the certified copy of the records of the trial of Luis Alberto Cantoral-Benavides *et al.*

15 *cf.* *Suárez-Rosero Case*, *supra* note 10, para. 33.

for the crime of terrorism, submitted as additional evidence at the request of the Court, same shall be assessed within the context of the whole of the evidence of this case.

62. Decree Law No. 25.475 (Crime of Terrorism) is considered useful in deciding the present case, and is added to the evidence of same, in compliance with Article 44(1) of the Rules of Procedure.¹⁶

VIII PROVEN FACTS

63. From the examination of the documents, the witnesses' testimony, the report from the expert and the statements of the State and the Commission during the course of the proceedings, the Court considers the following facts to have been proven:

- a. that on February 6, 1993, Luis Alberto Cantoral-Benavides was detained, without an arrest warrant issued by a competent authority, by agents of the DINCOTE at his home, located at Jirón Obreros 566, 4to piso "A" in the La Victoria District of Lima, Peru;¹⁷

16 *cf.* Decree Law No. 25.475 (Crime of Terrorism), of May 5, 1992.

17 *cf.* notification of detention of Luis Alberto Cantoral-Benavides, on February 6, 1993; report prepared by the task force comprising representatives of the Ministries of Justice, Interior, Defense and Foreign Relations, as well as the Office of the Public Prosecutor and the Judicial Branch of Peru, dated June 1996, pages 1, 3 and 5; report on torture in Peru and other cruel, inhuman and degrading types of treatment or punishment, January 1993 to September 1994, by the National Coordination Office for Human Rights, point 13.3; newspaper article entitled "Caen 14 Senderistas que mataron ocho soldados y dinamitaron 2 Comisarias," newspaper *La Nación* – Lima, Saturday, February 27, 1993; statement given by Luis Alberto Cantoral-Benavides at the detention cells of the Palace of Justice in Lima, May 5, 1993; Police affidavit No. 049-DIVICOTE-3-DINCOTE, dated February 25, 1993; testimony of Luis Alberto Cantoral-Benavides given before the Court on September 20, 1999; and testimony of Gladys Benavides-de-Cantoral given before the Court on September 21, 1999; statement made by Luis Alberto Cantoral-Benavides on February 12, 1993 at the DINCOTE offices; statement made by Luis Alberto Cantoral-Benavides on February 28, 1993, before the Special Navy Investigating Judge, during the investigation stage; judgment of

- b. that Luis Alberto Cantoral-Benavides had no prior criminal record;¹⁸
- c. that the members of the DINCOTE arrived at the house to detain José Antonio Cantoral-Benavides, Luis Alberto's brother, but, when he was not found, they detained Luis Alberto. Luis Alberto Cantoral-Benavides' twin brother, Luis Fernando Cantoral-Benavides, voluntarily accompanied his brother to the police station, and was later detained and sentenced to 25 years in prison;¹⁹
- d. that at the time of Luis Alberto Cantoral-Benavides' detention a state of emergency was in effect in the Department of Lima and the Province of Callao, and that the guarantees covered in sections 7 (inviolability of domicile), 9 (freedom of movement in national territory), 10 (freedom of association) and 20 g. (arrest with a warrant order or by police authorities in cases of a crime detected in the act) of Article 2 of the Peruvian Constitution in force at the time had been suspended;²⁰

March 5, 1993, rendered by the Special Navy Court; statement made by Luis Alberto Cantoral-Benavides on December 1, 1993, in the 43rd Criminal Court of Lima, during the investigation stage; and testimony of Luis Alberto Cantoral-Benavides, given in Peru in the Loayza-Tamayo Case.

18 *cfr. certification of criminal record, No. 0111, Supreme Court of Peru, Criminal Record Office, issued on October 18, 1993.*

19 *cfr. judgment of August 11, 1993, rendered by the Special Tribunal of the Supreme Council of Military Justice; statement made by Luis Alberto Cantoral-Benavides on February 28, 1993, before the Special Naval Investigating Judge, during the investigation stage; statement made by Luis Alberto Cantoral-Benavides at the detention cells of the Palace of Justice in Lima on May 5, 1993; testimony of Luis Alberto Cantoral-Benavides, given to the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given to the Court on September 21, 1999; and testimony of Luis Alberto Cantoral-Benavides, given in Peru in the Loayza-Tamayo Case.*

20 *cfr. Peruvian Constitution of 1979, Article 231.a); Supreme Emergency Decree No. 006-93-DE/CCFFAA, of January 19, 1993, published in the El Peruano newspaper of January 22, 1993; testimony of Víctor Álvarez-Pérez, given before the Court on February 5, 1997, in the Loayza-Tamayo Case.*

e. that Luis Alberto Cantoral-Benavides was held incommunicado at DINCOTE for eight or nine days, beginning on February 6, 1993, and it was not until 15 days after his detention that he was allowed to see a lawyer;²¹

f. that while being held incommunicado at DINCOTE Luis Alberto Cantoral-Benavides was subjected to, by the police and naval personnel, acts of violence in an attempt to get him to confess; for example, he was blindfolded, cuffed with his hands behind his back, forced to remain standing, struck in several parts of his body and, together with his brother Luis Fernando Cantoral-Benavides and another detainee, was taken to the beach at night, where he was subjected to physical and psychological torture, and could not avoid hearing the cries of his brother Luis Fernando Cantoral-Benavides as he was beaten by police agents. Also, Luis Alberto Cantoral-Benavides was thrown to the ground, beaten, interrogated and threatened with physical torture. Also, he was held, together with animals, at the veterinary section of the Las Palmas military base.²²

21 *cf.* police affidavit No. 049-DIVICOTE/3-DINCOTE, dated February 25, 1993, page 9; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; and testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999.

22 *cf.* testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Pedro Telmo Vega-Valle, given before the Court on September 21, 1999; statement made by Luis Alberto Cantoral-Benavides before the 43rd Criminal Court of Lima on December 1, 1993, during the investigation stage; a brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to Blanca Néhida-Colán, National Prosecutor, dated June 7, 1993; Report on torture in Peru and other cruel, inhuman and degrading types of treatment or punishment, January 1993 to September 1994, by the National Coordination Office for Human Rights; testimonies of Luis Guzmán-Casas, Luis Alberto Cantoral-Benavides, Juan Alberto Delgadillo, Pedro Telmo Vega-Valle and María Elena Loayza-Tamayo, given in Peru in the Loayza-Tamayo Case; testimonies of Víctor Álvarez-Pérez and Iván Bazán-Chacón, given before the Court beginning on February 5, 1997, in the Loayza-Tamayo Case; and testimony of María Elena Loayza-Tamayo, given before the Court beginning on June 9, 1998, in the Loayza-Tamayo Case, reparations.

g. that two days after his detention at the police station he was visited by a physician, who did not examine him thoroughly;²³

h. that writs of *habeas corpus* could not be submitted on behalf of people being tried for the crimes of treason against the fatherland and terrorism. On November 25, 1993, with the promulgation of Lay No. 26.248, the presentation of writs of *habeas corpus* for such crimes was permitted, except "writs of *habeas corpus* based on the same facts and causes which are the subject of a proceeding under way or already decided," as in the case of Mr. Cantoral-Benavides;²⁴

i. that Luis Alberto Cantoral-Benavides was displayed before the media, wearing the striped garb of a prisoner, as a member of the Communist Party of the Shining Path (hereinafter ("PCP-SL"))

23 *cf.* medical certificate 5313-L, dated February 8, 1993, from the General Directorate of Forensic Medicine, Forensic Medicine Institute of Peru; report prepared by the task force comprising representatives of the Ministries of Justice, Interior, Defense and Foreign Relations, as well as the Office of the Public Prosecutor and the Judicial Branch of Peru, dated June 1996; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Pedro Telmo Vega-Valle, given before the Court on September 21, 1999; testimonies of Luis Guzmán-Casas, Juan Alberto Delgado, and María Elena Loayza-Tamayo, given in Peru in the Loayza-Tamayo Case; testimony of Iván Bazán-Chacón, given before the Court beginning on February 5, 1997; and testimony of María Elena Loayza-Tamayo, given before the Court beginning on June 9, 1998, in the Loayza-Tamayo Case, reparations.

24 *cf.* Decree Law No. 23.506 (Law on Habeas Corpus and Civil Rights Protection), approved on December 7, 1982, Articles 6 and 38; Decree Law No. 25.659 (crime of treason against the fatherland), of August 13, 1992, Article 6; Law No. 26.248 (modifying Decree Law No. 25.659 as regards writs of *habeas corpus* in cases of terrorism and treason against the fatherland), of November 25, 1993, Article 2; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; and testimony of Víctor Álvarez-Pérez, given before the Court beginning on February 5, 1997.

and as the perpetrator of the crime of treason against the fatherland, even though he had not yet been legally tried or convicted;²⁵

j. that Luis Alberto Cantoral-Benavides was subjected to physical violence, including beatings with a club, during his transfer and upon his arrival at the Cristo Rey prison in Cachiche;²⁶

k. that Luis Alberto Cantoral-Benavides spent the first year of his incarceration in solitary confinement, in a small cell with no ventilation or natural light, where he was held for twenty-three and a half hours a day; the other half hour, he was allowed to be outside in a small yard. Also, he was permitted to see his relatives only once a month, but could have no physical contact with them; he was restricted from engaging in physical exercise or intellectual efforts; and he suffered the consequences of overcrowding;²⁷

25 *cf.* testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Pedro Telmo Vega-Valle, given before the Court on September 20, 1999; testimony of Susana Villarín-de-la-Puente, given before the Court on September 20, 1999; newspaper article entitled "Caen 14 Senderistas que mataron ocho soldados y dinamitaron 2 Comisarias," newspaper *La Republica* – Lima, Saturday, February 27, 1993; police affidavit No. 049-DIVICOTE: 3-DINCOFE, dated February 25, 1993; testimonies of Luis Guzmán-Casas, Luis Alberto Cantoral-Benavides, Juan Alberto Delgadillo, Pedro Telmo Vega-Valle and María Elena Loayza-Tamayo, given in Peru in the Loayza-Tamayo Case; and testimony of María Elena Loayza-Tamayo, given before the Court beginning on June 9, 1998, in the Loayza-Tamayo Case, reparations.

26 *cf.* testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; testimonies of Luis Guzmán-Casas and Pedro Telmo Vega-Valle, given in Peru in the Loayza-Tamayo Case; official letter from Luis Alberto Cantoral-Benavides' lawyer, addressed to Blanca Nélida-Colán, National Prosecutor, dated June 7, 1993.

27 *cf.* Decree Law No. 25.744, of September 27, 1992, Article 3; Decree Law No. 25.475 (Crime of Terrorism), of May 5, 1992, Article 20; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Susana Villarín-de-la-Puente, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; official letter from Luis Alberto Cantoral-Benavides' lawyer, addressed to Blanca Nélida-Colán, National Prosecu-

l. that on February 25, 1993, police affidavit No. 49-DIVICOTE 3-DINCOTE was taken from Luis Alberto Cantoral-Benavides, in connection with the crime of treason against the fatherland;²⁸

ll. that Luis Alberto Cantoral-Benavides was tried in the military jurisdiction, together with other defendants in a joinder, for the crime of treason against the fatherland, a trial in which the following acts took place:

- i) in a judgment rendered on March 5, 1993, the Special Naval Court acquitted him, but ordered the transfer of all police and judicial records to the Provincial Prosecutor of Lima duty, for study and subsequent action;
- ii) in a judgment rendered on April 2, 1993, the Special Naval War Council upheld the judgment of the Special Court and decided to acquit him, but ordered the transfer of the file to the Provincial Prosecutor for criminal cases, in the regular jurisdiction, for action. The accused submitted an appeal for annulment of said judgment;
- iii) in a judgment rendered on August 11, 1993, the Special Tribunal of the Supreme Council of Military Justice for Matters of Treason Against the Fatherland acquitted him of the crime of treason against the fatherland and ordered his immediate release. The Special Deputy General Prosecutor submitted an extraordinary motion for review; and
- iv) in a judgment rendered on September 24, 1993, the Full Special Tribunal of the Supreme Council of Military Justice upheld the acquittal of Luis Alberto Cantoral-Benavides,

ecutor, dated June 7, 1993; testimonies of Luis Guzmán-Casas, Juan Alberto Delgadillo, Pedro Telmo Vega-Valle and María Elena Loayza-Tamayo, given in Peru in the Loayza-Tamayo Case; testimony of Iván Bazán-Chacón, given before the Court beginning on February 5, 1997, in the Loayza-Tamayo Case; and testimony of María Elena Loayza-Tamayo, given before the Court beginning on June 9, 1998, in the Loayza-Tamayo Case, reparations.

²⁸ *cfr. police affidavit No. 049-DIVICOTE 3-DINCOTE, dated February 25, 1993.*

but ordered the transfer of the records to the regular jurisdiction, where he was to be tried for the crime of terrorism;²⁹

m. that the judge responsible for executing the judgment calling for the release of Luis Alberto Cantoral-Benavides released, by mistake, on August 25, 1993, his twin brother Luis Fernando Cantoral-Benavides, who had been sentenced to 25 years in prison. Luis Alberto Cantoral-Benavides was not released;³⁰

29 *cf.* Judgment of March 5, 1993, rendered by the Special Navy Court; Prosecutor's Report, of March 12, 1993; judgment of April 2, 1993, rendered by the Special Navy War Council; judgment of August 11, 1993, rendered by the Special Tribunal of the Supreme Council of Military Justice for Matters Related to Treason Against the Fatherland; judgment of September 24, 1993, rendered by the Criminal Branch of the Special Tribunal of the Supreme Council of Military Justice; police affidavit No. 049-DIVICOTE 3-DINCOTE, dated February 25, 1993; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; and testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; testimony of Rosa María Quedena-Zambrano, given before the Court on September 21, 1999.

30 *cf.* Judgment of August 11, 1993, rendered by the Special Tribunal of the Supreme Council of Military Justice for Matters Related to Treason Against the Fatherland; judgment of September 24, 1993, rendered by the Criminal Branch of the Special Tribunal of the Supreme Council of Military Justice; official letter from the Special Naval Investigating Judge of the Naval Investigating Court, to the Chairman of the National Penitentiary Council, dated August 20, 1993; decision of the Special Navy Investigating Judge, of August 17, 1993; order to open investigation stage of trial, of October 8, 1993, from the 43rd Criminal Court of Lima; report prepared by the task force comprising representatives of the Ministries of Justice, Interior, Defense and Foreign Relations, as well as the Office of the Public Prosecutor and the Judicial Branch of Peru, of 1994; decision of September 21, 1993, from the Provincial Judge of the First Criminal Court of Lima; judgment of September 29, 1993, rendered by the 26th Criminal Court of Lima; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; testimony of Rosa María Quedena-Zambrano, given before the Court on September 21, 1999; testimony of Elba Greta Minaya-Calle, given before the Court on September 21, 1999; and testimony of Luis Alberto Cantoral-Benavides, given in Peru in the Loayza-Tamayo Case.

n. that on September 23, 1993, Luis Alberto Cantoral-Benavides' attorneys submitted a writ of habeas corpus to require the presence of the Special Naval Investigating Judge identified with the code number BT-10003000, and all other responsible parties, to execute the release ordered in the judgment of August 11, 1993, rendered by the Special Tribunal of the Supreme Council of Military Justice for Matters Related to Treason Against the Fatherland. On September 24, 1993, the 26th Criminal Court of Lima took the writ under consideration and, in a decision rendered on September 29, 1993, declared the writ of habeas corpus unfounded. On October 22, 1993, an appeal for review was submitted to the Supreme Court of Peru, but it did not succeed;³¹

ñ. that Luis Alberto Cantoral-Benavides was tried in the regular jurisdiction for the crime of terrorism, during which:

- i) on October 7, 1993, the Provincial Prosecutor's Office for the 43rd District of Lima submitted a criminal indictment to the 43rd Criminal Court of Lima;
- ii) on October 8, 1993, the 43rd Criminal Court of Lima ordered the opening of the investigation stage of the trial;
- iii) in a judgment rendered on October 10, 1994, the Special Criminal Branch of the Superior Court of Lima sentenced him to 20 years in prison for the crime of terrorism. Said sentence was appealed by the petitioners; and

31 *cf.* Judgment of August 11, 1993, rendered by the Special Tribunal of the Supreme Council of Military Justice for Matters Related to Treason Against the Fatherland; writ of habeas corpus dated September 23, 1993, on behalf of Luis Alberto Cantoral-Benavides, submitted to the Criminal Branch of the Superior Court of Lima; decision of September 24, 1993, rendered by the 26th Criminal Court of Lima; judgment of September 29, 1993, rendered by the 26th Criminal Court of Lima; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; testimony of Rosa María Quedena-Zambrano, given before the Court on September 21, 1999; and testimony of Elba Greta Minaya-Calle, given before the Court on September 21, 1999.

iv) in a judgment rendered on October 6, 1995, the Supreme Court of Peru upheld the judgment of October 10, 1994;³²

o. that DINCOTE formulated the legal definition of the crime which was used as the foundation for the proceedings before the military and regular courts; that in cases involving the crime of treason against the fatherland and terrorism a summary proceeding is conducted by "faceless" judges; and that Luis Alberto Cantoral-Benavides was judged by "faceless" judges in both jurisdictions;³³

32 *cf.* criminal indictment of October 7, 1993, from the Provincial Prosecutor for the 43rd District of Lima; order to open investigation stage of trial, of October 8, 1993, issued by the 43rd Criminal Court of Lima; judgment of October 10, 1994, rendered by the Special Criminal Branch of the Superior Court of Lima; judgment of October 6, 1995, rendered by the Supreme Court of Peru; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; and testimony of Rosa María Quedena-Zambrano, given before the Court on September 21, 1999.

33 *cf.* Decree Law No. 25.659 (Crime of Treason Against the Fatherland) of August 13, 1992, Articles 4, 5 and 7; Decree Law No. 25.475 (Crime of Terrorism) of May 5, 1992, Articles 12,13 and 15; Decree Law No. 25.708 (Rules of procedure in trials for treason against the fatherland) of September 10, 1992, Article 1; Decree Law No. 25.744, (Rules applicable to the police investigation, the investigation stage of the proceedings and the trial itself, as well as carrying out the sentence for the crimes of treason against the fatherland contained in Decree Law No. 25.659), of September 27, 1992, Article 1 and 2; Decree Law No. 23.204 (Code of Military Justice), of July 25, 1980, Articles 710-712, 715-717; police affidavit No. 049 DIVICOTE-3-DINCOTE, dated February 25, 1993; report prepared by the task force comprising representatives of the Ministries of Justice, Interior, Defense and Foreign Relations, as well as the Office of the Public Prosecutor and the Judicial Branch of Peru, from 1994; Report No. 057-95-JUS/CNDH-SE-DPDDH, from the Director for the Promotion and Dissemination of Human Rights, dated May 3, 1995; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Susana Villarán-de-la-Puente, given to the Court on September 20, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; and testimonies from Víctor Álvarez-Pérez and Iván Bazán-Chacón, given before the Court beginning on February 5, 1997, in the Loayza-Tamayo Case.

p. that in the military trial of Luis Alberto Cantoral-Benavides his defense lawyer faced difficulties in gaining access to the file, being given only one afternoon to study same and prepare his arguments; he was not allowed to speak openly and in private with his client; and he was given only fifteen minutes to present his oral arguments; neither Cantoral-Benavides nor his defense lawyer were notified of some of the aspects of the military criminal proceedings; he had difficulty in gaining access to evidence and contesting it; and hearings were held in military or penitentiary facilities, and were not open to the public;³⁴

q. that during the trial in the regular jurisdiction for the crime of terrorism, and even though Luis Alberto Cantoral-Benavides was able to appoint a lawyer of his choosing, same was not allowed to present a proper defense;³⁵

34 *cf.* Decree Law No. 25.744, (Rules applicable to the police investigation, the investigation stage of the proceedings and the trial itself, as well as carrying out the sentence for the crimes of treason against the fatherland contained in Decree Law No. 25.659), of September 27, 1992, Article 2.b) and c); Decree Law No. 25.475 (Crime of Terrorism) of May 5, 1992, Article 13.c, 14, 15, and 16; Decree Law No. 25.708 (Rules of procedure in trials for treason against the fatherland), of September 10, 1992, Article 1; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; expert testimony from Arsenio Oré-Guardia, given before the Court on September 21, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; and testimony of Víctor Álvarez-Pérez and Iván Bazán-Chacón, given before the Court beginning on February 5, 1997, in the Loayza-Tamayo Case.

35 *cf.* Decree Law No. 25.475 (Crime of Terrorism) of May 5, 1992, Article 12.f); testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; testimony of Rosa María Quedena-Zambrano, given before the Court on September 21, 1999; expert testimony from Arsenio Oré-Guardia, given before the Court on September 21, 1999; minutes of the hearing held at the Special Criminal Branch of the Santa Monica Prison on July 26, 1994, in which a statement was taken from Luis Alberto Cantoral-Benavides; minutes from August 3, 10, 20 and 24 at Santa Monica and September 3, 6, 16 and 19, 1994 at the Castro-Castro Prison, which contain the continuation of the hearing; letter of notification/ Superior Court of Lima, File 634-93, of August 5, 1994; letter of notification/ Superior Court of Lima, File 634-93, June 24, 1994.

r. that on October 9, 1996, Luis Alberto Cantoral-Benavides requested a pardon from the *ad hoc* Commission created under Law No. 26.655, and that in Supreme Decision No. 078-97-JUS, of June 24, 1997, published in the *El Peruano* newspaper on June 25, 1997, said benefit was granted to him;³⁶

s. that Luis Alberto Cantoral-Benavides was incarcerated from February 6, 1993, to June 25, 1997, when he was released;³⁷

t. that during the time Luis Alberto Cantoral-Benavides was under arrest, physical and psychological aggression against people being investigated for the crimes of treason against the fatherland and terrorism was a common practice;³⁸ and

36 *cf.* Official letter CAH-ST-97-135, of May 16, 1997, from the General Coordinator of the *ad hoc* Commission; Official Letter DP-ST-97-163, of June 6, 1997, from the Executive Secretary of the *ad hoc* Commission; Supreme Decision 078-97-JUS, of June 24, 1997, published in the *El Peruano* newspaper on June 25, 1997; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; and testimony of Rosa María Quedena-Zambrano, given before the Court on September 21, 1999.

37 *cf.* notification of detention of Luis Alberto Cantoral-Benavides, on February 6, 1993; police affidavit No. 049 DIVICOTE-3-DINCOTE, dated February 25, 1993; report prepared by the task force comprising representatives of the Ministries of Justice, Interior, Defense and Foreign Relations, as well as the Office of the Public Prosecutor Office and the Judicial Branch of Peru, from 1994; Supreme Decision 078-97-JUS, of June 24, 1997, published in the *El Peruano* newspaper on June 25, 1997; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Víctor Álvarez-Pérez, given before the Court on September 21, 1999; and testimony of Rosa María Quedena-Zambrano, given before the Court on September 21, 1999.

38 *Cfr.* Report on torture in Peru and other cruel, inhuman and degrading types of treatment or punishment, January 1993 to September 1994, by the National Coordination Office for Human Rights; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Susana Villarán-de-la-Puente, given before the Court on September 20, 1999; testimony of Pedro Telmo Vega-Valle, given before the Court on September 21, 1999; testimony of María Elena Castillo, given before the Court on September 21, 1999; expert testimony from Arsenio Oré-Guardia, given before the Court on September 21,

u. that the State had knowledge of the acts of physical and psychological aggression committed against Luis Alberto Cantoral-Benavides, yet made no attempt to investigate same.³⁹

IX

PRIOR CONSIDERATIONS ON THE MERITS

64. In the reply to the complaint, the State declared, based on considerations of the internal laws of Peru (Article 305 of the Peruvian Constitution of 1979, Article 205 of the Peruvian Constitution of 1993, and Article 39 of Law No. 23.506 on *Habeas Corpus* and Civil Rights Protection), that the Commission should have rejected *in-limine* and *ab-initio* the petition submitted by the petitioner, and that, likewise, the Court should not have admitted the complaint.

65. The Court considers that, by making this allegation, Peru is attempting to re-open, in the merits stage, some of the points already

1999; newspaper article from the La Republica newspaper of Lima, Peru, entitled "Confesion a Golpes," dated December 18, 1994; testimonies of Luis Guzmán-Casas; Luis Alberto Cantoral-Benavides; Juan Alberto Delgadillo; Pedro Telmo Vega-Valle; and Mrs. María Elena Loayza-Tamayo, given in Peru in the Loayza-Tamayo Case; testimony of Victor Álvarez-Pérez and Iván Bazán-Chacón, given before the Court beginning on February 5, 1997 in the Loayza-Tamayo Case; expert testimony of León Carlos Arslanian, given before the Court beginning on February 5, 1997, in the Loayza-Tamayo Case; and testimony from María Elena Loayza-Tamayo, given before the Court beginning on June 9, 1998, in the Loayza-Tamayo Case, Reparations

39 *Cfr. Official letter 073-2000-MP-FN-, 3rd F.S.C.L. dated March 23, 2000, from the Third Superior Civil District Attorney's Office of Lima, of the Office of the Public Prosecutor; report prepared by the task force comprising representatives of the Ministries of Justice, Interior, Defense and Foreign Relations, as well as the Office of the Public Prosecutor and the Judicial Branch of Peru, from 1994; testimony of Luis Alberto Cantoral-Benavides, given before the Court on September 20, 1999; testimony of Gladys Benavides-de-Cantoral, given before the Court on September 21, 1999; testimony of Victor Álvarez-Pérez, given before the Court on September 21, 1999; brief from Luis Alberto Cantoral-Benavides' lawyer, addressed to Blanca Nérida-Colán, National Prosecutor, dated June 7, 1993; statement made by Luis Alberto Cantoral-Benavides before the 43rd Criminal Court of Lima, on December 1, 1993, during the investigation stage.*

decided in the judgment on preliminary objections rendered on September 3, 1998. This Tribunal dismisses the State's allegation, considering that same is totally inadmissible because it addresses matters already decided in the aforementioned judgment, which is final and cannot be appealed, under Article 67 of the Convention.

X

VIOLATION OF ARTICLES 7(1), 7(2), 7(3), 7(4) and 7(5) RIGHT TO PERSONAL LIBERTY

66. As regards the violation of Articles 7(1), 7(2), 7(3), 7(4), and 7(5) of the Convention, the Commission alleged that:

a) Mr. Cantoral-Benavides was detained without a warrant issued by a competent authority and which specified the reasons for his detention, ignoring the basic procedures and requirements established in Article 2.20.g) of the Peruvian Constitution of 1979;

b) Mr. Cantoral-Benavides was held incommunicado for eight days and was not permitted to see his relatives; for five (sic) days he had no access to a lawyer; and he was held for 20 days at the facilities of the DINCOTE, being brought before the Special Naval Court on February 26, 1993. The Commission considers that, for these reasons, it is shown that the Peruvian State violated Article 7(5) of the Convention;

c) Mr. Cantoral-Benavides was held prisoner even though the judgment rendered on August 11, 1993, which was considered *res judicata*, ordered his release. This happened because an illegal motion for review was accepted. An extraordinary motion for review of a final judgment for acquittal is not permitted in either a military or regular criminal proceeding. According to Article 690 of the Code of Military Justice, there are four situations in which a motion for review of a guilty verdict is permitted, but none of them applied to the circumstances of this case because the judgment of August 11 was a judgment for acquittal;

d) Mr. Cantoral-Benavides' detention and the trials he was subjected to were not supported by reasonable grounds of incrimination; and

e) given the above, Mr. Cantoral-Benavides' detention constitutes a violation of the right set forth in Article 7(2) and 7(3) of the Convention.

67. For its part, the State alleged that;

a) on February 6, 1993, when Mr. Cantoral-Benavides was detained, the Department of Lima and the Province of Callao were under a state of emergency, in accordance with Article 231.a) of the Peruvian Constitution of 1979. Said Article states that, under a state of emergency, the constitutional guarantees set forth in Article 2, subsections 7 (inviolability of domicile), 9 (freedom of movement in national territory), 10 (freedom of association) and 20.g) (arrest with a warrant or by police authorities in cases of a crime detected in the act) of the same Constitution, could be suspended. The state of emergency was legally decreed by the President of the Republic, with the consent of the Council of Ministers;

b) the arrest or detention of Mr. Cantoral-Benavides was neither arbitrary nor illegal since it was carried out within the constitutional and legal framework in force in Peru, meaning that his personal liberty was not violated under the terms of Article 7 of the Convention; and

c) since it is a rule of procedure, there is room for interpretation as to the use of the motion for review in the military jurisdiction.

*
* *

68. Article 7 of the American Convention states, in numerals 1 to 5, 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.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

69. The Court will now examine whether Mr. Cantoral-Benavides was detained for the reasons and under the conditions set forth in the Peruvian Constitution and in the laws established pursuant thereto.

70. The Peruvian Constitution of 1979, in force at the time of the events, states in Article 2.20.g):

No one may be detained without a written warrant from a judge, except in the case of crimes detected in the act, in which case the police are authorized to carry out the detention.

In any case, the detainee must be brought before the corresponding court within twenty-four hours, depending on the distance involved.

Exceptions are cases of terrorism, espionage and drug trafficking, in which police authorities may arrest and hold the alleged perpetrators for a term not to exceed fifteen calendar days, and are responsible for reporting same to the Office of the Public Prosecutor and the Judge, who may assume jurisdiction prior to the expiration of this term.

71. Article 231.a) of the Peruvian Constitution of 1979, stated:

The President of the Republic, with the consent of the Council of Ministers, decrees, for an indefinite period of time, in all or part of the national territory, and reporting same to the Congress or the Standing Commission, the states of emergency considered in this Article:

a) State of emergency, in cases of disturbances of the peace or internal order, of catastrophes or of grave circumstances that affect the life of the Nation. In such cases, the constitutional guarantees related to personal liberty and security, inviolability of domicile, freedom of association and freedom of movement in national territory, covered in subsections 7, 9 and 10 of Article 2, and in subsection 20-g of the same Article 2 [...], may be suspended

72. This Tribunal has noted that

[S]ince the suspension of guarantees must not exceed [...] the exact amount of time needed to respond to the emergency, all actions taken by the public powers that exceed those limits are illegal; these limits must be specified in the provisions decreeing the state of emergency, even within the situation of juridical exception in force.⁴⁰

73. As part of its efforts to combat terrorism, the State issued Decree Laws No. 25.475, which refers to the crime of terrorism, on May 5, 1992, and No. 25.744, which refers to the crime of treason against the fatherland, on September 27, 1992. The first states, in Article 12.c), that a person allegedly implicated in the crime of terrorism can be held under arrest for a period not to exceed fifteen calendar days, and that same is to

40 *Habeas Corpus in emergency situations* (Articles 27(2), 25.(1) and 7(6) of the American Convention on Human Rights). Advisory Opinion OC-8/87, of January 30, 1987. Series A No. 8, para. 38.

be reported within 24 hours to the Office of the Public Prosecutor and the criminal judge. According to Article 2.a) of Decree Law No. 25.744, said term of 15 days could be extended for an equal period without the person being brought before a judicial authority. This Court has noted that such provisions contradict the Convention, which states "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."⁴¹

74. It has been proven that Luis Alberto Cantoral-Benavides was held for many days without knowing the reasons for his arrest or the charges against him (*supra* para. 63. a. and e.).

75. Also, the Court considers that the trial of Mr. Luis Alberto Cantoral-Benavides in the military criminal court violated Article 8(1) of the American Convention, which refers to the right to a fair trial before a competent, independent and impartial judge (*infra* para. 115). Consequently, the fact that Cantoral-Benavides was brought before a military criminal judge does not meet the requirements of Article 7(5) of the Convention. Also, the continuation of his detention by order of the military judges constituted arbitrary arrest, in violation of Article 7(3) of the Convention.

76. The legal principle set forth in Article 7(5) of the Convention was not respected in this case until the accused was brought before a judge in the regular jurisdiction. In the file, there is no evidence of the date on which this occurred, but it can be reasonably concluded that it took place in early October 1993, since on October 8, 1993, the 43rd Criminal Court of Lima ordered that the investigation stage of a trial be opened against Cantoral-Benavides.

77. Therefore, the Court concludes that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 7(1), 7(2), 7(3), 7(4) and 7(5) of the American Convention.

41 *Castillo-Petruzzzi et al. Case, supra* note 9, para. 110.

XI
VIOLATION OF ARTICLE 5
RIGHT TO HUMANE TREATMENT

78. As regards the violation of Article 5 of the Convention, the Commission alleged that:

a) Mr. Cantoral-Benavides was subjected to physical and psychological violence by police authorities while held incommunicado at DINCOTE, and by naval personnel, in an attempt to get him to incriminate himself. He was not held incommunicado in order to prevent the obstruction of the investigation of the facts, nor was this an exceptional measure;

b) the fact that Mr. Cantoral-Benavides was held incommunicado "arbitrarily," and the prison conditions in which he was held, constituted cruel and inhuman treatment that caused him suffering and psychological trauma;

c) the persons investigated in trial No. 634-93 before the regular court, and who were being held at the same time as Mr. Cantoral-Benavides, affirmed that "they were subjected to torture similar to that imposed on" him while he was held by the police. The investigation conducted by the Office of the Public Prosecutor of the petition related to the rape of Mrs. María de la Cruz Pari established that several detainees were taken to the beach at night by members of the police, "which in itself constitutes an irregular procedure which is not in keeping with the rules of procedure of the internal legal system of Peru;"

d) the State "did not deny or challenge the facts that had been denounced, limiting itself, instead, to saying that the complainant had not proven the facts he had denounced;" and

e) Gladys Benavides-de-Cantoral, Luis Alberto Cantoral-Benavides' mother, suffered cruel, inhumane and degrading treatment from the Peruvian authorities, and alluded to the "pain, humilia-

tion, helplessness, uncertainty and frustration she felt as a result of the deceit and mistreatment" she was subjected to when she asked about her detained sons and when she visited them in jail. She also stated that Luis Fernando Cantoral-Benavides, Luis Alberto Cantoral-Benavides' brother, was also subjected to torture and cruel, inhuman and degrading treatment by the Peruvian authorities. As a consequence, the Commission asked the Court to declare that Article 5(1) and 5(2) of the Convention, as they relate to Article 1(1) of same, had been violated to the detriment of Mrs. Benavides-de-Cantoral and Mr. Luis Fernando Cantoral-Benavides.

79. For its part, the State alleged that:

a) when the facts occurred, the Department of Lima and the Province of Callao were under a state of emergency, as per Article 231.a) of the Peruvian Constitution of 1979, in force at the time. The aforementioned article stated that once a state of emergency had been declared, constitutional guarantees could be suspended;

b) police authorities did not engage in torture or coercion to the detriment of Mr. Cantoral-Benavides. Since such illegal actions did not take place "it is unlikely that "proof" to the contrary could exist." According to the State, this affirmation is corroborated by medical certificate No. 5313-I., of February 8, 1993, and by the statement of the accused himself, given in the presence of his lawyer, Washington Durán-Abarca, and a representative of the Office of the Public Prosecutor, neither of which reveal facts that could have affected Mr. Cantoral-Benavides' physical well-being;

c) the statement given by Mr. Cantoral-Benavides on May 5, 1993, in the holding cells of the Palace of Justice of Lima lacks all validity, since it was not taken in compliance with legal requirements;

d) from the time of his detention, Mr. Cantoral-Benavides had access to a representative of the Office of the Public Prosecutor

and his defense lawyer, who neither filed complaints nor denounced his mistreatment, a fact corroborated by the certifications of his perfect "mental and psychological" state; and

e) therefore, the State had not violated Article 5 of the Convention.

*
* *

80. Article 5 of the American Convention states, in numerals 1 and 2, that

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

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

81. The file of the proceeding before this Court reveals that Mr. Cantoral-Benavides was held incommunicado for the first eight days of his detention (*supra* para. 63.e).

82. Under international human rights law it has been established that people are to be held incommunicado during detention only in exceptional situations, and that to do so may constitute an act contrary to human dignity.

83. Dating back to its earliest judgments, this Court has established that

Prolonged isolation and being held incommunicado constitute, in themselves, forms of cruel and inhuman treatment, harmful to the

mental and moral integrity of the person and to the right of all detainees of respect for the inherent dignity of the human being.⁴²

84. In the *Suárez-Rosero* case (1997), the Court spoke out again on holding a person incommunicado, stating that same can only be decreed as an exceptional measure, since it can cause the detainee to suffer extreme psychological and moral injury. The Court has said that

[O]ne of the reasons why holding a person incommunicado is viewed as an exceptional instrument is because of the serious impact it has on the detainee. Isolation from the outside world causes any person to suffer moral and psychological trauma, making him/her particularly vulnerable and increasing the risk of aggression and arbitrariness in jails.⁴³

85. As regards prison conditions, the Court accepts as proven the fact that Mr. Cantoral-Benavides was held in strict isolation for one year, in a crowded cell with other prisoners, without ventilation or natural light, and that he was permitted to receive few visitors (*supra* para. 63.k). Also, the evidence presented clearly reveals that the medical attention given to the victim was very deficient (*supra* para. 63.g). Also, it has been established in this same judgment that 20 days after being incarcerated, when he had not yet been tried, much less convicted, Mr. Cantoral-Benavides was paraded before the media, dressed in defamatory clothes, along with other prisoners, as the perpetrator of the crime of treason against the fatherland (*supra* para. 63.i).

86. The United Nations Human Rights Committee (hereinafter the "Human Rights Committee") has held that the detention of a prisoner with other persons, in conditions that pose a threat to his/her health,

42 *cf.* *Fairén-Garbi and Solís-Corrales Case*, *supra* note 10, para. 149; *Godínez-Cruz Case*, *supra* note 10, para. 164; and *Velázquez-Rodríguez Case*, *supra* note 10, para. 156.

43 *Suárez-Rosero Case*, *supra* note 10, para. 90.

constitutes a violation of Article 7 of the International Covenant on Civil and Political Rights.⁴⁴

87. The Inter-American Court has stated that

all persons detained have the right to live in prison conditions that are in keeping with personal dignity, and the State must guarantee their right to life and personal integrity. Consequently, the State, which is responsible for detention facilities, is the guarantor of these rights of detainees.⁴⁵

88. In the provisional measures related to the case of Mrs. María Elena Loayza-Tamayo, who was tried at the same time as Mr. Cantoral-Benavides for the crimes of treason against the fatherland and terrorism, this Tribunal concluded that the prison conditions for persons accused of such crimes did not comply with the provisions of the American Convention, and ordered the State

to modify the conditions in which Maria Elena Loayza-Tamayo was being held, especially as regards her isolation in cell(s), for the purpose of bringing such conditions into line with the provisions of Article 5 of the American Convention [...].⁴⁶

Also, it ordered the State to provide the prisoner with medical attention, both physical and psychological, as soon as possible.

89. The Court has established that

44 *cf.* United Nations. Human Rights Committee. *Moriana Hernández Valentini de Bazzano v. Uruguay*, No. 5/1997, of August 15, 1979, paras. 9 and 10.

45 *cf.* *Durand and Ugarte Case*. Judgment of August 16, 2000. Series C No. 68, para. 78, and *Neira-Alegria et al. Case*, *supra* note 14, para. 60.

46 *Loayza-Tamayo Case*, Provisional Measures, Decision of the Court of September 13, 1996, Operative Paragraph 1.

Holding a person incommunicado, public exhibition in defamatory clothing before the media, isolation in a small cell, without ventilation or natural light, [...] restriction of visiting rights [...], constitute forms of cruel, inhuman and degrading treatment, as per Article 5(2) of the American Convention.⁴⁷

90. Also, the Court, for its part, has reiterated that "a person illegally detained [...] is in a situation of heightened vulnerability in which there is a high risk of his/her rights being violated, such as the right to physical integrity and to be treated with dignity."⁴⁸

91. There are sufficient reasons to assert that, in addition to being held incommunicado, and having been subjected to very hostile and restrictive prison conditions, Mr. Cantoral-Benavides was on several occasions beaten and physically mistreated in other ways, and that this caused him severe bodily injury and emotional suffering (*supra* para. 43.a. and 63.f. and j.).

92. Other persons tried along with Mr. Cantoral-Benavides said in their statements that they suffered acts of aggression similar to those inflicted upon him (*supra* paras. 38 and 43.c.).

93. The Courts deems it pertinent to consider the facts that make up the present case in the context of the practices prevailing at the time in Peru *vis-à-vis* persons accused of the crimes of treason against the fatherland and terrorism.

94. When adopting the judgment on merits in the *Loayza-Tamayo* case (1997), whose evidence was incorporated into the file of the present case (*supra* para. 38), the Court affirmed that

47 *Loayza-Tamayo Case*, *supra* note 12, para. 58.

48 *cf. Villagrán-Morales et al. Case*. Judgment of September 19, 1999. Series C No. 63, para. 166; *Suárez-Rosero Case*, *supra* note 10, para. 90, and *Loayza-Tamayo Case*, *supra* note 12, para 57.

During the time Mrs. María Elena Loayza-Tamayo was detained, cruel, inhuman and degrading treatment during criminal investigations into the crimes of treason against the fatherland and terrorism was common practice in Peru [...].⁴⁹

95. The Court must now determine whether the facts referred to above constitute torture, cruel, inhuman and degrading treatment, or both, in violation of Article 5(2) of the American Convention. It must be clearly understood that, regardless of the nature of the acts referred to, they are strictly prohibited under international human rights law. To this end, the European Court of Human Rights has noted, in reference to Article 3 of the European Convention on Human Rights, that same

strictly prohibits torture and inhuman or degrading punishment or treatment regardless of what the victim has done. Article 3 provides for no exceptions, in contrast with most of the principles of the Convention [...] and [...] does not permit derogation even in the case of a public danger which threatens the life of the nation.⁵⁰

The aforementioned Tribunal has specified, on repeated occasions, that said prohibition applies even in the most difficult of circumstances for the State, such as those involving aggression by terrorist groups or large-scale organized crime.⁵¹

96. Along the same lines, the Inter-American Court has warned that the fact that a State is confronted with terrorism should not lead to

49 *Loayza-Tamayo Case*, *supra* note 12, para. 46.1.

50 *Eur. Court HR, Ireland v. United Kingdom*, Judgment of 18 January 1978. Series A Vol. 25, para. 163.

51 *cf. Eur. Court HR, Labita v. Italy*, Judgment of 6 April 2000, para. 119; *Eur. Court HR, Selmouni v. France*, Judgment of 28 July 1999, para. 95; *Eur. Court HR, Chabal v. United Kingdom*, Judgment of 15 November 1996, *Reports* 1996-V, paras. 79 and 80; and *Eur. Court HR, Tomasi v. France*, Judgment of 27 August 1992, Series A Vol. 241-A, para. 115.

restrictions on the protection of the physical integrity of the person. Specifically, the Court has stated that

[A]ny use of force that is not strictly necessary, given the behavior of the person detained, constitutes an affront to human dignity [...] in violation of Article 5 of the American Convention. The need to conduct investigations and the undeniable difficulties inherent to combating terrorism are not grounds for placing restrictions on the protection of the physical integrity of the person.⁵²

97. The European Court has underscored that fact that one of the elements considered in defining torture in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the intentional infliction of physical or mental pain or suffering for certain purposes, such as obtaining information from a person, or intimidating or punishing him/her.⁵³ In the case of Mr. Bámaca, it has been shown that the Army used special methods to obtain information from guerrillas that had been captured (*supra* proven facts), and that, in his capacity as a guerrilla commander, Bámaca-Velázquez was repeatedly tortured to obtain information (*supra* proven facts).

98. The Inter-American Convention Against Torture, in Article 2, defines torture as

any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to

52 *Castillo-Petruzzi et al. Case, supra* note 9, para. 197 and *Loayza-Tamayo Case, supra* note 12, para. 57.

53 *cf. Eur. Court HR, Mahmut Kaya v. Turkey*, Judgment of 28 March 2000, para. 117.

diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

And adds:

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

99. The European Court has pointed out recently that certain acts that were classified in the past as inhuman or degrading treatment, but not as torture, may be classified differently in the future, that is, as torture, since the growing demand for the protection of fundamental rights and freedoms must be accompanied by a more vigorous response in dealing with infractions of the basic values of democratic societies.⁵⁴

100. It should be pointed out that, according to international standards for protection, torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering in the victim.

101. Both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Inter-American Convention on the same subject, make reference to this possibility. Also, by institutionalizing the right to personal integrity, the latter of these two international instruments makes explicit reference to respect for the psychological and moral integrity of the person.

102. International jurisprudence has been developing the notion of psychological torture. The European Court of Human Rights has established that the mere possibility of the commission of one of the acts prohibited in Article 3 of the European Convention is sufficient to consider that said article has been violated, although the risk must be real and imminent. In line with this, to threaten someone with torture may con-

54 *cf. Eur. Court HR, Selmouni v. France, supra* note 51, para. 101.

stitute, in certain circumstances, at least "inhuman treatment."⁵⁵ That same Tribunal has decided that, for purposes of determining whether Article 3 of the European Convention on Human Rights has been violated, not only physical suffering, but also moral anguish, must be considered.⁵⁶ Having examined communications received from individuals, the United Nations Human Rights Committee has classified the threat of serious physical injury as a form of "psychological torture."⁵⁷

103. The above leads to the conclusion that a true international system prohibiting all forms of torture has been put in place.

104. Considering the circumstances of the case, and the context in which the facts took place, this Tribunal considers, beyond a reasonable doubt, that at least some of the acts of aggression examined in this case can be classified as physical and psychological torture. The Court also considers that said acts were planned and inflicted deliberately upon Mr. Cantoral-Benavides for at least two purposes. Prior to his conviction, the purpose was to wear down his psychological resistance and force him to incriminate himself or to confess to certain illegal activities. After he was convicted, the purpose was to subject him to other types of punishment, in addition to imprisonment.

105. As regards the alleged violation of Article 5(1) and 5(2) of the Convention vis-à-vis the relatives of Mr. Cantoral-Benavides, the Court recognizes that the situation Mrs. Gladys Benavides-de-Cantoral and Mr. Luis Fernando Cantoral-Benavides, mother and brother of the victim, respectively, went through as a result of his detention and imprisonment caused them severe suffering and anguish, but the Tribunal will assess same when setting necessary reparations for proven violations of the American Convention.

55 *cf. Eur. Court HR, Campbell v. Cosans*, Judgment of 25 February 1982, Series A Vol. 48, para. 26.

56 *cf. Eur. Court HR, Soering v. United Kingdom*, Judgment of 7 July 1989, Series A Vol. 161, paras. 110 and 111.

57 *cf. United Nations. Human Rights Committee. Miguel Angel Estrella v. Uruguay*, No. 74/1980 of March 29, 1983, paras. 8.6 and 10.

106. Given the above, the Court concludes that the State violated, to the detriment of Mr. Luis Alberto Cantoral-Benavides, Article 5(1) And 5(2) of the American Convention.

XII VIOLATION OF ARTICLE 8 RIGHT TO A FAIR TRIAL

107. The Commission alleged that, in the present case, the State had violated the following rights and guarantees of due process covered in the American Convention: to a hearing before an independent and impartial tribunal (Article 8(1)); to the presumption of innocence (Article 8(2)); to have adequate time and means to prepare a proper defense (Article 8(2)c); to choose a lawyer (Article 8(2)d); to question witnesses (Article 8(2)f); to not be compelled to be a witness against himself and to speak without coercion of any kind (Article 8(2)g and 8(3)); to not be subjected, after being acquitted in a nonappealable judgment, to a new trial for the same facts –*non bis in idem*– (Article 8(4)), and to a public trial (Article 8(5)).

Violation of Article 8(1) of the Convention
Competent, independent and impartial judge

108. As regards the violation of Article 8(1) of the Convention, the Commission alleged that:

- a) Mr. Cantoral-Benavides was judged, both in the military and regular courts, by "faceless judges" who lacked the independence and impartiality demanded by Article 8(1) of the Convention;
- b) Decree Law 25.659 (Crime of Treason Against the Fatherland) states that persons accused of having committed said crime shall be judged by military judges. By expanding the military jurisdiction to include civilians, Peru contradicts due respect for the guarantees of the administration of justice and the right of persons to be judged by the appropriate and competent judge. The exclusive military jurisdiction is a special jurisdiction which is subordinate to the Executive Branch; and

c) when the military jurisdiction is expanded to include civilians, the independence and impartiality of judges cannot be guaranteed. The armed forces are responsible for combating subversion and, at the same time, assume the function of judging those accused of belonging to irregular armed groups.

109. For its part, the State alleged that:

a) Article 233(1) of the Peruvian Constitution of 1979 established that military justice and arbitrational justice were separate from regular or common justice, a provision contained in Article 139(1) of the Constitution in force and in numeral III of the preliminary chapter of the Organic Law of Military Justice (Decree Law No. 23.201);

b) in accordance with Decree Law No. 25.659, the so-called "faceless judges" who try the crime of treason against the fatherland in the military jurisdiction have the required professional credentials. Said jurisdiction is made up of officers of the Military Justice Corps who have a law degree, and its composition, as well as the recruitment and promotions of its officers are regulated by Article 623 *et seq.* of the Organic Law of Military Justice (Decree Law No. 23.201) and complementary rules;

c) the "faceless judges" in both the military and regular courts issue decisions in their field of competence when judging the crimes of treason against the fatherland and terrorism, and convict or acquit the accused as the case may be; and

d) the special military tribunals that investigate and judge the crime of treason against the fatherland, and the tribunals of the regular criminal court system qualified to hear cases of terrorism, were the ideal jurisdictional organs, given the gravity of the internal situation in Peru in 1992 and 1993. Said tribunals fell within the scope of Article 8(1) of the Convention, and the special legislation complied with the provisions of Article 27(1) of same.

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110. Article 8(1) of the American Convention reads:

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.

111. The Court notes that Decree Law No. 25.744, of September 27, 1992, regarding trials of treason against the fatherland, granted the DIN-COTE investigative powers regarding the corresponding crimes and determined that same should be tried by military judges even if committed by civilians, in a summary proceeding "in the theatre of operations," as provided for in the Code of Military Justice.

112. It is important to point out that the military jurisdiction is established in several laws, in order to maintain order and discipline within the armed forces. Therefore, its application is reserved for military personnel who have committed crimes or misdemeanors in the performance of their duties and under certain circumstances. In this regard, the military jurisdiction was regulated under Peruvian law (Article 282 of the Constitution of 1979). The transfer of jurisdiction from the regular courts to military courts, and the subsequent trying of civilians for the crime of treason against the fatherland in these courts, as in this case, excludes the appropriate judge from hearing such cases. In this regard, the Court has said that "[w]hen the military courts assume jurisdiction over a matter that should be heard by the regular courts, the right to the appropriate judge is violated, as is, *a fortiori*, due process, which, in turn, is intimately linked to the right of access to justice."⁵⁸

113. In a recent case, the Court determined that

[i]n a democratic state of law, the criminal military jurisdiction is to be restricted and exceptional in scope and intended to protect special juridical interests linked to the duties assigned to the armed forces by law. Therefore, civilians are not to be judged in this jurisdiction, and only military personnel are to be tried for crimes or misdemeanors which, by their very nature, harm the juridical interest of the military.⁵⁹

114. The Court considers that the military courts of the State that judged the alleged victim for the crime of treason against the fatherland do not meet the requirements of independence and impartiality established in Article 8(1) of the Convention. The Court considers that in a case such as the present one, the impartiality of the judge is affected by the fact that the armed forces have the dual function of combating insurgent groups with military force, and of judging and imposing sentence upon members of such groups. On another occasion, this Tribunal asserted that

according to the Organic Law of Military Justice, the appointment of the members of the Supreme Council of Military Justice, the highest ranking body within the military jurisdiction, is the responsibility of the Minister of the pertinent sector. The members of the Supreme Military Council, in turn, determine the promotions, professional incentives and assignment of duties of their subordinates. This fact raises questions regarding the impartiality of the military judges.⁶⁰

115. For these reasons, the Court concludes that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 8(1) of the American Convention. It also concludes that, as a result of this determination, Article 8(2)c, d) and f) (the means necessary to prepare a proper

59 *Durand and Ugarte Case*, *supra* note 45, para. 117

60 *Castillo-Petruzzi et al. Case*, *supra* note 9, para. 130

defense, to choose a lawyer, to question witnesses), 8(4) (*non bis in idem*) and 8(5)(a public trial), as they pertain to the military criminal trial of Luis Alberto Cantoral-Benavides, were also violated.

Violation of Article 8(2) of the Convention
Presumption of Innocence

116. As regards the violation of Article 8(2) of the Convention, the Commission alleged that:

- a) the "faceless judges" who participated in the present case entered the case with prejudice and assumed *a priori* that the accused was guilty, meaning that Peru violated Article 8(2) of the Convention. It is the obligation of the State to prove the guilt of the accused, not the obligation of the accused to prove his/her innocence;
- b) in the present case, the indications taken into consideration to convict Luis Alberto Cantoral-Benavides "did not meet the requirements of formality, precision and compatibility needed to establish the subjective link that must exist between the perpetrator of the criminal offense and the criminal act;"
- c) the detention and trials of Mr. Luis Alberto Cantoral-Benavides were not supported, in fact or in law, by reasonable grounds for incrimination, since Peru punished an innocent person whose link to terrorist activities was not demonstrated; and
- d) Peru also violated the principle of presumption of innocence when, on February 26, 1993, Mr. Cantoral-Benavides was "paraded by the DINCOTE before the media, dressed in a striped uniform, as a member of the PCP-SL and as the perpetrator of the crime of treason against the fatherland."

117. For its part, the State alleged that:

- a) Peruvian law guarantees the presumption of innocence in Articles 2(20)f) of the Constitution of 1979, 12.c) of Decree Law

No. 25.475 and 13 of Decree Law No. 24.475. According to the State, the Commission is attempting

to disavow the legitimacy of the special processes of investigation and judgment for the crimes of treason against the fatherland in the exclusive military jurisdiction; however, when arguing against the outcome of the trial of the same person in the regular courts, it reaffirms its action because it involved a judgment favorable to it; and

b) the Commission cannot rightfully, via judicial maneuvers, claim a violation of the right to the presumption of innocence since, based on the evidence presented initially, the criminal liability of Mr. Cantoral-Benavides was corroborated and accredited during the proceedings. The burden of proof lies with the accuser and, in the present case, the proof consisted of the expert handwriting evidence which was the basis for the presumption of liability for the crime of terrorism, and was corroborated during the criminal proceeding in the regular courts, which determined said liability.

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118. Article 8(2) of the Convention reads:

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.

119. The Court observes, in the first place, that in the present case it is proven that Mr. Cantoral-Benavides was paraded before the media, dressed in defamatory clothing, as the perpetrator of the crime of treason against the fatherland, before he had been legally tried or convicted (*supra* para. 63.i).⁶¹

61 *Loayza-Tamayo Case, supra* note 12, para. 46.d.

120. The principle of presumption of innocence, as stated in Article 8(2) of the Convention, demands that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted.

121. In the criminal proceedings against Luis Alberto Cantoral-Benavides, full evidence of his liability was not presented; nonetheless, the judges in the regular courts sentenced him to 20 years in prison. This situation was expressly recognized by the State, as can be seen in Supreme Decision No. 078-97-JUS, of June 24, 1997, which was added to the file by the State, and says textually:

HAVING SEEN: The application presented by Luis Alberto Cantoral-Benavides and Report No. 127-97/CAH, prepared by the ad hoc Commission created under Law No. 26.655, in which a pardon is recommended;

WHEREAS:

Under Law No. 26.655, an *ad hoc* Commission was created to study cases and propose that the President of the Republic, in exceptional situations, grant a *pardon* and act of grace, *to persons who have been convicted of terrorism or treason against the fatherland on the basis of insufficient evidence* which enables the Commission to assume, reasonably, that they had no link to terrorist elements, activities or organizations; and

Since the application of Luis Alberto Cantoral-Benavides falls within the scope of Article 1 of Law No. 26.655, the members of the aforementioned ad hoc Commission have unanimously recommended that Luis Alberto Cantoral-Benavides be granted a pardon;

Pursuant to Article 118, subsection 21) of the Peruvian Constitution, it is the prerogative of the President of the Republic to grant pardons;

IT IS RESOLVED:

Article one. To grant a PARDON to LUIS ALBERTO CANTORAL-BENAVIDES, who is in the Miguel Castro-Castro Prison.

Be it known, (in italics outside the text)

122. Consequently, the Court considers that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 8(2) of the American Convention.

Violation of Article 8(2)c, d) and f) of the Convention
to prepare a proper defense
to choose a lawyer
to question witnesses

123. As regards the violation of Article 8(2)c, d) and f) of the Convention, the Commission alleged that:

a) The Peruvian State violated Article 8(2)c) of the American Convention, mentioning in support of this claim, "*inter alia* the limited communication between Luis Alberto [Cantoral-Benavides] and his defense lawyers and the failure to notify them of resolutions and procedural matters." Also, it referred to the difficulties faced by lawyers in gaining access to the file; to the material aspects of communication between the accused and his lawyers; and to the fact that the judges in charge of the military trial wore field uniforms, side arms and ski masks "for the purpose of intimidating the defense lawyer, who was taken to the military facilities blindfolded;"

b) the State violated Article 8(2)d) of the Convention in that it made it difficult for Mr. Cantoral-Benavides to select a lawyer of his choosing by assigning lawyers to his case; and

c) Articles 13.c) and 2.b) of Decree Laws No. 25.475 and No. 25.744, respectively, state that those involved in the preparation of the police affidavit, and the members of the armed forces that captured the accused, may not appear as witnesses before the court hearing the case. Consequently, the members of the DINCOTE that drew up the police affidavit that incriminated Luis Alberto Cantoral-Benavides did not make statements during the criminal proceedings.

124. For its part, the State alleged that:

a) Mr. Cantoral-Benavides, throughout his detention and during the trials in the military and regular courts, was assisted by lawyers, and that "the right to a defense was respected at all times, there being no statement or certification to the contrary, nor complaint or denunciation regarding the quality of the defense provided;" and

b) as regards the impossibility of summoning as witnesses police officials or members of the armed forces who prepared the police affidavit or participated in the capture or detention, this is forbidden by law and does not constitute a violation of Article 8.f) of the Convention.

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125. Article 8(2) of the Convention states, as pertains, that:

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:

[...]

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;

[...]

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;

126. The Court refers to the decision in this same judgment (*supra* para. 115) regarding the violation of Articles 8(1) and 8(2)c, d) and f) of the Convention, as they pertain to the criminal military trial of Luis Alberto Cantoral-Benavides.

127. It has been proven in the present case that in the actions carried out by the judges in the regular courts the following situations occurred: a) free and private communication between Mr. Cantoral-Benavides and his defense lawyer was impeded; b) the victim's lawyer was unsuccessful in presenting certain evidence crucial to the defense, such as the admission of the testimony of members of the DINCOTE who captured Cantoral-Benavides and participated in the preparation of the incriminating affidavit; nor was he able to force a confrontation of the handwriting experts in order to clear up the differences in their testimony; and c) the identity of the judges who heard the trial for terrorism was hidden, making it impossible for Cantoral-Benavides and his lawyer to determine if there were grounds for a challenge, and to mount a proper defense.

128. The Court concludes, from the above, that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 8(2)c), 8(2)d) and 8(2)f) of the American Convention.

Violation of Article 8(2)g) and 8(3) of the Convention
to not be required to testify against himself and
to speak without any type of coercion

129. As regards the violation of Article 8.2.g) and 8(3) of the Convention, the Commission alleged that:

- a) Luis Alberto Cantoral-Benavides was coerced into testifying against himself and, as a result, forced to incriminate himself and accept the charges against him;
- b) in the trials of Luis Alberto Cantoral-Benavides, statements obtained from the victim through coercion were provided as partial evidence; and

c) his detention for a period of time longer than that authorized by law, and his interrogation at unusual hours and places, are also forms of coercion.

130. For its part, the State alleged that:

a) The Peruvian Constitution of 1979, in Article 233, established due process as a jurisdictional guarantee, which was respected; and

b) the legality of the all police and judicial actions were "closely watched by the Office of the Public Prosecutor."

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131. Article 8(2)g) and 8(3) of the Convention, as pertains, state that:

2. [...] During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

g. the right not to be compelled to be a witness against himself or to plead guilty; and [...]

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

132. As has been expressed in this same judgment (*supra* para. 104), Luis Alberto Cantoral-Benavides was subjected to torture to break down his psychological resistance and force him to incriminate himself or confess to certain illegal activities.

133. The Court concludes, therefore, that the State violated, to the detriment of Mr. Luis Alberto Cantoral-Benavides, Article 8(2)g) and 8(3) of the American Convention.

Article 8(4) of the Convention
Non bis in idem

134. As regards the violation of Article 8(4) of the Convention, the Commission alleged that:

- a) Luis Alberto Cantoral-Benavides was acquitted by the Supreme Council of Military Justice on August 11, 1993, a decision upheld by the same Council on September 24, 1993. The judgment of the Supreme Council of Military Justice was considered final because it could not be appealed; however, because the second judgment so ordered, a copy of the record was sent to the regular courts for a trial for terrorism, and the accused was subjected to another trial in the regular courts and convicted for the same facts;
- b) the acquittal of Mr. Luis Alberto Cantoral-Benavides by the Supreme Council of Military Justice for the charges leveled by the DINCOTE in police affidavit No. 49-DIVICOTE 3-DINCOTE has, in accordance with Article 8(4) of the Convention, the binding effect *erga omnes* against any persecution on the part of Peru against said person for the same facts. This article of the Convention prevents a person from being subjected to a new trial for the same facts, regardless of how the law defines the offense. In other words, what was absolved as the "crime of terrorism within the definition of treason against the fatherland cannot be the subject of a new trial for the crime of terrorism on the basis of the same facts;"
- c) in the case of Mr. Luis Alberto Cantoral-Benavides, the State changed the facts referred to in the police affidavit which provided the grounds for his being tried and acquitted in the exclusive military jurisdiction "on the basis of an argument which turned out to be fictitious, since the trial in the regular courts was based not only on the same facts, but also [...] on the same crime;" and
- d) Mr. Luis Alberto Cantoral-Benavides was tried in two separate trials, in which he was judged for the same facts in violation of the principle of *non bis in idem*.

135. For its part, the State alleged that:

a) the Peruvian Constitutions of 1979 and 1993 establish the framework of jurisdictional guarantees for cases of the crimes of treason against the fatherland and terrorism. The existence of presumption of liability for another punishable offense, based on new evidence (handwriting evidence) which was not taken into account when the decisions were issued in the exclusive military jurisdiction, is the reason why the records were sent to the regular courts, and the acquittal of Mr. Luis Alberto Cantoral-Benavides was not executed in the military court. The accused could have contested the incriminating evidence, but did not;

b) there is no double jeopardy for the same crime. The crime of treason against the fatherland is different from terrorism. If there were indications confirming liability for the commission of the crime of terrorism, this could not go unpunished because another trial had taken place for a different crime, treason against the fatherland; and

c) the trial was normal and conducted in accordance with the rules of due process called for in and supported by the Constitution.

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136. Article 8(4) of the Convention states that:

An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

137. The Court observes that one of the elements regulated by Article 8(4) is the conduct of a first trial that ends in a final decision of acquittal. According to the application of the Commission, that first trial, in the present case, would be the military trial of Luis Alberto Cantoral-Benavides, for the crime of treason against the fatherland.

138. In this same judgment (*supra* para. 114), the Court has stated that the application of military criminal justice to civilians infringes upon the provision regarding a competent, independent and impartial judge (Article 8(1) of the American Convention). This is enough to determine that the actions and decisions taken by the authorities of the exclusive military jurisdiction in the matter of Luis Alberto Cantoral-Benavides do not constitute the type of proceeding called for in Article 8(4) of the Convention.

139. This determination is consistent with reasoning of the Court in the *Castillo- Petruzzi et al.*, *Cesti Hurtado* and *Durand and Ugarte* cases.⁶² In the first two cases, this Court declared that the application of military justice to civilians violates the rules of the American Convention regarding the right to a competent, independent and impartial judge. In the third, it offered an opinion regarding the limits of the natural jurisdiction of military justice.

140. Based on the above, the Court considers that, given the circumstances of this case, the alleged infraction of Article 8(4) of the Convention is included in the violation of Article 8(1) of same. Consequently, the Court refers to its decision regarding the violation, by the State, of Article 8(1) of the Convention (*supra* para. 115).

Violation of Article 8(5) of the Convention Public trial

141. As regards the violation of Article 8(5) of the Convention, the Commission alleged that the trials of Mr. Luis Alberto Cantoral-Benavides, in both the military and regular courts, were carried out in the "non public" way prescribed in the anti-terrorism laws (Articles 13.f) and 14 of Decree Law No. 25.475, and Article 5 of Decree Law No. 25.659) in force at the time of the facts, meaning that they consisted of "private hearings, in military facilities or penal institutions, before "faceless"

62 *Durand and Ugarte Case*, *supra* note 45, para. 117; *Cesti-Hurtado Case*. Judgment of September 29, 1999. Series C No. 56, para. 151, and *Castillo- Petruzzi et al. Case*, *supra* note 9, para. 128.

judges, prosecutors and even lawyers, in a climate of intimidation and secrecy since no public was present at any time during the trial."

142. The State presented no allegation regarding the alleged violation of Article 8(5) of the Convention.

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143. Article 8(5) of the Convention states that:

Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

144. The Court refers to its decision in this same judgment (*supra* para. 115) regarding the violation of Articles 8(1) and 8(5) of the Convention, in connection with military criminal trial of Luis Alberto Cantoral-Benavides.

145. The Court also observes that, according to Article 16 of Decree Law No. 25.475 (Crime of Terrorism),

The trial shall be conducted in the respective penal institutions and under conditions that will prevent the judges, members of the Office of the Public Prosecutor and judicial assistants from being identified visually or audibly by the accused and the defense lawyers.

146. It is proven in the file that several hearings held as part of the proceedings in the regular courts were held in penal institutions (*supra* para. 63.p).

147. The above is sufficient to determine that the trial of Luis Alberto Cantoral-Benavides in the regular courts did not comply the requirement for a public trial established in Article 8(5) of the Convention.

148. The State did not provide information or arguments to show why the public nature of the trial should be restricted, given the "need to pre-

serve the interest of justice," as called for in Article 8(5) of the Convention. The Court considers that, given the particular characteristics of the Luis Alberto Cantoral-Benavides' case, his trial could be public without affecting the application of justice.

149. Consequently, the Court concludes that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 8(5) of the Convention.

XIII

VIOLATION OF ARTICLE 9

FREEDOM FROM EX POST FACTO LAWS

150. As regards the violation of Article 9 of the Convention, the Commission alleged that:

- a) Peru has recognized that the crime of treason against the fatherland, regulated under Decree Law No. 25.659, is an aggravated form of the crime of terrorism, which is regulated under Decree Law No. 25.475. Both descriptions use unclear terms and are open to broad interpretation, making it difficult to distinguish one from the other. This violates the basic principle of criminal law regarding the need to define the nature of a crime precisely;
- b) Mr. Luis Alberto Cantoral-Benavides was tried for the crime of treason against the fatherland in the exclusive military jurisdiction "under the accusation that documents of a subversive nature were found in his possession." Later, he was tried in the regular courts for the crime of terrorism, for allegedly having authored documents of this nature; and
- c) The ambiguity and similarity of the legal definitions of the crimes of treason against the fatherland and terrorism violate the legal principle established in Article 9 of the Convention, and led to double jeopardy in the case of Mr. Luis Alberto Cantoral-Benavides.

151. For its part, the State presented no arguments regarding the alleged violation of Article 9 of the Convention.

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152. Article 9 of the American Convention states that:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

153. In Decree Law No. 25.659, Articles 1, 2, and 3, and Decree Law No. 25.475, Articles 2 and 3, the crimes of treason against the fatherland and terrorism, respectively, are defined, and the punishment for each is established. In this regard, this Court has already established that "both Decree Laws (25.475 and 25.659) refer to conduct that is not precisely defined, meaning that it could be considered under either, according to the criteria of the Office of the Public Prosecutor Office, of the respective judges [...] and of the 'police' [DINCOTE]."⁶³

154. The Court deems it pertinent to point out that:

a) according to Article 2 of Decree Law No. 25.475, the crime of terrorism is committed by a person who "creates [...] a state of anxiety [...] or fear among the population" or who "carries out acts against life, personal security or against the patrimony, against the security of public buildings, byways, power stations or any

⁶³ *Castillo-Petruzzi et al. Case*, *supra* note 9, para. 119 and *Loayza-Tamayo Case*, *supra* note 12, para. 68.

other good or service, using weapons, explosive materials or devices or any other means capable of causing damage or seriously disturbing the peace;"

b) according to Article 1.a) of Decree Law No. 25.659, the crime of treason against the fatherland is committed by a person who commits "the acts considered in Article 2 of Decree Law No. 25.475, when the following methods are used: car bombs or similar bombs, explosive devices, weapons of war or similar weapons, which cause the death of persons or injure their physical integrity, or damage public or private property;" and

c) it is a fact that Article 2 of Decree Law No. 25.659 specifies the characteristics of the perpetrators of the crime of treason. However, in doing so, it refers not only to certain special conditions, such as being the leader or head of a terrorist organization, and belonging to armed groups or bands responsible for the physical elimination of persons, but also contributing to "the harmful outcome" of the crime in question by "supplying, providing, disseminating reports, data, plans, projects and other documents."

155. In light of the provisions transcribed above, the Court considers that the definitions of the crimes of terrorism and treason against the fatherland do not clearly describe the criminal acts in question, the elements used in their commission, the objects or assets against which they are directed, and the impact they have on society. Also, the inclusion of such broad methods of participation in the commission of the corresponding crime, such as those covered in Article 2 of Decree Law No. 25.659, alters the definition of the perpetrator of treason against the fatherland, bringing this crime and the crime of terrorism so close together that they become one.

156. As the Court asserted on an earlier occasion, the "existence of common elements [in the crimes of terrorism and treason against the fatherland] and the lack of precision in drawing a line between both

affects the legal situation of the accused in different ways: the applicable sanction, the competent tribunal and corresponding trial."⁶⁴

157. In defining the crimes, it is necessary to keep the principle of criminal legality in mind; in other words,

a clear definition of the illegal conduct, which sets forth its elements and makes it possible to distinguish it from non-punishable behavior or illegal activities punishable with non-criminal measures. Ambiguity in the definition of the crime creates doubt and gives authorities discretion, which is particularly undesirable when establishing the criminal liability of individuals and imposing sentences that have a serious impact on fundamental rights such as life or liberty.⁶⁵

It is clear that the laws governing the crimes of terrorism and treason against the fatherland in force in the State at the time of the facts in this case suffer from the ambiguity just referred to.

158. The Court concludes, therefore, that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 9 of the American Convention.

XIV
VIOLATION OF ARTICLES 7(6) AND 25(1)
RIGHT TO PERSONAL LIBERTY AND
JUDICIAL PROTECTION

159. As regards the violation of Article 7(6) and 25(1) of the Convention, the Commission alleged that:

a) during the detention and trial of Mr. Luis Alberto Cantoral-Benavides, it was not possible to bring action on his behalf

64 *Castillo-Petruzzi et al. Case, supra* note 9, para. 119

65 *Castillo-Petruzzi et al. Case, supra* note 9, para. 121

because "an express rule of the anti-terrorism laws (Article 6 of Decree Law No. 25.659) prohibited the presentation of writs of habeas corpus for facts related to the crime of terrorism;"

b) by not providing Luis Alberto Cantoral-Benavides with any means to ensure respect for his fundamental rights, the State not only incurred in a violation per se of Article 25(1) of the Convention, but also exempted him from the obligation of exhausting domestic remedies; and

c) on September 23, 1993, Luis Alberto Cantoral-Benavides' submitted a writ of habeas corpus, which was declared inadmissible on September 29, 1993 by the 26th Criminal Court of Lima.

160. For its part, the State did not refer to the cited articles.

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161. Article 7 of the American Convention, subparagraph 6 states that:

Anyone 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 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.

162. Article 25(1) of the American Convention states that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized

by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

163. The Court reiterates that the right of all persons to a simple and rapid remedy or to any other effective remedy before competent judges or tribunals that will protect them against acts that violate their fundamental rights

constitutes one of the basic pillars, not only of the American Convention, but also of the Rule of Law in a democratic society as per the Convention [...]. Article 25 is closely linked to the general obligation set forth in Article 1(1) of the American Convention, by attributing the function of protection to the internal laws of the States Parties.⁶⁶

164. Also, the Court has pointed out that

The absence of an effective remedy against the violation of rights recognized in the Convention constitutes a breach of same by the State Party in which such a situation takes place. In this regard, it is necessary to underscore the fact that, for such a remedy to exist, it is not enough for it to be called for in the Constitution or law, or that it be formally admissible; it must also be truly effective in determining whether there has been a violation of human rights and providing the means to remedy it.⁶⁷

165. The above is valid not only in normal situations, but also in exceptional circumstances. Among the indispensable judicial guarantees that

66 *cf. Durand and Ugarte Case, supra* note 45, para. 101; *Castillo-Petruzzzi et al. Case, supra* note 9, para. 184; *Paniagua-Morales et al. Case, supra* note 9, para. 164; *Blake Case, supra* note 11, para. 102; *Castillo-Páez Case, supra* note 12, paras. 82 and 83; and *Suárez-Rosero Case, supra* note 10, para. 65.

67 *Durand and Ugarte Case, supra* note 45, para. 102; and *Judicial guarantees in states of emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights, Advisory Opinion OC-9/87 of October 6 1987. Series A No. 9 para. 24.*

must be observed, habeas corpus is the most effective means "to control respect for the life and integrity of persons, to prevent their disappearance or the concealment of their place of detention, as well as to protect them against torture or other cruel, inhuman or degrading treatment or punishment."⁶⁸

166. According to the proven facts, Luis Alberto Cantoral-Benavides did not have, in application of Article 6 of Decree Law no. 25.659 (referring to the crime of treason against the fatherland), the right to interpose any action intended to safeguard his personal liberty or question the legality of his detention (*supra* para. 63.h.), regardless of whether guarantees had been suspended or not. This article establishes that

in no stage of the police investigation or criminal proceedings may action be brought by persons detained for, implicated in or on trial for the crime of terrorism, covered in Decree Law No. 25.475, or against the provisions of the present Decree Law.

167. This law was later modified by Decree Law No. 26.248, which was promulgated on November 12, 1993, and entered into force on November 25, 1993. Said modification made it possible, in principle, to bring action on behalf of those implicated in the crime of terrorism or treason against the fatherland. However, this change had no impact on the legal situation of Mr. Luis Alberto Cantoral-Benavides, since Article 2 of said Decree Law stated that "writs of *habeas corpus* were not admissible based on the same facts or causes of a proceeding under way or already decided."

168. According to the proven facts, the judgment of August 11, 1993, rendered by the Special Tribunal of the Supreme Council of Military Justice, acquitted Mr. Cantoral-Benavides and ordered his release. In response to a motion for review of said judgment, this same authority upheld, on September 24, 1993, the acquittal of the accused, but ordered

⁶⁸ *Castillo-Petruzzzi et al. Case*, *supra* note 9, para. 187; *Neira-Alegria et al. Case*, *supra* note 14, para. 82; and *Habeas corpus under suspension of guarantees (arts. 27.2, 25.1 and 7.6 of the American Convention on Human Rights)*, *supra* note 40, para. 35.

that the records be sent to the regular jurisdiction, where he was to stand trial for the crime of terrorism. On October 8, 1993, the regular court ordered the opening of the investigation stage of the trial (*supra* para. 63.ñ.ii.).

169. As a result, a writ of *habeas corpus* was submitted on behalf of Luis Alberto Cantoral-Benavides (*supra* para. 63.n), but was declared inadmissible. Consequently, the action brought was ineffective and Mr. Luis Alberto Cantoral-Benavides remained in prison from February 6, 1993, the date of his detention, until June 25, 1997, when he was released as the result of a pardon.

170. all these reasons, the Court concludes that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Articles 7(6) and 25(1) of the American Convention.

XV

NONCOMPLIANCE WITH ARTICLES 1(1) AND 2 OBLIGATION TO RESPECT RIGHTS AND FREEDOMS AND DUTY TO ADOPT DOMESTIC LEGAL EFFECTS

171. As regards noncompliance with Articles 1(1) and 2 of the Convention, the Commission alleged that:

- a) as a consequence of the violation of the rights embodied in Articles 5, 7, 8 and 25 of the Convention, Peru also violated Article 1(1) of the Convention, which refers to the obligation to respect the rights and freedoms embodied in same, as well as the duty to ensure and guarantee their free and full exercise to all persons under the jurisdiction of the State; and
- b) because Peru had not brought its legislation into line with the Convention, modifying those laws that contradicted same, especially anti-subversive legislation, it also violated Article 2 of the Convention.

172. For its part, the State argued that the topic of the alleged violation of Article 2 of the American Convention, due to the failure to adjust anti-subversive legislation to said Convention, was not presented by the petitioners before the Commission, nor transmitted by same to the State or included in Report No. 15-A-96, so it was not discussed previously in the proceedings before the Commission, and the internal jurisdiction of Peru on this matter was not exhausted. Therefore, the Court does not have jurisdiction to hear this matter. Since Decree Laws No. 25.475 and 25.659 were promulgated and published in 1992, when the application was filed in August 1996, the right to question such legislation had lapsed, as established in Article 46(1)b) of the Convention.

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173. Article 1(1) of the Convention states that:

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

174. Article 2 of the Convention states that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties 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 freedoms.

175. Prior to any consideration of this point, it is necessary to refer to what this Court has already said in the judgment regarding preliminary objections rendered in this case on September 3, 1998, to wit:

Although the Commission had not raised the alleged violation of Article 2 of the Convention in the application to the Court, the Court is authorized to examine the issue *motu proprio*. Article 2 of the Convention, like Article 1(1), sets forth a general obligation—that is added to the specific obligations as to each of the protected rights—and the Court, as the judicial organ of supervision of the Convention, has the official duty to determine its fulfillment by the States Parties. The Respondent State can not, by means of a preliminary objection, attempt to negate this authority which is inherent to the jurisdiction of the Court.⁶⁹

176. As the Court has held, the States Parties to the Convention cannot dictate measures that violate the rights and freedoms recognized in it.⁷⁰ Also, this Tribunal has affirmed that "a rule *per se* can violate Article 2 of the Convention, whether or not it has been applied in a specific case."⁷¹

177. The Court notes that, in this case, according to the present judgment, the State violated Articles 7(1), 7(2), 7(3), 7(4) and 7(5), 5(1) and 5(2), 8(1), 8(2), 8(2)c, d, f) and g), 8(3), 8(5), 9, 7(6) and 25(1) of the American Convention to the detriment of Luis Alberto Cantoral-Benavides, meaning that it has not complied with the general duty of respecting the rights and freedoms recognized in the Convention and of guaranteeing their free and full exercise, as established in Article 1(1) of same.

178. The Court observes, furthermore, as it has in the past, that the provisions contained in the emergency legislation adopted by the State to combat terrorism, and in particular Decree Laws No. 25.475 and 25.659,

69 *Cantoral-Benavides Case, Preliminary Objections*. Judgment of September 3, 1998. Series C No. 40, para. 46.

70 *Castillo-Petruzzzi et al. Case, supra* note 9, para. 205; *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14 para. 36.

71 *cf. Castillo-Petruzzzi et al. Case, supra* note 9, para. 205; and *Suárez-Rosero Case, supra* note 10, para. 98.

applied to Mr. Luis Alberto Cantoral-Benavides in the present case, violate Article 2 of the American Convention, because the fact that said decrees had been issued and were in force in Peru means that the State had not taken the proper steps of internal law to enforce the rights embodied in the Convention. On this matter, the Court has said that

the general duty set forth in Article 2 of the American Convention implies the adoption of measures on two fronts. On the one hand, the suppression of rules and practices of any kind that entail the violation of the guarantees set forth in the Convention. On the other, the issuance of rules and the development of practices leading to the effective observance of said guarantees.⁷²

179. As a consequence, the Court concludes that the State has not complied with the general obligations contained in Articles 1(1) and 2 of the American Convention.

XVI
VIOLATION OF ARTICLES 2, 6 AND 8
OF THE INTER-AMERICAN CONVENTION
TO PREVENT AND PUNISH TORTURE

180. As regards the violation of Articles 2, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, the Commission alleged that:

- a) The State violated same to the detriment of Luis Alberto Cantoral-Benavides;
- b) the Prosecutor Julia Eguía Dávalos, responsible for investigating allegations of torture, decided "TO REJECT the petition interposed in this case ... against agents of the DIVICOTE 3-DIN-COTE because it LACKED THE ELEMENTS OR EVIDENCE

⁷² *cf. Durand and Ugarte Case, supra* note 45, para. 137; and *Castillo-Petruzzi et al. Case, supra* note 9, para. 207.

required to conduct a judicial investigation of the people denounced;" and

c) in its final arguments, the Commission indicated that Peru had violated Articles 6 and 8 of the Inter-American Convention Against Torture "by not adopting 'effective measures to prevent and punish torture' and by not investigating and punishing those responsible for such acts."

181. For its part, the State alleged that it had not violated the cited articles of the Inter-American Convention Against Torture. Also, it reiterated the arguments it had raised to show that it had not violated Article 5 of the Convention.

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182. Article 2 of the Inter-American Convention Against Torture states that:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

183. Article 6 of the Inter-American Convention Against Torture states that

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

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

184. Article 8 of the Inter-American Convention Against Torture states that:

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

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

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

185. This Court has already had the opportunity to apply the Inter-American Convention Against Torture and to declare a State responsible for violating it.⁷³

⁷³ *cf.* *Villagrán-Morales et al. Case*, *supra* note 48, para. 249; and *Paniagua-Morales et al. Case*, *supra* note 9, para 136.

186. In the present case, it is appropriate for the Court to exercise its jurisdiction to apply the Inter-American Convention Against Torture, which entered into force on February 28, 1987.

187. The Commission alleged on different occasions that Mr. Luis Alberto Cantoral-Benavides was subjected to physical and psychological torture. The State, for its part, alleged that it had not violated the articles of the Inter-American Convention Against Torture. From the additional evidence requested by the Court and submitted by the State, it can be inferred that the accused filed no application calling for an investigation of the torture to which he was allegedly subjected. However, in different writs submitted as evidence by the State, *inter alia*, the testimony of the lawyer of the accused (*supra* para. 43.e.), as well as the statements of the mother (*supra* 43.j.) and of Mr. Cantoral-Benavides himself (*supra* para. 43.a.), it is noted that on different occasions the Peruvian authorities were asked to investigate the facts related to alleged mistreatment or torture (*supra* para. 63.u.) which have been proven in this case (*supra* para. 106).

188. However, the documents and the testimonies contained in the file reveal that the administrative and judicial authorities in Peru did not make a formal decision to initiate a criminal investigation of the alleged commission of the crime of torture, and that they did not conduct such investigation (*supra* para. 63.u.) despite the existence of evidence of cruel, inhuman and degrading treatment and of torture committed to the detriment of Luis Alberto Cantoral-Benavides.

189. Article 8 of the Inter-American Convention Against Torture clearly sets forth the obligation of the State to proceed as a matter of routine and immediately in cases such as the present case. In this regard, the Court has held that "in proceedings regarding violations of human rights, the defense of the State cannot lie on the inability of the complainant to submit evidence which, in many cases, cannot be obtained without the cooperation of the State."⁷⁴ The State, however, did not fulfill said obligation in this case.

74 *fr. Villagrán-Morales et al. Case, supra* note 48, para. 251; *Gangaram-Panday Case, supra* note 11, para. 49; *Godínez-Cruz Case, supra* note 10, para. 141, and *Velázquez-Rodríguez Case, supra* note 10, para. 135.

190. The Court concluded, after studying the State's violation of Article 5 of the Convention, that the State, through its public agents, had subjected Luis Alberto Cantoral-Benavides to torture and other cruel, inhuman and degrading treatment (*supra* paras. 104 and 106). Therefore, it is clear that said State did not effectively prevent such acts, and that, by not investigating same, failed to punish those responsible for same.

191. Consequently, the Court concludes that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 2, 6 and 8 of the Inter-American Convention Against Torture.

XVII

APPLICATION OF ARTICLE 63(1)

192. As regards the application of Article 63(1) of the Convention, the Commission asked the Court to order that:

- a) Peru make full reparations to Luis Alberto Cantoral-Benavides for the serious material and moral injury caused to him and, as a consequence, order his immediate release and payment of fair compensation to him; and
- b) Peru pay the expenses incurred by the relatives of Luis Alberto Cantoral-Benavides and the petitioners in this case.

193. For its part, the State alleged that:

- a) it was opposed to the request to release Luis Alberto Cantoral-Benavides since it was not obligated to do so until he completed his jail term, and that it was not obligated to compensate him in any way; and
- b) the payment of expenses should be rejected because Peru is under no obligation to make any payment to the relatives of Luis Alberto Cantoral-Benavides, or the petitioners or the Inter-American Commission, and because no evidence has been presented to

demonstrate the expenses incurred by said relatives and petitioners and the Commission.

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* *

194. Article 63(1) of the American Convention states that

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

195. The Court deems that the request by the Commission that the Court order the Peruvian State to release Luis Alberto Cantoral-Benavides is no longer of interest, since he was pardoned and has been free since June 25, 1997 (*supra* para. 63.r.).

196. Also, the Court considers that reparations are in order for the situation created as a result of the violation of the rights specified in this case, which should include fair compensation and the payment of the expenses incurred by the victim or his relatives or the petitioners in connection with this trial.

197. The Court will require sufficient information and evidence in order to set reparations, and, therefore, recommends that the corresponding stage of the proceedings be opened, and commissions its President to adopt such measures as may be necessary.

XVIII OPERATIVE PARAGRAPHS

198. Therefore,

THE COURT,

unanimously,

1. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 5(1) and 5(2) of the American Convention on Human Rights.

unanimously,

2. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 7(1), 7(2), 7(3), 7(4) and 7(5) of the American Convention on Human Rights.

unanimously,

3. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 8(1) of the American Convention on Human Rights.

unanimously,

4. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 8(2) of the American Convention on Human Rights.

unanimously,

5. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 8(2)c), 8(2)d) and 8(2)f) of the American Convention on Human Rights.

unanimously,

6. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 8(2)g), 8(3) of the American Convention on Human Rights.

by seven votes to one,

7. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 8(5) of the American Convention on Human Rights.

Judge Vidal Ramírez dissenting.

by seven votes to one,

8. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Article 9 of the American Convention on Human Rights.

Judge Vidal Ramirez dissenting.

unanimously,

9. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Articles 7(6) and 25(1) of the American Convention on Human Rights.

unanimously,

10. declares that the State has not fulfilled the general obligations of Article 1(1) and 2 of the American Convention on Human Rights, in connection with the violations of the substantive rights identified in the preceding operative paragraphs of the present judgment.

unanimously,

11. declares that the State violated, to the detriment of Luis Alberto Cantoral-Benavides, Articles 2, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

unanimously,

12. decides that the State should order an investigation to determine the persons responsible for the violations of human rights referred to in this judgment, and punish them.

unanimously,

13. decides that the State should make reparations for the injury caused by the violations.

unanimously,

14. decides to open the reparations stage, to which end it commissions its President to take such measures as may be necessary.

Judge Vidal Ramirez informed the Court of his reasoned and partially dissenting opinion, which is attached hereto.

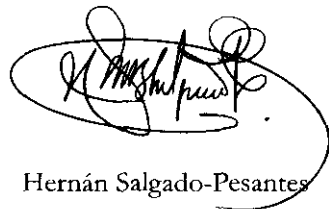
Done in Spanish and English, the Spanish text being authentic, in San José, Costa, Rica, on the eighteenth day of August, 2000.



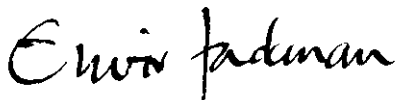
Antônio A. Cançado Trindade
President




Máximo Pacheco-Gómez



Hernán Salgado-Pesantes



Oliver Jackman



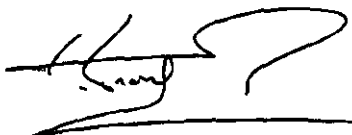
Alirio Abreu-Burelli



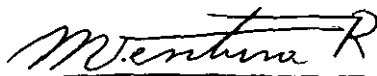
Sergio García-Ramírez



Carlos Vicente de Roux-Rengifo

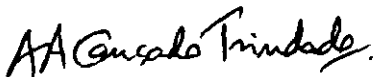


Fernando Vidal-Ramírez
Judge *ad hoc*




Manuel E. Ventura-Robles
Secretary

So ordered,



Antônio A. Caçado Trindade
President



Manuel E. Ventura-Robles
Secretary