INTER-AMERICAN COURT OF HUMAN RIGHTS[*]

CASE OF J. *v.* PERU[**]

JUDGMENT OF NOVEMBER 27, 2013

(Preliminary objection, merits, reparations and costs)

In the *case of J.,*

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

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

also present,

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

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

---

[*] The President of the Court, Judge Diego García-Sayán, a Peruvian national, did not take part in the hearing of this case and the deliberation of the Judgment in accordance with the provisions of Articles 19(2) of the Court's Statute and 19(1) of its Rules of Procedure. Accordingly, pursuant to Articles 4(2) and 5 of the Court's Rules of Procedure, Judge Manuel E. Ventura Robles, Vice President of the Court, became the acting President for this case.

[**] At the request of the presumed victim, and by a decision of the Court in plenary meeting during its ninety-sixth regular session, the identity of the presumed victim was kept confidential, and she is identified as "J." (*infra* para. 5).

TABLE OF CONTENTS

I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On January 4, 2012, under Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted the case of *J. v. the Republic of Peru* (hereinafter "the State" or "Peru") to the jurisdiction of the Inter-American Court. The case concerns the alleged "illegal and arbitrary detention of J. and the searches of her home on April 13, 1992, by State agents, who [presumably] committed acts of torture and cruel, inhuman and degrading treatment, including the [alleged] rape of the [presumed] victim." According to the Commission, "[t]hese acts were followed by the transfer of Ms. J. to the National Counter-terrorism Directorate (DINCOTE) and her [alleged] deprivation of liberty there for 17 days, without judicial oversight and in inhuman detention conditions," as well as "by a series of [alleged] violations of due process and the principle of legality and non-retroactivity during the criminal proceedings against the [presumed] victim for supposed acts of terrorism while Decree-Law 25,475 was in force. Ms. J. was exonerated in June 1993, following which she left Peru." According to the Commission, "[o]n December 27, 1993, the 'faceless' Supreme Court of Justice annulled the acquittal without explaining its reasons and ordered a new trial. At the present time, proceedings against Ms. J. remain pending in Peru, and an international warrant has been issued for her arrest."

2. *Proceedings before the Commission.* The proceedings before the Commission were as follow:

a) *Petition.* On June 17, 1997, Ms. J. and Curtis Francis Doebbler, acting as her representative, lodged the initial petition.[1]

b) *Admissibility Report.* On March 14, 2008, the Commission approved Admissibility Report No. 27/08.[2]

c) *Merits Report.* On July 20, 2011, the Commission approved Merits Report No. 76/11,[3] pursuant to Article 50 of the Convention (hereinafter also "the Merits Report"), in which it reached a series of conclusions and made several recommendations to the State:

Conclusions. The Commission concluded that the State was responsible for the violation of Articles 5, 7, 8, 9, 11 and 25 of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Ms. J. The Commission also concluded that Peru was responsible for the violation of the obligations established in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter "the Inter-American Convention against Torture") and 7 of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women (hereinafter "the Convention of

---

[1] "On June 29, 2000, the Commission, pursuant to Article 40(1) of its rules of procedure, decided to separate the file [of Ms. J.'s initial petition] into two new files, distinguished with [the letters A and B], and decided that, in file [A] it would thereafter process the part of the petition referring exclusively to the detention, trial and other facts denounced that concerned Ms. J. directly and personally." In addition, the Commission decided that, thereafter, "file [B] would refer to the facts denounced in the petition that originated the case [...] which related to the incidents that took place in the Castro Castro Prison, in Lima, in May 1992." File B "was joindered [to another] case [...] to be processed jointly, and was submitted to the Inter-American Court of Human Rights on August 13, 2004, and decided in a judgment of that Court in the case of the Miguel Castro Castro Prison on November 25, 2006." Merits Report No. 76/11, Case [...]-A, J. *v.* Peru, July 20, 2011 (merits report, folios 7 and 8)

[2] In this report, the Commission decided that the petition was admissible with regard to the presumed violations of "Articles 5, 7, 8, 9 11 and 25 of the American Convention, in relation to Articles 1(1) and 2 of this international instrument," and also in relation to "Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and Article 7 of the Convention of Belém do Pará." Admissibility Report No. 27/08, Case [...]-A [J.] *v.* Peru, March 14, 2008 (file of the proceedings before the Commission, folios 1023 to 1036).

[3] *Cf.* Merits Report No. 76/11, Case [...]-A, J. v. Peru, July 20, 2011 (merits report, folios 7 to 78).

Belém do Pará"), to the detriment of Ms. J.

Recommendations. Consequently, the Commission made a series of recommendations to the State, indicating that it should:

i. Provide integral reparation to Ms. J. for the human rights violations declared in [the said] report. This reparation should include both pecuniary and non-pecuniary aspects. If the victim so wishes, rehabilitation measures appropriate to her physical and mental health should be provided.

ii. Conduct an investigation, in an effective and impartial manner and within a reasonable time, in order to clarify fully the acts that violated the American Convention, identify the masterminds and perpetrators, and impose the corresponding penalties.

iii. Order the required administrative, disciplinary or criminal measures for the acts or omissions of the State officials that contributed to the denial of justice and the current impunity of the facts of the case.

iv. Complete the process of adapting the provisions of Decree-Law 25,475 that remain in force and whose incompatibility with the American Convention was declared in [the said] report.

v. Annul any expression of the exercise of the State's punitive powers against J., in which the procedural defects of the trial held in 1992 and 1993 that generated the violations of the American Convention persist. Specifically, the State must ensure that no proceeding is held against Ms. J. that is based on the evidence obtained illegally and arbitrarily, as declared in [the said] Merits Report.

d) *Notification of the State.* The Merits Report was notified to the State on August 4, 2011, and it was granted two months to report on compliance with the recommendations. In response to Peru's request and its express waiver of the right to present preliminary objections on the time frame established in Article 51(1) of the American Convention, the Commission granted an extension of the time frame for the State to report on compliance with the recommendations. On December 20 and 28, 2011, the State presented a report on the measures adopted to comply with the said recommendations.

e) *Submission to the Court.* On January 4, 2012, the Commission submitted this case to the Court "in order to obtain justice for the [presumed] victim, in view of the State's failure to comply with the recommendations." The Commission appointed Commissioner José de Jesús Orozco Henríquez and then Executive Secretary, Santiago A. Canton, as its delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, lawyer of the Executive Secretariat, as legal advisers.

3. *Requests of the Inter-American Commission.* Based on the foregoing, the Inter-American Commission asked this Court to declare the international responsibility of Peru for the violation of the rights to personal integrity, personal liberty, judicial guarantees, legality and non-retroactivity, protection of honor and dignity, private and family life, and judicial protection, recognized in Articles 5, 7, 8, 9, 11 and 25 of the American Convention, in relation to the general obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Ms. J. The Commission also asked the Court to declare that Peru was responsible for the violation of the obligations established in Articles 1, 6 and 8 of the Inter-American Convention against Torture and Article 7 of the Convention of Belém do Pará, to the detriment of Ms. J. In addition, the Inter-American Commission asked the Court to order the State to provide specific measures of reparation, which are described and analyzed in the corresponding chapter (*infra* Chapter X).

II
PROCEEDINGS BEFORE THE COURT

4. *Notification of the State and the representative.* The submission of the case was notified to the State and to the representative of the presumed victim (hereinafter also "the representative") on March 12, 2012.

5. *Request to keep the identity of the presumed victim confidential.* On May 4, 2012, the representative asked the Court to clarify some aspects relating to the confidentiality of the identity of the presumed victim in this case.[4] On May 9 and 18, 2012, respectively, the Commission and the State forwarded their observations in this regard. On September 10, 2012, the Court informed the parties and the Commission that "in view of the violations alleged in this case, the confidentiality of the presumed victim's identity was in order and must be respected, both during these proceedings before the Court and in any statements or information that any of the parties publicizes with regard to the case. The Court also consider[ed] that, owing to the facts alleged in this case, the confidentiality of the identity of the presumed victim entails not only the confidentiality of her name, but also of any sensitive information in the case file concerning the alleged rape, publication of which could harm the presumed victim's right to privacy and personal integrity."

6. *Brief with motions, arguments and evidence.* On May 15, 2012, the representative presented her brief with motions, arguments and evidence (hereinafter "motions and arguments brief"), under Articles 25 and 40 of the Court's Rules of Procedure. She then presented the "[a]rgument relating to the legal analysis of this case" and the "[c]laims concerning reparations" on May 18, 2012, three days after the non-extendible time frame for the presentation of the motions and arguments brief had expired. In this regard, the Court, meeting in plenary during its ninety-fifth regular session, decided that these arguments would not be admitted because they were time-barred pursuant to Article 40(d) of the Court's Rules of Procedure. This decision was communicated to the parties and to the Commission in notes of the Secretariat of the Court of July 11 and 24, 2012.

7. *Answering brief*. On September 26, 2012, Peru submitted to the Court its brief with a preliminary objection, answering the submission of the case by the Commission, and with observations on the motions and arguments brief (hereinafter "answering brief"). In this brief, the State filed a preliminary objection, and contested the description of the facts made by the representative and the Commission, and also the violations alleged by the latter. The State appointed Luis Alberto Huerta Guerrero, Special Supranational Public Prosecutor,[5] as its Agent for this case and Iván Arturo Bazán Chacón and Carlos Miguel Reaño Balarezo, lawyers from the Office of the Special Supranational Public Prosecutor, as its deputy agents.

8. *Access to the Legal Assistance Fund.* In an Order of October 24, 2012, the acting President admitted the request made by the presumed victim to access the Victim's Legal Assistance Fund of the Court, and decided that the necessary financial assistance would be granted for the presentation of a maximum of two statements, either by affidavit or during the public hearing, and the appearance of a representative at the public hearing.[6]

9. *Observations on the preliminary objection*. On November 24 and 25, 2012, the Inter-American Commission and the representative, respectively, presented their observations on the preliminary objection filed by the State.

---

[4] On that occasion, the representative presented various newspaper articles as evidence of the "derogatory [...] statements [made] against the [presumed] victim" (merits report, folios 131 to 175).

[5] Initially, the State appointed Alberto Salgado Tantte as its Agent. Subsequently, on May 30, 2012, Peru appointed Oscar José Cubas Barrueto as its Agent and, finally, on October 19, 2012, it appointed Luis Alberto Huerta Guerrero, actual Special Supranational Public Prosecutor, as its Agent.

[6] *Cf. Case of J. v. Peru.* Order of the acting President of the Court of October 24, 2012. Victim's Legal Assistance Fund. Available at: http://corteidh.or.cr/docs/asuntos/j_fv_12.pdf

10. *Public hearing.* On April 16, 2013, the acting President issued an Order,[7] in which he convened the Inter-American Commission, the representative, and the State to a public hearing to receive the final oral arguments of the representative and of the State, and the final oral observations of the Commission, on the preliminary objection and eventual merits, reparations and costs. In this Order, he also required that the affidavits of six witnesses and three expert witnesses be received by affidavit, and these were submitted by the parties and the Commission on May 7 and 8, 2013. The representative and the State were given the opportunity to pose questions and make observations on the deponents offered by the opposing party. In addition, the said Order summoned two witnesses, two expert witnesses[8] and one deponent for information purposes to testify during the public hearing. The public hearing was held on May 16, 2013, during the ninety-ninth regular session of the Court, which took place at its seat.[9] During this hearing, the parties presented certain helpful evidence.

11. *Final written arguments and observations.* On June 14 and 16, 2013, the parties and the Commission presented their final written arguments and observations, respectively.

12. *Helpful evidence and information, and supervening evidence on expenses.* Together with their final written arguments, and on June 24, 2013, the representative and the State submitted part of the information, explanations and helpful evidence requested by the judges of the Court (*supra* para. 10). Also, on July 29, 2013, the representative presented documentation concerning the expenses incurred following the presentation of the final written arguments. Also, on August 1 and November 6, 2013, the Secretariat of the Court, on the instructions of the acting President, requested the State to present certain helpful documents and explanations, which were presented on August 14 and 21 and November 11, 2013.[10]

13. *Observations on the helpful information and evidence, and on the supervening evidence on expenses.* On July 17 and 22 and August 14, 2013, the parties and the Commission presented their observations on the helpful information, explanations and evidence presented by the other parties in response to the requests of the judges of the Court (*supra* para. 10) and, in the case of the State, also on the expense vouchers submitted by the representative on July 29, 2013. In their respective briefs, the representative and the State included general observations on the final written arguments of the opposing party and, in the case of the State, on the final written observations of the Commission also. Lastly, on September 3 and November 19, 2013, the representative[11] and the

---

[7] *Cf. Case of J. v. Peru.* Order of the acting President of the Court of April 16, 2013. Available at: http://www.corteidh.or.cr/docs/asuntos/j_16_04_13.pdf

[8] In his Order of April 16, 2013, the acting President admitted Stefan Trechsel, expert witness proposed by the Inter-American Commission, and summoned him to testify at the public hearing. However, on April 25, 2013, the Commission withdrew this expertise indicating that Mr. Trechsel "ha[d] indicated that he would be unable to appear at the public hearing, owing to professional commitments he had accepted previously and that could not be postponed."

[9] There appeared at this hearing: (a) for the Inter-American Commission: Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Secretariat specialist; (b) for the presumed victim: the representative and the lawyers Guglielmo Verdirame and Christine Chinkin, and (c) for the State: Luis Alberto Huerta Guerrero, Special Supranational Public Prosecutor, Agent; Carlos Miguel Reaño Balarezo, Deputy Agent, and Doris Margarita Yalle Jorges, both lawyers from the Office of the Special Supranational Public Prosecutor.

[10] In particular, on August 1, 2013, the State was asked to present documents and explanations on the applicable laws in force during all the events of the case, as well as on the criminal proceedings opened against Ms. J. Subsequently, on November 6, 2013, the State was asked to forward a copy of Legislative Decree No. 638 published on April 27, 1991, promulgating the Code of Criminal Procedure.

[11] On that occasion, the representative, also, presented detailed arguments and explanations on the application of article 135 of the Code of Criminal Procedure to this specific case, together with other documents. On the instructions of the acting President for this case, the representative was reminded that the pertinent procedural occasion for forwarding evidence to the Court was regulated in Articles 35(1), 40(2), 41(1) and 42(2) of the Court's Rules of Procedure. Any evidence that is not presented at those opportunities can only be admitted, exceptionally, when the exceptions indicated in Article 57(2) of the Rules of Procedure are complied with, namely: *force majeure*, grave impediment or supervening facts; and also, exceptionally, when it has been requested by the Court in application of Article 58 of the Rules of Procedure. The acting President considered that the

Commission submitted their observations on the helpful documents and explanations provided by the State in response to the requests of the acting President (*supra* para. 12).

14. *Report on disbursements from the Assistance Fund.* On September 20, 2013, the Secretariat, on the instructions of the acting President, forwarded information to the State on the disbursements made in application of the Victim's Legal Assistance Fund in this case and, as established in article 5 of the Court's Rules for the Operation of the said fund, granted it a time frame for presenting any observations it deemed pertinent. On September 27, 2013, the State presented its observations in this regard.

III
PRELIMINARY OBJECTION

A) Arguments of the Commission and of the parties

15. The State argued that "the facts alleged by Ms. J. commenced on April 13, 1992; in other words, before the Peruvian State had ratified [the Convention of Belém do Pará, on June 4, 1996,] and […] before the date that it was adopted by the States parties." It therefore asserted that "they should remain outside the Court's jurisdiction." The State also indicated that, in the Miguel Castro Castro Prison case, the Inter-American Court had established that, as of June 4, 1996, Peru should have observed the provisions of Article 7(b) of the Convention of Belém do Pará, "which obliges it to act with due diligence to investigate and punish the said violence."

16. The representative argued that "[t]he substantive rights (and, consequently, the obligations) established in the Convention [of Belém do Pará] were already included in the American Convention." She also indicated that "[t]he violation of article 7 of the Convention of Belém do Pará in the instant case relates to the conducts of the State that occurred after the Peruvian State had ratified the Convention of Belém do Pará."

17. Meanwhile, the Commission indicated that "the obligation to investigate that arises from [acts of rape], continues over time. At the time the State of Peru ratified the Convention of Belém do Pará, the obligation to investigate and the failure to respond adequately to this obligation had already arisen, and it subsisted following that date." The Commission indicated that "[t]his approach is consistent with the case law of the Inter-American Court," including in the case of the Miguel Castro Castro Prison."

B) Considerations of the Court

18. This Court notes that, as any organ with jurisdictional functions, it has the power inherent in its attributes to determine the scope of its own competence (*compétence de la compétence/ Kompetenz-Kompetenz*). The instruments accepting the optional clause on the binding jurisdiction (Article 62(1) of the Convention) presuppose the acceptance by the States presenting them of the Court's right to decide any dispute relating to its jurisdiction.[12]

---

representative had failed to justify why the explanations and evidence provided on November 19, 2013, had not been presented with her motions and arguments brief, or at any of the subsequent procedural opportunities granted by the Court or its acting President to provide helpful information on the laws applicable to this specific case. He also found that the explanations and evidence provided by the representative did not constitute simple observations on the documentation provided by the State and, therefore, had not been requested by the acting President and was not contemplated in the Court's Rules of Procedure. Given that the possibility of presenting observations does not constitute a new procedural opportunity to expand arguments, on the instructions of the acting President, the representative was advised that the arguments on merits and the evidence provided on November 19, 2013, were inadmissible.

[12] *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs*. Judgment of June 21, 2002. Series C No. 94, paras. 16 and 17, and *Case of the Río Negro Massacres v. Guatemala*. *Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012. Series C No. 250, para. 35.

19. The State deposited the document ratifying the Convention of Belém do Pará before the General Secretariat of the Organization of American States on June 4, 1996. Based on this, and on the principle of non-retroactivity codified in Article 28 of the 1969 Vienna Convention on the Law of Treaties, the Court may examine acts or facts that occurred following the date of this ratification,[13] and that have resulted in human rights violations of instantaneous execution and those also of continuing or permanent execution.

20. Accordingly, the Court considers that it does not have competence to rule on the alleged rape to which Ms. J. was presumably subjected in 1992, as a possible violation of the Convention of Belém do Pará. However, the Court does have competence to rule on whether the said act constituted a violation of the American Convention (*supra* para. 3).

21. In addition, as it has in other cases, including the case of the Miguel Castro Castro Prison, the Court will examine the arguments on the supposed denial of justice in light of the alleged violation of the rights recognized in Article 7(b) of the Convention of Belém do Pará, regarding which this Court does have competence.[14] Therefore, the Court rejects the preliminary objection filed by the State.

IV
PRELIMINARY CONSIDERATIONS

A) On the determination of presumed victims in this case

22. In accordance with Article 35(1) of the Court's Rules of Procedure, in its brief submitting the case, the Inter-American Commission indicated that the presumed victim in this case was Ms. J. Nevertheless, it noted that, following the notification of the Merits Report, the representative "presented a brief in which she included a list of family members affected by the violations against Ms. J." Before the Court, the representative alleged that the mother, father, sisters and companion of Ms. J. should be considered beneficiaries of the judgment. The State opposed the inclusion of these persons as presumed victims, because, in its Merits Report, the Commission had only identified Ms. J. as the victim, so that "the analysis of the facts [was] limited to what happened to Ms. J. […], and did not include the repercussions of these acts on her family."

23. The Court recalls that the presumed victims must be indicated in the Commission's Merits Report issued pursuant to Article 50 of the Convention.[15] Article 35(1) of this Court's Rules of Procedure establishes that the case shall be presented to the Court by the submission of the said report, which must "identify the presumed victims." According to this article, it is for the Commission and not this Court to identify the victims in a case before the Court precisely and at the

---

[13] *Cf. Case of Blake v. Guatemala. Merits*. Judgment of January 24, 1998. Series C No. 36, paras. 39 and 40, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 37.

[14] *Cf. Case of the Miguel Castro Castro Prison v. Peru*. Merits, reparations and costs. Judgment of November 25, 2006. Series C No. 160, paras. 5 and 344, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra. Merits, reparations and costs*. Judgment of November 20, 2012. Series C No. 253, para. 26.

[15] This has been the Court's consistent case law since the *Case of García Prieto et al. v. El Salvador. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, paras. 65 to 68, and the *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. *Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, paras. 224 and 225. These judgments were adopted by the Court during the same session. In application of the Court's new Rules of Procedure, this criterion has been ratified since the *Case of the Barrios Family v. Venezuela. Cf. Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, footnote 214, and the *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261, para. 27.

appropriate procedural opportunity.[16] Legal certainty demands, as a general rule, that all the presumed victims are duly identified in the Merits Report, and it is not possible to add new presumed victims subsequently, except in the exceptional circumstance established in Article 35(2) of the Court's Rules of Procedure.[17] The Court notes that this case does not involve one of the presumptions of the said Article 35(2) that could justify the identification of presumed victims following the Merits Report.

24. In this regard, the Court emphasizes that the representatives must indicate all the presumed victims during the proceedings before the Commission and refrain from doing this following the issue of the Merits Report referred to in Article 50 of the Convention,[18] as in the instant case. The reasons for this is because, when issuing the said report, the Commission must have all the necessary information to determine the legal and factual issues of the case, including the identity of those who should be considered victims,[19] and this did not occur in the instant case.

25. Consequently, in application of Article 35(1) of its Rules of Procedure and its consistent case law, the Court declares that it will only consider Ms. J. as the presumed victim and eventual beneficiary of any reparations that may be decided, as she was the only person identified as such in the Merits Report of the Commission.

B) On the factual framework of this case

26. In her motions and arguments brief, the representative included facts relating to the "international recognition of 'J.' as a human rights defender," and supposed acts of "harassment" against the presumed victim owing to her work of defending other cases before the Court, which were not included by the Commission in its Merits Report. Also, the State argued that the refugee status accorded to Ms. J. and the 2008 extradition procedure against her "do not form part of the facts that are the object of this [case]."

27. This Court recalls that the factual framework of the proceedings before it is constituted by the facts contained in the Merits Report submitted to its consideration. Consequently, it is not admissible for the parties to alleged new facts that differ from those contained in the said report, even though they may describe those that may explain, clarify or reject the facts mentioned in the report and that have been submitted to the Court's consideration.[20] The exception to this principle are facts characterized as supervening, provided that the latter are related to the facts of the proceedings. The Court notes that the said acts of harassment described by the representative do not constitute facts that explain, clarify or reject the facts included in the Merits Report. Accordingly, the Court will not take them into account in its decision in this case.

---

16 *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Suárez Peralta v. Ecuador, supra*, para. 27.

17 *Mutatis mutandi,* under the Court's previous Rules of Procedure, *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 110, and *Case of Fleury et al. v. Haiti. Merits and reparations.* Judgment of November 23, 2011. Series C No. 236, para. 21.

18 *Cf. Case of García and family members v. Guatemala. Merits, reparations and costs.* Judgment of November 29, 2012. Series C No. 258, para. 35.

19 *Cf. Case of García and family members v. Guatemala, supra*, para. 35.

20 *Cf. Case of Five Pensioners v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Mémoli v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 18.

28. To the contrary, the Court notes that the facts relating to the asylum and request for the extradition of Ms. J. do fall within the factual framework described by the Commission in its Merits Report.[21] Therefore, the Court finds the State's objection in this regard inadmissible.

29. The State opposed the Court examining the alleged violation of Article 5(4) of the Convention, owing to the presumed failure to segregate Ms. J., who was being tried, from those inmates who had already been convicted during her detention in the Miguel Castro Castro Prison. Peru argued that the "Ms. J.'s entries into, transfers between, and departures from [the Miguel Castro Castro and the Santa Mónica Prisons], as well as the detention conditions that she experienced, do not form part of this case." According to the State, "the factual framework of the *case of the Miguel Castro Castro Prison* has already been examined and decided by the Inter-American Court in the respective judgment, which generates an identity of facts with those that correspond to the *case of J*. The fact that the Commission seeks to claim another right that was not discussed in the case of the Castro Castro Prison is inadmissible." Peru indicated that, since "the so-called triple identity of person, facts and legal grounds exists [in the two cases], this constitutes international *res judicata*," so that the Court should not rule on the alleged violation of Article 5(4) of the Convention. According to the State, "[t]he contrary would signify incurring in the cause for inadmissibility of Article 47[d] of the American Convention and 33 of the Rules of Procedure of the Inter-American Commission."

30. The State did not present this argument as a preliminary objection. Despite this, the Court recalls that the provisions contained in Article 47(d) of the American Convention signifies that a petition will be inadmissible when it is substantially the same as one previously examined by the Commission or by another international organization. This Court has established that the phrase "substantially the same" means that the cases must be of an identical nature. To this end, three elements are required: that the parties are the same, that the purpose is the same, and that the legal grounds are identical.[22]

31. In this case, the State is not arguing the identical nature of these three elements with regard to the entire case, but only with regard to one of the violations alleged by the Inter-American Commission and the representative concerning the detention conditions of Ms. J. in the Miguel Castro Castro Prison. In this regard, the Court notes the identical nature of the parties in both cases, because Ms. J. was a victim of the facts examined by this Court in that case, and some of the facts of the instant case coincide with the situations described, in general, in the case of the Miguel Castro Castro Prison. However, in that case, no violation of Article 5(4) of the American Convention was examined based on the failure to separate Ms. J. from those inmates who had been convicted during the time she was detained in that prison. In the case of the Miguel Castro Castro Prison, this Court referred to certain contextual facts regarding detention conditions in Peru at the time of the facts, and ruled on the detention conditions of the victims when they were transferred from the Miguel Castro Castro Prison[23] (to the "Santa Mónica de Chorrillos" Prison in the case of Ms. J.). However, in that case, it was not alleged that Article 5(4) of the Convention had been violated owing to the detention conditions of the victims before the attacks that occurred in the Miguel Castro Castro Prison from May 6 to 9, 1992, and the Court did not rule on this. Therefore, the Curt concludes that it is able to rule on the alleged violation of Article 5(4) of the Convention owing to the failure to separate the presumed victim from those inmates who had been convicted during the

---

[21] Specifically, the Commission referred to the recognition of Ms. J. as a refugee in paragraph 118 of the Merits Report, and to the extradition procedure in paragraphs 137 to 143 of this report.

[22] *Cf. Case of Baena Ricardo et al. v. Panama. Preliminary objections*, Judgment of November 18, 1999. Series C No. 61, para. 53, and *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations*. Judgment of May 14, 2013. Series C No. 260, para. 31.

[23] *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs, supra*, paras. 197.10 and 197.13.

time she was interned in the Miguel Castro Castro Prison prior to the events that took place from May 6 to 9, 1992, on which this Court ruled in the said case.

C) On the admissibility of certain arguments of the representative

C.1 Admissibility of arguments during the public hearing and in the final written arguments

32. As mentioned previously, in this case the Court has declared inadmissible the legal arguments and the claims for reparation presented by representative after the appropriate time frame established in Article 40(d) of the Rules of Procedure had expired (*supra* para. 6). Despite this, the Court observes that Article 29(2) of the Court's Rules of Procedure establishes that "[w]hen victims, alleged victims, or their representatives; the defendant State or, if applicable, the petitioning State, enter a case at a later stage in the proceedings, they shall participate in the proceedings at that stage." In this regard, as in other cases, the Court may allow the parties to take part in certain procedural measures, taking into account the stages that have expired based on the appropriate procedural moment.[24] The Court also observes that, contrary to other cases, in the instant case only part of the motions and arguments brief was considered inadmissible because it was time-barred. The other arguments of the representative contained in this brief were presented in due form and at the appropriate time, so that they are admissible insofar as they refer to the factual framework and purpose of this case.

33. The Court notes that the representative had the procedural opportunity to participate fully in the public hearing and, *inter alia*, to present her final oral and written arguments, which included legal arguments and claims concerning reparations. In this regard, the Court considers that all the legal arguments submitted during the said hearing are admissible, as well as those included in the final written arguments that are related to the legal arguments submitted during the hearing, and the answers and evidence strictly related to the questions posed by the judges during the hearing.[25] Nevertheless, the Court finds that, due to the principle of procedural preclusion, the specific claims of the representative with regard to reparations are not admissible, with the exception of those referring to the costs and expenses incurred following the presentation of the motions and arguments brief[26] (*infra* para. 421). The Court also finds inadmissible the arguments concerning violations of the American Convention or the Convention of Belém do Pará submitted by the representative after her motions and arguments brief and that are additional to those analyzed by the Commission in its Merits Report,[27] without prejudice to the Court's authority to take the corresponding legal decisions.

34. The State observed that, in the final written arguments, the representative had incorporated facts and arguments that had not been presented in her motions and arguments brief. In this regard, the Court recalls that, essentially, the final written arguments provide an opportunity to systematize the legal and factual arguments presented at the opportune moment, and not a stage

---

[24] *Cf. Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251, para. 19.

[25] *Cf. Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 20.

[26] This has been the consistent criterion of the Court in relation to costs and expense. See, *inter alia*, *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 24, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs* Judgment of November 28, 2012. Series C No. 257, para. 49.

[27] In particular, the following are inadmissible: the alleged violations of Article 11 of the Convention based on the protection of the presumed victim's reputation, the alleged violations of Articles 2 and 24 of the Convention based on the presumed gender-based acts of violence, and the alleged violations of Articles 4(b), 4(c), 4(e), 7(a), 7(f) and 7(g) of the Convention of Belém do Pará, as well as the representative's request to consider the presumed acts of gender-based violence as crimes against humanity.

for submitting new facts and/or additional legal arguments, because the parties would be unable to respond to them. Consequently, in its decision, this Court will only consider the final written arguments that are strictly related to the evidence and legal arguments that were provided in the motions and arguments brief or during the hearing (*supra* para. 33), or the helpful evidence requested by a judge or the Court, which, if necessary, will be indicated in the corresponding section of this Judgment. To the contrary, any new argument presented in the final written arguments will be inadmissible because it is time-barred.[28] In this regard, the Court will take into account the observations of the parties and the whole body of evidence in order to assess the said brief, pursuant to the rules of sound judicial discretion.

C.2 Admissibility of certain parts in English of the final written arguments

35. The Court notes that the State objected to the admissibility of certain parts of the representative's brief with final arguments that were originally submitted in English. Thus, the Court observes that on the day the time frame expired, June 16, 2013, the representative presented her final arguments brief with two chapters and some citations in English. Following a request by the Secretariat, on the instructions of the acting President,[29] on June 18, 2013, the representative presented the translation of the chapters on "[f]inal arguments on gender" and on "[g]eneral comments concerning reparation in this case."

36. In this regard, first, the Court notes that the complete version of the representative's final arguments brief was presented within the corresponding time frame, but with certain parts in a language that was not the working language for this case. The respective translation was presented two days later. Taking into account that this translation was presented within the 21-day period established in Article 28(1) of the Court's Rules of Procedure for the presentation of originals,[30] the Court finds that the initial presentation in English did not affect the State's right of defense or the legal certainty and procedural balance between the parties,[31] and it did not give rise to a disproportionate burden for the State that could justify its inadmissibility. The final written arguments of the representative were sent to the State, together with the respective translation, so that it was able to read the said brief in its entirety in the working language of the case, without any delay, at the same time the representative was able to examine the final written arguments of the State, which were forwarded at the same time. In addition, the translation presented two days after the expiration of the time frame did not represent new arguments, but the same arguments presented within the time frame, but in another language, so that it did not impair the procedural balance between the parties. Consequently, the Court admits all the representative's final written arguments, of which the translation presented on June 18, 2013, forms an integral party, without detriment to the observations made in paragraphs 33 and 34 of this Judgment. Furthermore, regarding "the other parts in English of the final written arguments" of the representative that the State asked the Court not to admit, the Court has verified that they are citations of norms, case law or the initial petition before the Commission, all of which was originally in English. Therefore, the Court does not consider it in order to declare these parts of the above-mentioned brief of the representative inadmissible either.

---

[28] Thus, the representative's argument that the application of the procedural aspect of Decree 25,475 constituted a retroactive application of a less favorable criminal law that prejudiced Ms. J. was time-barred, because it was only submitted in her brief with final arguments.

[29] On June 17, 2013, on the instructions of the acting President, the Court's Secretariat asked the representative to "forward as soon as possible the translation into Spanish of the sections of the said brief that were written in English; particularly, as regards the arguments." Nevertheless, on that occasion, the representative was advised that "the Court w[ould] determine the admissibility of the parts of the said brief that were forwarded in English at the appropriate procedural moment."

[30] Similarly, see *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 15.

[31] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 13, and *Case of Escher et al. v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 6, 2009. Series C No. 200, para. 60.

V
COMPETENCE

37. The Court is competent to hear this case in the terms of Article 62(3) of the Convention, because Peru has been a State party to the American Convention since July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981. Furthermore, the State ratified the Inter-American Convention against Torture on March 28, 1991, and the Convention of Belém do Pará on June 4, 1996.

VI
EVIDENCE

38. Based on the provisions of Articles 50, 57 and 58 of the Rules of Procedure, as well as on its case law with regard to evidence and its assessment,[32] the Court will examine and assess the documentary probative elements forwarded by the parties at different procedural opportunities, the statements, testimony and expert opinions provided by affidavit or during the public hearing before the Court, as well as the helpful evidence requested by the Court and incorporated *ex officio* (*supra* para. 12 and *infra* para. 45). To this end, the Court will abide by the principles of sound judicial discretion, within the corresponding legal framework.[33]

A) Documentary, testimonial and expert evidence

39. This Court received different documents presented as evidence by the Inter-American Commission, the representative, and the State, attached to their main briefs (*supra* paras. 1, 6 and 7). The Court also received the affidavits prepared by the witnesses Klemens Felder, Susan Pitt, Martin Rademacher, Nancy de la Cruz Chamilco, Pablo Talavera Elguera and Ana María Mendieta, and also the proposed expert witnesses José María Asencio Mellado, Miguel Ángel Soria Fuerte, and Eduardo Alcócer Povis. In the case of the evidence provided during the public hearing, the Court listened to the statements of J.'s sister, and of witness Magda Victoria Atto Mendives, deponent for information purposes Federico Javier Llaque Moya, and expert witness Patricia Viseur Sellers.[34]

B) Admission of the evidence

B.1 Admission of the documentary evidence

40. In this case, as in others, the Court grants probative value to those documents presented by the parties and the Commission at the appropriate time that were not contested or opposed, and authenticity of which was not challenged.[35]

41. With regard to the newspaper articles presented by the parties and the Commission together with their different briefs, this Court has considered that these may be assessed when they refer to well-known public facts or declarations by State officials, or when they corroborate aspects related

---

[32] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, paras. 69 al 76, and *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C No. 266, para. 30.

[33] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits, supra*, para. 76, and *Case of García Lucero et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 267, para. 45.

[34] The Order of the acting President of April 16, 2013, established the purpose of this testimony (*supra* footnote 7).

[35] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, *and Case of Luna López v. Honduras. Merits, reparations and costs.* Judgment of October 10, 2013. Series C No. 269, para. 12.

to the case.[36] The Court decides to admit those documents that are complete or that, at least, allow their source and date of publication to be verified, and will assess them taking into account the whole body of evidence, the observations of the parties and the rules of sound judicial discretion.[37]

42. Also, regarding some documents indicated by the parties and the Commission by means of electronic links, this Court has established that, if a party provides, at least, the direct electronic link to the document cited as evidence and it is possible to access it, neither legal certainty nor procedural balance is impaired, because it can be located immediately by the Court and the other parties.[38] In this case, neither the other parties nor the Commission opposed or submitted observations on the content and authenticity of such documents.

43. Regarding the procedural occasion to present documentary evidence, according to Article 57(2) of the Rules of Procedure this must be presented, in general, together with the briefs submitting the case, with motions and arguments, or answering the submission, as applicable.[39] The Court recalls that evidence provided outside the appropriate procedural opportunities is not admissible, unless it complies with the exceptions established in the said Article 57(2) of the Rules of Procedure, namely: *force majeure*, grave impediment, or if it refers to an event that occurred after the procedural opportunities mentioned.

44. During the public hearing (*supra* para. 10), the State and the representative presented various documents,[40] copies of which were delivered to the parties and the Commission, and they

---

[36] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 146, *and Case of Luna López v. Honduras, supra*, para. 14.

[37] *Cf. La República* newspaper, April 24, 1992 (file of annexes to the motions and arguments brief, annex 3, folio 3014); *'El Diario' obedecía órdenes de la cúpula senderista* [El Diario obeyed orders from the Shining Path leaders]*, El Comercio,* April 24, 1992 (file of annexes to the motions and arguments brief, annex 4, folio 3016); *Hay cinco requisitoriados en el Case of 'El Diario'* [Five arrest warrants have been issued in the case of El Diario], *El Comercio*, April 25, 1992 (file of annexes to the motions and arguments brief, annex 5, folio 3018); Weekly publication *Sí, Letra Muerta*, week of April 20 to 26, 1992, p. 33 (file of annexes to the motions and arguments brief, annex 6, folio 3021); *Hay pruebas suficientes de que fue senderista* [There is sufficient proof of membership in Shining Path]*, Correo* newspaper, November 13, 2007 (file of annexes to the Merits Report, annex 37, folio 408); *Consejo Nacional de Derechos Humanos denuncia serio desconocimiento de la ONG del exterior* [National Human Rights Council denounces serious ignorance of the foreign NGO], *Correo* newspaper, October 30, 2007 (file of annexes to the Merits Report, annex 37, folio 409); *Procuraduría vigilará rapidez en extradición de [Ms. J.]* [Prosecutor will ensure that [Ms. J.] is extradited promptly], *Noticias,* newsletter of the Office for the Supervision of the Judiciary (file of annexes to the Merits Report, annex 37, folio 414); *En Alemania hay voluntad para extraditar a [Ms. J.]*, [Germany willing to extradite [Ms. J.] *Correo* newspaper, February 5, 2008 (file of annexes to the Merits Report, annex 37, folio 415); *Canciller preocupado por galardón a terrorista [J.] en EEUU* [Minister of Foreign Affairs concerned by award to terrorist [J.] in the USA], *Correo* newspaper, October 29, 2007 (file of annexes to the motions and arguments brief, annex 49, folio 3133); *Dircote captura a 56 senderistas y desarticula su aparato de diffusion* [Dircote captures 56 members of Shining Path and dismantles their dissemination apparatus], *La República* newspaper, April 21, 1992, (annex to the final written arguments of the State, annex 4, folio 4310); *Dircote acabó con el 'vocero' de senderismo* [Dircote silences Shining Path's 'voice'], *La República* newspaper, April 24, 1992 (file of annexes to the State's brief of June 24, 2013, annex 5, folios 4312 to 4314); *Sendero gastaba 40 mil dólares al mes para mantener aparato de propaganda* [Shining Path spent US$40,000 a month on propaganda apparataus], *La República* newspaper, April 2, 1992 (file of annexes to the State's brief of June 24, 2013, annex 6, folio 4316), and articles entitled *Procurador Galindo: Estado desenmascarará engaños de [J.] a la CIDH* [Prosecutor Galindo: State unmasks [J.'s] deception of IACHR] published on the webpage of the *Agencia Peruana de Noticias* and on Tuteve.tv, on February 5 and 6, 2012 (merits report, folios 162 and 163), and *Vamos a desenmascarar a [J.]* [We will unmask [J.]], Peru21.pe, February 6, 2012 (merits report, folios 166 and 167).

[38] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs. Judgment of* July 4, 2007. Series C No. 165, para. 26, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C. No. 268, para. 34.

[39] Despite this, the Court notes that, before presenting the motions and arguments brief, the representative had filed a brief dated May 4, 2012 (*supra* para. 5), to which she attached evidence on declarations made by State agents and the confidentiality of the presumed victim's identity. The Court has already ruled on the confidentiality of the presumed victim's identity and considers it pertinent to admit the evidence provided, taking into account that the State and the Commission had numerous opportunities to present their observations in this regard. This information and documentation will be assessed in the context of the body of evidence and according to the rules of sound judicial discretion.

[40] *Cf.* Record of delivery of documents. Public hearing of May 16, 2013 (merits report, folio 1285).

were allowed to present their observations. Considering them useful to decide this case, the Court admits the documents provided by the State and the representative during the public hearing as evidence under Article 58 of the Rules of Procedure, and will consider any relevant information they contain taking into account the whole body of evidence, the observations of the parties, and the rules of sound judicial discretion.

45. The State and the representative also presented certain documentation together with their final written arguments and also on two subsequent opportunities, in response to requests for helpful information and evidence by the judges of the Court at the end of the public hearing in this case, and by the acting President (*supra* paras. 10 to 13). The admissibility of the information and documentation requested was not contested, nor was its authenticity or veracity challenged. Consequently, pursuant to Article 58(b) of the Rules of Procedure, the Court finds it appropriate to admit the documents provide by the representative and the State that were requested by the Court's judges or its President as helpful evidence. This information and documentation will be assessed in the context of the body of evidence and according to the rules of sound judicial discretion.

46. Despite the foregoing, this Court notes that the representative contested the admissibility of certain evidence provided by the State in its brief of June 24, 2013, with helpful explanations, documentation and evidence (*supra* para. 12), considering that this had not been requested by the Court's judges. She also objected to arguments included in this brief "which should have been presented with its final arguments." The Commission also noted that, in its brief of June 24, 2013, the State had "incorporate[d] legal arguments that […] should have been presented, at the latest, with the final arguments brief, and not on the additional occasion granted by the Court." The Court notes that the State did present a timetable of facts and new evidence in that regard that had not been requested by the Court's judges. In this regard, the State indicated that "in order to help decide this dispute, [it was presenting] a timetable of the facts of the case, based on information in the case file before the Inter-American Court and new information identified by the Peruvian State when seeking information to respond to the questions posed by the Court's judges." This Court considers that, even though the said arguments and evidence had not been requested, they may be useful to decide this case, because they help give context to other evidence provided to the case file, and explain some of the parties' arguments. The Court also notes that the representative and the Commission were able to present their observations on the said arguments and evidence. Therefore, pursuant to Article 58(a) of the Rules of Procedure and having granted the parties the opportunity to submit observations (*supra* para. 13), the Court finds it in order to admit those documents that are relevant for the analysis of this case, and they will be assessed in the context of the body of evidence and according to the rules of sound judicial discretion.

47. The Court also notes that, in their briefs with observations on the helpful evidence, both the representative and the State included general observations on the final arguments of the opposing party and, in the case of the State, also on the final written observations of the Commission (*supra* para. 13). This Court points out that, when granting the parties a time frame for presenting observations on "the helpful information, explanations and documentation" in the Secretariat's notes of July 5, 2013, the parties and the Commission were advised that this period did "not constitute a new procedural opportunity to expand their arguments." The Court notes that the presentation of observations on the final written arguments of the parties is not contemplated in the Court's Rules of Procedure and was not requested by the Court in this case. Therefore, the Court considers that neither the observations of the representative on the final written arguments of the State, nor the general observations of the State on the final written arguments of the representative and on the final written observations of the Commission, all included in briefs dated July 17, 2013, are admissible.

48. Lastly, the Court takes note that, with her motions and arguments brief, the representative forwarded the expert opinion of Ana Deutsch and the statement of J.'s mother, both provided by

affidavit in the case of the *Miguel Castro Castro Prison v. Peru,*[41] as well as the sworn statement of Emma Vigueras "who acted as legal representative of another woman who was detained during the same operation [where J.] was detained," which had been presented to the Commission during the processing of this case. These annexes were forwarded to the Commission and the State together with the motions and arguments brief. In this regard, the Court reiterates that the pertinence of a statement offered by the parties or the Commission in a case, and the definition of its purpose, must be established by this Court or its President. Therefore, the Court ratifies the decision of the acting President in his Order of April 16, 2013, that the said statements would only be considered documentary evidence, insofar as they had not been requested, and their purpose had not been determined, by the Court or its President;[42] accordingly, they will be assessed in the context of the existing body of evidence and according to the rules of sound judicial discretion.

B.2 Admission of the testimonial and expert evidence

49. Regarding the testimony of the witnesses and the deponent for information purposes, and the expert opinions provided during the public hearing and by affidavit, the Court finds them pertinent, only insofar as they are in keeping with the purpose defined by the acting President in the Order requiring them (*supra* para. 10). They will be assessed in the corresponding chapter, together with the rest of the body of evidence, and taking into account the observations of the parties.[43]

50. In a brief of May 10, 2013, the State made certain observations on the affidavits of the representative; in particular, that the deponents proposed by the presumed victim had not answered the questions posed by the State specifically and directly. On May 14, 2013, the State was informed that this was not the procedural occasion for making observations on the testimony presented by the representative, because, the Order of the acting President of April 16, 2013, had established that these should be presented together with its final written arguments. However, the State did not reiterate these observations in its final written arguments; hence, the Court does not find it necessary to refer to them.

VII
FACTS

51. In this chapter, the Court will establish the facts of this case, based on the facts submitted to it by the Commission, taking into consideration the body of evidence in the case, as well as the motions and arguments brief of the representative and the arguments of the State. The Court recalls that, under Article 41(3) of the Rules of Procedure,[44] it may consider accepted the facts that have not been expressly denied, and the claims that have not been expressly contested, although this does not mean that it will consider them accepted automatically in all the cases in which they have not been opposed by one of the parties, and without an assessment of the specific circumstances of the case and the existing body of evidence. The silence of the defendant State or its evasive or ambiguous answer may be interpreted as an acceptance of the facts of the Merits

---

[41] The purpose of this expert opinion was "the facts of [the case of the *Miguel Castro Castro Prison v. Peru*] and issues related to [eventual] reparations in [that] case," in her capacity as "expert in torture." The purpose of the testimony of the J.'s mother was "what she, as a mother, experienced in relation to the acts that were investigated in [that] case." *Cf. Case of Juárez Cruz Cruzzat et al. v. Peru.* Order of the President of May 24, 2006, first operative paragraph.

[42] Similarly, see, *Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs,* Judgment of March 4, 2011. Series C No. 223, para. 39, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 46.

[43] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012. Series C No. 252, para. 40.

[44] Article 41(3) of the Court's Rules of Procedure establishes that "[t]he Court may consider accepted those facts that have not been expressly denied and those claims that have not been expressly controverted."

Report, while the contrary does not appear in the case file or does not result from judicial certainty.[45]

52. Taking the above into account, the Court will refer to the facts related to the alleged violations in this case, in the following order: (A) the context of the facts of this case; (B) the practice of detention, torture and cruel, inhuman and degrading treatment at the time of the facts; (C) the counter-terrorism laws in force at the time of the facts; (D) the amendments to the counter-terrorism laws, and (e) the proven facts concerning Ms. J.

A) Context: "Political situation and public order in Peru at the time of the facts"

53. The Court recalls that, in the exercise of its contentious jurisdiction, it has examined different historical, social and political contexts that permitted situating the acts that were alleged to have violated the American Convention within the framework of the specific circumstances in which they occurred. In addition, in some cases the context made it possible to characterize the facts as forming part of a systematic pattern of human rights violations[46] and/or was taken into account in order to determine the international responsibility of the State.[47]

54. In this case, the political and historical context at the time of the facts will be established based mainly on the report of the Truth and Reconciliation Commission (hereinafter "the CVR"). The State created the CVR in 2001 in order "to clarify the process, the facts and the responsibilities of the terrorist violence and of the human rights violations that took place from May 1980 to November 2000, attributable to both the terrorist organizations and State agents, and also to propose initiatives designed to reinforce peace and harmony among Peruvians." The Commission issued its Final Report on August 28, 2003, and this was presented to the different powers of the State which acknowledged its conclusions and recommendations and acted in consequences, adopting policies that reflect the significance accorded to this institutional document.[48] Following the publication of the Final Report, this Court has also used the conclusions of the CVR repeatedly to establish the context of the armed conflict in Peru in different cases.[49]

55. The Court has considered that the reports of Truth or Historical Clarification Commissions constitute relevant evidence on other occasions.[50] In this regard, the Court has indicated that, in

---

[45] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 138, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 19.

[46] *Cf., inter alia, Case of Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, paras. 61 and 62, and *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, paras. 102 and 103.

[47] *Cf., inter alia, Case of Goiburú et al. v. Paraguay, supra*, paras. 53 and 63, and *Case of Gudiel Álvarez (Diario Militar) v. Guatemala, supra*, para. 52.

[48] *Cf. Case of Baldeón García v. Peru. Merits*, reparations and costs, Judgment of April 6, 2006. Series C No. 147, para. 72.1, and *Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 10, 2007. Series C No. 167, paras. 89 and 91.

[49] *Cf. Case of De La Cruz Flores v. Peru. Merits, reparations and costs.* Judgment of November 18, 2004. Series C No. 115; *Case of Gómez Palomino v. Peru. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 136; *Case of Baldeón García v. Peru, supra*; *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs, supra*; *Case of La Cantuta v. Peru. Merits, reparations and costs.* Judgment of November 29, 2006. Series C No. 162; *Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra*, and *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202.

[50] *Cf., inter alia, Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs.* Judgment of November 25, 2003. Series C, No. 101, paras. 131 and 134; *Case of Maritza Urrutia v. Guatemala. Merits, reparations and costs.* Judgment of November 27, 2003. Series C No. 103, para. 56; *Case of the Plan de Sánchez Massacre v. Guatemala. Merits*. Judgment of April 29, 2004. Series C No. 105, para. 42; *Case of Almonacid Arellano et al. v. Chile, supra*, para. 82; *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 166, para. 128; *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, footnote, 37, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 298.

keeping with the purpose, procedures, structure and objective of their mandate, such commissions are able to contribute to the construction and preservation of the historical memory, the clarification of the facts, and the determination of institutional, social and political responsibilities during certain historical periods of a society.[51] Nevertheless, the establishment of a context, based on the report of the CVR does not exempt this Court from assessing the whole body of evidence in accordance with the rules of logic and based on experiences, without having to submit to rules concerning the *quantum* of evidence.

56. In the instant case, the State is not disputing the conclusions of the Report of the Peruvian Truth and Reconciliation Commission included in the judgment, but contests their application to this particular case. The Court will refer to this and will take the corresponding decision in the pertinent parts of this Judgment.

57. Taking the foregoing into account, according to the CVR, Peru experienced a conflict between armed groups and members of the police and military forces during the 1980s and up until the end of 2000.[52]

58. In 1991 the State created the National Counter-terrorism Directorate (hereinafter "DINCOTE") as a special unit of the National Police responsible for preventing, denouncing and combating terrorist activities, and treason. Furthermore, the Special Intelligence Group (hereinafter "GEIN") was established within the DINCOTE and, although it was formally attached to DINCOTE, "it began to operate independently of the regular work of the said Directorate."[53]

59. In previous cases, this Court has recognized that the said armed conflict intensified and included a systematic practice of human rights violations, including extrajudicial executions and forced disappearances of persons suspected of belonging to illegal armed groups, such as the Peruvian Communist Party - *Sendero Luminoso* (hereinafter "Shining Path") and the Túpac Amaru Revolutionary Movement (MRTA). These actions were carried out by State agents following the orders of senior military and police officers.[54]

60. The Court has also recognized that the suffering that the Shining Path caused to Peruvian society is extensively and well-known.[55] In this regard, the CVR has indicated that "the decision of [Shining Path] to initiate a so-called 'people's war' against the State was the fundamental reason for the onset of the armed conflict in Peru." Also, according to the CVR, "[t]he ideology and strategy of [Shining Path] gave rise to atrocious acts" and "[t]he terrorist characteristics [of this organization] were evident as of its first actions, including '*ajusticiamientos*,' that is murder accompanied by

---

[51] *Cf. Case of Myrna Mack Chang v. Guatemala, supra*, paras. 131 and 134; *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 128, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 298.

[52] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume I, chapter 1.1, *Los periodos de la violencia*, pp. 54 and 55, available at http://cverdad.org.pe/ifinal/ (hereinafter "Report of the Truth and Reconciliation Commission"). See also, *Case of Loayza Tamayo v. Peru. Merits, supra*, para. 46, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*, *supra*, para. 197.1.

[53] The DINCOTE was established on November 8, 1991, and replaced the Counter-terrorism Directorate (DIRCOTE). *Cf.* Report of the Truth and Reconciliation Commission, volume II, chapter 1.2, pp. 164, 218, 219, 221, 205 and 206; *Case of Castillo Petruzzi et al. v. Peru. Merits*, reparations and costs. Judgment of May 30, 1999. Series C No. 52, para. 86.2*; Case of De la Cruz Flores v. Peru, supra*, para. 73.3, and *Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs. Judgment of November 25, 2004. Series C No. 119, para. 88.3.

[54] *Cf. Case of Castillo Páez v. Peru v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, para. 42; *Case of La Cantuta v. Peru, supra*, para. 80.1, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*, *supra*, para. 197.1. See also, Report of the Truth and Reconciliation Commission, volume VI, chapter 1.2, pp. 112 and 117, chapter 1.3, pp. 129 and 179.

[55] *Cf. Case of the Miguel Castro Castro Prison v. Peru. Interpretation of the judgment on merits, reparations and costs.* Judgment of August 2, 2008. Series C No. 181, para. 41.

torture, and car bombs in the cities." Shining Path "committed very serious crimes that constitute crimes against humanity," as well as "gross violations [of international humanitarian law,] respect for which was obligatory for all the participants in the hostilities." According to the CVR, Shining Path "was the main perpetrator of crimes and human rights violations, measured by the number of those who were killed or disappeared"; thus, it was responsible for 54% of the fatalities reported to the CVR," "totaling 31,331 persons."[56]

61. Furthermore, according to the CVR, starting in October 1981, "the recourse to states of emergency was expanded, suspending [different] constitutional guarantees for renewable periods."[57] In this regard, by a supreme decree of September 5, 1990, a state of emergency was ordered in the department of Lima and the constitutional province of Callao and this was extended on several occasions, including on March 26, 1992.[58] Consequently, the constitutional guarantees relating to the inviolability of the home, freedom of movement, freedom of association, and personal liberty and safety were suspended, and "[t]he Armed Forces assumed control of internal order"[59] (*infra* paras. 129 and 132).

62. Moreover, on the evening of April 5, 1992, the then President, Alberto Fujimori, announced a series of measures "to try and expedite the process of […] national reconstruction," including the temporary dissolution of the Congress of the Republic and the total reorganization of the Judiciary, the National Council of the Judiciary, the Court of Constitutional Guarantees, and the Public Prosecution Service." He also indicated that any "articles of the Constitution that [were] incompatible with these Government objectives [were] suspended." At the same time, "troops of the Army, the Navy, and the Air Force, and the National Police [took] control of the capital and of the main cities in the interior of the country, and occup[ied] Congress, the Palace of Justice, the media, and public places."[60]

63. On April 6, 1992, Decree-Law No. 25,418 was promulgated, setting up the provisional "Government of Emergency and National Reconstruction." Following up on the announcements made the previous evening, the decree dissolved Congress and proclaimed the "total reorganization

---

[56] Report of the Truth and Reconciliation Commission, volume II, chapter 1.1, pp. 13, Conclusions, pp. 127 and 128, and Caretas, *El Peru en los tiempos del terror. La verdad sobre el espanto*, updated edition (merits report, folio 1293).

[57] Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, p. 221.

[58] *Cf.* Supreme Decree No. 034/DE, September 5, 1990, Article 1 (file of annexes to the State's brief of August 14, 2013, folio 5038); Supreme Decree No. 043/DE/SG, October 5, 1990, article 1 (file of annexes to the State's brief of August 14, 2013, folio 5040); Supreme Decree No. 064/DE/SG, December 4, 1990, article 1 (file of annexes to the State's brief of August 14, 2013, folio 5042); Supreme Decree No. 03/DE/SG, February 2, 1991, article 1 (file of annexes to the State's brief of August 14, 2013, folio 5045); Supreme Decree No. 016/DE/SG, April 2, 1991, article 1 (file of annexes to the State's brief of August 14, 2013, folio 5047); Supreme Decree No. 29-91/DE/SG, June 2, 1991, article 1 (file of annexes to the State's brief of August 14, 2013, folio 5049); Supreme Decree No. 08-91-DE-CCFFAA, July 31, 1991, article 1 (file of annexes to the State's brief of August 14, 2013, folio 5051); Supreme Decree No. 51-91-DE-CCFFAA, September 28, 1991, article 1 (file of annexes to the State's brief of August 14, 2013, folio 5053); Supreme Decree No. 70-91-DE-CCFFAA, November 30, 1991, article 1 (file of annexes to the State's brief of August 14, 2013, folio 5055); Supreme Decree No. 4-92-DE-CCFFAA, January 22, 1992, article 1 (file of annexes to the State's brief of August 14, 2013, folio 5057), and Supreme Decree No. 019-92-DE-CCFFAA, March 26, 1992, article 1 (file of annexes to the answering brief, annex 65, folio 4254).

[59] The relevant part of the said decree of March 26, 1992, established that, "owing to the fact that the terrorist actions that gave rise to [the declaration of the state of emergency] continue," it was decreed "To extend the state of emergency for sixty (60) days as of March 28, 1992, in the department of Lima and the constitutional province of Callao"; to suspend "the guarantees established in paragraphs 7, 9, 10, and 20-g of article 2 of the Peruvian Constitution" (*infra* para. 129), and that "[the Armed Forces [would] assume control of internal order." Supreme Decree No. 019-92-DE-CCFFAA, March 26, 1992, arts. 1, 2 and 3 (file of annexes to the answering brief, annex 65, folio 4254).

[60] Museum of the Congress of the Republic of Peru, Message to the Nation of the President of Peru, Alberto Fujimorii Fujimori, April 5, 1992, pp. 4 and 5, Available at http://www.congreso.gob.pe/museo/mensajes/Mensaje-1992-1.pdf; Report of the Truth and Reconciliation Commission, volume III, chapter 2.3, pp. 83 and 85, and IACHR, *Report on the Situation of Human Rights in Peru,* OEA/Ser.L/V/II.83, Doc. 31, March 12, 1993, Section lll, Situation since April 5, 1992, paras. 42 and 52. Available at: http://www.cidh.org/countryrep/Peru93eng/iii.htm

of the Judiciary, the Court of Constitutional Guarantees, the National Council of the Judiciary, the Public Prosecution Service, and the Office of the Comptroller General of the Republic."[61]

64. In addition, the Inter-American Commission reported that, as of April 5, 1992, the "[p]olitical violence perpetrated by illegal armed groups, especially [Shining Path], increased significantly."[62]

B) The practice of detentions, torture and cruel, inhuman and degrading treatment at the time of the facts

65. The CVR established that the State's actions included a pattern of detentions that "consisted in an initial violent arrest of the victim [...,] accompanied by a search of the victim's home using the same violent methods." The person detained "was blindfolded or their face was covered entirely." The CVR stressed that many of the witnesses it heard stated that they were unable to read the records that were made of the searches and that "the victims or their family members were made to sign" them. It also indicated that "[i]n the case of arrests in the home or at checkpoints, the suspect was previously followed or their location discovered." Subsequently, the person was taken to police or military premises where "the person's fate [was decided and] they were either released or executed arbitrarily."[63]

66. The CVR received thousands of reports of torture or cruel, inhuman or degrading treatment or punishment that had occurred over the period from 1980 to 2000. In its Final Report it affirmed that, of the 6,443 acts or torture and cruel, inhuman or degrading treatment or punishment recorded by this body, "75% correspond[ed] to actions attributed to State officials or persons acting with its authorization and/or acquiescence," while 23% corresponded to the subversive group, Shining Path.[64] The CVR concluded that "torture and other cruel, inhuman or degrading treatment or punishment constituted a systematic and widespread practice in the context of counter-insurgency operations."[65]

67. The CVR indicated that torture was frequent in the offices of the Police, such as the DINCOTE headquarters, where it was used as an investigation method.[66] The CVR also indicated that it was very usual that "the members of the victims' family [were] threatened, if the victims did not incriminate themselves, or accuse others."[67] Moreover, the CVR indicated that, during this period, those detained in the DINCOTE were placed in small cells, without a bed or mattress, while being deprived of food and, "in many case, were not allowed to use the lavatories."[68] The denunciations of

---

[61] Decree-Law No. 25,418 of April 7, 1992 (file of annexes to the State's brief of August 14, 2013, folio 5236); Report of the Truth and Reconciliation Commission, volume I, chapter 4, p. 242 and volume III, chapter 2.3, pp. 83 and 84, and IACHR, *Report on the Situation of Human Rights in Peru,* OEA/Ser.L/V/II.83, Doc. 31, March 12, 1993, Section III, Situation since April 5, 1992, para. 52, Available at: http://www.cidh.org/countryrep/Peru93eng/iii.htm

[62] IACHR, *Report on the Situation of Human Rights in Peru,* OEA/Ser.L/V/II.83, Doc. 31, March 12, 1993, Section III, Situation since April 5, 1992, para. 108, Available at: http://www.cidh.org/countryrep/Peru93eng/iii.htm

[63] Report of the Truth and Reconciliation Commission, volume VI, chapter 1.2, p. 114, and chapter 1.4, pp. 240, 241 and 252.

[64] *Cf.* Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4., p. 183. See also, *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*, *supra*, para. 197(5).

[65] Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, p. 212.

[66] *Cf.* Report of the Truth and Reconciliation Commission, volume V, chapter 2.22, pp. 706 and 707. See also, affidavit prepared on June 21, 2006, by expert witness Ana Deutsch in the *Case of the Miguel Castro Castro Prison* (file of annexes to the motions and arguments brief, annex 68, folio 3217).

[67] Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, p. 249.

[68] In addition, the statements received by the CVR indicated that "the places of reclusion were small spaces [that] did not receive daylight and, especially adequate ventilation, and were usually damp and smelled bad, because, since most people did not have access to toilet facilities, they defecated where they were kept." Report of the Truth and Reconciliation Commission,

torture and other cruel, inhuman or degrading treatment or punishment received by the CVR included reports of detainees on the DINCOTE (DIRCOTE) premises in Lima.[69]

68. During the armed conflict "numerous Peruvian women were raped by assailants from both the State sector and the subversive groups."[70] Regarding the actions of the State, the CVR concluded that "rape was a widespread practice that was surreptitiously tolerated, but in some cases openly permitted, by the immediate superiors in certain sphere."[71] The conclusions of the CVR in this regard are described in greater detail in the chapter corresponding to the allegations of this type of violation (*infra* paras. 315 to 319).

69. The CVR identified as the reasons for the increase in torture: the declarations of the state of emergency; the excessive power granted to the Police Forces and Armed Forces, including the power to keep detainees incommunicado, which "in many cases, […] extended to discussions with their lawyer," and the conduct of the agents of justice. In this regard, it emphasized that "the prosecutors called on by law to determine the existence of abuses and to report them to the courts ignored the complaints of those detained and even signed statements without having been present when they were made, so that they were 'incapable of guaranteeing the physical and mental integrity of the detainee."[72]

C) The counter-terrorism laws in force at the time of the facts

70. The 1991 Peruvian Criminal Code defined the offense of apology of terrorism (*apologia*) in its article 316,[73] the "crime of terrorism" in article 319,[74] "aggravated terrorism" in article 320,[75] and the offense of "membership in a terrorist organization" in article 322.[76] Following the establishment

---

volume VI, chapter 1.4, p. 250.

69 *Cf.* Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, p. 233.

70 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.5, p. 272.

71 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.5, p. 304.

72 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, pp. 221 to 224 and 250.

73 Article 316: "[a]nyone who publicly endorses a crime or a person who has been convicted as its perpetrator or participant shall be sentenced to no less than one and no more than four years' imprisonment. If the crime endorsed is against public security and peace, against the State and national defense, or against the powers of the State and the constitutional order, the sentence shall be no less than four and no more than six years' imprisonment." 1991 Peruvian Criminal Code, article 316 (file of annexes to the State's brief of August 14, 2013, folio 5442).

74 Article 319: "[a]nyone who provokes, creates or maintains a state of unrest, alarm or terror among the population or a sector of the population, committing acts against the life, body, health, liberty, personal security, or physical integrity of the individual or against their property, against the security of public buildings, roads or means of communication or transportation of any type, energy or transmission towers, power plants or any other goods or services, using violent methods, weapons, explosive devices or materials or any other means of wreaking havoc or serious disturbance of the public peace, or affecting international relations or social or State security, shall be sentenced to no less than ten years' imprisonment. 1991 Peruvian Criminal Code, article 319 (file of annexes to the State's brief of August 14, 2013, folio 5445).

75 Article 320: "The punishment shall be: 1. No less than fifteen years' imprisonment if the actor operates as a member of an organization that, to achieve its goals, whatsoever these may be, uses the crime of terrorism established in article 319 as a means. The punishment shall be no less than twenty years when the actor belongs to the organization as its chief, leader or head. 2. No less than eighteen years' imprisonment if the crime results in injuries to persons or damage to public or private property. 3. No less than twenty years' imprisonment if minors are made to participate in the perpetration of the crime. 4. No less than twenty years' imprisonment if the damage to public or private property prevents, totally or partially, the delivery of essential services to the population. 5. No less than twenty years' imprisonment if, for terrorist purposes, individuals are kidnapped or extortion is practiced in order to obtain the release of detainees from prison or any other undue advantage from the authorities or private individuals, or when, to the same end, any means of transportation by air, water or land, either national or foreign, is high jacked or its itinerary is changed, or if the extortion or kidnapping is designed to obtain money, assets, or any other advantage. 6. No less than twenty years' imprisonment if, as a result of the perpetration of the acts described in article 313, serious injuries or death occurs, provided that the actor could have foreseen these results." 1991 Peruvian Criminal Code, article 320 (file of annexes to the State's brief of August 14, 2013, folio 5445).

76 Article 322: "[a]nyone who forms part of an organization composed of two or more persons created to instigate, plan,

of the Government of Emergency and National Reconstruction (*supra* para. 63), Decree-Law No. 25,475 was issued on May 5, 1992, amending the provisions of the 1991 Criminal Code concerning the said offenses.[77]

71. Decree-Law No. 25,475 also amended various procedural matters relating to the investigation and prosecution of crimes of terrorism. The Court has indicated that, owing to this decree, the trials undertaken for crimes of terrorism were characterized, among other matters, by: the possibility of ordering the complete incommunicado of those detained for a legal maximum period, the limitation of the participation of defense counsel after the detainee had given his or her statement, the inadmissibility of release on bail during the investigation stage, the prohibition of offering as witnesses those who intervened, owing to their functions, in the elaboration of the police attestation, the obligation of the senior prosecutor to press charges "under his own responsibility,"[78] the holding of the trial by private hearings, the inadmissibility of recusing any of the intervening judges and judicial auxiliaries, the participation of 'secret' judges and prosecutors, and continual solitary confinement for the first year of the prison sentences imposed.[79] It also established that "[t]he processing of the cases that, at the date [the decree came] into force, [were] at the stage of the police investigation, preliminary investigation by the court, or trial, [would] be adapted to the provisions of [the said] Decree-Law."[80]

72. Then, on August 12, 1992, Decree-Law No. 25,659 was promulgated which established the inadmissibility of "*habeas corpus* for detainees accused of, or being processed for, crimes of terrorism."[81]

73. The CVR indicated that the rights of those accused were infringed by the application of the counter-terrorism laws, owing to "indiscriminate detentions, trials for crimes that had not been committed, the manufacturing of evidence, delays in the proceedings, the defenselessness of those detained, and the delivery of judgments without real grounds." In particular, it established that:

> [O]wing to the fact that the guarantees ensuring a proper assessment of the evidence were eliminated, the manufacture of evidence became an extended practice of the National Police and the Armed Forces in order to incriminate those they considered presumed terrorists, but whose guilt they could not prove by other means. Thus, the well-known "plants" were carried out; in other words, false evidence was planted in the homes or among the belongings of the suspects, to serve as evidence in the criminal proceedings or, in the worst case, to encourage detainees to incriminate other individuals.[82]

D) Amendments to the counter-terrorism laws

---

promote, organize, disseminate or commit direct or indirect acts of terrorism, as set forth in this chapter, shall be punished, for the mere act of being a member, with no less than ten or more than twenty years' imprisonment." 1991 Peruvian Criminal Code, article 322 (file of annexes to the State's brief of August 14, 2013, folio 5446).

77 *Cf.* Articles 2, 5 and 7 of Decree-Law No. 25,475 of May 5, 1992 (file of annexes to the answering brief, annex 7, folio 3255).

78 According to Decree 25,475, "[w]hen the preliminary investigation has concluded, the case file shall be forwarded to the president of the respective court, who shall forward the proceedings to the senior public prosecutor, who, in turn, will appoint a public prosecutor who must bring charges within three days, subject to incurring responsibility." Decree-Law No. 25,475 of May 5, 1992, article 13(d) (file of annexes to the answering brief, annex 7, folio 3262).

79 *Cf. Case of De la Cruz Flores v. Peru, supra*, para. 73.4, *and Case of García Asto and Ramírez Rojas v. Peru. Merits, reparations and costs.* Judgment of November 25, 2005. Series C No. 137, para. 97(3). See also, Decree-Law No. 25,475 of May 5, 1992, arts. 12(d), 12(f), 13(a), 13(c), 13(d), 13(f), 13(h), 15 and 20 (file of annexes to the answering brief, annex 7, folios 3261, 3262 and 3264).

80 Decree-Law No. 25,475 of May 5, 1992, transitory and final provisions, fifth (file of annexes to the answering brief, annex 7, folio 3265).

81 Decree-Law No. 25,659 promulgated on August 12, 1992, article 6 (file of annexes to the answering brief, annex 9, folio 3273).

82 Report of the Truth and Reconciliation Commission, volume III, chapter 2.6, pp. 280 and 281.

74. Starting on October 15, 1997, the order was given that the prosecution of the terrorism offenses established in Decree-Law 25,475 must be conducted by judges who were "duly appointed and identified."[83] However, the most significant amendments to the counter-terrorism laws occurred as of January 3, 2003, when the Constitutional Court of Peru handed down a judgment in which it analyzed the alleged unconstitutionality of several provisions of Decree-Laws Nos. 25,475, 25,659, 25,708, 25,880 and 25,744. The Constitutional Court concluded that various substantive and procedural provisions of the counter-terrorism laws were unconstitutional, and established a new way of interpreting other provisions.[84]

75. Legislative Decrees Nos. 921 to 927 were issued to follow up on this judgment.[85] In particular, Legislative Decree No. 926 established that the National Counter-terrorism Chamber "shall annul the judgment and the oral proceeding, *ex officio*, unless this is expressly waived by the accused, and shall declare, if applicable, the absence of grounds for the charges in those criminal proceedings for crimes of terrorism that were held before the ordinary criminal jurisdiction with 'secret' judges or prosecutors." This annulment was limited "to those persons who had been convicted and for the acts on which the conviction was based, as well as the accused who were absent and in contempt of court and for the acts on which the charges were based." In addition, this decree established specific rules with regard to the evidence in proceedings that were re-opened as a result of the said annulment.[86]

E) Proven facts in relation to Ms. J.

76. When the facts that are the subject of this case began, Ms. J. was a 25-year-old law graduate of the Pontificia Universidad Católica del Peru.[87] In March 1992, she was hired as a production assistant by the Colombian journalist, Marc de Beaufort, who was filming a television program for WGBH, a public television channel from Boston, on the political situation in Peru, highlighting the Shining Path guerrilla movement.[88] J. was responsible for obtaining the official permits and authorizations to visit the different locations in Lima and the surrounding areas. The Peruvian authorities were informed of, and authorized, the trips made by Ms. J. and by the team of journalists.[89]

---

83 Law No. 26,671 of October 11, 1997, sole article (file of annexes to the answering brief, annex 8, folio 3270).

84 *Cf.* Judgment of the Constitutional Court of January 3, 2003, File No. 010-2002-AI/TCLIMA, conclusions 41, 112 and 113 (merits report, folios 1531, 1545, 1557, 1563 and 1564).

85 *Cf.* Legislative Decree No. 921 of January 17, 2003, Legislative Decree No. 922 of February 11, 2003, Legislative Decree No. 923 of February 19, 2003, Legislative Decree No. 924 of February 19, 2003, Legislative Decree No. 925 of February 19, 2003, Legislative Decree No. 926 of February 19, 2003, Legislative Decree No. 927 of February 19, 2003 (file of annexes to the answering brief, annexes 14 to 20, folios 3294 to 3295, 3297 to 3304, folios 3307 to 3311; 3313 to 3314, 3316 to 3317, 3319 to 3322 and 3324 to 3328).

86 *Cf.* Legislative Decree No. 926 of February 19, 2003, third complementary provision (file of annexes to the answering brief, annex 19, folios 3320 and 3321); affidavit prepared on May 6, 2013, by witness Pablo Rogelio Talavera Elguera (merits report, folio 1082), and Legislative Decree No. 922 of February 11, 2003, article 8 (file of annexes to the answering brief, annex 15, folios 3299).

87 *Cf.* Statement by Ms. J. on April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3668); certification No. 36762 of the Pontificia Universidad Católica del Peru of March 16, 1992 (file of annexes to the motions and arguments brief, annex 18, folio 3054), and attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3340). Ms. J. had also attended the general arts program at that university for two years. *Cf.* Certification of the Pontificia Universidad Católica del Peru of May 25, 1991 (file of annexes to the motions and arguments brief, annex 19, folio 3057).

88 *Cf.* Sworn statement of Marc de Beaufort of July 25, 1994 (file of annexes to the Merits Report, folio 65); copy of production assistant contract of March 1, 1992 (file of annexes to the Merits Report, annex 11, folio 98); letter of Marc de Beaufort and Yezid Campos of November 18, 1993 (file of annexes to the motions and arguments brief, annex 12, folio 3039), and attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3507).

89 *Cf.* Sworn statement of Marc de Beaufort of July 25, 1994 (file of annexes to the Merits Report, annex 5, folio 66).

77. Ms. J. had no criminal or judicial record;[90] however, she did have a police record and an arrest warrant dated June 1990 for the crime of terrorism, although the case file does not record the reason for this precedent.[91] Ms. J. has denied her membership in Shining Path in all her statements before State authorities,[92] and also that she worked for *El Diario.*[93] Nevertheless, she indicated that, in 1987, she had been arrested "for putting up a poster [of the] weekly publication '*Cambio*.'"[94]

E.1 Arrest of Ms. J. and searches

78. In 1992, DINCOTE "ordered that [the publication] '*El Diario'* be monitored, determining that it form[ed] part of the group calling itself the Communist Party of Peru – Shining Path," and carried out several interventions and arrests.[95] According to a police attestation (*infra* para. 97) and prosecution documents, *El Diario* was considered to be "the publication that disseminates or instigates the barbaric acts committed by the subversive group, Shining Path."[96] According to these documents, *El Diario* not only used expressions that constituted "an evident incitement to commit the crime of terrorism, but these acts have been planned, premeditated, voluntary, continuous and habitual, without any coercion or pressure, over time, obeying commands, and carrying out tasks mandated by the terrorist organization, Shining Path."[97] *El Diario* had gone underground in 1989.[98] The CVR indicated that *El Diario* was a "Shining Path publication."[99]

79. On April 13, 1992, "during the evening, agents [of the National Police of Peru] DIVICOTE 1-DINCOTE, began to execute ['Operation] Moyano', intervening different buildings in the capital simultaneously," to continue "the inquiries into the weekly publication '*El Diario.'*"[100] In the context of Operation Moyano, a "building located on Las Esmeraldas Street, La Victoria, [owned by Ms. J.'s

---

90 *Cf.* Charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folio 3748).

91 *Cf.* Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3381).

92 *Cf.* Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3671), and preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folios 3699 and 3700). See also, preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folios 3703 to 3709); preliminary statement of June 19, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 17, folios 4740 to 4745), and preliminary statement of August 3, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 18, folios 4747 to 4745).

93 *Cf.* Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3670).

94 Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folios 3699 and 3700).

95 *Cf.* Report of the special prosecutor for terrorism No. 118-92.9 of September 9, 1992 (file of annexes to the answering brief, annex 43, folio 3712).

96 Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3484); Charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folio 3755), and Report of the special prosecutor for terrorism No. 118-92.9 of September 9, 1992 (file of annexes to the answering brief, annex 43, folio 3712).

97 Attestation No. 084-DINCOTE. April 28, 1992 (file of annexes to the answering brief, annex 23, folio 3484).

98 *Cf.* Attestation No. 084–DINCOTE. April 28, 1992 (file of annexes to the answering brief, annex 23, folio 3484).

99 Report of the Truth and Reconciliation Commission, volume I, chapter 1.1, p. 108.

100 Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3343 and 3484); statement made by Magda Victoria Atto Mendives during the public hearing held in this case; charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folio 3755); Report of the special prosecutor for terrorism No. 118-92.9 of September 9, 1992 (file of annexes to the answering brief, annex 43, folio 3712), and Report of the Truth and Reconciliation Commission, volume I, chapter 1.1, p. 108, and volume II, chapter 1.2, p. 222.

parents] was intervened, because there was information that terrorists, members of […] 'Shining Path,' were meeting in that building, coordinating actions to attack Lima."[101]

80. At 8.55 p.m. on April 13, 1992, police agents raided the building located on Las Esmeraldas Street.[102] There are two versions of the events surrounding the intervention. According to the police attestation, when they arrived at the building, "the occupants tried to escape by a back door, and were subsequently captured."[103] The record of the search of the premises indicates that the representative of the Public Prosecution Service, Magda Victoria Atto Mendives, was present during the operation.[104] In this regard, during the public hearing held in this case, the latter stated that she "was present from the start [of the intervention] until the search or the operation ended," and that "in this specific case there was never any violence."[105]

81. According to the official records, Ms. J., another woman and a man were arrested during the intervention in the building on Las Esmeraldas Street.[106] These documents also indicate that "when searching the premises, terrorist propaganda, typed and handwritten documents [of the] Communist Party – Shining Path – were seized," among other items.[107] According to the search record, Ms. J. and the two other individuals detained refused to sign it.[108]

82. To the contrary, the presumed victim stated before the domestic authorities that "no printing press had ever operated" in the building on Las Esmeraldas Street; but rather it was used as commercial premises, and that it had been remodeled to offer it for rent, so that at the time of the events, it was empty.[109] According to Ms. J., on the evening of April 13, she was in the building

---

101 Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3344 and 3349), and charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folio 3755).

102 *Cf.* Record of search of premises and seizure of property from the building on Las Esmeraldas Street (file of annexes to the Merits Report, annex 28, folio 323).

103 Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3349).

104 *Cf.* Record of search of premises and seizure of property from the building on Las Esmeraldas Street (file of annexes to the Merits Report, annex 28, folios 323 and 330).

105 Statement made by Magda Victoria Atto Mendives during the public hearing held in this case.

106 *Cf.* Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3349); charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folio 3755), and Record of search of premises and seizure of property from the building on Las Esmeraldas Street (file of annexes to the Merits Report, annex 28, folio 323).

107 *Cf.* Charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folio 3755), and attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3349). A complete list of the documents seized can be found in Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3440 to 3444), and Record of search of premises and seizure of property from the building on Las Esmeraldas Street (file of annexes to the Merits Report, annex 28, folios 324 to 330).

108 *Cf.* Record of search of premises and seizure of property from the building on Las Esmeraldas Street (file of annexes to the Merits Report, annex 28, folio 330). According to the presumed victim, she "was never shown this record at the time of her arrest." *Cf.* Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 39, folio 3699). She also stated that "it is untrue that [she] had tried to escape from the police." Preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folio 3704).

109 *Cf.* Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folios 3699), and preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folios 3703 and 3704). Moreover, on two other occasions, J. had stated that, in the building on Las Esmeraldas Street, there were "some items for personal use […] chairs, desks" and that Ms. J. was using the building to write her thesis. In this regard, the criminal complaint establishes that it had been disproved that the subversive material "constituted research material for her […] thesis, because no proof of this was found; for example, the thesis outline. *Cf.* Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3669); preliminary statement of June 19, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 17, folio 4741), and April 28, 1992 (file of annexes to the answering brief, annex 36, folio 3683).

alone with a woman, who was a prospective tenant and who J. had not known previously.[110] She also stated that, when they were leaving the building:

> [She sensed] that someone was trying to open the backdoor that opened onto Las Esmeraldas Street, [and] immediately asked what was happening; from outside, they answered 'I'm the owner, open up," and [she] opened the window to see what was happening and answered that [she] was the owner and that there had been a mistake; [she] had not finished her sentence when an arm broke the window panes, took [her] by the hair, pointed a gun at [her], and about 15 people entered dressed in civilian clothing, all of them armed; and as [she] had been injured by the glass that had fallen on her back, they threw [her] on the floor and immediately tied [her] hands behind [her] back, and blindfolded [her]; they hit [her] and took [her] to the back of the premises, threatening and insulting [her]. When they tied [her] up, one of the men, who was dark-skinned and wore a yellow cap, hit [her] legs, touched her all over [her] body – patting [her] down according to him – and stole a gold bracelet [and] a gold ring.[111]

83. Ms. J. also stated before the police that:

> [A]t the time of the arrest, [she] was beaten, sexually abused, in other words, touched all over, and a gold ring in the form of a horseshoe and a gold bracelet had been taken from her by force.[112]

84. Also, according to the presumed victim, the representative of the Public Prosecution Service "was not present at the time of the police raid, [but arrived] later," so that "there was no lawyer who could certify what was supposedly found in the offices."[113] J. also stated that "they covered [her] eyes the whole time, therefore [… she] did not see everything they could have planted in that place to implicate her in subversion."[114] According to Ms. J., when the prosecutor arrived, she indicated that there was nothing on the premises.[115] Regarding the seized objects, Ms. J. indicated that she "did not recognize most of the items, except [her] personal documents and the business cards of Marc de Beaufort and of Yezid Campos."[116]

85. The Court notes that, in the record of the inspection made of the building on Las Esmeraldas Street, the Public Prosecution Service certified that, when the building was searched, "there were only two girls." Also, the said record indicated that, when the inspection was carried out, "everything was as it was found on the day of the judicial inspection, [except] that the glass on the door had been changed because it had been broken"[117]

---

110 *Cf.* Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3669), and preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folios 3697 and 3698).

111 Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folios 3698 and 3699).

112 Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3671). In the same statement, Ms. J. indicated that when they "were going to leave, [she] heard a knock on the door and went to see and they told [her] to open up because they were the owners of the house and [she] opened the door, […] they broke the windows, they took [her] by the hair and they took [her] to the back of the building; they blindfolded [her], and they put [her] against the wall." *Cf.* Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3669).

113 In this regard, Ms. J. stated on June 19, 1992, that the prosecutor had arrived an hour and a half later, while on August 3, 1992, she stated that the prosecutor had arrived from two hours and a half to three hours later. *Cf.* Preliminary statement of June 19, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 17, folio 4741), and preliminary statement of August 3, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 18, folio 4749). See also, preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folio 3704)

114 Preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folio 3704).

115 *Cf.* Preliminary statement of August 3, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 18, folio 4749).

116 Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3699).

117 Inspection on August 11, 1992 (file of annexes to the brief of August 14, 2013, folio 5527).

86. Ms. J. declared that, at the end of the search, she and the other woman "were taken out to a car [which] drove round all night until 6 a.m.; […] all this time, [she] was blindfolded and tied up; she could only listen."[118]

87. According to J.'s mother, a neighbor of the building on Las Esmeraldas Street advised her that "some thieves had forced their way into the property." When J.'s mother was on the way to the building accompanied by J.'s younger sister, they were "assaulted by two men who forced them into a car," and drove them to the building on Las Esmeraldas Street. J.'s mother indicated that, when they arrived, she was told that her "daughter had resisted and [they had] killed her."

88. At 9.20 p.m. on April 13, the house where Ms. J. lived with her family on Casimiro Negrón Street was raided.[119] When searching Ms. J.'s room, two revolvers were found, one with four bullets and the other with three bullets, 10 bullets for a FAL rifle [light automatic] and six .38 caliber bullets, in addition to documentation classified as "of a subversive nature."[120] According to the record, two representatives of the Public Prosecution Service were present during this search, together with J.'s younger sister, and her mother, who had authorized it.[121] The record does not indicate that Ms. J. was present; however, it indicates that she and her younger sister had refused to sign the record,[122] while their mother did sign it.[123]

89. According to J.'s mother, she and her younger daughter had been asked to sign "some papers," but, as J.'s younger sister refused to sign, they arrested her.[124] In this regard, the official records establish that, on that April 13, 1992, J.'s younger sister was arrested in order to "clarify the offense against the public peace (terrorism)."[125]

---

118 Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3698).).

119 *Cf.* Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3354), and record of house search and seizure of property from the house on Casimiro Negrón Street of April 13, 1992 (file of annexes to the answering brief, annex 26, folio 3646).

120 Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3348, 3369 and 3517 to 3520). A complete list of the documents seized can be found in Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3479 to 3482), and record of house search and seizure of property from the house on Casimiro Negrón Street of April 13, 1992 (file of annexes to the answering brief, annex 26, folios 3646 to 3650).

121 *Cf.* Record of house search and seizure of property from the house on Casimiro Negrón Street of April 13, 1992 (file of annexes to the answering brief, annex 26, folio 3646).

122 *Cf.* Record of house search and seizure of property from the house on Casimiro Negrón Street of April 13, 1992 (file of annexes to the answering brief, annex 26, folios 3646 and 3650), and attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3348 and 3354).

123 *Cf.* Record of house search and seizure of property from the house on Casimiro Negrón Street of April 13, 1992 (file of annexes to the answering brief, annex 26, folios 3646 and 3650), and attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3348 and 3354).

124 *Cf.* Affidavit prepared by J.'s mother on June 13, 2006, for the case of the Miguel Castro Castro Prison (file of annexes to the motions and arguments brief, annex 1, folios 2998 and 3000).

125 DINCOTE detainee register (file of annexes to the answering brief, annex 28, folios 3657 and 3659), and release order No. 109 of April 28, 1992 (file of annexes to the answering brief, annex 64, folio 4252). Regarding J.'s younger sister, attestation No. 084 indicates that "[s]he was searched, and the result was negative for weapons, ammunition, explosives, subversive propaganda or literature and similar." The attestation concludes that "despite the procedures carried out, it has not been feasible to obtain indications and/or evidence that prove beyond a reasonable doubt participation in the offense against public peace – terrorism [in the case of J.'s younger sister]; so that she was merely summoned." Subsequently, on April 28, 1992, the prosecution ordered the final archiving of the file on J.'s younger sister *Cf.* Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3347 and 3620), and criminal complaint of April 28, 1992 (file of annexes to the answering brief, annex 36, folio 3684).

90. Ms. J. acknowledged that "the revolvers and ammunition belonged to [her] father,"[126] and her mother corroborated this.[127] However, she indicated that she did not recognize the other items, including two letters that were addressed to her.[128] She also indicated that "the only explanation is that the police planted them to implicate her in all this."[129] In her preliminary statement Ms. J. indicated that she "does not recognize any of the items listed, except those for personal use."[130] In addition, she stated that she could not be in any photograph because she had not been to the places where the photographs were taken and did not know the people who appeared in them.[131] Also, in the "ten rolls [of photographs]" where J. appeared "leading two teams of foreign journalists," Ms. J. indicated that she had only had contact with the foreign journalists who worked with her.[132]

91. On April 16, another search was carried out, this time of another building located on Avenida Villa Marina, also owned by Ms. J.'s family, with negative results.[133] On April 21, 1992, Ms. J.'s room in the house on Casimiro Negrón Street was searched for a second time in her mother's presence.[134] During this search, photographs, books and other items "relating and/or alluding to [Shining Path]" were seized."[135] In this regard, J. stated that it was "very strange that [the items seized on that occasion] were not found on the 13th when the house was also searched."[136]

E.2 Ms. J.'s detention from April 14 to 30, 1992

92. On April 14, 1992, Ms. J. was notified that she was detained in the DINCOTE police unit "in order to clarify the crime of terrorism."[137] According to Ms. J., she had been taken to a police station at 6 a.m. on April 14.[138] However, according to the DINCOTE detainee register, provided by the State, Ms. J. entered this center on April 15, 1992, at 11.55 a.m.[139] On April 14, 1992, the

---

126 Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3669).

127 In this regard, J.'s mother indicated that the weapon seized belonged to Ms. J.'s father who had bought it for personal safety. *Cf.* Affidavit prepared by J.'s mother on June 13, 2006, for the case of the Miguel Castro Castro Prison (file of annexes to the motions and arguments brief, annex 1, folio 3000).

128 *Cf.* Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folios 3669 and 3670), and preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3700).

129 Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3670).

130 Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folios 3700 and 3701).

131 *Cf.* Preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folio 3705).

132 *Cf.* Preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folios 3705 and 3706).

133 *Cf.* Record of search of premises of April 16, 1992 (file of annexes to the answering brief, annex 26, folio 3651), and Report of the special prosecutor for terrorism No. 118-92.9 of September 9, 1992 (file of annexes to the answering brief, annex 43, folio 3717).

134 *Cf.* Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3520), and record of house search and seizure of property from the house on Casimiro Negrón Street of April 21, 1992 (file of annexes to the answering brief, annex 27, folio 3653).

135 Record of house search and seizure of property from the house on Casimiro Negrón Street of April 21, 1992 (file of annexes to the answering brief, annex 27, folio 3653).

136 Preliminary statement of June 19, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 17, folio 4743).

137 Notification of detention of April 14, 1992 (file of annexes to the answering brief, annex 25, folio 3644).

138 *Cf.* Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3698).

139 *Cf.* DINCOTE detainee register (file of annexes to the answering brief, annex 28, folios 3657 and 3658).

DINCOTE informed a Lima provincial criminal prosecutor and an investigating court of the detention of Ms. J. and her younger sister.[140] The file before this Court contains no official information on where Ms. J. was between April 13 and 14. According to J.'s mother, she went to the DINCOTE on April 14 to look for her two daughters; however, they were not registered and she was therefore unable to find them until the third day.[141] Moreover, the prosecutor [of the Public Prosecution Service] declared that she "took the citizen to the DINCOTE" and that the detainee registers "are clearly the responsibility of police personnel."[142]

93. On April 18, 1992, Ms. J. underwent a forensic medical examination "[t]o determine: physical condition, old or recent injuries"[143] by two male forensic physicians.[144] The certificate states that:

> [S]mall abrasions (2) [were] observed – one on the underside of the left scapular, and the other in the right paravertebral region at the level of the 12th dorsal and 1st lumbar vertebra. Bruising on one side of 1/3 of the left thigh; back of both legs of 1 to 3 cm diameter, another under the right patella of 2 x 3 cm. All of them in the process of healing. Does not require medical leave.[145]

94. The DINCOTE detainees register indicates that Ms. J. left the DINCOTE Center on April 28, 1992, at 3 p.m.[146] On April 30, 1992, Ms. J. entered the Miguel Castro Castro National Penitentiary Institute.[147] Meanwhile, J.'s younger sister was released on April 28, 1992, and considered to be "summoned" and notified "to appear […] before the competent judicial authority as often as this was […] required."[148]

E.3 Criminal proceeding against Ms. J.[149]

95. Following Ms. J.'s arrest, the DINCOTE made various requests for information about the presumed victim.[150] Also, on April 21, 1992, Ms. J. gave her statement in the DINCOTE offices in the presence of her defense counsel.[151] The information gathered from the said requests, Ms. J.'s statement, and the information collected during the different searches provided the basis for

---

140 *Cf.* Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3365).

141 *Cf.* Affidavit prepared by J.'s mother on June 13, 2006, for the case of the Miguel Castro Castro Prison (file of annexes to the motions and arguments brief, annex 1, folio 3000). See also, sworn statement made by Emma Vigueras on May 15, 2000 (file of annexes to the motions and arguments brief, annex 2, folios 3008 and 3009).

142 Statement made by Magda Victoria Atto Mendives during the public hearing held in this case.

143 Note No. 3900-OCD-DIRCOTE of April 14, 1992 (file of annexes to the answering brief, annex 32, folio 3673).

144 *Cf.* Affidavit prepared by the witness Nancy Elizabeth De la Cruz Chamilco on May 8, 2013 (merits report, folio 1068), and forensic medicine certification No. 15339-L of April 18, 1992 (file of annexes to the answering brief, annex 30, folio 3663).

145 Forensic medicine certification No. 15339-L of April 18, 1992 (file of annexes to the answering brief, annex 30, folio 3663).

146 *Cf.* DINCOTE detainee register (file of annexes to the answering brief, annex 28, folio 3659).

147 *Cf.* Note No. 091-97-URD-EPREMCC-INPE of August 25, 1997 (file of annexes to the answering brief, annex 34, folio 3678).

148 Note No. 4348-DINCOTE of April 28, 1992 (file of annexes to the answering brief, annex 33, folio 3676); DINCOTE detainee register (file of annexes to the answering brief, annex 28, folios 3657 and 3659); release order No. 109 of April 28, 1992 (file of annexes to the answering brief, annex 64, folio 4252), and attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3620).

149 The Court does not have a complete copy of the file of the criminal proceeding against Ms. J., only some of the measures taken.

150 *Cf.* Note No. 170-DINCOTE-DIRCOTE of April 16, 1992 (file of annexes to the answering brief, annex 29, folio 3661), and attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3366).

151 *Cf.* Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3668).

preparing the police attestation on Ms. J. and the other detainees in Operation Moyano.[152] The police attestation was a document on which the prosecution of crimes of terrorism was based.[153]

96. On April 23, 1992, Ms. J. was presented to the media in a press conference organized by the Minister of the Interior at the time, together with other persons detained during Operation Moyano, including her younger sister.[154]

97. On April 28, 1992, the DINCOTE forwarded police attestation No. 084 to the prosecutor and made Ms. J. available to him as a detainee for the crime of terrorism.[155] In this police attestation it was considered proved that Ms. J. was implicated in the crime of terrorism, and the attestation indicated that J. was "responsible for the process of the writing, editing and coordinating with foreign journalists of the clandestine newspaper '*El Diario.*'" In addition, it indicated that Ms. J. had been detained on April 28, 1987, "for taking part in subversive activities," and that in November 1989, she had been "referred to as a member of the "Revolutionary Movement for the People's Defense" (MRDP), an organization created by 'Shining Path.'" It also indicated that the presumed victim's participation in Shining Path "is corroborated by the searches conducted of the premises in Las Esmeraldas Street," as well as what was found in Ms. J.'s bedroom. According to the attestation, Ms. J. "sought to distort the reality of the facts," by not describing the places she had traveled to with the foreign journalists. In addition, the attestation affirms that Ms. J. had lied when stating that she had never met the woman with whom she was arrested in the building on Las Esmeraldas Street, because a photograph had been seized of the presumed victim with the said person taken at another moment.[156] The attestation also indicates that:

> Her militancy in [Shining Path] and her fanaticism are proved because, at all times, she has sought to evade her responsibility from the moment of her arrest when she tried to flee, putting up strong resistance, as well as the cynicism she demonstrated during her statement, and her refusal to sign documents that were drawn up in her presence, and that of witnesses and of the Public Prosecution Service, in order to obstruct, delay, and distort the police and judicial proceedings, showing her disdain for the laws and her subjection to the so-called 'Five Requirements of the Party,' complying fanatically with its 'golden rule,' which is a directive issued to the militants of [Shining Path] by its central leadership.[157]

98. The same day that he received the police attestation, the prosecutor filed criminal charges before the investigating judge against Ms. J. and others who had been detained during Operation Moyano as "presumed perpetrators of the offense against public peace – terrorism, against the State; a criminal act established and penalized in [articles] 319 and 320 of the Criminal Code."[158] In response to these charges, on the same April 28, the Tenth Investigating Court of Lima opened an inquiry in the ordinary jurisdiction against Ms. J. and the other detainees for the crime of terrorism. Consequently, an order was issued to receive "the preliminary statements of the accused." Furthermore, a warrant for the arrest of Ms. J. was issued, in "application [of] article [135] of the Code of Criminal Procedure," and this was notified to the presumed victim.[159]

---

[152] *Cf.* Note No. 4348-DINCOTE of April 28, 1992 (file of annexes to the answering brief, annex 33, folio 3675), and attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3340 to 3633).

[153] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra*, para. 86.2, and *Case of De la Cruz Flores v. Peru, supra*, para. 73.3.

[154] *Cf.* Videos provided by the State together with its brief of June 24, 2013, and *Dircote acabó con el "vocero" del senderismo* [Dircote silences Shining Path's 'voice'], *La República* newspaper, April 24, 1992 (file of annexes to the State's brief of June 24, 2013, annex 5, folios 4312 to 4314).

[155] *Cf.* Note No. 4348-DINCOTE of April 28, 1992 (file of annexes to the answering brief, annex 33, folio 3675).

[156] *Cf.* Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3594, 3595, 3596, 3622 and 3624).

[157] Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3596).

[158] Criminal complaint of April 28, 1992 (file of annexes to the answering brief, annex 36, folio 3682).

[159] *Cf.* Decision of April 28, 1992, of the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 37, folios 3687 to 3689), and notification of the arrest warrant of April 28, 1992, of the Tenth Investigating Court of Lima (file of

99. That same April 28, an attempt was made to obtain the preliminary statement of Ms. J. (*supra* para. 98); however, the procedure was suspended "at the request of the accused who ask[ed] to be assisted by her lawyer."[160] On May 26, 1992, an attempt was made to continue with the preliminary statement; nevertheless, once again the procedure was suspended "owing to the court's work overload [and] the late hour."[161] On June 10, 15 and 19 and August 3, 1992, Ms. J.'s preliminary statement was received piecemeal.[162]

100. On September 9, 1992, the prosecutor indicated that "the conduct attributed to the accused was [also] established in [article] 322 of the Criminal Code, [which typifies conspiracy to commit a terrorist act]." In addition, he noted that "based on […] Decree-Law [25,475] other conducts were penalized [such as] apology of terrorism. Therefore, he indicated that "it was for the jurisdictional organ and the corresponding procedural stage" to determine "which [of the two provisions] is the most favorable to the accused."[163] In this regard, on October 28, 1992, the criminal judge expanded the order to investigate the alleged crime of April 28, in order to consider Ms. J. as author of the "offense, also against public peace – conspiracy to commit a terrorist act," included in Article 322 of the Criminal Code.[164]

101. On January 8, 1993, prosecutor No. 9288526Y filed charges against Ms. J. and another 93 persons "as perpetrators of the crime of terrorism and conspiracy to commit a terrorist act against the State." The prosecutor specified the acts that would be attributed to some of the accused in relation to *El Diario*. However, he did not describe the acts attributed specifically to Ms. J.,[165] but merely, in general, indicated that "the other accused […] were responsible for the work of printing, editing, distribution, and circulation of the voice [of Shining Path] *El Diario*; while others of the accused were in charge of writing some of the articles included in this newspaper in order to disseminate the ideology and other plans of [Shining Path]."[166] On February 1, 1993, the Higher Court of Lima declared that "there were grounds to proceed to an oral hearing against [Ms. J.] for

---

annexes to the answering brief, annex 38, folio 3691).

160 Preliminary statement of April 28, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 39, folio 3693).

161 Preliminary statement of May 26, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 40, folio 3695).

162 *Cf.* Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folios 3697 to 3701); preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folios 3705 to 3709); preliminary statement of June 19, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 17, folios 4740 to 4745), and preliminary statement of August 3, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 18, folios 4745 to 4747).

163 Report of the special prosecutor for terrorism No. 118-92.9 of September 9, 1992 (file of annexes to the answering brief, annex 43, folio 3740).

164 *Cf.* Decision of the Forty-third Investigative Judge of Lima of October 28, 1992 (file of annexes to the answering brief, annex 44, folios 3743 to 3745).

165 Regarding Ms. J., he merely indicated that "the [13] accused [who included Ms. J.] in order to evade their responsibilities and the action of justice prepared alibis that lack any legal basis or logic." Charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folio 3756 to 3759).

166 Charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folio 3756 and 3758). Furthermore, the said indictment indicates that the other accused, who included Ms. J., "deny any participation in the perpetration of the crime investigated, narrating in great detail the way and circumstances in which they had been raided by the police, and all affirming that they have no connection whatsoever to Shining Path and that they were unaware that *El Diario* was linked to this subversive group." In addition, the indictment indicates that some of the accused, including Ms. J., "in order to evade their responsibilities and the action of justice prepared alibis that lack any legal basis or logic." Charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folios 3756 and 3757).

[the] crimes of terrorism and conspiracy to commit a terrorist act."[167] The private hearing in this proceeding was held from May 19 to June 9, 1993.[168]

102. On June 18, 1993, the "faceless" Lima Superior Court of Justice, in a judgment concerning several of the accused, decided to acquit Ms. J. "owing to lack of evidence […] for the charges brought against her for the crime of terrorism and conspiracy to commit a terrorist act against the State," indicating that she should "be released immediately." In that judgment, 11 of the accused were convicted, 17 were acquitted, and the proceedings were held in reserve against 65 persons.[169]

103. In particular, with regard to Ms. J., the Lima Higher Court of Justice took into account that: "[t]he accused denies the charges"; the accused "states that the building on Las Esmeraldas adjoining Palermo was up for sale or rent"; the accused indicated that the record of the search by the representative of the Public Prosecution Service establishes that "when she arrived on the day of the police operation, 'there were only two girls,' referring to [Ms. J.] and Mery Morales Palomino"; the accused indicated that "there was a contradiction between the record [of the search of the building on Las Esmeraldas and other search records] which mention the same time as that at which the building on Las Esmeraldas Street was raided] and also, with a difference of mere minutes, the same representative of the Public Prosecution Service appears in other searches in different and distant places"; "according to the testimony of the carpenter Dimas Tembladera Vilca […] the said premises were totally unoccupied and he had worked there for three months according to the contract that appears [in the case file]"; "according to a document […], the said accused signed a contract with WGBH-TV, a Boston public television station, as production assistant for a documentary on Peru"; "they obtained […] permission to operate from the Military Region"; "the weapons seized in the home of the accused […] were acquired by her father for self-defense"; "the father of the accused, […] in his testimony, […] corroborated his daughter's statement with regard to the weapons, adding that the bullets and cartridges found with them also belong to him"; the accused "denies emphatically that she is the owner or possessor of the compromising documentation attributed to her"; the accused denies "knowing Luis Durand Araujo, who she had never seen before, [and] the latter, also accused […] corroborates this version, clarifying that he was arrested in the Parque de Lince," and "the case file contains the expertise [on the handwritten documents found], which concludes that this writing does not correspond to the said accused."[170] The judgment finds that:

> [H]aving assessed the evidence provided, it must be established that, although the charges are specific and based on seizures of subversive material ready for distribution, the exculpatory evidence and other documents are of such consistence that they weaken the charges to the point that doubt arises and, consequently, the judge must apply the said benefit in this case.[171]

---

[167] Decision of the Lima Superior Court of Justice of February 1, 1993 (file of annexes to the answering brief, annex 46, folios 3764 and 3765). The same day, the decision was notified to Ms. J.'s lawyer. *Cf.* Notification of the decision of the Lima Superior Court of Justice of February 1, 1993 (file of annexes to the answering brief, annex 47, folio 3767).

[168] *Cf.* Record of the hearing on May 19, 1993 (file of annexes to the State's brief of June 24, 2013, annex 19, folios 4753 to 4756); record of the hearing of June 2, 1993 (file of annexes to the State's brief of June 24, 2013, annex 20, folios 4758 to 4767); record of the hearing of June 7, 1993 (file of annexes to the State's brief of June 24, 2013, annex 21, folios 4769 to 4784), and record of the hearing on June 9, 1993 (file of annexes to the State's brief of June 24, 2013, annex 22, folios 4786 to 4796).

[169] *Cf.* Judgment of the Lima Superior Court of Justice of June 18, 1993 (file of annexes to the answering brief, annex 48, folios 3784 and 3785).

[170] Judgment of the Lima Superior Court of Justice of June 18, 1993 (file of annexes to the answering brief, annex 48, folios 3773 to 3775).

[171] Judgment of the Lima Superior Court of Justice of June 18, 1993 (file of annexes to the answering brief, annex 48, folio 3775).

104. The same June 18, 1993, the National Penitentiary Council was advised that the presumed victim should be released.[172] Following this decision, Ms. J. left Peru in August 1993 (*infra* para. 114).

105. Both those convicted in the judgment and the senior prosecutor filed an appeal for a declaration of nullity against the judgment of June 18, 1993[173] (*supra* para. 104). On December 27, 1993, the "faceless" Supreme Court of Justice annulled the judgment of June 18, 1993, and ordered that "a new oral hearing be held by another special criminal chamber." The grounds for this decision were that the judgment of June 18, 1993, "did not make a proper assessment of the facts that were the subject of the charges and did not assess the evidence provided appropriately in order to establish the innocence or guilt of the accused."[174]

106. On February 9, 1994, the "faceless" National Counter-terrorism Chamber took over the hearing of the case, an oral hearing was scheduled for February 18, 1994, and a warrant was issued to re-arrest Ms. J.[175] On April 5, 1994, the proceeding against Ms. J. was held in reserve.[176] This decision was confirmed by the Supreme Court of Justice on September 24, 1997, by judges identified with a numerical code.[177] On December 9, 1997, and on March 1, 2001, in judgments with regard to other accused in the same proceedings, the action against Ms. J. was held in reserve.[178]

E.4 Criminal procedure following the 2003 amendment of the counter-terrorism law

107. Pursuant to the provisions of Legislative Decree No. 926 (*supra* para. 75), on May 20, 2003, the National Counter-terrorism Chamber declared "null, all proceedings with regard to [Ms. J.]," because the nullity established in the said Legislative Decree was applicable. In this regard, the Chamber declared that "the charges [of January 8, 1993,] were unsubstantiated," and that all the proceedings as of the decision of February 1, 1993, declaring that there were grounds to proceed to an oral hearing against Ms. J., including that one, were null (*supra* para. 101). The Chamber noted

---

172 *Cf.* Note of the Lima Superior Court of Justice of June 18, 1993 (file of annexes to the answering brief, annex 49, folio 3787).

173 *Cf.* Decision of the National Counter-terrorism Chamber of April 2, 2004 (file of annexes to the Merits Report, annex 24, folio 290). In addition, the judgment of June 18, 1993, that acquitted Ms. J. "orders that, should this judgment not be expressly appealed, the declaration of nullity is granted *ex officio* with regard to the acquittal." Judgment of the Lima Superior Court of Justice of June 18, 1993 (file of annexes to the answering brief, annex 48, folio 3785).

174 Judgment of the Supreme Court of Justice of Lima of December 27, 1993 (file of annexes to the answering brief, annex 50, folio 3789).

175 *Cf.* Decision of the National Counter-terrorism Chamber of February 9, 1994 (file of annexes to the answering brief, annex 51, folios 3791 and 3792).

176 *Cf.* Judgment of the Special Criminal Chamber for Terrorism of April 5, 1993 (file of annexes to the State's brief of June 24, 2013, annex 23, folios 4798 to 4826). See also, Judgment of the Special Criminal Chamber for Terrorism of April 24, 1993 (file of annexes to the State's brief of June 24, 2013, annex 24, folios 4828 to 4830). In this regard, the Code of Criminal Procedures establishes that "[w]hen the court has received the proceedings against the accused who is absent, they will be forwarded to the prosecutor, and the latter shall bring charges. After renewing the arrest warrant and issuing orders summoning the accused and stating the offenses that he or she is accused of in the indictment, the court shall hold the proceeding in reserve until the accused is arrested." 1941 Code of Criminal Procedures, article 319 (file of annexes to the State's brief of August 14, 2013, folio 5162).

177 *Cf.* Decision of the Supreme Court of Justice of September 24, 1997, in case file No. 608-93 (file of annexes to the answering brief, annex 52, folios 3797 to 3800).

178 *Cf.* Judgment of the Special Criminal Chamber of the Lima Superior Court of December 9, 1997 (file of annexes to the State's brief of August 14, 2013, folio 5571), and Judgment of the Special Criminal Chamber of the Lima Superior Court of March 1, 2001 (file of annexes to the State's brief of August 14, 2013, folio 5585). These decisions were confirmed, respectively by the supreme writ of execution of the Criminal Chamber of July 2, 1998 (file of annexes to the State's brief of August 14, 2013, folios 5573 to 5576), and the supreme writ of execution of the Criminal Chamber of March 6, 2001 (file of annexes to the State's brief of August 14, 2013, folios 5588 and 5589).

that, in the proceedings against Ms. J., the prosecutor had not yet prepared the indictment report required by Decree-Law 25,475. Therefore, in compliance with the provisions of Legislative Decree 922 and "in order to avoid subsequent nullities," the Chamber indicated that the proceedings should be held according to "the ordinary proceeding established in the Code of Criminal Procedures."[179]

108. On January 7, 2004, the National Counter-terrorism Chamber joindered the file of the case against Ms. J. with others in which the leader of Shining Path was also incriminated.[180] On September 21, 2004, the Permanent Chamber of the Supreme Court ordered the issue of arrest warrants against Ms. J., indicating that "her preventive detention ha[d] been ordered in order to request her subsequent extradition, because she had been located in London."[181]

109. On November 29, 2004, the Second Supraprovincial Criminal Prosecutor issued a report in which he requested the expansion of the complaint of April 28, 1992, indicating that Ms. J. "was accused of being a member of the terrorist organization, Communist Party of Peru - Shining Path […], having been in charge of the process of writing, editing and coordinating with foreign journalists the clandestine newspaper *'El Diario,'* a written medium dedicated to disseminating the terrorist activities of the said subversive organization." The report established that the legal grounds for the charges brought against Ms. J. were articles 316 (defense of the crime of terrorism) and 322 (membership in a terrorist group) of the 1991 Criminal Code.[182]

110. On December 30, 2004, the Second Supraprovincial Criminal Court admitted the findings in the prosecutor's report and decided to expand "the order to open an investigation of [April 28, 1992,] by a decision of [October 28, 1992]," because "her criminal actions are codified within the crime established in article [316] of the 1991 Criminal Code ([…] defense of the crime of terrorism) and article 322 (membership in a terrorist group)." In addition, it annulled the mention of other offenses in the order to open an investigation and its first expansion.[183]

111. On September 29, 2005, the senior prosecutor of the Third National Superior Criminal Prosecution Service issued a report in which he indicated that there were grounds to proceed to an oral hearing. He charged Ms. J. with the crime of terrorism, specifically for the conducts established in articles 316 and 322 of the Criminal Code, and requested 20 years' imprisonment and civil reparation of 30,000 million new soles to be paid together with the other accused, plus another 130,000 new soles "with regard to the crime [of apology of terrorism]."[184] In addition, he requested the repetition of the order to find and arrest Ms. J., and established that "she should be declared in contempt of court, if she insist[ed] in her refusal to abide by [the corresponding laws, and because] it is not possible to hold the hearing if the accused is not present and, if she does not desist from her refusal to obey the law she should be declared in contempt of court."[185]

---

[179] Ruling of the National Counter-terrorism Chamber of May 20, 2003, in case file No. 35-93 (file of annexes to the answering brief, annex 53, folios 3813 to 3816).

[180] *Cf.* Decision of the National Counter-terrorism Chamber of January 7, 2004, in case file No. 35-93 (file of annexes to the answering brief, annex 55, folio 3827).

[181] Decision of the National Counter-terrorism Chamber of September 21, 2004 (file of annexes to the Merits Report, annex 23, folio 286).

[182] *Cf.* Report No. 118 of the Second Supraprovincial Prosecutor of November 29, 2004, in case file No. 641-03 (file of annexes to the answering brief, annex 56, folios 3829, 3856, 3857 and 3863), and criminal complaint of April 28, 1992 (file of annexes to the answering brief, annex 36, folio 3682).

[183] *Cf.* Decision of the Second Supraprovincial Prosecutor of December 30, 2004, in case file No. 641-03 (file of annexes to the answering brief, annex 57, folios 3889, 3900 and 3901).

[184] Report No. 040-05-05-3FSPN-MP-FN of the Third National Superior Criminal Prosecutor of September 29, 2005 (file of annexes to the answering brief, annex 58, folios 3906, 3907, 4085, 4087, 4088, 4089, 4090, 4092 and 4102).

[185] Report No. 040-05-05-3FSPN-MP-FN of the Third National Superior Criminal Prosecutor of September 29, 2005 (file of annexes to the answering brief, annex 58, folio 4102).

112. On January 24, 2006, the National Criminal Chamber declared that there were grounds to proceed to an oral hearing "[f]or the offense of apology of terrorism […], and for the crime of terrorism," "codified in articles 316 and 322 of the 1991 Criminal Code" against Ms. J. The Chamber set February 10, 2006, as the date for the start of the oral hearing and appointed a defense counsel *ex officio* [for Ms. J. together with those other accused who were absent]. It also ordered the repetition of "the warrants to locate and arrest [Ms. J.]."[186]

113. On May 25, 2006, the National Criminal Chamber handed down a guilty verdict against several of the accused and reserved the "sentence against [Ms. J.] until she ha[d] been […] arrested and brought before the competent judicial authority." This guilty verdict also contained other decisions concerning other persons who had been tried under the same case file as Ms. J.[187] As of that moment, on different occasions, orders have been given to hold in reserve the proceedings against Ms. J. and the other accused who are absent.[188] J. was declared to be in contempt of court,[189] and on November 5, 2007, an international warrant was issued for to locate and arrest Ms. J.[190] According to the State, in the proceedings against Ms. J., the oral hearing is pending so that, thereafter, the National Criminal Chamber may issue the respective first instance judgment. There is no record that Ms. J. has appealed or acted at any stage of the criminal proceedings.

E.5 The departure of Ms. J. from Peru and the extradition process

114. On August 9, 1993, following her release (*supra* para. 104), Ms. J. filed a complaint before the Public Prosecution Service that, following the decision to acquit her, she and her family had been the victims of threats and had been followed by unknown individuals, as well as by presumed police agents.[191] On August 12, Ms. J. asked the Prosecution Service to "provide her with the pertinent guarantees."[192] According to J.'s mother, owing to these "incidents of harassment," J. left Peru on August 16, 1993.[193] On September 30, 1993, Ms. J. arrived in the United Kingdom of Great Britain and Northern Ireland (hereinafter "the United Kingdom") and, on October 13, 1993, she requested asylum.[194] When she arrived in the United Kingdom, J. had tuberculosis, which she

---

186 Decision of the National Criminal Chamber of January 24, 2006 (file of annexes to the answering brief, annex 60, folios 4123 to 4125).

187 *Cf.* Judgment of the National Criminal Chamber of May 25, 2006, case file 89-93 (file of annexes to the answering brief, annex 61, folios 4218 and 4219).

188 *Cf.* Judgment of the National Criminal Chamber of October 4, 2006, case file 89-93 (file of annexes to the Merits Report, annex 18, folio 267); Note of the National Criminal Chamber to the representative of the Judiciary before the National Human Rights Council of April 17, 2007 (file of annexes to the Merits Report, annex 22, folio 281); Decision of the National Criminal Chamber of January 24, 2007 (file of annexes to the answering brief, annex 62, folio 4221); Judgment of the National Criminal Chamber of July 3, 2007 (file of annexes to the answering brief, annex 63, folios 4249 and 4250), and Judgment of the National Criminal Chamber of July 17, 2007 (file of annexes to the Merits Report, annex 20, folio 275).

189 *Cf.* Ruling of October 29, 2007, of the National Criminal Chamber (file of annexes to the State's brief of August 14, 2013, folio 5598).

190 *Cf.* Note No. 89-93/SA-SPN of the National Criminal Chamber to the Executive Director of OCN-INTERPOL Lima dated November 5, 2007 (file of annexes to the State's brief of August 14, 2013, folio 5594).

191 *Cf.* Complaint by Ms. J. before the Public Prosecution Service of August 9, 1993 (file of annexes to the motions and arguments brief, annex 9, folios 3027 to 3030).

192 Request to the Prosecutor General's Office dated August 12, 1993 (file of annexes to the motions and arguments brief, annex 10, folio 3034).

193 *Cf.* Affidavit prepared by J.'s mother on June 13, 2006, for the case of the Miguel Castro Castro Prison (file of annexes to the motions and arguments brief, annex 1, folio 3004); Statement of J.'s sister during the public hearing held in this case, and Note No. 13-95 SPN of the National Criminal Chamber of January 14, 2009 (file of annexes to the representative's final written arguments and to the brief of June 24, 2013, folio 5036.4).

194 *Cf.* Identity document issued to Ms. J. by the Immigration and Nationality Directorate (file of annexes to the motions

probably caught in prison.[195] Also, according to the psychological report prepared by the Traumatic Stress Clinic, Ms. J. suffered from chronic complex post-traumatic stress disorder.[196]

115. On January 23, 1997, the United Kingdom granted Ms. J. refugee status[197] and, on May 26, 2000, she was granted indefinite permission to remain in the United Kingdom as a refugee.[198] On February 24, 2003, Ms. J. became naturalized as a British citizen.[199]

116. In December 2007, Ms. J. traveled with her companion to Germany to visit her younger sister.[200] On December 28 that year, when J. was preparing to return to London, she was detained provisionally by the Police of the Cologne Bonn Airport in Germany, based on the request to find and arrest her sent out by the Peruvian authorities through INTERPOL.[201] On January 4, 2008, the Cologne Higher Regional Court issued an order of preventive detention against Ms. J. for the purposes of her extradition. On January 9, she was excused from complying with the preventive detention in exchange for fulfilling certain obligations, [including] payment of a surety."[202]

117. In parallel, on January 4, 2008, the National Criminal Chamber decided "to request the judicial authorities of the German Republic to extradite [Ms. J.], accused of the crimes of apology of terrorism, and terrorism, [established in articles 316 and 322 of the 1991 Criminal Code, respectively]."[203] It indicated that "the criminal action [was] in effect at that date, […] because the offenses had been committed – according to the charges – concurrently and, also, the latter was a permanent offense."[204]

118. However, on January 21, 2008, the Second Transitory Criminal Chamber of the Supreme Court of Justice indicated that "the statute of limitations was in effect for the offense of apology of terrorism, and the extradition request was not in order [for that offense], so that only the charges for the crime of terrorism subsisted."[205] On January 24, 2008, the Executive, in a supreme decision,

---

and arguments brief, annex 14, folio 3043).

195 *Cf.* Letter of Dr. Gill Hinshelwood of October 26, 1994 (file of annexes to the Merits Report, annex 9, folio 93), and letter of Dr. M.R. Hetzel of November 22, 1994 (file of annexes to the Merits Report, annex 10, folio 95).

196 *Cf.* Report of the Traumatic Stress Clinic dated November 28, 1996 (file of annexes to the Merits Report, annex 7, folio 86).

197 *Cf.* Letter from the Immigration and Nationality Directorate of January 23, 1997 (file of annexes to the motions and arguments brief, annex 15, folio 3046).

198 *Cf.* Letter from the Immigration and Nationality Directorate of May 26, 2000 (file of annexes to the motions and arguments brief, annex 16, folio 3049).

199 *Cf.* Naturalization certificate dated February 24, 2003 (file of annexes to the motions and arguments brief, annex 17, folio 3052).

200 *Cf.* Affidavit prepared on May 8, 2013, by the witness Klemens Felder (merits report, folio 1236), and affidavit prepared by the witness Martin Rademacher on May 8, 2013 (merits report, folio 1245).

201 *Cf.* Decision of the Second Transitory Criminal Chamber of January 21, 2008, case file 05-2008 (file of annexes to the Merits Report, annex 31, folio 341); judgment of the Cologne Higher Regional Court of August 22, 2008 (file of annexes to the Merits Report, annex 36.2, folio 397); INTERPOL arrest warrant dated November 21, 2007 (file of annexes to the motions and arguments brief, annex 53, folio 3140), and affidavit prepared by the witness Martin Rademacher on May 8, 2013 (merits report, folio 1245).

202 Judgment of the Cologne Higher Regional Court of August 22, 2008 (file of annexes to the Merits Report, annex 36.2, folio 397).

203 Judgment of the National Criminal Chamber of January 4, 2008 (file of annexes to the Merits Report, annex 29, folio 336).

204 Judgment of the National Criminal Chamber of January 4, 2008 (file of annexes to the Merits Report, annex 29, folio 335).

205 Decision of the Second Transitory Criminal Chamber of January 21, 2008 (file of annexes to the Merits Report, annex 31, folio 343).

decided "[t]o admit the request for extradition of [Ms. J.] made by the National Criminal Chamber" and to request Germany to extradite Ms. J.[206]

119. On August 22, 2008, the Cologne Higher Regional Court decided "[t]o declare inadmissible the extradition of [Ms. J.] for the purpose of her criminal prosecution based on the request to find and arrest her of November 5, 2007." The justification for this decision was that "the extradition would violate the prohibition to try someone twice for the same offense."[207]

120. On December 19, 2008, Ms. J. asked the General Secretariat of INTERPOL to remove the red notice (order to seek and arrest) from her name arguing that it was illegal.[208] The Commission for the Control of INTERPOL's files considered this request admissible in July 2009 and, in November 2009, INTERPOL decided to erase from its files the information on Ms. J. forwarded by Peru.[209]

E.6 Publications on the facts of the case in the media

121. Following Ms. J.'s detention in 1992, various newspaper articles were published on her presumed links to Shining Path.[210] Furthermore, the file of this case contains several newspaper articles published in Peru, especially in 2007, 2008 and 2012, which include statements by senior State authorities about Ms. J. and the criminal proceedings against her.[211]

VIII
RIGHTS TO PERSONAL LIBERTY, TO PROTECTION OF THE HOME, TO JUDICIAL GUARANTEES, AND PRINCIPLE OF LEGALITY IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS AND TO ADOPT DOMESTIC LEGAL PROVISIONS

---

206 *Cf.* Note No. 048-2008-JUS-DNJ/DICAJ of January 28, 2008 (file of annexes to the Merits Report, annex 30, folio 339).

207 Judgment of the Cologne Higher Regional Court of August 22, 2008 (file of annexes to the Merits Report, annex 36.2, folios 396 and 401).

208 In particular, Ms. J. indicated that the red notice had no substantive validity because the statute of limitations was in effect for one of the offenses, as well as no substantive validity, because the facts were *res judicata*. *Cf.* Request of Ms. J. (file of annexes to the motions and arguments brief, annex 61, folio 3194 and 3196), and acknowledgment of receipt of February 12, 2009, by the Secretary of the Commission for the Control of INTERPOL's Files (file of annexes to the motions and arguments brief, annex 62, folio 3199).

209 *Cf.* Letter of July 1, 2009, from the Secretary of the Commission for the Control of INTERPOL's Files (file of annexes to the motions and arguments brief, annex 63, folio 3201), and Letter of November 17, 2009, from the Secretary of the Commission for the Control of INTERPOL's Files (file of annexes to the motions and arguments brief, annex 67, folio 3212).

210 *Cf. La República*, April 24, 1992 (file of annexes to the motions and arguments brief, annex 3, folio 3014); *`El Diario´ obedecía órdenes de la cúpula senderista, El Comercio*, April 24, 1992 (file of annexes to the motions and arguments brief, annex 4, folio 3016); *Hay cinco requisitoriados en el caso `El Diario,' El Comercio*, April 25, 1992 (file of annexes to the motions and arguments brief, annex 5, folio 3018); *Sí, Letra Muerta* (weekly), week of April 20 to 26, 1992, p. 33 (file of annexes to the motions and arguments brief, annex 6, folio 3021). See also, Affidavit prepared by the witness Klemens Felder on May 8, 2013 (merits report, folios 1237 and 1238).

211 *Cf., inter alia*, the following newspaper articles: *Hay pruebas suficientes de que fue senderista, Correo*, November 13, 2007; *Consejo Nacional de Derechos Humanos denuncia serio desconocimiento de la ONG del exterior*, *Correo*, October 30, 2007; *Procuraduría vigilará rapidez en extradición de [Ms. J.]*, Newsletter of the Office for the Supervision of the Judiciary, and *En Germany hay voluntad para extraditar a [Ms. J.]*, *Correo*, February 5, 2008 (file of annexes to the Merits Report, annex 37, folios 408, 409, 414 and 415); *Canciller preocupado por galardón a terrorista [J.] en EEUU, Correo*, October 29, 2007 (file of annexes to the motions and arguments brief, annex 49, folio 3133); Articles entitled "*Procurador Galindo: Estado desenmascarará engaños de [J.] a la CIDH*," published on the webpages of the *Agencia Peruana de Noticias*, tuteve.tv, and Peru21 (merits report, folios 162, 163, 166 and 167), and Article entitled "*Jiménez sobre nueva denuncia de CIDH*: '*No nos pasarán por encima'*" and accompanying video. Peru21, February 3, 2012 (merits report, folio 154). See also, Affidavit prepared by the witness Klemens Felder on May 8, 2013 (merits report, folios 1237 and 1238).

122. In this chapter the Court will analyze together the alleged violation of Ms. J.'s rights to personal liberty,[212] to protection of the home,[213] and to judicial guarantees due to the concurrence of facts that may have given rise to these violations. The Court will also rule on the alleged violation of the principle of legality.

123. First, the Court recalls that, pursuant to Articles 33(b)[214] and 62(3)[215] of the Convention, it only has to rule on the conformity of the State's conduct in relation to the provisions of this instrument. Hence, when it refers to facts, acts or omissions of private individuals or non-State entities, it does so to the extent that these can be attributed to the State or because, the act of the State whose compatibility with the Convention must be determined has been executed with regard to such individuals or entities. Thus, the Court finds it essential to reiterate, as it has in other cases,[216] that it is not a criminal court that analyzes the criminal responsibility of the individual. Consequently, in this case, the Court will not rule on the alleged criminal responsibility Ms. J., or of any of the other persons who were processed or tried with her, because this is a matter for the ordinary criminal jurisdiction of Peru.

124. This Court has also indicated that, even though the State has the right and the obligation to guarantee its security and maintain public order, its powers are not unlimited, because, at all times, it has the obligation to apply procedures that are in keeping with the law and that respect the fundamental rights of every individual subject to its jurisdiction.[217] Thus, Article 27(1)[218] of the

---

[212] Article 7 of the Convention establishes that: "1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 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. 6. 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. […]."

[213] Article 11(2) establishes that: "[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."

[214] Article 33 of the Convention stipulates that: "[t]he following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: (a) the Inter-American Commission on Human Rights […];" and (b)the Inter-American Court of Human Rights […]."

[215] Article 62(3) of the Convention establishes that: "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

[216] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 134; *Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 37, and *Case of the Santo Domingo Massacre v. Colombia, supra. Preliminary objection, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 193.

[217] *Cf. Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 174, and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 87.

[218] Article 27 of the Convention, on the suspension of guarantees, stipulates that: "1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. 3. Any State Party availing itself of the right of suspension shall immediately inform

Convention permits the suspension of the obligations that it establishes "to the extent and for the period of time strictly required by the exigencies of the situation" in question, and provided that "such measures are not inconsistent with its other obligations under international law and do not involve [any] discrimination." Thus, in the Court's opinion, this means that, pursuant to the provisions of Article 29(a) of the Convention,[219] the said prerogative must also be exercised and interpreted exceptionally and restrictively. Moreover, Article 27(3) establishes the obligation of the State to "immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions whose application it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension." In the instant case, there is no record that the State complied with this obligation.

A) Rights to personal liberty and to protection of the home

125. In this section, the Court will analyze separately each of the arguments presented by the parties and the Commission in relation to the right to personal liberty and to protection of the home. The Court recalls that Article 7 of the American Convention contains two distinct types of regulations, one general and other specific. The general one is found in the first paragraph: "[e]very person has the right to personal liberty and security." While, the specific one is composed of a series of guarantees that protect the right not to be deprived of liberty illegally (Article 7(2)) or arbitrarily (Article 7(3)), to be informed of the reasons for his detention and to be notified of the charges against him (Article 7(4)), to judicial control of the deprivation of liberty (Article 7(5)), and to contest the legality of the detention (Article 7(6)).[220] Any violation of paragraphs 2 to 7 of Article 7 of the Convention necessarily entails the violation of Article 7(1) of this instrument.[221]

126. Article 7(2) of the American Convention establishes that "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." This Court has indicated that when referring back to the Constitution and the laws established "pursuant thereto," analysis of the observance of Article 7(2) of the Convention entails the examination, as specifically as possible, of compliance with the requirements established "beforehand" in the said laws in relation to the "reasons" and "conditions" for the deprivation of physical liberty. If the substantive and formal aspects of the domestic laws are not observed when depriving a person of his liberty, this deprivation will be illegal and contrary to the American Convention[222] in light of Article 7(2).

127. Furthermore, with regard to the arbitrariness referred to in Article 7(3) of the Convention, the Court has established that no one can be subjected to detention or imprisonment for reasons and by means that – even though they are categorized as legal – may be considered incompatible with respect for the fundamental rights of the individual, because they are, among other factors,

---

the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension."

[219] The relevant part of Article 29 of the Convention stipulates that: "[n]o provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein."

[220] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 51, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 125.

[221] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 54, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 125.

[222] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 57; *Case of Yvon Neptune Haiti. Merits, reparations and costs.* Judgment of May 6, 2008. Series C No. 180, para. 96; *Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of October 30, 2008. Series C No. 187, para. 54, and *Case of Torres Millacura et al. v. Argentina, supra. Merits, reparations and costs.* Judgment of August 26, 2011. Series C No. 229, para. 74.

unreasonable, unpredictable, or disproportionate.[223] Thus, the arbitrariness mentioned in Article 7(3) of the Convention has its own legal content, which it is only necessary to analyze in the case of detentions that are considered legal.[224] Nevertheless, the domestic law, the applicable procedure, and the corresponding general principles, whether express or implicit, must also be compatible with the Convention.[225] Thus, the concept of "arbitrariness" should not be equated to "contrary to the law," but should be interpreted more broadly in order to include elements of impropriety, injustice and unpredictability.[226]

128. Meanwhile, protection of the home is established in Article 11 of the Convention. The Court has established that the protection of privacy, family life, and the home entails the recognition that a personal sphere exists that must be exempt from and immune to abusive or arbitrary interference or attacks from third parties or from public authorities. Thus, the home, and private and family life are intrinsically connected, because the home becomes a space in which private and family life can be developed freely.[227]

129. Article 2 of the Peruvian Constitution in force at the time of the facts stipulates that everyone has the right:

> […]
>
> 7. To the inviolability of the home. No one may enter it, or conduct investigations or searches without the authorization of the person who lives there or by court order, except in the case of *flagrante delicto* or imminent danger of its perpetration. The exceptions based on hygiene or grave risk are regulated by law.
>
> […]
>
> 9. To choose freely the place of residence; to move about national territory and leave and enter it, with the exception of restrictions for reasons of hygiene.
> Not to be repatriated or separated from his place of residence, unless this is by court order or application of the immigration laws.
>
> 10. To assemble peacefully, without weapons. Meetings in private places or places open to the public do not require prior notice. Those held in public spaces and streets require advising the authorities previously, who may only prohibit them for proven reasons of public safety or hygiene.
>
> […]
>
> 20. To personal liberty and safety.
>
> Consequently:
>
> […]
>
> b) No form of restriction of personal liberty is permitted, except in the cases established by law. […]
>
> g) No one may be detained unless it is by a written and reasoned order of the judge or by the police authorities *in flagrante delicto*. In any case, the detainee must be brought before the corresponding court within 24 hours or based on distance.

---

223 *Cf. Case of Gangaram Panday v. Suriname. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 133.

224 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, paras. 93 and 96, and *Case of Bayarri v. Argentina, supra*, para. 62.

225 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 91, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 133.

226 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 92, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 133.

227 *Cf. Case of the Ituango Massacres v. Colombia, supra*, paras. 193 and 197, and *Case of the Barrios Family v. Venezuela, supra*, para. 140.

> The exception to this are cases of terrorism, spying, and illegal drug-trafficking in which the police authorities may carry out the preventive detention of those presumably involved for no longer than 15 calendar days, but must inform the Public Prosecution Service and the judge, who may assume jurisdiction before this period has expired.
>
> h) Everyone shall be informed immediately and in writing of the cause or reasons for his arrest. He shall have the right to communicate with and be assisted by a defense counsel of his election as of the time he is summoned or detained by the authorities.
>
> i) No one may be kept incommunicado, unless this is essential for clarifying an offense, and in the way and for the time established by law. The authorities are obliged to indicate, promptly, the place where the person is detained, subject to incurring responsibility.[228]

130. Meanwhile, Article 231 of the current Constitution establishes that:

> Article 231. The President of the Republic, with the agreement of the Council of Ministers, decrees the states of emergency that this article contemplates, for a specific period, in all or part of the territory and informing Congress or the Permanent Commission:
>
> a. State of emergency, in case of disturbance of the peace or internal order, of catastrophe or of serious circumstances that affect the life of the Nation. In this eventuality, the constitutional guarantees relating to freedom of association and the inviolability of the home, freedom of association and movement in the territory contemplated in paragraphs 7, 9, 10 and 20(g) of article 2 may be suspended. Under no circumstance can the penalty of banishment be imposed. The state of emergency may not exceed sixty days. An extension requires a new decree. In a state of emergency, the Armed Forces assume control of internal order when decided by the President of the Republic.
>
> b. State of siege, in case of invasion, external war or civil war, or imminent danger that these may occur, specifying the personal guarantees that continue in effect. The state of siege shall not exceed forty-five days. When decreeing the state of siege, Congress meets by law. An extension requires the approval of Congress.[229]

131. The procedural standards for the police investigation, preliminary inquiry and prosecution of crimes committed for terrorist purposes were also in force.[230]

132. At the time of Ms. J.'s detention, a decree suspending the right to the inviolability of the home, to movement and assembly, to be detained only by court order or *in flagrante delicto*, and to be brought before a judge within a set maximum period, contained in Article 2, paragraphs 7, 9, 10 and 20.g, respectively, of the Constitution was in force in Lima and the constitutional province of Callao (*supra* paras. 61 and 129). Taking this into account, the Court will analyze together the initial arrest of the presumed victim, the delay in bringing her before a judge, and the alleged violation of protection of the home (*section A.1 infra).* Then, the Court will examine the alleged violations in relation to: *(A.2)* the notification of the reasons for the detention; *(A.3)* the failure to register Ms.

---

228 Peruvian Constitution of July 12, 1979 (file of annexes to the State's brief of August 14, 2013, folios 5190 and 5191).

229 Constitution of Peru of July 12, 1979 (file of annexes to the State's brief of August 14, 2013, folios 5218 and 5219).

230 When Ms. J. was arrested, these norms established that: (i) the Peruvian Investigations Police were in charge of the investigation; (ii) if "the circumstances of the investigation" so required, it was possible to request that the detainee be kept incommunicado for 10 days; (iii) all statements by those involved must be given in the presence of their defense counsel; (iv) the preliminary investigation would be conducted by an ordinary criminal proceeding, with some modifications, including that when the investigating judge considered that the criminal action was not in order, he had to submit the corresponding decision to the Correctional Court for their opinion, and the detention was retained until that court had ruled, following a report by the senior prosecutor; (v) at the stage of the preliminary investigation, the judge could also order that the detainee be kept incommunicado for a maximum of 10 days, but this could not prevent the accused from communicating with his defense counsel; (vi) the Special Correctional Courts appointed by the Supreme Court were responsible for the trial; (vii) an appeal for a declaration of nullity before the Criminal Chamber of the Supreme Court was admissible against the judgments; (viii) the recusal of judges and prosecutors was only admissible if they had been a witness or had been harmed by the offense or in the cases established in the Code of Criminal Procedures "and evidence was required for the reasons alleged," and (ix) the application for *habeas corpus* was not admissible against the 15-day police detention and the 10-day incommunicado authorized by the investigating judge. *Cf.* Law No. 24,700 of June 1987, which established the procedures for the police investigation, preliminary hearing and prosecution of terrorism-related offenses (file of annexes to answering brief, annex 5, folios 3244 to 3248).

J.'s detention; *(A.4)* the preventive detention of the presumed victim and its relationship to the principle of the presumption of innocence, and *(A.5)* the right to have recourse to a competent judge or court to contest the legality of her preventive detention.

A.1 The initial arrest of the presumed victim, her presentation before a judge, and protection of the home

A.1.1) Arguments of the Commission and of the parties

133. The Commission argued that 'there is sufficient evidence to conclude that the search of the Las Esmeraldas building was illegal, because the security forces did not have an arrest warrant; the presence of a representative of the Public Prosecution Service is uncertain and there are inconsistencies among the different versions, without the State having met the corresponding burden of proof." It also indicated that "[t]he case file does not contain […] information that would allow the conclusion to be reached that a situation of *flagrante delicto* existed when the security forces arrived at the Las Esmeraldas building." It emphasized that the supposed state of emergency cited by the State "was inconsistent with the argument on the application of the constitutional mechanism of *flagrante delicto,*" and that, regardless of this, "at the time of the facts, there was a constitutional and legal hiatus during which the states of emergency were no longer the excuse for the restriction and suspension of rights." In addition, it considered that the "use of unjustified violence is a sufficient factor to conclude that the deprivation of liberty of Ms. J. and the search of the Las Esmeraldas building was arbitrary." It argued that the State "has not explained the nature of the risk or identified factual elements that allow it to be concluded that the use of force to arrest the [presumed] victim was necessary and proportionate to a specific danger to the life or integrity of the State agents." The Commission also stressed that "Decree 25,475 established the requirement to inform the judge when detention in the DINCOTE for a maximum of 15 days was ordered," and this "evidently contravened the provisions of Article 7(5) of the Convention," without it being relevant whether Ms. J. was detained 15 or 17 days in the DINCOTE. In addition, bearing in mind that the said alleged violation "took place because […] Decree 25,475 was in force," the Commission concluded that the State had violated Article 2 of the Convention. It also concluded that the considerations made on the arbitrary nature of the detention were applicable to the searches, so that these, in addition to being illegal, constituted "an arbitrary interference in the private life of Ms. J."

134. The representative argued that Ms. J. was "arbitrarily detained (in other words, without being *in flagrante delicto*, or based on a court order)." She also indicated that the detention was carried out when "the constitutional order had been suspended." She also pointed out that "permanent *flagrante delicto*" is "an inexistent concept in the vocabulary of international public law." In addition, she indicated that "prior to April 30 [1992], J. did not see any judge and no charges had been brought against her, because no indictment had been formulated; in other words, she was in police custody for 17 days without a specific charge against her." In this regard, the representative emphasized that there is no record of where J. was from April 13 to 15, or from April 28 to 30. Furthermore, she asserted that the searches of the buildings of Ms. J.'s family were conducted without the presence of the prosecutor from the Public Prosecution Service, who "was in Lince attending the arrest of another detainee and then in the San Martín district."[231]

135. The State indicated that, "at the date of the facts of this case, the right to personal liberty was temporally suspended," so that "it was possible to deprive a person of liberty without a court order or the existence of *flagrante delicto*, provided that the principles of reasonableness and

[231] According to information provided by the State, the building on Las Esmeraldas Street is about 1.2 kilometers from the building on Bartolómé Herrera Street in the Lince district (file of annexes to the State's brief of August 14, 2013, folios 5555, 5557 and 5558). In addition, according to the representative, the San Martín district "is approximately […] two and a half hours from where J. was arrested."

proportionality were respected." Despite this, the State indicated that "Ms. J. was detained because she was *in flagrante delicto*, committing acts related to the crime of terrorism." In this regard, the State argued that "when she was arrested, objects, documents and other evidence was seized that linked her to the 'Shining Path' terrorist group." It also indicated that the crime of terrorism "is understood by criminal doctrine as a permanent offense." It also indicated that "the search records […] reveal the presence of officials of the Public Prosecution Service as a guarantee of constitutional rights, during the measures taken in this case." In addition, the State asserted that the arrest was not arbitrary because "the force used by the members of the National Police was necessary, reasonable and proportionate, since they were dealing with individuals committing acts of terrorism who tried to escape the police operation." It also indicated that "[t]he petitioner was arrested on the evening of April 13, 1992, and brought before a judge on April 28, 1992 […], as authorized by the Constitution in force at that time, and also the state of emergency." Regarding what happened between April 28 and 30, 1992, it indicated that "when someone is brought before the courts, they are kept in what are known as the court cells (*carceleras*") […], which are under the judicial authorities and, then, the prison to which the detainee will be taken is decided." The State indicated that, owing to the existing state of emergency, "the obligation […] to bring J. before the judicial authorities immediately was not in effect at the time of her detention."

136. Peru also argued that, at the time of the searches, "the right to the inviolability of the home was suspended," "so that it was possible to enter a home without [the existence of a court order or a situation of *flagrante delicto*], provided that the principles of reasonableness and proportionality were respected." Lastly, "[r]egarding the fact that the persons arrested did not sign the police record," it argued that "this was common practice by those arrested for terrorism and *in flagrante delicto*, and it is their right, while the State cannot take any coercive measure to oblige someone to sign a police record."

A.1.2) Considerations of the Court

137. The Court has noted that, at the time of Ms. J.'s arrest, a decree was in force that suspended guarantees (*supra* paras. 61 and 132). The Court has established that the suspension of guarantees constitutes an exceptional situation, under which it is licit for the Government to apply certain measures that restrict rights and freedoms that, under normal conditions, are prohibited or subject to stricter requirements. Nevertheless, this does not mean that the suspension of guarantees entails the temporary suspension of the rule of law or that it authorizes the Government to deviate from the legal conduct that it should always observe. When guarantees are suspended, some of the legal restrictions to the actions of the public powers may differ from those in force under normal conditions, but these restrictions should not be considered to be inexistent and, consequently, it should not be understood that the Government is invested with absolute powers that exceed the conditions under which this exceptional legality is authorized.[232]

138. The Convention permits the suspension of guarantees only in case of war, public emergency or other emergency that threatens the independence or security of the State Party.[233] In this regard, the Court understands that the facts of this case took place in the context of a conflict between armed groups and members of the police and military forces (*supra* para. 57). Moreover, the representative and the Commission have not argued that, at the time of the facts of this case, the situation in Peru did not require the suspension of the said rights.

---

[232] *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25.1 and 7.6 American Convention on Human Rights).* Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 24.

[233] *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25.1 and 7.6 American Convention on Human Rights)*, *supra*, para. 19, and *Case of Zambrano Vélez et al. v. Ecuador*, *supra*, para. 43.

139. In addition, bearing in mind that Article 27(1) establishes different situations and that the measures adopted in any of these emergencies must be adapted to "the requirements of the situation," it is clear that what is permissible in one of them, may not be permissible in others. Thus, the legality of the measures adopted to deal with each of the special situations referred to in Article 27(1) will depend on the nature, intensity, complexity, and particular context of the emergency, as well as on the proportionality and reasonableness of the measures adopted in relation to it.[234] The Convention only authorizes the suspension of certain rights and freedoms, and this "to the extent and for the period of time strictly required by the exigencies of the situation." The measures adopted should not violate other international obligations of the State Party, and must not involve discrimination on the grounds of race, color, sex, language, religion, or social origin.[235] The Court has indicated that the suspension of guarantees must not exceed what is strictly necessary, and that any action of the public powers that oversteps limits that must be precisely indicated in the provisions authorized by the state of emergency is illegal.[236] In this regard, the limitations imposed on the State's actions respond to the general requirement that, in any state of emergency, appropriate measures exist to control the provisions enacted in order to ensure that they are appropriate to the needs of the situation and do not exceed the strict limits imposed by the Convention or derived from it.[237]

140. The decree in force at the time of Ms. J.'s detention reveals that the state of emergency suspended the rights to inviolability of the home, to movement, to association, to be detained only following a court order or *in flagrante delicto*, and to be brought before a judge within no more than 15 days. The Court notes that the Convention does not prohibit suspending the said rights on a temporary basis while complying with certain safeguards. In this section, the Court will refer only to the suspension related to personal liberty and the protection of the home, which correspond to certain aspects of Article 7(2) and 7(5), as well as Article 11 of the Convention relating to the legality of the detention, the time frame for taking "any person detained" "promptly" "before a judge or other officer authorized by law to exercise judicial power," and the protection of the home, respectively. In this regard, the Court notes that the detention of J. and the searches of her family's buildings were carried out due to the presumed perpetration of the crime of terrorism, during the time and in the geographical sphere of the state of emergency that had been decreed, so that they were carried out under its provisions.

141. Regarding personal liberty, the Human Rights Committee of the International Covenant on Civil and Political Rights (hereinafter "the Human Rights Committee") has recognized that the State cannot cite the suspension of guarantees "as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance, […] through arbitrary deprivations of liberty."[238] Thus, the Court reiterates that the suspension of guarantees must not exceed the time that is strictly necessary (*supra* paras. 124 and 139), and the suspension of certain rights does not

---

234 *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25.1 and 7.6 American Convention on Human Rights), supra*, para. 22, and *Case of Zambrano Vélez et al. v. Ecuador*, *supra*, para. 45.

235 *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25.1 and 7.6 American Convention on Human Rights)*, *supra*, para. 19, and *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 43.

236 *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25.1 and 7.6 American Convention on Human Rights), supra*, para. 38; *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory* Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 36; *Case of Cantoral Benavides v. Peru. Merits.* Judgment of August 18, 2000. Series C No. 69, para. 72, and *Case of the Gómez Paquiyauri Brothers v. Peru. Merits, reparations and costs.* Judgment of July 8, 2004. Series C No. 110, para. 85.

237 *Cf. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). supra*, para. 21, and *Case of the Gómez Paquiyauri Brothers v. Peru, supra*, para. 85.

238 Human Rights Committee, General comment No. 29, States of emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

mean that they will be entirely inapplicable.[239] Consequently, even accepting that the decree suspending guarantees was in force, the Court must analyze the proportionality of the actions taken by the State authorities when detaining Ms. J.

142. First, the Court emphasizes that, since the constitutional guarantee concerning the time for bringing a person before a judge was suspended, it is not necessary to analyze the alleged failure to comply with the time frame established in the Constitution. Despite this, it is pertinent to clarify that, after examining the evidence submitted, the Court does not have sufficient information to know whether Ms. J.'s detention lasted more than the 15 days alleged by the State.[240] Therefore, for the effects of this Judgment, the Court will consider that Ms. J. remained at least 15 days without being brought before a judge.

143. In this regard, the Court recalls that the first part of Article 7(5) of the Convention establishes that the detention of a person must be subject to prompt judicial review. The Court has indicated that prompt judicial control is a measure tending to avoid the arbitrary or illegal nature of detentions, bearing in mind that, under the rule of law, it is for the judge to guarantee the rights of the detainee, to authorize the adoption of precautionary measures, or coercive measures when strictly necessary and, in general, to ensure that the accused is treated in a way that is consequent with the presumption of innocence.[241] Prompt judicial review of the detention is particularly relevant when applied to arrests made without a court order.[242] Even though this right was suspended, this suspension cannot be absolute and, therefore, the Court must analyze the proportionality of what happened in this case.[243]

144. The meaning of the expression "promptly" must be examined in light of the particular circumstances of the specific case. Thus, the investigation in cases of terrorism may present the authorities with special problems, and these must be taken into account when analyzing the "prompt" presentation before a judge.[244] Nevertheless, in this case, it has been proved that Ms. J. was not brought before a judge for at least 15 days (*supra* para. 142), while the case file does not include any well-founded reasons for this delay in submitting Ms. J.'s detention to a judge. The Court considers that, even under the suspension of guarantees, the proportionality of Ms. J.

---

239 *Cf.* Human Rights Committee, General comment No. 29, States of emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 4. See also, IACHR, *Asencios Lindo et al. v. Peru,* Report No. 49/00 of April 13, 2000, para. 85.

240 First, the Court recalls that there is no dispute between the parties that the initial arrest of Ms. J. occurred on April 13, 1992. Also, the DINCOTE Detainees Register indicates that Ms. J. left the said center on April 28, 1992 (*supra* paras. 80, 82 and 94). That same day, the DINCOTE forwarded police attestation No. 084 to the prosecutor and made Ms. J. available to him as a detainee for the crime of terrorism, an arrest warrant was issued against Ms. J., and a preliminary investigation in the ordinary jurisdiction was opened against the presumed victim (*supra* para. 97). However, there are no records of where J. was from April 28 to 30, because, according to the records of the Miguel Castro Castro National Penitentiary Institute, the presumed victim entered this center on April 30, 1992 (*supra* para. 94). Furthermore, the representative provided as documentary evidence a sworn statement by Emma Vigueras, the lawyer of others accused in the same judicial proceeding as the presumed victim, questioning the truth of the contents of the official documents, in the sense that, on April 28, Ms. J. and the other persons detained in the said proceeding were "still at the DINCOTE and without the judge [having been] able to make any assessment of the facts. Sworn statement of Emma Vigueras of May 15, 2000 (file of annexes to the motions and arguments brief, annex 2, folio 3010).

241 *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 129, and *Case of Fleury et al. v. Haiti, supra*, para. 61.

242 *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 88.

243 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra*, paras. 109 to 111. See also, ECHR, *Aksoy v. Turkey*, 18 December 1996, § 78, Reports of Judgments and Decisions 1996-VI.

244 *Mutatis mutandi,* ECHR, *Brogan and Others. v. The United Kingdom*, 29 November 1988, § 61, Series A No. 145-B; *Brannigan and McBride v. The United Kingdom, 26* May 1993, § 58, Series A no. 258-B, and *Aksoy v. Turkey*, 18 December 1996, § 78, Reports of Judgments and Decisions 1996-VI.

remaining detained for at least 15 days without any form of judicial control must be analyzed, bearing in mind that she was detained without a court order. In cases such as this one, where the initial arrest was executed without a court order, the presentation before a judge is particularly important. Therefore, the Court finds that the measures taken in this case were not those that were "strictly necessary." In particular, the Court underlines that the suspension of certain aspects of the right to personal liberty cannot signify that the State's actions can derogate the jurisdictional controls over the way in which detentions are carried out (*supra* para. 141). Consequently, the Court considers that the failure to bring Ms. J. "promptly" before a judge is not justified by the suspension of guarantees that existed in this case, so that it was arbitrary and, therefore, the State violated paragraphs 1, 3 and 5 of Article 7 of the American Convention, in relation to Article 1(1) of the Convention.

145. Moreover, based on the above conclusions, the Court does not find it necessary to make a specific analysis of whether the search of the building located on Las Esmeraldas Street was in keeping with the Convention. The arguments on the presumed violence used during the initial arrest will be analyzed, as pertinent, in the chapter on the right to personal integrity (*infra* paras. 308 to 368).

146. With regard to the first search of the house located on Casimiro Negrón Street, the Court notes that, according to the search record, it was carried out with the authorization of J.'s mother, who signed the said record.[245] J.'s mother indicated that "[t]hey wanted her to sign some papers. They said that they were papers that had been seized; there was a list." She also stated that her younger daughter had refused to sign the record and had therefore been arrested.[246] The State did not question the truth of the statement made by Ms. J.'s mother, while the refusal of J.'s younger sister to sign the record and her arrest appear in the file of this case (*supra* paras. 87 and 89). Meanwhile, at the domestic level, the presumed victim declared that her mother had been coerced to sign a record,[247] and this could correspond to the assertion of the CVR that many of the witnesses had stated that they were unable to read the records made of the searches, and that "the victim or the family members were required to sign [them]."[248]

147. Despite the above, the Court underscores that, in her statement, J.'s mother did not deny that she had authorized this search. Also, it should be recalled that the statement of the presumed victim cannot be assessed in isolation, but rather in the context of all the evidence in the proceeding.[249] Likewise, regarding the statement by J.'s mother, this Court finds that, since she is a member of the presumed victim's family and has a direct interest in this case, her testimony cannot be assessed in isolation, but rather in the context of the evidence in the proceedings.[250] Consequently, the Court finds that it does not have sufficient evidence to disprove the fact that, according to the respective search record, J.'s mother authorized the entry into her home of the police agents and, therefore, concludes that the search of the home of Ms. J. on Casimiro Negrón Street did not violate Article 11(2) of the Convention.

---

245 *Cf.* Record of house search and seizure of property from the house on Casimiro Negrón Street of April 13, 1992 (file of annexes to the answering brief, annex 26, folios 3646 and 3650).

246 *Cf.* Affidavit prepared by [J.'s mother] on June 13, 2006, for the case of *Miguel Castro Castro Prison* (file of annexes to the motions and arguments brief, annex 1, folio 3000).

247 *Cf.* Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3699).

248 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, p. 241.

249 *Cf. Case of Loayza Tamayo v. Peru. Merits*, *supra*, para. 43, and *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra*, para. 34.

250 *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June, 2003. Series C No. 99, para. 57.

A.2 Notification of the reasons for the detention

A.2.1) Arguments of the Commission and of the parties

148. The Commission considered that "due to the way in which the operation [during which Ms. J. was arrested] was conducted, it is reasonable to infer that Ms. J. was not given any explanation as to why she was being arrested or her rights in this situation, [because] according to Ms. J., she was not even shown the police record of the arrest." The representative did not submit any arguments other than those indicated *supra* (para. 134). For its part, the State indicated that "since Ms. J. was arrested *in flagrante delicto* for the crime of terrorism, she cannot argue that she was unaware of the reasons for her detention." During the public hearing, the State argued that "the first way an individual [was] informed of the reason for their arrest was verbally," and then "they were made to sign a record where they were advised of the reasons for their detention."

A.2.2) Considerations of the Court

149. As can be inferred from paragraph 129 *supra*, domestic law requires that "[e]veryone shall be informed immediately and in writing of the cause or reasons for their arrest." Similarly, Article 7(4) of the American Convention refers to two guarantees for the person who is being arrested: (i) oral or written information on the reasons for the arrest, and (ii) notification, which must be in writing, of the charges.[251] The information on the "reasons" for the arrest must be given "when this occurs," which constitutes a mechanism to avoid illegal or arbitrary detentions at the time of the deprivation of liberty and, also, to ensure the detainee's right of defense.[252] Furthermore, this Court has indicated that the agent who carries out the arrest must provide the information in simple language, without using technical terminology, on the facts and basic legal basis on which the arrest is based, and that the requirements of Article 7(4) of the Convention are not met by merely mentioning the legal basis.[253] Insofar as it was established in a domestic norm that was not suspended (*supra* paras. 129 and 132), if individuals do not receive adequate information about the reasons for their detention, including the facts and their legal basis, they do not know the charges against which they must defend themselves and, furthermore, judicial control becomes illusory.[254] If it is established that the State did not inform the victims of the "causes" or "reasons" for their detention, the detention was illegal and, consequently, contrary to Article 7(2) of the Convention; additionally, it constituted a violation of the right established in Article 7(4) of this instrument.[255]

150. Regarding the obligation to provide information on the reasons for the arrest verbally, the presumed victim has no mechanism available to enable her to prove this fact. Her allegation is of a negative nature; she indicates the inexistence of a fact. Meanwhile, the State affirms that the information on the reasons for the arrest was provided. This is an allegation of a positive nature and, therefore, can be proved.[256] In this regard, the Court notes that, during the public hearing, the prosecutor from the Public Prosecution Service indicated that she "advise[d] each person of the reasons for the search procedure."[257] Beyond contesting the presence of the prosecutor during the

---

[251] *Cf. Case of Cabrera García and Montiel Flores v. Mexico, supra*, para. 106, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 132.

[252] *Cf. Case of Juan Humberto Sánchez v. Honduras, supra*, para. 82, and *Case of Yvon Neptune v. Haiti, supra*, para. 107.

[253] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 71, and *Case of Cabrera García and Montiel Flores v. Mexico, supra*, para. 105.

[254] *Cf. Case of Yvon Neptune v. Haiti, supra*, para. 109.

[255] Similarly, see, *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra,* para. 69.

[256] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 73.

[257] Statement made by Magda Victoria Atto Mendives at the public hearing held in this case.

whole search, a matter that will be examined *infra* (paras. 338 and 339), the representative did not specifically challenge this aspect of her statement during the public hearing or at any other procedural stage. Therefore, the Court considers that it has insufficient evidence to declare that the State failed to comply with this element of the obligation contained in Article 7(4) of the Convention.

151. Regarding the obligation to notify the charges brought against Ms. J. promptly and in writing, the Court recalls that this obligation exists, even if the prosecutor from the Public Prosecution Service did advise Ms. J. verbally of the reasons for her detention. In the instant case, the acts relating to compliance with this obligation are related to the duty to inform the accused of the charges brought against her included in Article 8(2)(b),[258] so that they will be analyzed together (*infra* paras. 194 to 201).

A.3 The failure to register Ms. J.'s detention

152. This Court notes that it is unclear where J. was from April 28 to 30, and also from April 13 to 15, 1992 (*supra* paras. 92, 94 and 142). In this regard, the Court has considered that any detention, irrespective of the reason or its duration, must be duly registered in the pertinent document, indicating clearly, at least, the reasons for the detention, who executed it, the time of detention and the time of release, as well as a record that the competent judge was advised, in order to protect the physical liberty of the individual against any illegal or arbitrary interference.[259] The Court has established that this obligation also exists in police detention centers.[260] Moreover, the Court notes that the registration of the detention is even more important when this is carried out without a court order and during a state of emergency, as in the instant case. This obligation is also established in the laws of Peru (*supra* para. 129). Consequently, the failure to register Ms. J.'s detention over the period mentioned constitutes a violation of the rights embodied in paragraphs 1 and 2 of Article 7 of the American Convention, in relation to Article 1(1) of this instrument.

A.4 The preventive detention of the presumed victim between April 30, 1992, and June 18, 1993, as well as its relationship to the principle of the presumption of innocence

A.4.1) Arguments of the Commission and of the parties

153. The Commission considered that "the preventive detention of Ms. J. was arbitrary because it lacked an individualized justification of the procedural objectives that it sought," and also because "article 13(a) of Decree 25,475 of May 5, 1992, [… had been applied to her,] as of its entry into force, [which] established the obligatory deprivation of liberty during the preliminary investigation stage 'with no exceptions.'"

154. The representative did not present additional arguments to those mentioned regarding the alleged violation of the right not to be detained arbitrarily and to be brought promptly before a judge or judicial authority (*supra* para. 134).

155. The State argued that, according to the Court's case law, "preventive detention is authorized when this ensures the efficient implementation of the investigation; in other words, it prevents the accused from obstructing or evading the action of justice, destroying evidence, or colluding with

---

[258] Similarly, see, *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, paras. 224 to 227.

[259] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 53, and *Case of García and family members v. Guatemala, supra*, para. 100.

[260] *Cf. Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 131.

other accused, when there is a risk that the accused may escape or commit another offense." It indicated that "observing these formalities, on April 28, 1992, the Tenth Investigating Court of Lima issued an arrest warrant on observing sufficient probative elements that implicated Ms. J. as the presumed perpetrator of the crime of terrorism; in other words, it reasoned its decision. In addition, the State indicated that article 13(a) of Decree-Law No. 25,475 was not applied to Ms. J., because it was not in force at the time of her detention.

A.4.2) Considerations of the Court

156. Based on the arguments submitted by the parties, the Court will analyze the order of preventive detention and the application of article 13(a) of Decree-Law No. 25,475 to the case of Ms. J.

i. The order of preventive detention

157. The reiterated case law of this Court indicates that the general rule should be the liberty of the accused while a decision is taken on their criminal responsibility,[261] because the latter enjoys the legal status of innocence, which signifies that he or she must be treated by the State in a manner that accords with their condition of a person who has not been convicted. In exceptional cases, the State may use preventive detention in order to avoid situations that jeopardize achieving the objectives of the proceeding; in other words, to ensure that the accused does not impede the effective implementation of the investigations or evade the action of justice.[262] Thus, the preventive detention of an accused may be ordered only exceptionally and when, for example, there are no other guarantees that ensure his or her appearance before the court.[263]

158. In this regard, the Inter-American Court has repeatedly indicated that, for a measure that deprives an individual of his liberty to be in keeping with the guarantees established in the Convention, its application must be exceptional and respect the principle of the presumption of innocence and the principles of legality, necessity and proportionality, essential in a democratic society.[264] Any restriction of liberty that is not based on sufficient grounds that permit an evaluation of whether it is in keeping with the said conditions will be arbitrary and, therefore, violate Article 7(3) of the Convention.[265]

159. This Court has also indicated that, in order to restrict the right to personal liberty by measures such as preventive detention, there must be sufficient evidence allowing it to be reasonably supposed that the person subject to the proceeding has taken part in the illegal act investigated.[266] However, even if this point has been verified, the deprivation of liberty of the

---

[261] Among others, *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 106; *Case of Acosta Calderón v. Ecuador. Merits, reparations and costs*. Judgment of June 24, 2005. Series C No. 129, para. 74; *Case of Palamara Iribarne v. Chile, supra*, para. 196; *Case of López Álvarez v. Honduras, supra*, para. 67, and *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs.* Judgment of November 17, 2009. Series C No. 206, para. 67.

[262] *Cf. Case of Suárez Rosero v. Ecuador. Merits, supra*, para. 77, and *Case of Barreto Leiva v. Venezuela, supra*, para. 67, para. 111.

[263] *Cf. Case of Tibi v. Ecuador, supra*, para. 106, and *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, para. 144.

[264] *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 228; *Case of Torres Millacura et al. v. Argentina, supra*, para. 71.

[265] *Cf. Case of García Asto and Ramírez Rojas v. Peru, supra*, para. 128, and *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, para. 166.

[266] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador, supra*, para. 101, and *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of November 27, 2012. Series C No. 241, para. 106.

accused cannot be based on general or specific preventive objectives that can be attributed to punishment, but can only be based on one legitimate goal: to ensure that the accused will not prevent the implementation of the proceeding or evade the action of justice.[267] At the same time, the personal characteristics of the supposed perpetrator and the seriousness of the offense he or she is accused of are not, in themselves, sufficient justification for the preventive detention.[268] The procedural risk cannot be presumed, but must be verified in each case, based on the real and objective circumstances of the specific case.[269] Thus, in order to respect the presumption of innocence when ordering measures that restrict liberty, in each specific case, the State must justify and authenticate, clearly and with reasons, the existence of the requirements contained in the Convention.[270] If the State proceeds otherwise, it would equate anticipating the punishment, which contravenes widely-known general principles of law, including the principle of the presumption of innocence.[271]

160. In the instant case, on April 28, 1992, the Tenth Investigating Court of Lima issue an arrest warrant against Ms. J.[272] The decision related to 96 persons, including Ms. J., against whom an investigation was opened "for an offense against public peace (Terrorism) against the Peruvian State" and an arrest warrant was issued.[273] The reasoning of the decision was that "the facts […] that ha[d] been individualized to the presumed perpetrators were defined as offenses and penalized in articles [319 and 320] of the Criminal Code in force, and that criminal proceedings were not subject to the statute of limitations." The Court also indicated that the coercive measure was issued in "application of article [135] of the Code of Criminal Procedure, […] which establishes detention whenever the penalty to be imposed would be more than four years and there are sufficient probative elements of the perpetration of the wrongful act that connect the accused as the perpetrators […] and in application of article [77] of the Code of Criminal Procedures."[274]

---

267 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador, supra*, para. 103, and *Case of Barreto Leiva v. Venezuela, supra*, para. 111.

268 *Cf. Case of López Álvarez v. Honduras, supra*, para. 69 and *Case of Bayarri v. Argentina, supra*, para. 74

269 *Cf. Case of Barreto Leiva v. Venezuela, supra*, para. 115.

270 *Cf. Case of Palamara Iribarne v. Chile, supra*, para. 198, and *Case of Servellón García et al. v. Honduras.* Judgment of September 21, 2006. Series C No. 152, para. 90.

271 *Cf. Case of Usón Ramírez v. Venezuela, supra*, para. 144.

272 *Cf.* Decision of April 28, 1992, of the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 37, folios 3687 to 3689).

273 *Cf.* Decision of April 28, 1992, of the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 37, folios 3687 to 3689).

274 Decision of April 28, 1992, of the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 37, folios 3687 and 3688). The said article 135 in force at the date of the arrest warrant established that: "[t]he judge may issue an arrest warrant if, based on the initial evidence submitted by the Provincial Prosecutor, it is possible to determine: 1. That there is sufficient evidence of the perpetration of an offense implicating the accused as perpetrator or participant in it. 2. That the penalty to be imposed is more than four years' imprisonment, and 3. That the accused, owing to his record or circumstances, may try to evade the action of justice or obstruct the probative actions." 1991 Code of Criminal Procedure. Legislative Decree No. 638 of April 27, 1991 (merits report, folio 2641). Also, article 77 of the Code of Criminal Procedures in force at the time established: "[o]n receiving the complaint, the investigating judge shall only open the preliminary investigation if he considers that the act denounced constitutes an offense, that the presumed perpetrator has been individualized, and that that the criminal action is not subject to the statute of limitations. The decision shall include the precise reasons and grounds, and shall indicate the specific classification of the offense or offenses with which the accused is charged and the order that he or she must appear before the court to provide a preliminary statement. In the case of offenses prosecuted by privately instituted proceedings, the judge when classifying the complaint may, *ex officio*, take preliminary measures within the first 10 days of receiving it. If he considers that the action is not in order, he shall issue a decision of INADMISSIBLE. In addition, he shall return the complaint if he considers that any procedural elements expressly indicated by law has been omitted. An appeal may be made against these decisions. The court shall decide the appeal within three days of receiving the prosecutor's report, which must be issued within the same time frame. In all cases, the judge must rule within no more than 15 days of receiving the complaint." 1941 Code of Criminal Procedures (file of annexes to the State's brief of August 14, 2013, folio 5092)

161. The said decision did not specify the reasons why it was necessary to order the preventive detention of Ms. J., on an individual basis, but rather, the motivation included applied to all the 96 persons included in the decision. Thus, the decision does not include, for example, a determination revealing that there was: (i) sufficient evident leading to a reasonable assumption that Ms. J. specifically took part in the crime of terrorism being investigated, and (ii) a need to detain her on a preventive basis, in real and objective circumstances related to her specific case. In addition, when analyzing the general reasoning included in the decision, it should be stressed that it did not include any motivation of the need to issue the precautionary measure based on any of the permitted legitimate goals; namely, to ensure that the accused would not prevent the implementation of the proceeding or that he or she would not evade the action of justice (*supra* para. 159). The Court underscores that article 135 of the applicable Code of Criminal Procedure established expressly that an arrest warrant could be issued if it was possible to determine "[t]hat the accused, owing to his record and circumstances, would try and evade the action of justice or obstruct the probative actions."[275]

162. Nevertheless, the decision only mentions that "the penalty to be imposed [for the crime of terrorism] would be more than four years" (*supra* para. 160). The Court notes that the evaluation of the need for detention focused only and exclusively on the criterion of the severity of the offense, expressed by the penalty in abstract established by law, denatures the eminently procedural objective of the mechanism of preventive detention and converts it into an premature punishment. In this regard, the Court recalls that preventive detention is a precautionary, and not a punitive, measure.[276]

ii. The application to Ms. J. of article 13(a) of Decree-Law 25,475

163. Decree-Law 25,475 of May 1992, applicable to terrorism offenses, established that: "[d]uring the preliminary investigation proceeding, no type of liberty was admissible, without any exception."[277] Even though this Decree-Law was not in force when the order for the preventive detention of Ms. J. was issued, the Court recalls that this precautionary measure may not be extended when the reasons for its adoption no longer subsist. Thus, this Court has observed that the domestic authorities are responsible for assessing whether it is pertinent to maintain the precautionary measures that they have issued pursuant to their own laws. When performing this task, the domestic authorities must provide sufficient grounds to allow the reasons why the restriction on liberty is retained to be known.[278] Moreover, to ensure that it does not constitute an arbitrary deprivation of liberty under Article 7(3) of the American Convention, the grounds must be based on the need to ensure that the detainee will not prevent the effective implementation of the investigations or evade the action of justice.[279]

164. Article 2 of the American Convention establishes the general obligation of the States Parties to adapt their domestic law to its provisions in order to ensure the rights recognized therein. The Court has established that this obligation entails the adoption of two types of measures: on the one hand, the elimination of norms and practices of any nature that result in the violation of the guarantees established in the Convention; on the other hand, the enactment of norms and the implementation of practices leading to the effective observance of the said guarantees.[280] In particular, this means that the State has

---

275 1991 Code of Criminal Procedure. Legislative Decree No. 638 of April 27, 1991 (merits report, folio 2641)

276 *Cf. Case of Suárez Rosero v. Ecuador. Merits, supra,* para. 77, and *Case of Barreto Leiva v. Venezuela, supra*, para. 121.

277 Decree-Law No. 25,475 of May 5, 1992, Article 13(a) (file of annexes to the answering brief, annex 7, folio 3261).

278 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 107, and *Case of Bayarri v. Argentina, supra*, para. 74.

279 *Cf. Case of Bayarri v. Argentina, supra*, para. 74.

280 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra*, para. 207, and *Case of Mendoza et al. v. Argentina, supra*, para. 293.

the obligation to take any measures required to adapt its laws and judicial practice in order to guarantee all aspects of the right to personal liberty recognized in Article 7 of the Convention, as of the date on which it ratified the Convention. The entry into force of Decree-Law 25,475, which did not allow exceptions to the obligatory detention established in this decree, implicitly prohibited the assessment of the pertinence of continuing the preventive detention of Ms. J., who remained deprived of liberty until June 18, 1993.

iii. Conclusions with regard to the preventive detention

165. Accordingly, the Court concludes that, owing to the absence of adequate grounds for the order of preventive detention and the legal restrictions established in Decree-Law 25,475 that prevented an evaluation of the pertinence of continuing this preventive detention, the State violated paragraphs 1 and 3 of Article 7 of the Convention, in relation to Articles 1(1) and 2 thereof.

166. In addition, the Court has indicated that an order of arbitrary preventive detention may give rise to a violation of the presumption of innocence (*supra* para. 159). The principle of the presumption of innocence is recognized in Article 8(2) of the American Convention (*infra* para. 233). This Court has established that, in order to respect the presumption of innocence, when ordering measures that restrict liberty the State must provide the grounds and prove, clearly and with reasoning, in each specific case, the existence of the said requirements contained in the Convention (*supra* para. 159).

167. This Court takes note that, in its judgment of January 2003, the Constitutional Court considered that this norm was not *per se* unconstitutional and that it did not signify "a premature declaration of the criminal responsibility of the accused," because "this procedural action merely opens the criminal proceedings, during which it will ultimately be decided whether or not the accused is responsible for the offense for which he or she is being tried." According to the Constitutional Court, this norm should not be interpreted literally, "in the sense that once the complaint has been formalized by the representative of the Public Prosecution Service, the criminal judge must irrevocably open the preliminary investigation" and order the detention of the person accused of terrorism, but rather it should be interpreted systematically with article 77 of the Code of Criminal Procedures and article 135 of the Code of Criminal Procedure, so that "the opening of the criminal investigation against the accused, eventually, could result in the issue of a precautionary measure such as judicial preventive detention, if the legal presumptions established in these articles are fulfilled, and not because the criminal judge is obliged to do so."[281]

168. Notwithstanding the above, this Court recalls that it has already concluded that the order of preventive detention against the presumed victim was arbitrary because it did not contain objective and reasoned legal grounds concerning its appropriateness. In addition, it considered that the application of Decree-Law 25,475 prevented the judges from evaluating and justifying the maintenance of the preventive measure in this specific case. Bearing this in mind, as well as the duration of the preventive deprivation of liberty of the presumed victim for almost fourteen months during the first stage of the proceedings, the Court declares that Peru violated the right to the presumption of innocence of Ms. J. established in Article 8(2) of the American Convention, in relation to Articles 1(1) and 2 thereof.

A.5 The right to have recourse to a competent judge or court with regard to the legality of her detention

A.5.1) Arguments of the Commission and of the parties

169. The Commission indicated that Decree-Law No. 25,659, which prohibited "by law the possibility of filing applications for *habeas corpus,*" entered into force on August 7, 1992, so that it was applied to Ms. J., who was deprived of liberty until June 1993. The representative indicated that "[i]t is a proven fact [...] that, with the Constitution suspended and the inexistence of remedies such as *habeas corpus*, there was no way in which J.'s family could have access to the protection of the law." For its part, the State

[281] Judgment of the Constitutional Court of January 3, 2003, Case of Marcelino Tineo Silva and more than 5,000 citizens, File No. 010-2002-AI/TC (merits report, folios 1570 and 1572).

argued that, from April 13, 1992, when Ms. J. was detained, "until August 12, 1992, the date on which Decree-Law No. 25,659 was promulgated […], Ms. J., her family members or defense counsel could have filed an application for *habeas corpus*, because it was in force in domestic law […]; however, they did not do so, [and] this omission cannot be transferred to the State." Peru indicated that "[t]he absence of an application for *habeas corpus* in her favor was not due, at that time, to the new counter-terrorism legislation." It also indicated that an application for *habeas corpus* "is not filed two, three, four weeks or six months after the detention; it is filed immediately to counter an arbitrary detention."

A.5.2) Considerations of the Court

170. Article 7(6) of the Convention protects the right of every individual deprived of liberty to appeal the lawfulness of his detention before a competent judge or court, so that the latter may decide without delay on the lawfulness of the deprivation of liberty and, if appropriate, order his or her release.[282] The Court has emphasized that the authority that must decide on the lawfulness of the arrest or detention must be a judge or court; the Convention is thereby safeguarding that the control of the deprivation of liberty must be judicial.[283] It has also stated that the remedies "must not only exist formally in law, but they must be effective; that is, they must meet the objective of obtaining a decision on the lawfulness of the arrest or of the detention promptly."[284]

171. The Court notes that as of the entry into force of Decree-Law 26,659 in August 1992, "actions of *amparo* for those detained, accused of, or prosecuted for the crime of terrorism [were declared inadmissible] under Decree-Law No. 25,475" (*supra* para. 72). This Court observes that the right to appeal the lawfulness of the detention before a judge must be guaranteed throughout the time that the person is deprived of liberty. Ms. J. was detained until June 18, 1993, so that for ten months and five days of her detention, she was unable to avail herself of the remedy of *habeas corpus*, if she had wished to do so, because the said legal provision contrary to the Convention was in force. Therefore, as it has in other cases,[285] the Court considers that, as of the entry into force of Decree-Law 26,659 the State violated Article 7(6) of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Ms. J.

172. Moreover, based on the foregoing conclusion, the Court finds it unnecessary to rule on the alleged violation of Article 7(6) of the Convention due to the alleged factual impossibility of exercising the said remedies before the promulgation of Decree-Law 26,659.

B) Right to judicial guarantees[286] and the principle of legality

---

[282] *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25.1 and 7.6 American Convention on Human Rights), supra*, para. 33, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 140.

[283] *Cf. Case of Vélez Loor v. Panama, supra,* para. 126, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 140.

[284] *Case of Acosta Calderón v. Ecuador, supra*, para. 97, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 141.

[285] *Cf. Case of Loayza Tamayo v. Peru. Merits, supra*, paras. 52, 54 and 55; *Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra*, paras. 182 to 188; *Case of Cantoral Benavides v. Peru. Merits, supra*, paras. 166 to 170, and *Case of García Asto and Ramírez Rojas v. Peru, supra*, paras. 114 and 115.

[286] The relevant part of Article 8 of the Convention stipulates that: "1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature. 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: […] (b) prior notification in detail to the accused of the charges against him; (c) adequate time and means for the preparation of his defense; (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; […] (f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; (g) the right not to be compelled to be a witness against himself or to plead guilty […]. 4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause. 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice."

173. In the instant case, Ms. J. was detained on April 13, 1992, following which criminal proceedings were opened against her, as a result of which she was acquitted in June 1993. However, this acquittal was annulled in December 1993 due to a supposed "erroneous assessment of the facts and an inadequate review of the evidence provided." Owing to this decision, the proceedings were retrogressed in such a way that a new trial was held. At that time, Ms. J. was no longer in Peru, so that in the subsequent decisions taken in relation to the other accused in the same case file, the proceedings against her were held in reserve (*supra* para. 106). Starting in 2003, a series of reforms were made to Peru's counter-terrorism laws on the basis on which all the proceedings in the trial of Ms. J. that had been carried out by 'secret' judges or prosecutors were declared null and void and, consequently, the proceedings were retrogressed to the moment of the issue of the indictment by the prosecutor of the Public Prosecution Service. Currently, the holding of an oral hearing is pending in the proceedings (*supra* paras. 107 and 113). For the purposes of this Judgment, the Court will refer to the judicial proceedings prior to the 2003 amendments to the terrorist legislation as the "first stage of the proceedings" (*supra* paras. 74 and 75) and the judicial proceedings after 2003 as the "second stage of the proceedings."

174. However, before examining the alleged violations of Article 8 of the Convention, this Court notes that the State has argued that, owing to the judgment of the Constitutional Court of January 3, 2003, and to Legislative Decree No. 926, the National Counter-terrorism Chamber issued its decision of May 20, 2003, in which it declared that all the previous proceedings with regard to Ms. J. were null and void so that "[a]ll the errors that may have been committed in the criminal proceedings before the faceless courts were duly redressed." According to the State, the Court should not rule on these aspects, because all the jurisprudential and legal measures have already been taken to guarantee the right to due process, so that there is no point in the Court ruling on the proceedings held before faceless judges, the absence of publicity, and the failure to provide the grounds for the judgments in the proceedings against Ms. J., because the State has modified this procedural framework in its domestic legislation. The State argued that it saw no reason for the Court to rule on this issue again.

175. In this regard, the Court notes that, on previous occasions, it has examined the reforms adopted by the State as of 2003.[287] However, the Court observes that several of the alleged violations in this case occurred before the said reforms. Therefore, as it has in other cases,[288] the Court must rule on the said violations, notwithstanding the effect that the subsequent reforms could have on the reparations that are found to be pertinent in this case. The Court emphasizes that already in other cases against Peru, it has ruled on facts and violations that took place before the reforms referred to by the State, after the said reforms had entered into force.[289] Consequently, even though the proceedings opened against Ms. J. were held in the context of a legislation most of which is no longer in force, this does not prevent the Court from ruling on the alleged violations that may have occurred before the said reforms in application of those laws.

176. Based on the arguments of the parties and of the Commission, in this section the Court will analyze first (B.1) the alleged violations of due process related to the first stage of the proceedings,

---

[287] *Cf. Case of De la Cruz Flores v. Peru, supra,* para. 73.36; *Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs*, supra,* paras. 223 to 225; *Case of García Asto and Ramírez Rojas v. Peru, supra*, para. 135; *Case of Castillo Petruzzi et al. v. Peru. Monitoring compliance with judgment.* Order of the Court of July 1, 2011, considering paragraph 12; *Case of Loayza Tamayo v. Peru. Monitoring compliance with judgment.* Order of the Court of July 1, 2011*,* considering paragraph 34, and *Case of Lori Berenson Mejía v. Peru. Monitoring compliance with judgment.* Order of the Court of June 20, 2012*,* considering paragraph 8.

[288] *Cf. Case of Acosta Calderón v. Ecuador, supra*, para. 134; *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs.* Judgment of September 19, 2006. Series C No 151, para. 102; *Case of Barreto Leiva v. Venezuela, supra*, footnote 40, and *Case of Vélez Loor v. Panama, supra*, para. 195.

[289] *Cf. Case of De la Cruz Flores v. Peru, supra*, para. 83; *Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs*, supra,* para. 223 to 225; *Case of García Asto and Ramírez Rojas v. Peru, supra*, para. 135.

and will then examine (B.2) the alleged violations of due process that are also related to the second stage of the criminal proceedings against Ms. J. The Court will then examine (B.3) the alleged violations of the principle of legality.

B.1 Alleged violations of due process in the first stage of the criminal proceedings against Ms. J.

177. Regarding the first stage of the proceedings the Commission and the representative alleged violations of: (B.1.1) the guarantees of competence, independence and impartiality of the judicial authorities who heard the case; (B.1.2) the right to defend oneself; (B.1.3) the right to public proceedings, and (B.1.4) the obligation to provide the reasoning.

B.1.1) ***Guarantees of competence, independence and impartiality of the judicial authorities who heard the case***

i. Arguments of the Commission and of the parties

178. The Commission argued that identity of the judges who acquitted Ms. J. in June 1993 and of those who annulled this acquittal in December 1993, and also of one of the Public Prosecution Service officials was secret based on article 15 of Decree-Law 25,475, which was applicable to the trial of Ms. J. as of May 1992, as was article 13(h) of Decree-Law 25,475 which prohibited filing recusals against judges or court officials during the processing of trials for terrorism.

179. The representative argued that two "faceless" courts had decided the case of the presumed victim. She also indicated that during "the proceedings against J." after May 1992, "the prosecutor began to sign her reports as a "faceless" prosecutor, by number."

180. The State argued that "[a]t the beginning of the criminal proceedings, in April 1992, […] the proceedings were processed […] before the Tenth Investigating Court of Lima, which respected her right to be heard by a competent, independent and impartial judge." With regard to the proceedings held before "faceless" judges, the State indicated that "it should be acknowledged that the efforts to investigate and prosecute offenses, including those of a terrorist nature, may expose judges and other participants in the administration of justice to threats to their life or safety," which "may require the adoption of certain exceptional measures." Despite this, the State specified that the restriction under Decree-Law No. 25,475 "was fully restored" by Law No 26,671 of 1997, as well as by the judgment of the Constitutional Court of January 3, 2003, and Legislative Decree No. 926. Nevertheless, the State "reject[ed] any observations concerning the presumed violation of the right to an ordinary judge," because Ms. J. had been prosecuted by courts that were competent to try cases of terrorism, as regulated in the American Convention.

ii. Considerations of the Court

181. Article 8(1) of the American Convention establishes that "[e]very 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."

182. This Court has determined that impartiality requires subjective guarantees on the part of the judge, as well as sufficient guarantees of an objective nature to eliminate any doubt that the justiciable or the community may have as regards the absence of impartiality.[290] Thus, the Court

[290] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 56, and *Case of Atala Riffo and daughters v. Chile.*

has clarified that recusal is a procedural instrument that protects the right to be tried by an impartial organ.[291] Similarly, the Court has determined that the guarantees of Independence and impartiality extend to other non-judicial organs responsible for the investigation prior to the judicial proceedings.[292]

183. In this case, the Court notes that both the prosecutor who brought the charges in 1993, and also the judges of the Lima Higher Court of Justice and of the Supreme Court of Justice who intervened in this case in 1993 were identified by a numerical code, so that Ms. J. and her lawyer were unaware of their identity (*supra* paras. 101 to 105). This Court also notes that Decree 25,475, which provided the procedural framework for these proceedings as of May 1992, prohibited the recusal of judges and prosecutors.[293]

184. According to the reiterated case law of this Court in cases involving Peru, trials before "faceless" or "secret" judges violate Article 8(1) of the American Convention, because they prevent the accused from knowing the identity of the judges and, consequently, from assessing their aptness and competence, as well as from determining if there are reasons to recuse them, so that they can exercise their defense before an independent and impartial court.[294] Furthermore, the Court reiterates that this situation was aggravated by the legal impossibility of recusing the said judges.[295] The Court also recalls that this obligation extends to other non-judicial officials who intervene in the proceedings, so that the intervention of the "faceless" prosecutor in the criminal proceeding against Ms. J. also constitutes a violation of Article 8(1) of the Convention.[296]

185. Regarding the State's argument that trials by "faceless" judges did not constitute a violation of the natural judge, the Court notes that trial by judges whose identity is not known does not allow the accused to question their competence, legality, independence and impartiality. The Peruvian Constitutional Court ruled similarly when declaring the unconstitutionality of article 13(h) of Decree-Law 25,475:

> 112. […] as is logical, it is not sufficient that the right to a natural judge is reflected in the constitutional texts, but it is necessary to establish those mechanisms that provide the justiciables with the means to put the use of the right into practice. The mechanism of recusal is designed specifically to question the impartiality and independence of the judge in deciding the case. Even when the Constitution expressly recognizes the right to a natural judge, if the possibility of recusing the judges of the proceedings is restricted unreasonably, it becomes impossible to exercise the right in the practice.
>
> 113. Hence, paragraph (h) of Article 13 of Decree-Law No. 25,475, by prohibiting absolutely the possibility of recusing the judges and court officials who intervene in the case, incurs in a disproportionate and unreasonable restriction of the right to a natural judge and is also unconstitutional.[297]

Merits, reparations and costs. Judgment of February 24, 2012. Series C No. 239, para. 189.

[291] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra,* para. 64.

[292] *Cf. Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra*, para. 133.

[293] Article 13(h) of this decree also established that "[i]n the processing of proceedings for terrorism, the recusal of the intervening judges or the court officials shall be inadmissible" (*supra* para. 71)

[294] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra,* paras. 133 and 134; *Case of Cantoral Benavides v. Peru. Merits, supra*, para. 127 and 128; Case of *De la Cruz Flores v. Peru, supra*, para. 114; *Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs*, supra,* para. 147, and *Case of García Asto and Ramírez Rojas v. Peru, supra*, para. 149.

[295] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra,* paras. 133 and 134, and *Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs*, supra,* para. 147.

[296] *Cf. Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra*, para. 133.

[297] Judgment of the Constitutional Court of January 3, 2003, File No. 010-2002-AI/TCLIMA (merits report, folios 1563 and 1564). The expert proposed by the State, José María Ascencio Mellao, was of a similar opinion, when he indicated that a "faceless" court does not guarantee the right to a natural judge, insofar as "the composition of each court or tribunal is not known." Affidavit prepared by the expert witness José María Asencio Mellado on May 6, 2013 (merits report, folio 1099).

186. The Court finds no reason to deviate from its consistent criterion in this case, and therefore considers that the prosecution of Ms. J. by a "faceless" prosecutor and judges during the first stage of the proceedings against her constituted a violation of the right to be tried by a competent, independent and impartial court established in Article 8(1) of the Convention.

187. The Court also repeats that, pursuant to Article 2 of the American Convention, States must eliminate norms and practices of any kind that entail a violation of the guarantees established in the Convention, and also adopt norms and practices leading to the effective observance of the said guarantees (*supra* para. 164). In particular, this means that the State has the obligation to take any necessary measures to adapt its laws in order to ensure hearings by a competent, independent and impartial court as of the date on which it ratified the Convention.

188. Even though the Court appreciates the efforts made by the Peruvian State since 1997 (*supra* para. 74), it notes that the violations of due process verified above occurred before the State had carried out the said legislative reform, so that the Court concludes that, in this case, the State failed to comply with the obligations imposed by Article 2 of the American Convention to adopt such legislative or other measures as may be necessary to guarantee the right to be tried by a competent, independent and impartial court.

189. Based on the foregoing considerations, the Court concludes that the State violated Article 8(1) of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Ms. J.

B.1.2) Right to defend oneself

i. Arguments of the Commission and of the parties

190. The Commission argued that Ms. J. was not notified of the charges against her at the start of the investigation, and her detention "took place following an investigation that the DINCOTE was conducting previously." In addition, it indicated that there is no record in the case file that, before giving her police statement, she had been informed of the charges against her. The Commission also argued that during the 15 months that Ms. J. was detained, "she was only able to talk to her lawyer on three occasions, for approximately 15 to 25 minutes." Furthermore, the Commission underscored that the prohibition to offer as witnesses those who intervened "owing to their functions" in the elaboration of the police attestation, as well as the prohibition for the authorities responsible for the case ruling on any procedural issue, objection or norm before the judgment constituted additional violations of her right to defend herself, and the latter also of the principle of the presumption of innocence. Lastly, the Commission argued that the threats made against Ms. J. during the 17 days that she was in the DINCOTE, to the effect that "if she collaborated this would reduce her sister's suffering," "are contrary to the guarantee of not being compelled to testify against oneself."

191. The representative argued that "[t]he only reason for the detention of J.'s sister was to use psychological torture on J. to make her confess," which, according to the representative "was a usual practice of the DINCOTE." She also affirmed that J. "[d]id not have the right to consult her lawyer in private during her time in the DINCOTE or before her statement to the police or to the judiciary. In the DINCOTE repeated attempts were made to interrogate her without the presence of lawyer or prosecutor."

192. Meanwhile, the State argued that Ms. J. "had access to and was assisted by her lawyers, [...] who were present during the main stages of the proceedings and when she provided a statement or was subject to questioning." In addition, Peru stressed that the petitioner was notified of her detention as well as of the main investigative activities in relation to the criminal proceedings in

which she was involved. The State argued that "Ms. J. was not compelled to sign the records of the seizure or of the house search" and that "she was able to testify freely, without any type of coercion or censure," so that "[t]he limited communication [of J. […] with the lawyer of her choice is not a matter that can be attributed to the State." It also argued that the "restrictions [due to which the presumed victim could only speak to her lawyer under the strict supervision of the authorities], arose from the confidential nature of the proceedings more than from a goal of restricting her right of defense." It also indicated that the prohibition to question police officials "did not prejudice her in any way, given that she was acquitted"; moreover, "it has not been proved that she sought the presence of the officials who took part in the elaboration of the police attestation and that this was refused." The State argued that, despite the said restriction, currently, Ms. J.'s defense counsel "has the right to question the witnesses who appear at the preliminary investigation stage and during the oral hearing, as well as to present any witnesses she may deem pertinent" or the possibility that another interpretation of the Constitution is used in her specific case. Regarding the limitations to the filing of remedies and preliminary questions, the State argued that Decree 25,475 "did not establish a prohibition to pose such questions, but determined that they must be decided at the time of the judgment"; also, that "it has not been proved that her defense counsel were prevented from filing any remedy related to her case."

ii. Considerations of the Court

193. In this case, a violation of the right to defend oneself is being alleged on the following grounds: (a) the failure to notify Ms. J. of the investigation opened against her and of the reasons for her detention; (b) the limitations J. had to converse with her lawyer; (c) the legal restrictions that prevented her from offering as witnesses those who intervened in the elaboration of the police attestation; (d) the legal restrictions regarding the means and opportunities to file preliminary questions, and (e) the alleged coercion Ms. J. received while she was detained, presumably to make her plead guilty. The Court will now examine each of these alleged violations.

a. Failure to notify Ms. J. of the investigation opened against her and of the reasons for her detention (*alleged violation of Articles 8(2)(b) and 7(4) of the Convention*)

194. This Court has established that it should be possible to exercise the right to defend oneself as soon as a person is named as a possible perpetrator of, or participant in, an illegal act and only culminates when the proceedings end.[298] Affirming the contrary implies that the convention-based guarantees that protect the right to defend oneself, including Article 8(2)(b), are contingent on the investigation being at a specific procedural stage, leaving open the possibility that, prior to this, the rights of the accused are affected by acts of authority that he is unaware of or that he cannot control or oppose effectively, which is evidently contrary to the Convention.[299] The right to defend oneself obliges the State to treat the individual at all times as a true subject of the proceedings, in the broadest sense of this concept, and not simply as its object.[300]

195. Accordingly, Article 8(2)(b) of the Convention is in effect even before an "accusation," strictly speaking, is formulated. To ensure that the said article can meet its intrinsic objectives, the notification must take place before the accused gives his first statement[301] before any public authority.[302]

---

298 *Cf. Case of Barreto Leiva v. Venezuela, supra*, para. 29, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 117.

299 *Cf. Case of Barreto Leiva v. Venezuela, supra*, para. 29.

300 *Case of Barreto Leiva v. Venezuela, supra*, para. 29 and *Case of López Mendoza v. Venezuela, supra*, para. 117.

301 *Cf. Case of Tibi v. Ecuador, supra*, para. 187, and *Case of Barreto Leiva v. Venezuela, supra*, para. 30.

302 *Cf. Case of Barreto Leiva v. Venezuela, supra*, para. 30.

196. Ms. J. was detained in the context of Operation Moyano, which, as previously established, was a carefully planned operation following an investigation of intelligence information (*supra* paras. 78 and 79). This reveals that an investigation was underway before the detention of Ms. J. of which she was not notified. In this regard, the State had indicated that "the notification of anyone simply meant the failure of the operation; the leadership of Shining Path could never have been captured, and especially the elimination of this terrorist group." In this regard, the Court has indicated that in certain cases, it is admissible to keep the measures taken during an investigation in criminal proceedings confidential in order to guarantee the effectiveness of the administration of justice. The State has the power to build up a case file taking the necessary measures to prevent this task being impaired by the destruction or concealment of evidence. However, this power must be harmonized with the right of defense of the person investigated, which supposes the possibility of knowing the facts of which he or she is accused.[303]

197. The information provided to the Court does not allow it to determine precisely when the investigation relating to Operation Moyano commenced, or whether Ms. J. had been individualized and identified as a person of interest or presumably related to *El Diario* before her arrest, so that it is not possible to determine whether she could have been notified of the investigation before her detention. However, the Court recalls that the transition between "investigated" and "accused" – and, at times, "convicted" – may occur suddenly, so that it is not possible to wait until someone is formally accused to provide him with the information on which the timely exercise of the right of defense depends.[304]

198. In the instant case, Ms. J. was informed verbally of the reasons for her arrest during the search of the building on Las Esmeraldas Street (*supra* para. 150). However, this Court reiterates the obligation to notify the charges that have been brought promptly and in writing in keeping with Article 7(4) of the Convention persisted, even after the prosecutor of the Public Prosecution Service had advised the reasons for the arrest verbally (*supra* para. 151). In this regard, the Court notes that, even though, on April 14, 1992, Ms. J. was notified that she had been detained "to clarify the crime of terrorism (*supra* para. 92), there is no record in the case file that she was notified of the facts, causes and reasons that had led the State to make this accusation. The first statement that Ms. J. gave before a State authority was a police statement made on April 21, 1992 (*supra* para. 95), and there is no record that, prior to this statement, Ms. J. was advised in writing of the reasons for her detention, the reasons why the State brought the charge, the probative basis for this, and the legal definition of those facts, above and beyond the general and non-motivated notification that she was being investigated for the crime of terrorism. According to the information provided to the file of this case, the first documents in which Ms. J. or her lawyer would have been able to see in writing the reasons for her detention are the police attestation and the criminal complaint, both dated April 28, 1992 (*supra* paras. 97 and 98).

199. Furthermore, in order to satisfy Article 8(2)(b) of the Convention, the State must inform the interested party not only of the acts or omissions that he or she is accused of, but also of the reasons that led the State to bring the charges, the evidence for this, and the legal definition of the facts. All this information must be described explicitly, clearly, fully and in sufficient detail to allow the accused to exercise her right to defend herself fully and to explain her version of the facts to the judge. Even though the contents of the notification will vary according to the stage of the investigation, the persons investigated must be provided, at least, with the most detailed information possible on the facts attributed to them, and this information will be most complete when the final charges are officially filed.[305] This Court has established that, before making a

303 *Cf. Case of Barreto Leiva v. Venezuela, supra*, para. 45.

304 *Cf. Case of Barreto Leiva v. Venezuela, supra*, para. 46.

305 *Cf. Case of Barreto Leiva v. Venezuela, supra,* para. 31.

statement, the person investigated must have been informed officially of the facts he or she is accused of, and not only infer them from the questions that are asked.[306] This Court also notes that this State obligation acquires greater relevant when the accused is subject to deprivation of liberty as in the instant case.[307] The Court has considered that the strict observance of Article 8(2)(b) is essential for the effective exercise of the right to defend oneself.[308]

200. In the instant case, according to the documentation in the case file, Ms. J.'s defense counsel was only able to know the facts for which she was investigated, the evidence gathered by the State and the legal definition given to these facts on April 28, 1992, when the prosecutor filed the criminal complaint against her, which occurred after Ms. J. had given her first statement (*supra* para. 198).

201. Therefore, the Court concludes that, by failing to notify Ms. J. formally of the reasons for her detention and the facts that she was accused of until April 28, 1992, when the criminal complaint was filed against her, the State violated the rights embodied in Articles 7(4) and 8(2)(b) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Ms. J.

b. The limitations J. had to converse with her lawyer (*alleged violation of paragraphs (c) and (d) of Article 8(2) of the Convention*)

202. This Court notes that Ms. J. was assisted by her lawyer during her police statement and during the different declarations that were part of her preliminary statement,[309] and also that her lawyer was able to file briefs in the proceedings and request that certain measures be taken.[310] Nevertheless, Ms. J. indicated that she was unable to meet with her lawyer more than three times for between 15 and 25 minutes during the fourteen months that she remained subject to preventive detention and always under strict State supervision. The Court notes that the State did not deny this; rather, to the contrary, Peru justified this restriction by "the confidential nature of the proceedings."

203. Although it is true that article 12(f) of Decree 25,475 was not in force at the time of Ms. J.'s detention,[311] the Court takes note of what the CVR indicated, to the effect that the said norm "ended up by consolidating a situation of *de facto* incommunicado of all those detained for the crime

---

306 *Cf. Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs.* Judgment of June 20, 2005. Series C No. 126, paras. 67 and 68, and *Case of Barreto Leiva v. Venezuela, supra,* para. 31.

307 *Cf. Case of Palamara Iribarne v. Chile, supra*, para. 225.

308 *Cf. Case of Tibi v. Ecuador, supra*, para. 187, and *Case of Barreto Leiva v. Venezuela, supra*, para. 28.

309 *Cf.* Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folios 3668 to 3671); preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folios 3697 to 3701); preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folios 3703 to 3709); preliminary statement of June 19, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 17, folios 4740 to 4745), and preliminary statement of August 3, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 18, folios 4745 to 4747).

310 *Cf.* Brief dated June 26, 1992, in which J.'s defense counsel requested evidence and asks the Third Criminal Court of Lima to send notes asking the different institutions to forward evidence to the proceedings; brief dated July 30, 1992, in which J.'s defense counsel asked the Third Criminal Court of Lima to send notes to institutions asking them to forward documents that prove that the journalists who J. assisted had the pertinent permits; brief dated August 11, 1992, in which J.'s defense counsel requested that the records of personal and home search in the case file be eliminated; brief with conclusions of J.'s representatives dated June 3, 1993; brief dated December 15, 1992, in which J.'s defense counsel contested the conclusions of the graphological expertise; brief dated February 18, 1993, in which J. proposes an expert witness for the purposes of the contesting the graphological expertise; brief dated February 18, 1993, in which J. requests a photographic expertise, and brief dated March 10, 1993, in which J. asks the court to notify the expert witness proposed for the graphology expertise of the questions that he should answer (file of annexes to the State's brief of June 24, 2013, annex 26, folios 4840 to 4852). Similarly, see the record of the hearing of June 2, 1993, which reveals that one of the expert witnesses proposed by J. was not summoned by the court owing to lack of time (file of annexes to the State's brief of June 24, 2013, annex 20, folio 4759).

311 *Cf.* Decree-Law No. 25,475 of May 5, 1992, Article 12(f) (file of annexes to the answering brief, annex 7, folio 3261).

of terrorism, because the systematic practice of the Police consisted in taking the statements of the detainees after they had been detained for several days, during which time it was virtually impossible for the lawyers to meet with their clients." Moreover, the CVR concluded that the meetings between the detainees and their lawyers "were normally supervised and overheard by police agents."[312]

204. In this regard, J.'s mother and Emma Vigueras indicated that Ms. J. was kept in total incommunicado, that only one lawyer had been able to see her but without being able to talk to her in private.[313] Emma Vigueras also indicated that "in this context of 'incommunicado,' the only opportunity she had, as a lawyer, […] to talk to her clients was when the detainees made their statement to the police; in other words, in the presence of the prosecutor and of the police who questioned the detainee officially. The lawyers were not allowed to have private conversations with those they were defending."[314] Similarly, she indicated that, between May and September 1992, during the preliminary investigation stage of the proceedings, "the lawyers were prevented from having any contact with their clients who were in complete incommunicado," and as of October 1992, "when access to [their] clients was established to some extent […], this was extremely restricted and in degrading conditions. The timing was limited and the visit took place in a small room, […] with no privacy."[315]

205. The Court underlines that a literal reading of Article 8(2)(d) of the Convention reveals that "everyone had the right to communicate freely and privately with his defense counsel." Moreover, the Court has emphasized that it is not sufficient that the accused has a defense counsel to guarantee his right to defend himself, but the effective exercise of this defense must be ensured by providing adequate time and means for its preparation.[316]

206. In the instant case, the Court finds that it has been proved that Ms. J. was unable to meet with her lawyer in private, and that when she met her, this was under the strict supervision of the State authorities. Peru has failed to justify to this Court that "the confidential nature of the proceedings" constituted a valid restriction of these rights. Although the State must ensure the success of the investigations and the punishment of those found guilty to the greatest extent possible, the power of the State is not unlimited, so that it must act within the limits and in accordance with procedures that permit preserving both public safety and the fundamental rights of the individual.[317] Consequently, if a State finds it necessary to restrict the right to defend oneself, it must do so in keeping with the principle of legality, present the legitimate objective that it seeks to achieve, and prove that the means used to this end is suitable, necessary and strictly proportionate. To the contrary, the restriction will be contrary to the Convention.[318]

207. In the instant case, the State has not argued that the restrictions to Ms. J.'s right to defend herself during the first stage of the proceedings against her were established by law. In addition,

---

312 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.6, pp. 398 and 421.

313 *Cf.* Affidavit prepared by J.'s mother on June 13, 2006, for the case of the Miguel Castro Castro Prison (file of annexes to the motions and arguments brief, annex 1, folio 3000), and Sworn statement made by Emma Vigueras on May 15, 2000 (file of annexes to the motions and arguments brief, annex 2, folio 3009).

314 Sworn statement made by Emma Vigueras on May 15, 2000 (file of annexes to the motions and arguments brief, annex 2, folio 3009).

315 Sworn statement made by Emma Vigueras on May 15, 2000 (file of annexes to the motions and arguments brief, annex 2, folio 3011).

316 *Cf. Case of Palamara Iribarne v. Chile, supra*, para. 170, and *Case of Cabrera García and Montiel Flores v. Mexico, supra,* para. 156.

317 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 154, and *Case of Barreto Leiva v. Venezuela, supra*, para. 53.

318 *Cf. Case of Barreto Leiva v. Venezuela, supra,* para. 55.

the Court underlines that the fact that Ms. J. only had access to three supervised meetings of between 15 and 25 minutes during the fourteen months of preventive detention, which has not been denied by the State, is clearly disproportionate in relation to Ms. J.'s right to defend herself. Therefore, the State violated paragraphs (c) and (d) of Article 8(2) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Ms. J.

c. Legal restrictions that prevented her from offering as witnesses those who intervened in the elaboration of the police attestation (*alleged violation of Article 8(2)(f) of the Convention*)

208. This Court has indicated previously that the prerogatives that must be granted to the accused include that of examining the witnesses for and against them, under the same conditions, in order to exercise their defense.[319] Article 13(c) of Decree-Law No. 25,475 was and is applicable in the proceedings against Ms. J. According to this norm, "[d]uring the preliminary investigation and the trial it shall not be possible to offer as witnesses those who intervened owing to their functions in the elaboration of the Police attestation" (*supra* para. 71).

209. In addition, the Court stresses that, according to the testimony of Pablo Talavera Elguera, president of the National Criminal Chamber who presided the preliminary investigation and the oral hearing of the criminal proceedings opened against Ms. J., "in the specific case [of Ms. J.], most of the sources of evidence were pre-constituted evidence, due to their urgent nature, and could only be replicated indirectly in the oral hearing through the testimony of those who prepared the records or intervened in obtaining them or, otherwise, by reading them."[320]

210. The Court considers, as it has previously,[321] that article 13(c) of Decree-Law No. 25,475 applicable to the proceedings against Ms. J., prevented her from exercising the right to question the witnesses who intervened in the elaboration of the police attestation that substantiates the charges against the presumed victim. The Court also finds that this constraint was particularly relevant in the case of Ms. J., who, from her first statement (her police statement in 1992), has denied and questioned the content of the search records and the police attestation used as the basis for the charges against her. Consequently, the State violated Article 8(2)(f) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of J. Likewise, since this violation occurred as a result of the application of article 13(c) of Decree 25,475, the State also failed to comply with Article 2 of the Convention.

d. Legal restrictions regarding the means and opportunities to file preliminary questions

211. Article 13(a) of Decree No 25,475 establishes that the "preliminary questions, requests for preliminary rulings, objections and any other matter shall be decided with the judgment."[322]

212. The Court notes that this provision established a deferment of the resolution of the possible preliminary questions to the sentencing stage. In fact, the judgment acquitting Ms. J. reveals that several co-accused filed preliminary questions (such as the existence of *res judicata*), on which the

---

319 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra,* para. 154, and *Case of García Asto and Ramírez Rojas v. Peru, supra*, para. 152.

320 Affidavit prepared on May 6, 2013, by the witness Pablo Rogelio Talavera Elguera (merits report, folio 1083).

321 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra,* para. 153; *Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs, *supra*, para. 183, and *Case of García Asto and Ramírez Rojas v. Peru, supra*, paras. 154 and 161.

322 Decree-Law No. 25,475 of May 5, 1992, Article 13(a) (file of annexes to the answering brief, annex 7, folio 3261).

Higher Court of Lima ruled in that decision.[323] This Court does not consider that a provision of this type is incompatible *per se* with the guarantee of the right to defend oneself, the presumption of innocence or any other provision of the American Convention. Although, in certain cases, the application of this provision could be disproportionate, the Court finds that this is a situation that must be examined taking into account the particular circumstances of the specific case. The evidence provided in the instant case does not reveal that Ms. J. or her lawyer filed any type of preliminary question, request for a preliminary ruling or objection that was only ruled on in the judgment on merits by the court hearing the case.[324]

213. In this regard, the Court recalls that the purpose of its contentious jurisdiction is not to review domestic laws in abstract, but must be exercised to hear specific cases where it is alleged that an act of the State, executed against individuals, violated the provisions of the Convention.[325] In the instant case neither the Commission nor the representative indicated how the provision established in article 13(a) of Decree 25,475 had disproportionately impaired Ms. J.'s right to defend herself. Consequently, the Court does not find that this legal restriction represented a violation of this right in the instant case.

e. Alleged coercion that Ms. J. received while she was detained, presumably to make her plead guilty (*alleged violation of Article 8(2)(g) of the Convention*)

214. In order to analyze this allegation, the Court must determine whether the coercion and threats, which the representative alleged occurred in the DINCOTE, really happened, and this determination will be made in the chapter on the alleged violations of Ms. J.'s personal integrity (*infra* paras. 372 to 374). Once it has made the pertinent determination, the Court will rule on the alleged violation of Article 8(2)(g) of the Convention in relation to the presumed coercion and threats, as appropriate.

f. Conclusion regarding the right to defend oneself

215. Based on all the foregoing considerations, the Court concludes that the State violated paragraphs (b), (c), (d) and (f) of Article 8(2) of the Convention, in relation to Articles 1(1) and 2 of this instrument, because Ms. J. was not notified formally or informed adequately of the reasons for her detention and of the acts that she was accused of, and also due to the legal restrictions that prevented her from questioning the witnesses who intervened in the elaboration of the police attestation on which the charges against her were based. Moreover, the absence of a formal detailed notification in writing of the charges against her also constituted a violation of Article 7(4) of the Convention.

B.1.3) Right to a public proceeding

i. Arguments of the Commission and of the parties

---

323 *Cf.* Judgment of the Lima Superior Court of Justice of June 18, 1993 (file of annexes to the answering brief, annex 48, folios 3770 a 3785).

324 *Cf.* Record of the hearing of May 19, 1993 (file of annexes to the State's brief of June 24, 2013, annex 19, folios 4753 to 4756); record of the hearing of June 2, 1993 (file of annexes to the State's brief of June 24, 2013, annex 20, folios 4758 to 4767); record of the hearing of June 7, 1993 (file of annexes to the State's brief of June 24, 2013, annex 21, folios 4769 to 4784), and record of the hearing of June 9, 1993 (file of annexes to the State's brief of June 24, 2013, annex 22, folios 4786 to 4796), and judgment of the Lima Superior Court of Justice of June 18, 1993 (file of annexes to the answering brief, annex 48, folios 3770 to 3785).

325 *Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs.* Judgment of January 29, 1997. Series C No. 30, para. 50, and *Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 23, 2012. Series C No. 255, para. 162.

216. The Commission argued that, in the instant case, "none of the stages of the proceedings was made public," and a public hearing was not held, because article 13(f) of Decree-Law 25,475, established that the trial should be held in private hearings, in violation of Article 8(5) of the Convention. The representative did not refer to this alleged violation. For its part, the State argued that "the criminal prosecution of presumed perpetrators of terrorist offenses was, in the opinion of the State, an exceptional circumstance that justified the confidential nature of the proceedings, because this was required by national security and the protection of the rights of the prosecutors and judges involved in the proceedings" and others who intervened. Peru argued that "the central purpose of publicity is access to the proceedings by the parties and even by third parties," while "in the hearings held in relation to the proceedings against J., the parties, in particular, her defense counsel," were present. Lastly, the State indicated that "[a] hearing held before a 'faceless' court is null and void in itself, because the identity of the judges is unknown, regardless of whether it was confidential."

ii. Considerations of the Court

217. The guarantee that proceedings shall be public established in Article 8(5) of the Convention is an essential element of the system of criminal procedure in a democratic State and is guaranteed by holding an oral stage in which the accused is able to have direct access to the judge and the evidence and which provides access to the public.[326] Hence, the secret administration of justice is prohibited, subjecting it to the scrutiny of the parties and of the public, and relates to the need for the transparency and impartiality of the decisions taken. In addition, this guarantee is a mechanism that promotes trust in the courts of justice. The public nature of proceedings refers specifically to access to information on the proceedings by the parties and even third parties.[327]

218. Article 13(f) of Decree-Law No. 25,475 established that:

> Once the trial has commenced, it shall be held in private hearings on a consecutive daily basis until its conclusion, within 15 natural days at the most, when the judgment shall be handed down in accordance with the rules of the Third Volume of the Code of Criminal Procedures, as applicable.[328]

219. In previous cases with regard to Peru, this Court has established that the said provision of Decree-Law 25,475 infringes the guarantee of the public nature of the proceedings.[329] In the instant case, as revealed by the text of the law and of the records of the hearings that appear in the case file, the hearings during the first stage of the proceedings against Ms. J. were held in private.[330] Furthermore, the lawyer, Emma Vigueras, indicated that "access to the case file was restricted even for the lawyers. There was a special Secretariat for this type of case and the only way to obtain access was by bribing those in charge of the custody of those documents."[331]

220. Article 8(5) of the American Convention requires that criminal proceedings shall be public,

---

326 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra*, para. 172, and *Case of Palamara Iribarne v. Chile, supra*, para. 167.

327 *Cf. Case of Palamara Iribarne v. Chile, supra,* paras. 167 and 168.

328 Decree-Law No. 25,475 of May 5, 1992, Article 13(f) (file of annexes to the answering brief, annex 7, folio 3262).

329 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra,* para. 172; *Case of Cantoral Benavides v. Peru. Merits, supra*, para. 146*; Case of De la Cruz Flores v. Peru, supra*, para. 73.4*; Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs*, supra,* para. 198, and *Case of García Asto and Ramírez Rojas v. Peru, supra*, para. 149.

330 *Cf.* Record of the hearing of May 19, 1993 (file of annexes to the State's brief of June 24, 2013, annex 19, folios 4753 to 4756); record of the hearing of June 2, 1993 (file of annexes to the State's brief of June 24, 2013, annex 20, folios 4758 to 4767); record of the hearing of June 7, 1993 (file of annexes to the State's brief of June 24, 2013, annex 21, folios 4769 to 4784), and record of the hearing of June 9, 1993 (file of annexes to the State's brief of June 24, 2013, annex 22, folios 4786 to 4796).

331 Sworn statement made by Emma Vigueras on May 15, 2000 (file of annexes to the motions and arguments brief, annex 2, folio 3011).

and that they are kept private only exceptionally, "to preserve the interests of justice." In the instant case, the State has not proved the need and proportionality of the restriction of the guarantee of the public nature of the proceedings. Consequently, the Court concludes that the application, as a general rule, of the private nature of the proceedings against Ms. J. until the 2003 legislative reform violated Article 8(5) of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Ms. J., inasmuch as the violation resulted from a legal norm in force at the time of the facts.

B.1.4) The absence of reasoning and the presumption of innocence in the decision of the Supreme Court of Justice of December 27, 1993

i. Arguments of the Commission and of the parties

221. The Commission considered that the Supreme Court of Justice had failed to comply with the obligation to provide its reasoning in its decision of December 27, 1993, because "it did not give any explanation of the reasons" for the decision; "nor did it explain which facts had not been duly evaluated, or […] indicate why the evidence had not been assessed adequately." According to the Commission, the Supreme Court of Justice "failed to provide an individualized reasoning with regard to the situation of Ms. J.," bearing in mind that the proceedings included a large number of persons for diverse acts, with different evidence and charges. In addition, the Commission argued that, in this case, "it was particularly relevant for the judicial authority to provide the reasoning that substantiated its ruling, because this entailed the declaration of the nullity of an acquittal for which important arguments had been made concerning the existence of a reasonable doubt about Ms. J.'s criminal responsibility"; consequently, the absence of reasoning also constituted non-compliance with the principle of the presumption of innocence. The Commission indicated that "the legal grounds are unknown, […] there is no information as to whether one of the parties had filed an appeal and that is why the Supreme Court [decided] to issue this ruling."

222. The representative argued that the judgment declaring the nullity of the acquittal "made no mention of substantiation or reason […] or referred to any legal basis for the ruling. Nor did it mention under which norm (paragraph) of the Code of Criminal Procedures it had made its ruling on nullity. […] The grounds are specific and restrictive." According to the representative, the Supreme Court "could not consider the facts that had been established or deny them indicating 'that the evidence had not been assessed correctly,' especially without providing the reasoning for this position'; while the grounds for annulment entail "serious irregularities, omission of procedures or omission of guarantees," none of which was indicated as the grounds for the declaration of nullity.

223. The State indicated that "regardless of whether the ruling issued was duly reasoned," "the said ruling no longer has any legal effect," owing to the case law of the Constitutional Court […] and Legislative Decree No. 926, which "should be considered as a measure of reparation." It also argued that "if the petitioner and the Commission consider that the judgment of December 27, 1993, is contrary to the provisions of due process and, therefore, invalid, the same is true of the judgment of June 18, 1993, which acquitted her."

ii. Considerations of the Court

224. The Court has indicated that the reasoning is the exteriorization of the rational justification that allows a conclusion to be reached.[332] The obligation to provide the reasoning for decisions is a guarantee related to the conscientious administration of justice that guarantees the individual the right to be tried for the reasons established by law, while providing credibility to judicial decisions in

[332] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador, supra*, para. 107, and *Case of López Mendoza v. Venezuela, supra*, para. 141.

a democratic society.[333] As a result, the decisions adopted by the domestic organs of the States that may have an impact on human rights must be reasoned; otherwise, they would be arbitrary decisions.[334] The reasoning of a ruling should reveal the facts, grounds and norms on which the organ that issues it based itself in order to take its decision, so that any sign of arbitrariness can be excluded, while it reveals to the parties that they have been heard during the proceedings.[335] In addition, it should show that the arguments of the parties have been duly taken into account and that all the evidence has been analyzed.[336] Based on the foregoing, the Court has concluded that the obligation to provide the reasoning is one of the "due guarantees" of due process included in Article 8(1).[337]

225. In the instant case, after Ms. J. had been acquitted by the Lima Higher Court of Justice on June 18, 1993, the "faceless" Supreme Court of Justice declared that the judgment of December 27, 1993, acquitting her was null and void, and ordered that "a new oral hearing be held by another Special Criminal Chamber" (*supra* paras. 102 and 105). The said decision merely states:

> Considerations: pursuant to the report of the prosecutor and considering, also, that the judgment that is being appealed does not make a proper evaluation of the facts that are the subject of the indictment and does not assess the evidence provided adequately in order to establish the innocence or guilt of those accused; that, on the other hand, with regard to the accused who have been convicted, it has not be determined specifically for each of them the pertinent article of the law applicable to their case, so that […] the judgment appealed was declared null and void […]; and it was ordered that a new oral hearing be held by another Special Criminal Chamber […].[338]

226. The Court notes that the said judgment of December 1993 contains no other factual or legal elements that provide information on the reasons for the ruling. In this regard, the Court notes that Ms. J. was indicted in proceedings where she was charged together with another 93 persons (*supra* para. 101). The judgment of the Lima Higher Court of Justice of June 18, 1993, which acquitted Ms. J., convicted 11 of the accused, acquitted 17, and held in reserve the proceedings against another 65 persons (*supra* para. 102). However, the ruling that declared this judgment null and void in December that year, did not specify with regard to whom the evidence had been assessed improperly or an undue evaluation had been made of the facts that were the subject of the indictment; it did not establish the legal basis based on which the nullity was declared or the reason why it was in order.[339] This absence of reasoning and grounds in the judgment of the Supreme Court meant that it was impossible for Ms. J. to defend herself adequately so as to be able to contest it or appeal against it in order to enforce the acquittal delivered in her favor.

---

333 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra,* para. 77, and *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227, para. 118.

334 *Cf. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of June 23, 2005. Series C No. 127, para. 125, *and Case of Chocrón Chocrón v. Venezuela, supra*, para. 118.

335 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 122; *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra,* para. 78, and *Case of Chocrón Chocrón v. Venezuela, supra,* para. 118.

336 *Cf. Case of López Mendoza v. Venezuela, supra*, para. 141.

337 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra,* para. 78, and *Case of López Mendoza v. Venezuela, supra*, para. 141.

338 Judgment of the Supreme Court of Justice of December 27, 1993 (file of annexes to the answering brief, annex 50, folio 3789).

339 The appeal for annulment is regulated in articles 292 to 301 of the Code of Criminal Procedures. In particular, article 292 establishes that: "[t]he appeal for annulment is in order against: (a) the judgments in ordinary proceedings; (b) the rulings issued by the Higher Criminal Court in the ordinary proceedings that, in first instance, revoke the conditional conviction, the reserved status of the conviction, and the penalty of a fine or community service or daytime confinement; (c) the final decisions delivered by the Higher Criminal Court that, in first instance, extinguish the action or terminate the proceeding or the instance; (d) the decisions issued by the Higher Criminal Court that, in first instance, rule on the merging of punishments, or the substitution of the punishment by retroactivity to the more favorable penalty, or that limit the fundamental right to personal liberty, and (e) the decisions expressly established by law. 1941 Code of Criminal Procedures, article 292 (file of annexes to the State's brief of August 14, 2013, folios 5153 to 5154).

227. The Court emphasizes that, although the decision of the "faceless" Supreme Court did not constitute a conviction, it did impair the rights of Ms. J., insofar as it affected the final nature of the acquittal. If the acquittal delivered in favor of Ms. J., had not been declared null and void, currently there would be no criminal proceedings open against Ms. J. In addition, the Court considers that the exigency of an adequate reasoning in the said ruling was even greater, because it annulled an acquittal delivered owing to insufficient evidence based on a supposed inadequate assessment of the evidence (*supra* para. 225).

228. In addition, this Court considers that the Supreme Court failed to act in accordance with the principle of the presumption of innocence, by requiring the lower court "to establish the innocence or guilt of those accused." The Court recalls that the principle of the presumption of innocence requires that no one be convicted unless there is complete evidence or evidence beyond any reasonable doubt of their guilt.[340] The Higher Court of Lima decided to acquit Ms. J. because it did not have sufficient evidence of her guilt. By not explaining how the evidence had been assessed inadequately, or the undue evaluation of the facts, the Supreme Court presumed that Ms. J. was guilty.

229. Based on the above considerations, this Court finds that the judgment of December 27, 1993, of the "faceless" Supreme Court of Justice failed to comply with the obligation to provide the reasoning for judicial decisions and infringed the presumption of Ms. J.'s innocence, in violation of paragraphs 1 and 2 of Article 8 of the American Convention, in relation to Article 1(1) thereof.

B.2 Alleged violations of due process in the first and second stages of the criminal proceedings against Ms. J.

B.2.1) Right to the presumption of innocence

i. Arguments of the Commission and of the parties

230. The Commission argued that the complaint and charges against Ms. J. are substantiated "to a great extent" on documents obtained during the "illegal and arbitrary" home search that resulted in the arrest of Ms. J., "together with the DINCOTE police attestation"; all of which also constituted evidence "provided and assessed by 'faceless' judges." The Commission considered that "this fact *per se* constitutes a violation of the right to a hearing "with due guarantees" and of the right to the presumption of innocence. The Commission also argued that several newspaper articles reveal "apparent quotes by different State officials" that "constitute indications of a prejudgment contrary to the presumption of innocence." In addition, the Commission indicated that "the declaration of the nullity of a final judgment, without any reasoning, constitutes an additional violation of the right to the presumption of innocence".

231. The representative argued that J. was presented together with her sister as a terrorist, in a press conference by the [then Minister of the Interior]," which constituted "a flagrant violation of the presumption of her innocence." She indicated that "these images served to perpetuate the false image of [J.] as a terrorist, which the Peruvian State has been disseminating for 20 years, without fail." The representative also argued that "senior State agents have insistently indicated that […], in their opinion, [J.] is not a presumed terrorist; she is a terrorist," and have attacked J. publicly. She indicated that "both the newspaper articles presented […] before the Inter-American Commission" and statements made by high-ranking authorities in 2012 reveal that the "name [of the presumed victim] and that of her family have been stigmatized." The representative asserted

[340] *Cf. Case of Cantoral Benavides v. Peru. Merits, supra*, para. 120, and *Case of Cabrera García and Montiel Flores v. Mexico, supra,* para. 183.

that the fact that State agents refer to J. as a terrorist "violates the principle of the presumption of innocence, because no court has found her guilty of terrorism."

232. The State argued that the presumption of innocence of Ms. J. has been respected in the criminal proceedings against her, in which she has not been convicted either "formally or informally," because "the procedural ruling to keep the proceedings open was issued under the counter-terrorism laws that had been adapted to the judgments of the Inter-American Court." It also argued that "the evidence gathered in these criminal proceedings was not illegal […], because most of it was sought and gathered first by the National Police of Peru and, subsequently, by ordinary prosecutors and judges," and "it was obtained fully respecting human rights." In addition, the State argued that "[t]he specific regime of exclusion of evidence adopted by the courts of justice of each country […] is not a matter that can be decided under the rules of the American Convention." According to Peru, "the presumed violations of due process that were committed do not constitute grounds for excluding material gathered previously; likewise, the nullity of a proceeding does not immediately cause an absolute prohibition to re-use the evidence that was gathered to open it." Regarding the statements mades by State officials concerning Ms. J., the State argued that the newspaper articles did not necessarily repeat the literal meaning of the statements of the officials. In addition, it indicated that "none of the officials referred to in the newspaper articles is a jurisdictional authority." In addition, it asserted that the Court should weigh the context in which the statements were made because this was shortly after J. had received an award relating to international justice, which sparked an outcry in the national media, since the charges against her were public knowledge. In this regard, the State denied that its officials had issued statements that went beyond explaining to the public the procedural situation of Ms. J., who had been accused of belonging to the Shining Path terrorist group.

ii. Considerations of the Court

233. The Inter-American Court has indicated that, in the sphere of criminal justice, the principle of the presumption of innocence constitutes a cornerstone of the judicial guarantees.[341] The presumption of innocence means that the accused does not have to prove that he has not committed the offense attributed to him, because the *onus probandi* corresponds to the accuser,[342] and any doubt must be used to benefit the accused. Thus, the irrefutable proof of guilt constitutes an essential requirement for imposing criminal punishment; hence, the burden of proof lies with the accuser and not with the accused.[343] In addition, the principle of the presumption of innocence signifies that the judges must not open the proceedings with a preconceived idea that the accused has committed the offense of which he is accused.[344]

234. The Court recalls that, previously, it concluded that the arbitrary nature of the order of preventive detention against Ms. J., as well as the failure to provide the reasoning for the ruling of the "faceless" Supreme Court of December 27, 1993, violated the presumption of her innocence (*supra* paras. 168 and 229). However, in this section, the Court will examine the violation of this right owing to other facts and circumstances alleged by the Commission and the representative, namely: (a) various statements by State officials concerning J.'s guilt, and (b) that the second stage of the proceedings against Ms. J. was based on evidence that was allegedly illegally obtained.

---

341 *Cf. Case of Suárez Rosero v. Ecuador. Merits, supra,* para. 77, and *Case of López Mendoza v. Venezuela, supra*, para. 128.

342 *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 154, and *Case of López Mendoza v. Venezuela, supra*, para. 128.

343 The Human Rights Committee of the International Covenant on Civil and Political Rights has ruled similarly. Human Rights Committee. General comment No. 32, Right to equality before courts ad tribunals and to a fair trial (HRI/GEN/1/Rev.9 (vol. I)), para. 30.

344 *Cf. Case of Cabrera García and Montiel Flores v. Mexico, supra*, para. 184, and *Case of López Mendoza v. Venezuela, supra*, para. 128.

a. Statements by State authorities concerning J.'s guilt

235. This Court has indicated that the right to the presumption of innocence, as established in Article 8(2) of the Convention, requires that the State must not convict someone informally or issue a judgment before society, thus contributing to form public opinion, while that person's criminal responsibility has not been proved according to law.[345] The European Court of Human Rights has ruled similarly when finding that the statements of State agents in the press about the guilt or criminal responsibility of a person who has not yet been convicted constitutes a violation of the presumption of innocence of that person.[346] The Human Rights Committee has ruled in the same way, when considering that "[i]t is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial e.g. by abstaining from making public statements affirming the guilt of the accused."[347]

236. In the cases of *Cantoral Benavides* and *Lori Berenson* the Inter-American Court concluded that the State had violated the right to the presumption of innocence of the respective victims, taking into account that "they were exhibited by the DINCOTE before the media as perpetrators of the offense of treason, when they had not been prosecuted and found guilty according to the law."[348]

237. In the instant case, based on the helpful evidence required from the State, at the request of the presumed victim, it has been proved that Ms. J. was presented to the media on April 23, 1992, in a press conference organized by the then Minister of the Interior, together with other persons detained during Operation Moyano, including Ms. J.'s younger sister (*supra* para. 10 and 96).

238. The Court notes that, according to the representative, J. was presented "to the media (television and newspapers) as a 'terrorist,' as a member of Shining Path, from the 'propaganda apparatus' *El Diario*." The original audio recording of the said press conference was not presented by the State. In its brief of June 24, 2013, Peru indicated that it had requested the information from the corresponding State authorities, in particular the DINCOTE and the Peruvian National Institute of Radio and Television, but they had indicated that they "did not have the official video that recorded in image and audio the [said] presentation." Nevertheless, the State presented four videos that contain press reports where it is possible to see a few seconds of the presentation to the press of Ms. J., without the corresponding audio recording. In this regard, the Court takes note of the

---

345 *Cf. Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs*, supra*, para. 160.

346 *Cf.* ECHR, *Allenet de Ribemont v. France*, 10 February 1995, § 36 and 38, Series A no. 308; *Nešťák v. Slovakia*, no. 65559/01, § 88, 27 February 2007, and *Butkeviďus v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II (extracts). The original text of *Nešťák v. Slovakia* states: "[t]he Court reiterates that the presumption of innocence under Article 6 § 2 will be violated if a judicial decision or, indeed, *a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proven according to law*. It suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty, while a premature expression of such an opinion by the tribunal itself will inevitably run afoul of the said presumption […]. Article 6 § 2 governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution […]". See also in this regard, *Khuzhin et al. v. Russia,* no. 13470/02, § 93, 23 October 2008, and *G.C.P. v. Romania*, no. 20899/03, § 54, 20 December 2011.

347 Human Rights Committee of the International Covenant on Civil and Political Rights. Human Rights Committee. General comment No. 32, Right to equality before courts and tribunals and to a fair trial (HRI/GEN/1/Rev.9 (vol. I)), paras. 19 and 30. See also*, Dimitry L. Gridin v. Russian Federation*, Communication No. 770/1997, U.N. Doc. CCPR/C/69/D/770/1997 (2000), para. 8.3; *Barno Saidova v. Tajikistan*, Communication No. 964/2001, U.N. Doc. CCPR/C/81/D/964/2001 (2004), para. 6.6; *Munguwambuto Kabwe Peter Mwamba v. Zambia*, Communication No. 1520/2006, U.N. Doc. CCPR/C/98/D/1520/2006 (2010), para. 6.5; *Eligio Cedeño v. Venezuela,* Communication No. 1940/2010, CCPR/C/106/D/1940/2010 (2012), para. 7(4), and *Vladislav Kovalev v. Belarus*, Communication No. 2120/2011, CCPR/C/106/D/2120/2011 (2012), para. 11.4.

348 *Case of Cantoral Benavides v. Peru. Merits, supra*, para. 119, and *Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs*, supra*, para. 158. In the Case of Cantoral Benavides, when declaring the violation of the right to the presumption of innocence, the Inter-American Court also took into account that Mr. Cantoral Benavides had been convicted without complete proof of his responsibility. *Case of Cantoral Benavides v. Peru. Merits, supra*, paras. 119 to 122.

representative's allegation that, at the time of the events, the State also used these images without sound to indicate that, when Ms. J. defended herself indignantly from the accusation of the Minister of the Interior and pointed out that the accusations against her were false, the State used this to say that she behaved like a "typical terrorist" "with quite energetic and aggressive behavior," and that she had "come out waving Shining Path banners."

239. This Court considers that the said press conference is an act that was carried out under the absolute control of the State and that the respective video constitutes evidence that is entirely in the hands of the State. In this regard, the Court recalls that, in proceedings concerning human rights violations, the State's defense cannot be based on the impossibility of the plaintiff providing evidence when it is the State that controls the means of clarifying facts that took place on its territory.[349] Even though the passage of time is now a reasonable justification, the Court points out that, since her first actions and briefs before the inter-American system in 1997, the presumed victim has referred to this presentation before the media, and has also asked that the State provide the recording.[350] Despite this, the State has not responded to this request until the May 2013 requirement by the acting President in the context of this case, when it indicated that it was unable to locate the said video with its original audio recording.

240. In this regard, the Court considers that this constitutes a presumption in favor of the representative's allegation that, during the said press conference, it was indicated that Ms. J. was a "terrorist" and "*Senderista*" [member of Shining Path], without the appropriate clarification – to safeguard her right to the presumption of innocence – that she had not yet been tried for the offense of which she was accused. This Court notes that the said presumption is reinforced by the references made in the newspaper articles and notes provided to the case file in this case by both the State and the representative, which reveal that the media understood that Ms. J. was a "terrorist," member of Shining Path, unreservedly and without any clarification.[351]

---

[349] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, paras. 135 and 136, and *Case of Vélez Restrepo and family members v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 156.

[350] *Cf.* Brief dated March 20, 1997 (file of the proceedings before the Commission, folios 714 and 715), and brief dated June 17, 1997 (file of the proceedings before the Commission, folio 556).

[351] In this regard, the following articles are highlighted: (1) Police reports in the newspaper *La República* of April 24, 1992, the legend under the photograph of J. states: "[*J.] (a) 'Camarada Ana', fue detenida cuando preparaba la última edición de 'El Diario"* [[J.] (alias) 'Comrade Ana' was arrested when she was preparing the latest edition of *El Diario*]. This article also indicates: "[w]ith these arrests, the authorities neutralized the last edition of *El Diario,* which should gone out on April 15. Machines, printers, photographs of the President of the Republic Alberto Fujimori, and of political and military authorities, diskettes, computers, hard drives with the files of the most important national and international events, […], among other elements, were shown to the press yesterday, together with those detained by the Minister of the Interior, Juan Briones Dávila. […]. *La República*, April 24, 1992 (file of annexes to the motions and arguments brief, annex 3, folio 3014); (2) "'*El Diario' obedecía órdenes de la cúpula senderista*" [*El Diario* obeyed orders from the Shining Path leaders], *El Comercio*, April 24, 1992, indicates the following: "23 detainees in this case, responsible for the writing, editing, printing and distribution of this Shining Path newspaper presented yesterday in a press conference by the Minister of the Interior himself, Juan Briones Dávila […]; the following were captured: […], [J.] (alias) Ana and Mery Morales Palomino (alias) Gladys. […]." *El Comercio*, April 24, 1992 (file of annexes to the motions and arguments brief, annex 4, folio 3016); (3) "*Revista Sí, Letra Muerta,*" week of April 20 to 26, 1992, indicates the following: "the Police disrupt the Shining Path propaganda apparatus. Last week they arrested all those responsible for writing, producing and printing the clandestine voice of Shining Path, *El Diario*. […]. Those captured included Jorge Duran Araujo […]. [Among the others are […], [J.'s younger sister], […], [J.] […]." *Revista Sí, Letra Muerta*, week of April 20 to 26, 1992, p. 33 (file of annexes to the motions and arguments brief, annex 6, folio 3021); (4) "*Dircote captura a 56 senderistas and desarticula su aparato de difusión*" [Dircote captures 56 members of Shining Path and dismantles their dissemination apparatus], *La República* of April 21, 1992, which states: "[t]he damaging operations recently executed by Dircote in Lima have not only permitted the capture of important MRTA military and political leaders and thwarted a chain of selective assassinations, but have also enabled the dismantling of Shining Path's so-called press and propaganda apparatus. 56 members of this group were arrested. […] not only its main members were captured, but also two printing facilities used by the extremists to prepare issues of the clandestine newspaper *El Diario* were intervened. […] The list of the 55 members of Shining Path captured by the Dircote, headed by General Ketim Vidal (Peruvian National Police) was kept strictly confidential. However, it transcended that they include […] [J]." *La República*, April 21, 1992 (file of annexes to the State's brief of June 24, 2013, annex 4, folio 4310); (5) "*Dircote acabó con el 'vocero' de senderismo*" [Dircote terminates Shining Path's 'voice'], *La República,* April 24, 1992, which indicates: "The Minister of the Interior, General Juan Briones Dávila (Peruvian Army), confirmed yesterday the

241. Furthermore, the Court takes note that, according to the findings of the Truth and Reconciliation Commission:

> The Police established a practice that consisted in presenting publicly, before the media, and in prison uniform, all those who were being investigated for the offenses of terrorism and treason, referring to them as members of the terrorist groups. This took place at the end of the preliminary investigation. There is no doubt that this practice, which had no legal basis or grounds and which constituted degrading treatment, violated the principle of the presumption of innocence and prejudiced the rights of those persons subjected to this practice, as well as their situation during the judicial proceedings against them. At the beginning of 1995, Supreme Decree No. 01–95 was promulgated, prohibiting the public presentation of those detained for the perpetration of any offense, with the exception of those accused of treason.[352]

242. In addition, during the second stage of the criminal proceedings against Ms. J., the Court notes that senior State authorities made public statements indicating that Ms. J. was a member of Shining Path, particularly from January 2007 to February 2008, and in 2012 (*supra* para. 121). The evidence in the case file includes such statements of the then State Prosecutor for terrorism offenses.[353] Furthermore, evidence of accusations made in 2012 by the same State Prosecutor in 2012,[354] as well as by the then Minister of the Interior, was provided to the case file.[355]

---

dismantling of the diffusion and propaganda apparatus of the violent armed movement Shining Path and the discovery of its main links that carry out propaganda tasks in different European countries and who, at the same time, are responsible for raising funds abroad. […] Minister Briones Dávila showed 19 of the 23 persons arrested during the raids of two clandestine printing facilities that were at the service of the group led by Abimael Guzmán to the press at the police premises on Avenida España […] 'We continue to apply a comprehensive Government strategy against the subversion. Shining Path has suffered an important blow owing to these captures made by the Dircote and the National Intelligence Service," said the Minister. […] The capture of the 23 members of Shining Path on April 13 and 14 was carried out in the presence of the head of the […] Office of the Special Prosecutor for cases of Terrorism, Julia Eguía Dávalos. The leader of this dismantled apparatus, Jorge Luis Durán Araujo […] was captured in the clandestine printing facilities on Las Esmeraldas Street […] [J.] (alias) 'Ana' [among others] was arrested in the same building on Balconcillo. They were preparing the latest edition of *El Diario.*" *La República*, April 24, 1992 (file of annexes to the State's brief of June 24, 2013, annex 5, folios 4312 and 4313), and (6) "*Sendero gastaba 40 mil dólares al mes para mantener aparato de propaganda*" [Shining Path spent $40,000 a month to maintain propaganda apparatus], *La República*, April 2, 1992, which states: "[…] Even though most of them are operating in secret, it was reported that around 35 individuals are currently imprisoned in the Miguel Castro Castro [Prison] of Canto Grande, accused of terrorism and subversion. […] It has been established that the said newspaper was distributed at both nationally and internationally and in most of its articles, mandated by the 'Permanent Committee' of that criminal organization, 'homage' was paid to violence and chaos, and the Government in power was attacked. 'It is merely a pamphlet,' stated a Dincote commander, responsible for the investigations, during a press conference on Wednesday. […] There, the police surprised […, J. among others], who was in charge of renting the premises." *La República*, April 2, 1992 (file of annexes to the State's brief of June 24, 2013, annex 6, folio 4316).

352 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.6, p. 420.

353 One article indicated that: "[t]he Office of the Counter-terrorism Prosecutor of the Ministry of the Interior (Mininter) will remain vigilant to ensure that measures are taken promptly to extradite the presumed member of Shining Path, [J.], according to information provided to *Correo* by the head of that office, Julio Galindo. […] Prosecutor Julio Galindo also said that he was sure that Germany would accept the extradition request against [J.], because she 'was a member of Shining Path, an evident terrorist, and he trusted that it would allow her to return to Peru to be tried as appropriate*" (*underlining added*).* "*Procuraduría vigilará rapidez en extradición de [Ms. J.]" [Prosecutor's Office will supervise prompt extradition of [Ms. J.]].* Press communiqué from the Office for the Control of the Judiciary (file of annexes to the Merits Report, annex 37, folio 414). Another article indicated that: "*En Germany hay voluntad para extraditar a [Ms. J.]"* [Germany has indicated its willingness to extradite [J.]]. We know that the excellent relations with that country will permit a prompt procedure. We consider her a terrorist and she must receive the corresponding punishment." *Correo*, February 5, 2008 (file of annexes to the Merits Report, annex 37, folio 415).

354 Various newspaper articles, including from the State news agency, indicate that the Counter-terrorism Prosecutor "clarified that [J.] was responsible for coordinating with national and international journalists the propaganda issued by the criminal group Shining Path; in addition, there is the testimony of someone who identifies her as a member of the terrorist group," and stated that "in our opinion there is no discussion as to whether she is a presumed terrorist; in our opinion she is a member of Shining Path, because she played a specific role in Shining Path." Articles entitled "*Procurador Galindo: Estado desenmascarará engaños de [J.] a la CIDH*" [Prosecutor Galindo: State unmasks [J.'s] deception of the IACHR], published on the webpages of the *Agencia Peruana de Noticias*, of tuteve.tv, and of Peru21 (merits report, folios 162, 163, 166 and 167).

355 In this regard, in the video that appears in this article, the Minister of the Interior stated that: "She is a member of Shining Path; [J.] is a member of Shining Path, a person sought by Peruvian justice, a person who is a fugitive from the law; Peru has issued an international arrest warrant for her; it is regrettable that this case has also been submitted to the international jurisdiction because that evidently involves a serious conflict for the Government. We are firmly decided to

243. The Court also takes note of information provided by J.'s mother,[356] her companion, and other members of Ms. J.'s family, that the presumed victim has continually been referred to as a terrorist by the Peruvian authorities, and this has been repeated by the newspapers.[357]

244. The European Court has emphasized that the presumption of innocence may be violated not only by the judges and courts in charge of the proceedings, but also by other public authorities;[358] thus, State authorities must choose their words carefully when making statements about criminal proceedings before a person or persons have been tried and convicted of the respective offense.[359] Even though, during the criminal proceedings, accusations of guilt by officials such as prosecutors and lawyers does not constitute a violation of the presumption of innocence, the categorical and unqualified statements made by these officials to the press infringe the presumption of innocence insofar as they encourage the public to believe in the person's guilt and to prejudge the evaluation of the facts by a competent judicial authority.[360] The Court endorses this criterion and notes that the presumption of innocence requires the State authorities to be discreet and prudent when making public statements about criminal proceedings.

245. It is legitimate and, at times, an obligation for the State authorities to speak out on matters of public interest. However, public officials must be particularly careful when making public statements in order not to violate human rights, owing to their high office and to the broad coverage and possible effects that their declarations may have on certain sectors of the population, as well as to avoid citizens and other interested persons receiving a manipulated version of specific facts.[361]

---

defend the Peruvian State; we will not be browbeaten." Article entitled "*Jiménez sobre nueva denuncia de CIDH*: '*No nos pasarán por encima'*" [Jiménez refers to new IACHR complaint: 'We will not be browbeaten], and accompanying video. Peru21, February 3, 2012 (merits report, folio 154).

356 Ms. J.'s mother testified that the police "tried to paint a picture of [J.] before the press and sullied our name, because they repeated over and over again that [her] daughter was a terrorist." Affidavit prepared by J.'s mother on June 13, 2006, for the case of the Miguel Castro Castro Prison (file of annexes to the motions and arguments brief, annex 1, folios 3000 and 3004).

357 According to J.'s companion, following the denial of the extradition request, J. had to face "the campaign orchestrated by the Peruvian authorities, who referred to her publicly as a 'terrorist' in the Peruvian media [...]. This stigmatization of her name also affected her family. This stigmatization has continued over a long period of time, for almost half J.'s lifetime to date. Obviously, it has been of great concern for all of us and has greatly affected us, to see how J.'s name has been treated in the Peruvian press, with the Peruvian authorities declaring her a 'terrorist' as if her guilt of something has already been proved somewhere." Affidavit prepared by the witness Klemens Felder on May 8, 2013 (merits report, folios 1237 and 1238). Also, according to Susan Pitt, "[J.] has been consistently and flagrantly defamed by the Peruvian State, which has gone to great lengths to prevent her from obtaining justice. This [...] has been happening for such a long time that I am fairly sure that she has been irreversibly harmed by the State of Peru. [...] Her sisters knew that it would be very difficult for them to function in Peru owing to the totally false profile of J. promoted by the State there, and they have lived abroad for many years." Affidavit prepared by the witness Susan Pitt on May 7, 2013 (merits report, folios 1254 and 1255).

358 Thus, the European Court of Human Rights has considered that statements by the Ministry of the Interior and senior police authorities, by the Head of Parliament, by the Prosecutor General, or other prosecution officials in charge of the investigation, and even by a well-known retired General, who was also a candidate for governor, but who was not a public official at the time of his declarations, gave rise to violations of the presumption of innocence in each case. *Cf. Allenet de Ribemont v. France*, 10 February 1995, Series A no. 308; *Butkevičius v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II (extracts); *Daktaras v. Lithuania,* no. 42095/98, § 42, ECHR 2000-X; *Fatullayev v. Azerbaijan*, no. 40984/07, § 160 and 161, 22 April 2010; *Khuzhin and Others v. Russia,* no. 13470/02, § 95, 23 October 2008, and *Kuzmin v. Russia*, no. 58939/00, § 59 to 69, 18 March 2010.

359 *Cf. Daktaras v. Lithuania,* no. 42095/98, § 41, ECHR 2000-X; *Butkevičius v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II (extracts); *Ismoilov and Others v. Russia*, no. 2947/06, §166, 24 April 2008; *Böhmer v. Germany*, no. 37568/97, §56, 3 October 2002, and *Khuzhin and Others v. Russia,* no. 13470/02, § 94, 23 October 2008.

360 ECHR, *Allenet de Ribemont v. France*, 10 February 1995, § 41, Series A no. 308. Similarly, *Ismoilov and Others v. Russia*, no. 2947/06, § 161, 24 April 2008.

361 *Cf., mutatis mutandi, Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra*, para. 131; *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of January 28, 2009. Series C No. 194, para. 139, and *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of January 28, 2009. Series C No. 195, para. 151.

246. The Court stresses that there is a clear difference between statements indicating a suspicion that someone is responsible for a specific offense and those in which it is clearly established, in the absence of a guilty verdict, that someone is responsible for the offense in question.[362] In the instant case, the statements of several high-level State officials are categorical about the guilt of Ms. J. for offenses of which she has never been convicted. The Court takes note of the State's argument that the newspaper articles did not necessarily repeat the literal meaning of the statements. Nevertheless, it notes that, beyond this, the State has not denied the different statements made in communiqués, reports and articles, but, to the contrary, tried to justify those statements issued in 2007 and 2008 based on the moment at which they were made, shortly after J. had received an award relating to international justice (*supra* para. 232).

247. In this regard, the Court reiterates that the State authorities must take into account that public officials are guarantors of the fundamental human rights and, therefore, their statements cannot ignore these.[363] This obligation of special care is particularly accentuated in situation of great social conflict, disturbance of public order, and social or political polarization – such as the counter-terrorism struggle in Peru – precisely due to the series of risk that this may entail for certain persons or groups at a given moment.[364] The presumption of innocence does not prevent the authorities from keeping society duly informed about criminal investigations, but requires that, when they do so, they should observe the discretion and circumspection necessary to guarantee the presumption of innocence of those possibly involved.[365]

248. The Court considers that the presentation of Ms. J. before the press by the DINCOTE, when she was identified as a member of Shining Path related to the publication of *El Diario*, as well as the categorical and unqualified statements of diverse State officials at different times, has encouraged a belief in Peruvian society of her guilt, when she has not been convicted of the offenses of which she has been accused, and has prejudged the evaluation of the facts by a competent judicial authority, so that the State has violated the presumption of innocence of Ms. J., recognized in Article 8(2) of the Convention, in relation to Article 1(1) of this instrument.

b. Second stage of the criminal proceedings against Ms. J. based on evidence that was allegedly illegal

249. According to the Commission and the representative, the criminal proceedings opened against Ms. J. were based on illegal evidence, which also violated the presumption of innocence. In this regard, the Court takes note that in its judgment of January 3, 2003, the Constitutional Court established that "it is necessary to realize the difference between sources of evidence and means of evidence. While the former are extra-procedural realities the existence of which is independent of the proceedings, the latter are procedural acts and, consequently, constitute an internal reality of the proceedings."[366] Thus, the Constitutional Court indicated that:

---

362 See, *inter alia*, *G.C.P. v. Romania*, no. 20899/03, § 55, 20 December 2011, and *Ismoilov and Others v. Russia*, no. 2947/06, §166, 24 April 2008.

363 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra*, para. 131; *Case of Ríos et al. v. Venezuela, supra*, para. 139, and *Case of Perozo et al. v. Venezuela, supra*, para. 151.

364 *Cf. Case of Ríos et al. v. Venezuela, supra*, para. 139, and *Case of Perozo et al. v. Venezuela, supra*, para. 151.

365 In this regard, the European Court of Human Rights has indicated that: "The freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected". ECHR, *Allenet de Ribemont v. France*, 10 February 1995, § 38, Series A no. 308.

366 Judgment of the Constitutional Court of January 3, 2003, File No. 010-2002-AI/TCLIMA, conclusion 162 (merits report, folios 1577 and 1578).

> The sources of evidence are included in the proceedings in order to lead to the means of evidence, but the nullity of the proceedings, given the recently explained differentiation, can only result in the invalidity of the means of evidence; in other words, the proposal, admission, processing and assessment of the evidence in the proceedings, but does not invalidate the sources of evidence. The validity or invalidity of a source of evidence depends exclusively on whether it has been obtained with strict respect for the fundamental rights.[367]

250. Expert witness José María Ascencio Mellao and witness Pablo Talavera, both proposed by the State testified similarly.[368] In addition, regarding Ms. J.'s possibility of questioning the validity or illegality of the evidence that supports the criminal charges against her currently, Mr. Talavera Elguera also indicated that, although it is not expressly required by a norm,[369] the Peruvian courts "respect the principle of exclusion of illegally obtained evidence."[370]

251. The Court considers that, during the proceedings opened against the presumed victim, she will be able to contest the sources of evidence that support the charges, which has not occurred to date because the trial in this case has not started. Therefore, as it has in other cases,[371] the Court finds that it is not incumbent on it to rule on the presumed violation of Article 8 of the Convention in relation to the presentation and assessment of the evidence during the second stage of the criminal proceedings against the presumed victim.

252. Nevertheless, the Court considers that the domestic judicial authorities must take into account the findings of this Court concerning the violations of due process and personal integrity of Ms. J., when examining the charges that are currently in effect against Ms. J. The Court notes that this is in keeping with the ruling of the Constitutional Court in its judgment, in the sense that the invalidity of a source of evidence may arise because it was obtained without strict respect for the fundamental rights (*supra* para. 249).

B.2.2) Guarantee of non bis in idem

i. Arguments of the Commission and of the parties

253. The Commission indicated that it had insufficient evidence to conclude that the State [...] had violated the guarantee of *non bis in idem* to the detriment of J. In this regard, it stated that

---

367 Judgment of the Constitutional Court of January 3, 2003, File No. 010-2002-AI/TCLIMA, conclusion 162 (merits report, folio 1578).

368 According to expert witness Ascencio Mellao, the nullity of the first stage of the proceedings, owing to the participation of "faceless" judges, is a "procedural nullity"; thus "it does not signify the exclusion of all the evidence, but exclusively that affected by the defect. And, in this regard, since the defect is solely attributable to the courts involved, it is not possible to attribute the same defect to the preliminary investigation, which remains valid, irrespective of the possible illegalities in the evidence, if they exist, and which the State must decide in its domestic jurisdiction and at the appropriate procedural moment." In addition, this expert witness indicated that "it falls within the exclusive competence of the Peruvian State, of its courts, which must decide, once the proceedings continue, on the validity or nullity, the sufficiency or insufficient, of the evidence." Affidavit prepared by expert witness José María Asencio Mellado on May 6, 2013 (merits report, folios 1093 and 1104). Meanwhile, Mr. Talavera Elguera, who was a judge of the National Criminal Chamber for Terrorism from 2002 to 2004, indicated that the evidence on which the charges against Ms. J. were based "was, strictly speaking, sources of evidence, because they can only be considered means of evidence when they have been assessed in the renewed oral hearing." Affidavit prepared by the witness Pablo Rogelio Talavera Elguera on May 6, 2013 (merits report, folio 1083).

369 Article 159 of the 2004 Code of Criminal Procedure establishes that: "[t]he Judge may not use, directly or indirectly, the sources or means of evidence obtained in violation of the essential content of the fundamental human rights." However, this Code is not in force in Lima and other regions of Peru. *Cf.* Affidavit prepared by the witness Pablo Rogelio Talavera Elguera on May 6, 2013 (merits report, folio 1085).

370 In this regard, he explained that "the courts or chambers of the National Counter-terrorism Chamber and the National Criminal Chamber have assessed the evidence based on the principle of the free assessment of evidence, applying the rules of logic and the rules of experience in the assessment of each element of evidence, as well as respecting the principle of the legality of how the sources of evidence were obtained; in other words, if, in a specific case, it was verified that a piece of evidence had been obtained in violation of the essential content of a fundamental right, it was excluded from the body of evidence." Affidavit prepared by witness Pablo Rogelio Talavera Elguera on May 6, 2013 (merits report, folios 1083 and 1086).

371 *Cf. Case of García Asto and Ramírez Rojas v. Peru*, *supra*, para. 156.

"one of the requirements for the application of this norm is the existence of a 'final' acquittal judgment and, in the instant case, even though the legal grounds [or] appeal that gave rise to the judgment of the Supreme Court of Justice is unclear, this is not the same as a unequivocal conclusion that the acquittal of June 18, 1993, would have become final." It also indicated that it "has no information" that "the alleged time-barred nature of the decision […] can result in a judgment becoming final."

254. The representative argued that the nullity decision of the "faceless" Supreme Court "does not affect the *res judicata* nature of the decision that acquitted J.," because: (i) "it annulled illegally the judgment of June 18, 1993, that acquitted J., since it was not based on any of the presumptions specifically described in Peruvian law for nullity" and because "it was time-barred"; (ii) "in addition, it was *ultra vires* because it was issued by an organ that, under international law, was illegal," and (iii) "[t]he expression "non-appealable judgment' in paragraph 4 of Article 8 of the American Convention […] should not be interpreted restrictively; in other words, limited to the meaning attributed to it in the domestic law of the States." According to the representative, "[i]f legal significance [is granted] to this nullity, it would re-open a case that is defunct." The representative also argued that "it should be considered that, in the United Kingdom, [the said decision of nullity] was referred to as an "act of persecution" in the terms of the United Nations Convention relating to the Status of Refugees," and also that a Higher Regional Court of Cologne, Germany, denied the extradition of J. considering "that a new trial would violate the principle of *non bis in idem".*

255. The State indicated that "it has been proved that the acquittal judgment of June 18, 1993, delivered by the Higher Court of Justice of Lima was never final, because the judgment of December 27, 1993, handed down by the Supreme Court of Justice declared that it was null and void and ordered that a new oral hearing be held." It added that "Legislative Decree No. 926 declared null and void those trials that had been held before secret judges and prosecutors as did the National Counter-terrorism Chamber on May 20, 2003, [and t]he Constitutional Court has indicated that there was no arbitrariness in those cases in which the initiation and implementation of a criminal trial was carried out as a result of the initial proceedings having been declared null and void." It concluded that this case "does not refer to two different trials, but to a single proceeding, which has been annulled up until the stage at which new charges were filed by the prosecutor, in keeping with the rules of the judicial guarantees established in the American Convention."

ii. Considerations of the Court

256. This Court has established that clarification of whether the State has violated its international obligations owing to the actions of its judicial organs may mean that the Court must examine the respective domestic proceedings,[372] in order to establish whether they are compatible with the American Convention.[373]

257. In addition, the Court considers it pertinent to recall that, in cases such as this, in which the actions taken in criminal proceeding are questioned, the organs of the inter-American system of human rights does not function as a court of appeal or of review of judgments handed own in domestic proceedings,[374] nor does it act as a criminal court in which the criminal responsibility of individuals can be analyzed. Its function is to determine the compatibility of the actions taken in the said proceedings with the American Convention[375] and, in particular, to examine the acts and

---

372 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Palma Mendoza et al. v. Ecuador. Preliminary objection and Merits.* Judgment of September 3, 2012. Series C No. 247, para. 18.

373 *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 146, and *Case of Palma Mendoza et al. v. Ecuador, supra*, para. 18.

374 *Cf. Case of Fermín Ramírez v. Guatemala, supra*, para. 62, and *Case of Mémoli v. Argentina, supra*, para. 190.

375 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra*, para. 83 and 90, and *Case of*

omissions of the domestic judicial organs in light of the guarantees protected in Article 8 of this treaty.[376] The Court recalls that it is a basic principle of the international rule of law, reflected in international human rights law, that every State is internationally responsible for each and every act or omission of any of its powers or organs that violates the internationally recognized rights.[377]

258. When referring to the judicial guarantees protected by Article 8 of the Convention, also known as procedural guarantees, the Court has established that, in order for these guarantees to truly exist, all the requirements that serve to protect, ensure and assert the ownership or exercise of a right must be observed;[378] in other words, the conditions that must be met to ensure the adequate defense of those whose rights or obligations are being considered by the courts.[379] This provision of the Convention establishes a system of guarantees that condition the exercise of the *ius puniendi* of the State and that seek to ensure that the accused is not subjected to arbitrary decisions, because "the due guarantees" must be observed that ensure the right to due process in the proceedings in question.[380] Furthermore, the Court has indicated that any persons subject to a trial of any nature before an organ of the State must have the guarantee that the said organ acts in accordance with the procedure established by law to hear and decide the case submitted to it.[381]

259. Regarding the *non bis in idem* principle recognized in Article 8(4) of the Convention, the Court has established that this principle seeks to protect the rights of individuals who have been prosecuted for certain acts, to ensure that they will not be tried again for the same acts. Contrary to the formula used by other international instruments for the protection of human rights (for example, the United Nations International Covenant on Civil and Political Rights, Article 14(7) of which refers to the same "*offense*"), the American Convention uses the expression "*the same cause,"* which is a broader term that benefits the person accused or prosecuted.[382]

260. The Court has maintained repeatedly that the elements of the situation regulated by Article 8(4) of the Convention include a first trial that culminates in a final judgment acquitting the accused.[383] The Court has also indicated that criminal proceedings are a single act implemented in different stages,[384] including the ordinary appeals that are filed against the judgment.[385]

261. In the instant case, the Court notes that Ms. J. was acquitted by the "faceless" Higher Court of Lima of the offenses of "terrorism" and membership in terrorist organizations" on June 18, 1993.

Mémoli v. Argentina, supra, para. 190.

376 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 220, and *Case of Mémoli v. Argentina, supra*, para. 190.

377 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 164, and *Case of Castillo González et al. v. Venezuela. Merits.* Judgment of November 27, 2012. Series C No. 256, para. 110.

378 *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, supra*, para. 147, and *Case of Mémoli v. Argentina, supra*, para. 191.

379 *Cf. Judicial guarantees en States of emergency (arts. 27(2), 25 and 8 American Convention on Human Rights), supra*, para. 28, and *Case of Mémoli v. Argentina, supra*, para. 191.

380 *Cf. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b American Convention on Human Rights).* Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 28, and *Case of Mémoli v. Argentina, supra*, para. 191.

381 *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 77, and *Case of Mémoli v. Argentina, supra*, para. 191.

382 *Cf. Case of Loayza Tamayo v. Peru. Merits, supra,* para. 66, and *Case of Mohamed v. Argentina, supra*, para. 121.

383 *Cf. Case of Cantoral Benavides v. Peru. Merits, supra*, para. 137, and *Case of Mohamed v. Argentina, supra,* para. 122.

384 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra*, para. 161, and *Case of Mohamed v. Argentina, supra*, para. 122.

385 *Cf. Case of Loayza Tamayo v. Peru. Merits, supra,* para. 66, and *Case of Mohamed v. Argentina, supra*, para. 122.

This acquittal was annulled in December 1993 by the "faceless" Supreme Court of Justice, which ordered that a new trial be held. Owing to the absence of Ms. J., these proceedings remained at the same stage until May 2003, when, in application of Legislative Decree No. 926, the National Counter-terrorism Chamber declared "all the proceedings up until that time null and void" with regard to Ms. J. As a result of this annulment, in September 2005, the Public Prosecution Service filed new charges against her for the offenses of "terrorism" and "apology of terrorism," even when it defined them by law as conducts "established and penalized under articles 316 and 322 of the 1991 Criminal Code." Lastly, in January 2006, the National Criminal Chamber declared that there were grounds to try Ms. J. for the offenses of "apology of terrorism" and "terrorism," following which the proceedings have been held in reserve on numerous occasions, owing to her absence. Currently, this criminal trial remains at the stage of the opening of the oral hearing and Ms. J. has been declared in contempt of court.

262. In order to constitute a violation of Article 8(4) of the American Convention: (i) the accused must have been acquitted; (ii) the acquittal must be the result of a final judgment, and (iii) the new trial must be based on the same facts that were the grounds for the first trial.[386]

263. In the instant case, although Ms. J. was acquitted at one time, the Court must determine whether this acquittal was non-appealable, so that it could give rise to a violation of the principle of *non bis in idem*. According to the representative, various defects in the 1993 judgment of the "faceless" Supreme Court of Justice result in this decision lacking legal effects, so that the acquittal delivered in favor of Ms. J. had become final and the proceedings currently open against her would violate the *non bis in idem* principle.

264. This Court takes note that the criminal proceedings against Ms. J. were specifically declared null and void during the first stage of the proceedings (up until 2003) and were then nullified as a result of a legal provision, common to all the trials processed by secret judges and agents of justice. In this regard, the Court notes that the dispute on the violation of the principle of *non bis in idem* turns on the effects that should be accorded to the specific nullity declared against the judgment acquitting her in 1993.

265. The Court underscores that two expert witnesses who testified on the principle of *non bis in idem* before this Court indicated that the said acquittal was never final, because it had been annulled by a decision of the Supreme Court in December 1993. In particular, expert witness Eduardo Alcócer Povis stated:

> The […] principle [of *non bis in idem*] was not violated because the acquittal judgment of June 18, 1993, was declared null and void by the ruling issued by the Supreme Court on December 27 that year; therefore, it never took effect under our legal system. Furthermore, Legislative Decree No. 926, declared null and void all the trials that had been held before 'faceless' judges. To this extent, the new trial is legal; the first decision never acquired the status of *res judicata*.[387]

266. Expert witness José María Ascencio Mellao also indicated that the acquittal was not final owing to the Supreme Court's judgment of 1993, and the annulment decreed in 2003 as a result of Decree-Law 926, as follows:

> The acquittal judgment of June 18, 1993, was never final because it was annulled by the Supreme Court. The tangible negative effects of *res judicata* are only admissible based on final judgments and when the required similarities exist; never from a judgment that was not final. For the violation denounced to be admissible, it would be necessary to admit that the judgment delivered by the Supreme Court in the appeal for annulment was null and void, but not the previous one, and that the said nullity resulted in the final nature of the previous one. But […] there are no arguments that would justify this conclusion. First, because the judgment that was

---

386 *Cf.* IACHR, Case No. 11,006. Report No. 1/95, Case of Alan García v. Peru. Annual Report, 1994, OEA/Ser.L/V/II.88 Doc. 9 rev. (1995), February 7, 1995.

387 Affidavit prepared by the expert witness Eduardo Alcócer Povis on May 8, 2013 (merits report, folio 1179)

> annulled was valid based on the grounds set out in the appeal. Its nullity was merely the result of the composition of the court and this was decided on May 20, 2003, by the National Counter-terrorism Chamber. And, at that same moment, the nullity of the first instance judgment was decreed for the same reasons because the error was identical. Thus, in this regard, the nullity of the court's judgment did not result in the final nature of the judgment of first instance, because the latter was also annulled and what has been annulled cannot become final. The nullity was decided in the same decision and caused identical effects for both rulings.[388]

267. Therefore, based on the evidence provided, the acquittal decided in favor of Ms. J. did not become final under domestic law. The term "non-appealable judgment" contained in the American Convention does not always coincide with its definition in domestic law. In particular, it has been pointed out that the principle of *non bis in idem* is not absolute and admits exceptions so as not to prevent the investigation of gross human rights violations,[389] and it is not applicable when the acquittal "responded to the purpose of removing the accused from his criminal responsibility" or "there was no real intention of subjecting the person responsible to the action of justice,"[390] or when the "non-appealable judgment" was delivered in contravention of the guarantees of competence, independence and impartiality[391] established in Article 8(1) of the Convention. This Court notes that, although both expert opinions provided to the case file indicated that the acquittal handed down in favor of Ms. J. was not final under domestic law, neither of the expert opinions took into account two fundamental aspects of the representative's arguments regarding the violation of *non bis in idem*, namely, that: (i) the nullity decreed in 2003 was limited to those prosecuted and convicted, and not to those acquitted, even when the acquittal had been handed down by a "faceless" court, and (ii) in addition to having been decided by "faceless" judges, the 1993 judgment of nullity suffered from additional defects, such as the absence of reasoning. This Court must determine whether these elements are sufficient to consider that the acquittal handed down in favor of Ms. J. should be considered non-appealable for the purposes of Article 8(4) of the Convention.

268. In this regard, the Court recalls that the annulment established in Legislative Decree No. 926 was limited "to those who have been convicted and for the acts for which they were convicted, as well as to those who are being prosecuted and are absent and in contempt of court, and for the acts that are the substance of the indictment."[392] In this regard, the Court takes note that Federico Javier Llaque Moya, Counter-terrorism Prosecutor, explained during the hearing in this case that the acquittals handed down by the "faceless "judges were not annulled "because even in cases in which the standards of due process were not met, following an acquittal, the case with a final judgment could not be dismissed."[393] Consequently, if the 1993 acquittal had been non-appealable, the general annulment decreed in 2003 for all the trials processed by secret judges and agents of justice would not have been admissible.

269. Regarding the defects in the judgment of the "faceless" Supreme Court of Justice, the

---

388 Affidavit prepared by the expert witness José María Asencio Mellado on May 6, 2013 (merits report, folio 1106).

389 See, *inter alia*, *Case of Barrios Altos v. Peru. Merits.* Judgment of March 14, 2001. Series C No. 75, para. 41; *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 319; *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 327, and *Case of García and family members v. Guatemala, supra*, para. 196.

390 See, *inter alia*, *Case of Almonacid Arellano et al. v. Chile*, *supra*, para. 154; *Case of Gutiérrez Soler v. Colombia. Merits, reparations and costs.* Judgment of September 12, 2005. Series C No. 132, para. 98; *Case of Carpio Nicolle et al. v. Guatemala.* Judgment of November 22, 2004. Series C No. 117, paras. 131 and 132, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 195.

391 See, *inter alia*, *Case of La Cantuta v. Peru, supra*, para. 153; *Case of Durand and Ugarte v. Peru. Merits*. Judgment of August 16, 2000. Series C No. 68, para. 115 to 131, 143 and seventh operative paragraph, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, paras. 195 and 197.

392 Legislative Decree No. 926 of February 19, 2003, article 2 (file of annexes to the answering brief, annex 19, folio 3320).

393 Testimony of Federico Javier Llaque Moya during the public hearing of this case.

representative indicated that this ruling should not have legal effects because the identity of the judges was secret, and owing to the failure to provide the reasoning for the judgment, the alleged time-barred nature of its delivery,[394] and its illegality (because it had no basis in any of the specific causes established by law).

270. In this regard, the Court notes that the secret identity of the judges constituted a common defect of both courts (*supra* paras. 102 and 105). In addition, the Court recalls that it has concluded that the said ruling of the "faceless" Supreme Court lacked reasoning, in violation of Article 8(1) of the Convention (*supra* para. 229). Furthermore, since the reasoning for the said judgment is lacking, it is not possible to determine whether Ms. J. had the opportunity to be heard during the said nullity proceeding, through her defense counsel, or to exercise an adequate defense. In addition, the absence of reasoning does not permit the Court to determine the cause of nullity that was applied, pursuant to the presumptions established in the Peruvian Code of Criminal Procedures.[395] The Court has established that the reasoning shows the parties that they have been heard and, in those cases in which the decisions can be appealed, provides them with the possibility of contesting the decision and obtaining a fresh examination of the matter before the higher courts.[396] Nevertheless, the Court has no evidence that would permit it to conclude that the failure to provide the reasoning for the 1993 judgment of nullity would have the effect of rendering the acquittal delivered previously in favor of Ms. J. final and non-appealable.

271. Regarding the effects of the alleged statute of limitations on the ruling on the appeal for a declaration of nullity on the final nature of the acquittal, the Court notes that the representative used as grounds the interpretation of the Inter-American Commission in the case of *Alan García v. Peru*. In this regard, the Court notes that the decision mentioned by the representative is not applicable to this case. On that occasion, the Commission concluded that the appeal that had altered a final decision had been time-barred and this was what "re-opened a closed case, thereby violating the principle of *res judicata*."[397] In the instant case, there is no evidence in the case file that the filing of the appeal for a declaration of nullity was subject to the statute of limitations.[398] In

---

[394] The representative argued that "[a]ccording to article 131 of the consolidated amended text of the Organic Law of the Judiciary, Supreme Decree No 017-93-JUS (which was in force at the time), the processing of proceedings before the Supreme Court must 'be decided in a non-extendible period of three calendar months at the most, notwithstanding explicit procedural norms that indicate a lesser time."

[395] In this regard, article 298 establishes: "[t]he Supreme Court shall declare nullity: 1. When serious irregularities or omissions have been incurred in the procedures or guarantees established by the Law of Criminal Procedure during the preliminary investigation or the trial; 2. If the investigating judge or the court that tries the case is not competent; 3. If anyone has been convicted of an offense that was not the subject of the investigation or the oral hearing or if an offense that appears in the complaint, the investigation or the charges has not been investigated or tried. Nullity shall not be declared in the case of procedural defects that can be rectified, or that do not affect the substance of the decision. Judges and courts are empowered to complete judicial decisions or rulings or to integrate accessory, incidental or subsidiary elements. The nullity of the proceedings shall have no further effects that revert the proceedings to the procedural stage at which the error was committed or produced, and the probative elements shall subsist that were not specifically affected. When the nullity of the oral hearing has been declared, the hearing shall be re-opened so that, in the said act, the defects or omissions that caused this can be rectified, or so that, if appropriate, the necessary evidence and procedures can be complemented and expanded." 1941 Code of Criminal Procedures, article 298 (file of annexes to the State's brief of August 14, 2013, folios 5156 and 5157).

[396] *Cf. Case of Apitz Barbera et al. (First Contentious Administrative Court) v. Venezuela, supra*, para. 78, and *Case of Chocrón Chocrón v. Venezuela, supra,* para. 118

[397] IACHR, Case No. 11,006. Report No. 1/95, Case of Alan García v. Peru. Annual Report, 1994, OEA/Ser.L/V/II.88 Doc. 9 rev. (1995), February 7, 1995.

[398] The judgment of June 18, 1993, that acquitted Ms. J. "ordered that, should [the said] judgment not be expressly appealed, the appeal for a declaration of nullity should be granted *ex officio* with regard to the acquittal. Judgment of the Lima Superior Court of Justice of June 18, 1993 (file of annexes to the answering brief, annex 48, folio 3785). Furthermore, although the date on which the appeals were filed does not appear in the case file, according to information in the case file, both the individuals convicted and the prosecutor of the Public Prosecution Service filed appeals for a declaration of nullity against the said decision, without any information having been provided that shows that the appeals were subject to the statute of limitations (*supra* para. 105).

addition, the representative argued that, in application of the same case, the expression "non-appealable judgment" should not be interpreted restrictively (*supra* para. 254). In this regard, the Court notes that, in the said case, the Commission established that "the expression 'non-appealable judgment' […] should not be interpreted restrictively, that is, limited to the meaning given to it by the domestic law of the States," but notes that the Commission also indicated that "'non-appealable judgment' [should be interpreted] as expressing the exercise of jurisdiction that acquires the immutability and incontestability of *res judicata*." Therefore, this Court finds no reason in the instant case that permits it to conclude that the acquittal of Ms. J. constitutes a non-appealable judgment for the effects of Article 8(4) of the Convention.

272. In addition, the representative cited, as grounds for her claim, the decisions and opinions of the United Nations High Commissioner for Refugees (UNHCR), the British Immigration Service, and the High Court of Cologne[399] regarding Ms. J.'s legal situation (*supra* para. 254). In this regard, the Court notes that the conclusions and decisions of these national and international bodies were arrived at in the context of proceedings of a different nature, the object and purpose of which was not the determination of a violation of Article 8(4) of the American Convention. Even though they constitute valid opinions with regard to the legal classification of Ms. J.'s situation, this Court considers that they are not sufficient to allow it to conclude, taking into account the other probative elements provided to the case file, that the acquittal handed down in favor of Ms. J. in June 1993 was non-appealable.

273. Consequently, the Court concludes that the State did not violate Article 8(4) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Ms. J.

B.3 Alleged violations of the principle of legality and of non-retroactivity[400]

B.3.1) Arguments of the Commission and of the parties

274. The Commission emphasized that "it is not possible to identify clearly" the illegal conducts attributed to Ms. J., nor were "the legal basis for the charges and the trial clear or consistent, or the specific acts based on which each of the conducts is attributed to her." The Commission argued that "the offenses of terrorism, membership in a terrorist organization, and apology of terrorism have different legal contents and different punishments," so that "the right of defense and the principle of legality, considered together, impose the obligation of both the Public Prosecution Service and the judicial authorities to establish clearly and precisely the acts included in each of the offenses," in order to allow "the accused […] to understand clearly the acts that are illegal under the each offense cited, [and] the punishments that correspond to the said illegal act." The Commission also argued that the substantive provisions of Decree-Law 25,475, which was enacted after the facts, were applied retroactively in the indictment and trial of Ms. J.

---

399 The High Court of Cologne denied the extradition of Ms. J. in 2008, considering that the nullity decision "does not satisfy the minimum State or legal standard or due process." In particular, this court considered that even though, from a formal point of view, the acquittal was not final, the particularities of the case should be taken into account, including that the purpose of the reforms to the counter-terrorism laws was to favor those who had been tried without due guarantees and that "the reasoning [of the nullity decision] is very superficial and does not consider the specific case." Also, "[n]o evidence is found that the accused had any possibility of having an influence on the proceedings that resulted in this judgment." The said court considered that "the continuation of the proceedings against [Ms. J.] would mean that a person who was acquitted in a proceeding that – according to Peruvian constitutional law – was illegal, had to accept an annulment of this acquittal judgment decided in a proceeding that was even less legal." Judgment of the Cologne Higher Regional Court of August 22, 2008 (file of annexes to the Merits Report, annex 36, folio 403)

400 Article 9 of the American Convention establishes that: "[n]o 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."

275. According to the representative, the presumed victim was tried: (i) "under substantive criminal legislation that was enacted following her detention"; (ii) without defining which criminal conduct [or specific acts] she was accused of"; (iii) "without at any time individualizing her specific responsibility in the different acts relating to the proceedings opened against around 23 persons," and (iv) that when "prosecuting her, Decree-Law 25,475 was applied, which was promulgated after her detention." Likewise, the representative established that "the September 29, 2005, indictment of J. and the criminal proceedings currently open against J. violate the principle of legality because they are based on an alleged offense of 'apology of terrorism' that is not in accordance with the definition of the said offense in the law," and, furthermore, the said offense had become subject to the statute of limitations.

276. Meanwhile, the State argued that "the illegal conducts attributed to Ms. J. can be identified clearly at the main procedural stages." According to the State, "the reference to the different offenses is due in part to the legislative reforms made in order to adapt the counter-terrorism laws to international standards"; hence, "[a]t each stage the offenses were identified under the laws in force at the time." The State also indicated that "the supposed indistinct use of different offenses was due only and exclusively to an issue of their nomenclature, but not to an alleged lack of clarity about the acts and their correspondence to the offenses." Peru argued that "Ms. J. was not prosecuted for acts or omissions that, when they were committed, were not offenses under the applicable law." According to the State "[t]he application of Decree-Law No. 25,475 […] has been amended by the Judiciary itself […, so that] there has been no violation of the principle of legality in the criminal proceedings opened against Ms. J." In addition, the State clarified that, based on the principle of *tempus regit actum,* the procedural norms contained in Legislative Decrees 922 to 926 are applicable to the new criminal proceedings against Ms. J. "and therefore, […] Article 9 of the American Convention was not violated either, since these norms are merely adjectival law."

B.3.2) Considerations of the Court

277. Based on the arguments of the Commission and the representative, the Court notes that, in the instant case, it is alleged that there has been a violation of the "right of defense and the principle of legality, considered in conjunction" owing to: (i) the alleged retroactive application of Decree-Law 25,475, and (ii) the alleged indeterminacy of the conducts of which the presumed victim is accused, as well as their legal basis. In addition, the representative has argued a violation of the principle of legality owing to (iii) the alleged basing of the new criminal proceedings on illegal evidence and the alleged prescription of the offense of apology of terrorism of which Ms. J. is accused.

i. <u>The alleged retroactive application of Decree-Law 25,475</u>

278. The principle of legality constitutes one of the key elements of criminal prosecution in a democratic society by establishing 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." This principle regulates the actions of all the organs of the State in their respective jurisdictions, particularly when punitive powers must be exercised.[401] In a democratic State, under the rule of law, every care must be taken to ensure that criminal punishments are adopted with strict respect for the basic rights of the individual and following a careful verification of the effective existence of the wrongful conduct.[402]

---

401 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 107, and *Case of Mohamed v. Argentina, supra*, para. 130.

402 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 106, and *Case of Mohamed v. Argentina, supra*, para. 130.

279. The Court has also indicated that the definition of an act as illegal and the establishment of its legal effects must pre-exist the conduct of the person who is considered an offender. To the contrary, the individual would be unable to adapt his or her conduct to the clear legal order in force that expresses the reprobation of society and its consequences.[403] Similarly, pursuant to the principle of the non-retroactivity of the unfavorable criminal law, the State must not exercise its punitive powers retroactively applying criminal laws that increase the punishments, establish aggravating circumstances, or create aggravated forms of the offense.[404]

280. Regarding the facts of this case, the Court notes that the 1991 Peruvian Criminal Code defines the offense of apology of terrorism in its article 316, the "crime of terrorism" in its article 319, the offense of "aggravated terrorism" in its article 320 and the offense of "membership in terrorist organizations" in its article 322 (*supra* para. 70). Following the establishment of the Government of Emergency and National Reconstruction, on May 5, 1992, Decree-Law No. 25,475 was issued amending the 1991 Criminal Code and establishing new wording for the "crime of terrorism," "membership in terrorist organizations," and apology of terrorism.

281. The Commission and the representative argued that the substantive provisions of Decree-Law 25,475 had been applied retroactively to Ms. J., owing to: (i) the report of September 1992 in which the representative of the Public Prosecution Service requested that the preliminary investigation be expanded to include the offense of "membership in a terrorist organization" and, also, requested the application of Decree-Law 25,475, and (ii) the indictment of January 8, 1993, in which the secret prosecutor accused her of offenses established in the Criminal Code, but indicated that Decree-Law 25,475 "should be taken in account when imposing the punishment" (*supra* paras. 100 and 101).

282. In this regard, the Court notes that the references in both documents to a possible application of the substantive norms of Decree-Law 25,475 constitute requests by the Public Prosecution Service that were not admitted in either case. Therefore, the Court considers that, in the first stage of the criminal proceedings, substantive norms of Decree-Law 25,475 were not applied retroactively to Ms. J.

283. Furthermore, at the current stage of the proceedings, Ms. J. is also being accused of offenses defined in the 1991 Criminal Code and not for the equivalent offenses in Decree-Law 25,475. In this regard, it should be underlined that, in July 2003, the National Counter-terrorism Chamber clarified that "at the date of the presumed perpetration of the offense with which [Ms. J.] is charged, articles [319] and [320] of the Criminal Code were in force […], an offense that was not adapted to [Decree-Law 25,475], because the original norm was more beneficial to the accused."[405]

284. Hence, the Court considers that there is no evidence in either the first stage or the second stage of the criminal proceedings against Ms. J. of a retroactive application of the substantive criminal laws that prejudiced her. Consequently, it concludes that the State did not violate Article 9 of the Convention in this regard. The effects of the alleged indeterminacy of the legal definition of the acts relating to the principle of legality are examined *infra*.

ii. <u>The alleged indeterminacy of the conducts attributed to the presumed victim, and their legal basis</u>

---

403 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 104, and *Case of Mohamed v. Argentina, supra*, para. 131.

404 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 106, and *Case of García Asto and Ramírez Rojas v. Peru, supra*, para. 191.

405 Decision of the National Counter-terrorism Chamber of July 22, 2003, in case file No. 35 -93 (file of annexes to the answering brief, annex 54, folio 3823), and Pablo Talavera was of a similar opinion. *Cf.* Affidavit prepared by witness Pablo Rogelio Talavera Elguera on May 6, 2013 (merits report, folios 1081 and 1082).

285. First, the Court emphasizes that neither the Commission nor the representative have argued or presented any evidence that the definition of the offenses attributed to Ms. J. violate the principle of legality. Therefore, in the instant case, this Court does not deem it pertinent to rule on the State's arguments in this regard.[406]

286. Second, the Commission and the representative argue that, throughout the proceedings against Ms. J. (during both the first and second stages), the conduct attributed to her or of which she is accused has never been clearly defined, and that in different State documents relating to the criminal proceedings reference is made indistinctly to different offenses, each of which has a different content and punishment; and this has therefore signified a violation of Ms. J.'s right to defend herself and of the principle of legality.

287. Regarding the principle of legality, the Court has indicated that, when drafting the definition of offenses, it is necessary to use strict, unequivocal terms that clearly delimit the illegal conducts, giving full meaning to the principle of criminal legality. This involves a clear definition of the incriminated conduct that establishes its elements and permits it to be delimited from conducts that are not illegal or from illegal conducts punished by non-penal measures. Any ambiguity in the wording of the definition of offenses gives rise to doubts and opens the way to the discretion of the authorities, which is particularly undesirable when establishing the criminal responsibility of individuals and sanctioning them with punishments that severely affect fundamental rights, such as life or liberty.[407]

288. Regarding the right to defend oneself, this Court reiterates that, in order to ensure this right, the State must inform the interested party not only of the cause of the accusation; that is, the acts or omissions that are attributed to him, but also the reasons that led the State to bring the charge, the evidence for this, and the legal definition of the acts. All this information must be explicit, clear, complete and sufficiently detailed to permit the accused to exercise his right to defend himself fully and to demonstrate his version of the facts to the judge. The Court has considered that the strict observance of Article 8(2)(b) is essential for the effective exercise of the right to defend oneself (*supra* para. 199)

289. In the instant case, the Court notes that, throughout the proceedings against Ms. J., the presumed victim has been accused of being the author of the offenses of terrorism, aggravated terrorism, membership in a terrorist organization and apology of terrorism, based on different legal provisions. During the first stage of the criminal proceeding against Ms. J., the supposed illegal conduct of the presumed victim was classified as terrorism (article 319) and aggravated terrorism (article 320) and, later, also as membership in a terrorist organization (article 322) (*supra* paras. 98, 100 and 101). During the second stage of the criminal proceeding against the presumed victim, after several imprecisions had been rectified, the preliminary investigation against Ms. J. was opened for the offenses of apology of terrorism (article 316) and membership in a terrorist organization (article 322), and the charges were later brought on this basis, and it was declared that there were grounds to open the oral hearing (*supra* paras. 109, 111 and 112). Nevertheless, the Court notes that, during this second stage, some of the decisions and rulings also refer to a

---

406 In this regard, the State indicated that "neither the Peruvian Constitutional Court nor the Inter-American Court [in other cases against Peru] have considered that the definition of the crime of terrorism, […] or the definition of the offense of belonging to or membership in a terrorist organization are unconstitutional or incompatible with the American Convention." Peru also argued that "the domestic authorities, in accordance with the judgment of the Constitutional Court of January 3, 2003, have introduced the necessary changes in the norms that regulated the definition of the offenses and other elements that formed the basis for the prosecution of those accused of terrorism."

407 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs, supra*, para. 121, and *Case of Usón Ramírez v. Venezuela, supra*, para. 55.

general accusation for the crime of terrorism, without indicating any legal basis other than articles 316 and 322 of the Criminal Code.

290. In addition, regarding the conducts attributed to Ms. J., it can be observed that, during the first stage of the proceedings, the charges brought by the Public Prosecution Service did not specify, on an individual basis, the illegal conducts attributed to Ms. J., but rather they indicated, in general, with regard to several persons, that "the other accused […] were responsible for the tasks of printing, editing, distribution and circulation of the voice of Shining Path, *El Diario*; while others of the accused were in charge of writing some of the article included in the said newspaper in order to disseminate the ideology and other plans of [Shining Path]" (*supra* para. 101). The February 1993 decision that declared that there were grounds to proceed to an oral hearing does not specify the conducts for which they will be tried.[408] During this first stage of the proceedings, the most detailed document concerning the conduct that can presumably be attributed to Ms. J. is the police attestation.[409] Despite this, the Court underscores that neither the indictment nor the police attestation or any other document that appears in the case file before the Court attributes a specific terrorist act to Ms. J., on an individual basis, providing the circumstances of time and place (other than those relating to her arrest) as the typical description of the offense for which she was being tried at that time would require (*supra* para. 70).

291. Subsequently, during the second stage of the criminal proceedings against her, Ms. J. has been accused of the offenses of apology of terrorism (article 316) and membership in a terrorist organization (article 322) (*supra* para. 109). In this regard, according to the decision of December 20, 2004, which expanded the preliminary investigation against Ms. J (*supra* para. 110) and the 2005 indictment of the Public Prosecution Service (*supra* para. 111):

> She is accused of being a member of the terrorist group, Communist Party of Peru "Shining Path," having acted as the person responsible for the process of the writing, editing and coordination with foreign journalists for the production of the clandestine newspaper *El Diario,* which was intervened on April 13, 1992, in the building on Las Esmeraldas Street […], together with Jorge Luis Durand Araujo and Mery Palomino Morales, with the seizure of subversive propaganda, and handwritten and typed documents referring to the subversive group, as verified in the [respective] search record. [The other searches conducted and the evidence found are also described, all of which] proves her participation in the dissemination of the newspaper *El Diario* [following which some evidence relating to this newspaper is described,] and, in this way, it is concluded that *El Diario* was at the service of the armed struggle launched by the PCP-Shining Path, and, in this case, [J.] was fully aware of this, collaborating in the writing, coordination with national and foreign journalists, for the dissemination of the terrorist activities of Shining Path in the country, through the newspaper *El Diario.*"[410]

292. The Court notes that the description of the supposed illegal conduct of the presumed victim is almost identical to that used during the first stage of the proceedings in which she was being prosecuted for other offenses. In addition, the Court considers that this description of the facts is not sufficiently precise to ensure an adequate defense on the part of the accused. In addition, it notes that it is not possible to infer from the accusation the act of terrorism or offense that Ms. J. had endorsed, as required by the criminal norm under which she is being accused (*supra* para. 70).[411] In this regard, the Court stresses the observations of the Peruvian Constitutional Court that:

---

[408] *Cf.* Decision of the Lima Superior Court of Justice of February 1, 1993 (file of annexes to the answering brief, annex 46, folios 3764 and 3765).

[409] In the police attestation of April 25, 1992, J. was accused of being a member of "the terrorist organization Shining Path occupying […] the position of leader […] of this clandestine organization, and being responsible for the process of writing, coordination with national and foreign journalists, for the dissemination of the terrorist activities of 'SP' by means of the clandestine newspaper *El Diario*." *Cf.* Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3622).

[410] Report No. 040-05-05-3FSPN-MP-FN of the Third National Superior Criminal Prosecutor of September 29, 2005 (file of annexes to the answering brief, annex 58, folios 3924, 3967, 3968), and see also the decision of the Second Supraprovincial Criminal Court of December 30, 2004, in case file No. 641-03 (file of annexes to the answering brief, annex 57, folios 3889 and 3968).

[411] Article 316 of the Criminal Code establishes: "[a]nyone who publicly endorses a crime or a person who has been

> The action prohibited is the apology of terrorism that constitutes an incitement to violence or to any other illegal act. Consequently, this article 316 of the Criminal Code must be applied taking into consideration the criteria of whether the punishment is warranted in function of the severity of the action. Thus, not all opinions expressed in favor of a terrorist act, or its perpetrator, constitute an offense; but rather, certain limits must be respected. There are:
> a) That the endorsement refers to a terrorist act that has already been executed;
> b) That when the defense refers to the person who has committed the offense, this person must have been found guilty by a non-appealable judgment;
> c) That the medium used by the apologist is capable of achieving the publicity required by the definition of the offense; in other words, that it should be an appropriate means of divulging the support to an indeterminate number of persons, and
> d) That the praise infringes the democratic rules of plurality, tolerance and consensus-seeking.[412]

293. In addition, the Court recalls that in order to ensure the right to defend oneself, the text of a criminal accusation must set out all the evidence for this. The Court observes that the actual indictment against Ms. J. indicates the evidence on which it is based. However, the Court notes that the said indictment does not take into account probative elements produced during the first stage of the proceedings that support the presumed victim's version of the facts, such as the testimony of her father (regarding the ownership of the weapons presumably found in J.'s room) or the expertise on the handwritten documents that were found, which concluded that the writing did not correspond to Ms. J. It is contrary to the right to be tried with the due guarantees that, when determining the charges, the Public Prosecution Service only took into account the elements that incriminate the accused and not those that could support her version. In this regard, the Court emphasizes the representative's argument that it would not be impossible to replicate some of the probative elements produced during the first stage of the proceedings.

294. Based on all the above, the Court concludes that the indeterminacy and vagueness of the description of the conducts that could supposedly be attributed to Ms. J., as well as the absence of conducts that fall within the definition all the offenses for which she is being prosecuted, have affected Ms. J.'s ability to exercise her right to defend herself adequately.

295. Nevertheless, the Court considers that this does not constitute a defect of the legal norm as such, but rather of the text of the complaints, orders to open the preliminary investigation, and charges in the proceedings against the presumed victim (at both the first and the second stages), so that it does not reveal a shortcoming relating to the principle of legality, but rather a violation of the presumed victim's right to defend herself because, owing to the imprecisions and ambiguities, she has been prevented from knowing the specific acts that she is accused of, the dates of such acts, and other detailed information, in order to exercise an adequate defense. Therefore, the Court concludes that the State has violated Article 8(2) of the American Convention, in relation to Article 1(1) of this instrument.

iii. The fact that the new criminal proceedings are allegedly based on illegal evidence, and the alleged prescription of the offense of apology of terrorism of which Ms. J. is accused

296. The representative also argued that the prosecution of Ms. J. for the offense of apology of terrorism violated the principle of legality. In this regard, the Court notes that, in a decision of the Second Transitory Criminal Chamber of the Supreme Court, in the context of the extradition request, it was indicated that the offense of apology of terrorism had prescribed (*supra* para. 118).

---

convicted as its perpetrator or participant shall be sentenced to no less than one and no more than four years' imprisonment. If the crime endorsed is against public security and peace, against the State and national defense, or against the powers of the State and the constitutional order, the sentence shall be no less than four and no more than six years' imprisonment." *Cf.* 1991 Peruvian Criminal Code (file of annexes to the State's brief of August 14, 2013, folio 5442).

412 Judgment of the Constitutional Court of January 3, 2003, File No. 010-2002-AI/TCLIMA, conclusions 41, 112 and 113 (merits report, folios 1557).

However, the Court takes note of the State's argument according to which Ms. J. is being charged with the concurrent (*concurso ideal*) offenses of apology of terrorism and membership in a terrorist organization, and in these circumstances the offense of apology of terrorism has not prescribed. In this regard, witness Pablo Talavera indicated that this is a matter that the prosecutor and judges of the specific case must elucidate.[413] Based on the information provided, the Court does not have evidence allowing it to conclude that the said offense has prescribed, so that the prosecution of Ms. J. for the said offense would constitute a violation of her right to be tried with due guarantees. Nevertheless, the Court considers that the prescription of the action is a defense that Ms. J. could present at the opportune procedural moment in the current criminal proceedings, and this has not occurred to date.

297. Also, regarding the sources of evidence that are the basis for the current proceedings, this Court reiterates that it is not incumbent on it to rule on the presumed violation of Article 8 of the Convention in relation to the presentation and assessment of the evidence in the actual criminal proceedings against the presumed victim because, during these proceedings, she will be able to contest the sources of evidence that substantiate the charges, which she has not done to date (*supra* para. 113).

IX
RIGHT TO PERSONAL INTEGRITY AND PRIVACY IN RELATION TO THE OBLIGATIONS TO RESPECT AND ENSURE THE RIGHTS

298. In this chapter the Court will examine the alleged violations of the right to personal integrity and privacy of Ms. J., due to the alleged ill-treatment suffered by the presumed victim at the time of her initial arrest and during her detention in the DINCOTE, as well as the alleged failure to separate Ms. J. from inmates who had been convicted during her detention in the Miguel Castro Castro Prison.

A) General arguments of the Commission and of the parties

299. The Commission indicated that Ms. J. was "[t]ortured by rape and another series of abuses and acts contrary to her personal integrity and dignity by [DINCOTE] officials," and also "subjected to incommunicado [and] inhuman detention conditions." It stated that "in cases such as this one, the victim has no means of proving the acts of violence against her. It is for the State, through its pertinent investigative authorities to disprove the complaints of abuse and violence by its agents." The Commission stressed that "in the case of Ms. J., the difficulty in obtaining evidence can be verified due not only to the nature of the acts described, but also to the whole institutional structure that, at the time, had been erected as an obstacle to obtaining evidence of acts of this nature."

300. The representative argued that the acts of violence, including the presumed rape, constituted torture. She indicated that the State had the burden of proof in this case, and that the latter "not only […] has not refuted any of the complaints with evidence […], but is also responsible up until the present day for having disregarded these complaints, for not having investigated the said torture, merely limiting itself to denying it." Regarding the medical examination that was performed, she indicated that it lasted five minutes and that certain forms of torture may leave no physical traces

301. The State argued that "from the start, the DINCOTE intervention was legitimated by the participation of representatives of the Public Prosecution Service and, during the subsequent actions, with the presence of her defense counsel, ruling out the possibility that acts of violence, and cruel, inhuman or degrading treatment had been perpetrated during her transfer and the time

[413] *Cf.* Affidavit prepared by witness Pablo Rogelio Talavera Elguera on May 6, 2013 (merits report, folio 1086).

she remained in the DINCOTE." The State indicated that "the human rights violations denounced have not been investigated […] because, in the opinion of the Peruvian State, these human rights violations do not exist." It also indicated that "on different occasions, J. was given the opportunity to make a statement before prosecution, police and judicial authorities that she had been a victim of presumed acts contrary to her personal integrity." It pointed out that the statements made by J. were "fairly general," so that the domestic authorities had not identified "a specific situation that was contrary [to the right to personal integrity] and that could be identified as an act of torture in order to conduct an investigation." In this regard, it stressed the J. had a lawyer with broad experience in criminal matters, "so that if acts of physical violence and rape had been committed against her […], they would have denounced them immediately before the competent authorities."

B) General considerations of the Court

302. In the instant case a dispute exists between the parties as to whether Ms. J. was subjected to ill-treatment, including rape, at the time of her initial arrest and during her detention on the premises of the DINCOTE. There is also a dispute between the parties with regard to the legal definition of the presumed ill-treatment.

303. Article 5(1) of the Convention establishes, in general terms, the right to physical, mental and moral personal integrity. Meanwhile, Article 5(2) establishes, in a more specific way, the absolute prohibition to subject someone to torture or to cruel, inhuman or degrading treatment or punishment, as well as the right of all persons deprived of liberty to be treated with respect for the inherent dignity of the human person.[414] The Court understands that any violation of Article 5(2) of the American Convention necessarily entails a violation of Article 5(1) thereof.[415]

304. This Court has established that torture and cruel, inhuman or degrading treatment or punishment are strictly prohibited by international human rights law.[416] The prohibition of torture and cruel, inhuman or degrading treatment or punishment is absolute and non-derogable, even in the most difficult circumstances, such as war, threat of war, the fight against terrorism or any other crime, internal states of emergency, unrest or conflict, suspension of constitutional guarantees, internal political instability, or other public emergencies or catastrophes.[417] Both universal[418] and regional[419] treaties establish this prohibition and the non-derogable right not to be subjected to any

---

[414] The principles recognized in Article 5(2) of the Convention are also contained in Articles 7 and 10(1) of the International Covenant on Civil and Political Rights which establish that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment" and that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The first and sixth principles of the Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment stipulate the same. For its part, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Cf.* International Covenant on Civil and Political Rights, Articles 7 and 10(1); Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment , Principles 1 and 6; and European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3. See also, *Case of Yvon Neptune v. Haiti, supra,* para. 129, and *Case of Fleury et al. v. Haiti, supra*, para. 68.

[415] *Cf. Case of Yvon Neptune v. Haiti, supra,* para. 129, and *Case of Fleury et al. v. Haiti, supra*, para. 68.

[416] *Cf. Case of Cantoral Benavides v. Peru. Merits, supra*, para. 95, and *Case of Mendoza et al. v. Argentina, supra*, para. 173.

[417] *Cf. Case of Lori Berenson Mejía v. Peru. Merits*, reparations and costs*, supra*, para. 100, and *Case of Mendoza et al. v. Argentina, supra*, para. 173.

[418] *Cf.* International Covenant on Civil and Political Rights, article 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 2; Convention on the Rights of the Child, article 10.

[419] *Cf.* Inter-American Convention to Prevent and Punish Torture, articles 1 and 5; African Charter on Human and Peoples' Rights , article 5; African Charter on the Rights and Welfare of the Child, article 16; Convention of Belém do Pará, article 4, and European Convention on Human Rights, article 3.

form of torture. Furthermore, this right is recognized in numerous international instruments that reiterate the same prohibition,[420] and even in international humanitarian law.[421]

305. Before examining the ill-treatment presumably inflicted on Ms. J., and its legal definition, this Court deems it pertinent to recall its case law concerning the criteria applicable to the assessment of evidence in a case such as this one. Starting with its first contentious case, the Court has indicated that, for an international court, the criteria for the assessment of the evidence are less rigid than under the domestic legal systems, and has affirmed that it is able to assess the evidence freely.[422] The Court must make an assessment of the evidence that takes into account the gravity of attributing international responsibility to a State and that, despite this, is able to establish with confidence the truth of the facts that have been alleged.[423] In order to establish that there has been a violation of the rights embodied in the Convention it is not necessary to prove the responsibility of the State beyond all reasonable doubt, or to identify, individually, the agents to whom the violations are attributed;[424] rather, it is sufficient to demonstrate that acts and omissions have been verified that have permitted the perpetration of those violations or that the State had an obligation with which it has failed to comply.[425]

306. The Court also recalls that it is legitimate to use circumstantial evidence, indications and presumptions as grounds for a judgment, provided that consistent conclusions with regard to the facts can be inferred from them.[426] In this regard, the Court has indicated that, in principle, the burden of proof concerning the facts on which the allegations are based falls on the plaintiff; however, it has emphasized that, contrary to domestic criminal law, in proceedings on human rights violations, the State's defense cannot be based on the impossibility of the plaintiff to provide evidence when it is the State that controls the means to clarify facts that occurred on its territory.[427]

307. Taking into account these criteria for the assessment of the body of evidence, this Court will now determine: (C) what happened during the initial arrest and its legal definition, and (D) what happened during the detention of Ms. J. in the DINCOTE, and its respective legal definition. Subsequently, the Court will rule on (E) other presumed violations of personal integrity alleged by the representative and the Commission.

---

420 *Cf.* Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment, Principles 1 and 6; Code of Conduct for Law Enforcement Officials, article 5; 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict, article 4, and Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, Guideline IV.

421 *Cf., inter alia,* Article 3 common to the four 1949 Geneva Conventions; Geneva Convention relative to the Treatment of Prisoners of War (Convention III), articles 49, 52, 87, 89 and 97; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), articles 40, 51, 95, 96, 100 and 119; Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), article 75.2.a.ii), and Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), article 4.2.a). See also, *Case of Fleury et al. v. Haiti, supra*, para. 71.

422 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* paras. 127 and 128, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 156.

423 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 129, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 156.

424 *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits, supra*, para. 91; *Case of González Medina and family members v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of February 27, 2012. Series C No. 240, para. 133, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 162.

425 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* paras. 172 and 173, and *Case of Luna López v. Honduras, supra*, para. 119.

426 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 130, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 156.

427 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 135, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 156.

C) Ill-treatment during the initial arrest

C.1) Arguments of the Commission and of the parties

308. The Commission indicated that, during the search of the building on Las Esmeraldas Street, J. had "had a revolver pointed at her, and been thrown to the ground and dragged three meters by her hair"; "[s]hards of glass from the windows had fallen on her shoulder+ owing to the violence [with] which the agents entered the building"; "[h]er hands were tied and she was blindfolded and warned not to move"; "[s]he was insulted as follows: 'shut up, you filthy terrorist, who went to Ayacucho eh?'"; "[w]hile she was on the ground, the men touched her, put their hands under her clothes and put their fingers in her vagina, while another man put his foot on her legs. When she protested because of the sexual abuse that she was being subjected to, she was beaten and kicked, and meanwhile they questioned her." The Commission also indicated that, during the subsequent transfers and prior to her entry into the DINCOTE, Ms. J. "was taken from the building on Las Esmeraldas, blindfolded and with her hands tied, [and i]n these conditions she was put in a car and taken to different places, without being able to see anything, just listening. When she asked where she was being taken, the police threatened her several [times] indicating that they were going "to drive to the beach,' a phrase that was commonly known in Peru as a threat of torture or assassination." The Commission concluded that "the acts described by Ms. J. constituted rape and torture," because "the invasion, even though slight, of the genital organs, is understood as rape."

309. The representative emphasized that "as soon as she was able and on repeated occasions, Ms. J. informed the domestic authorities that during [her] arrest she had been a victim of ill-treatment, insults, beating and threats," and also that, "in the custody of the DINCOTE, she was driven in a car without knowing where, [when] the agents told her that they were going to the beach, which, at that time, meant that she would be a victim of torture or assassination." The representative indicated that "[t]he GEIN official introduced his fingers in her trouser, in J.'s vagina when she was subjected to sexual abuse during the arrest (blindfolded, placed on the ground, with another member of GEIN standing on her legs so that she could not move, while the other one introduced his fingers in her genitals), but he did not penetrate the inner part of the vagina with his fingers." She emphasized that the medical report of April 18, 1992, revealed bruises on J.'s legs and the inside of her thighs, which is consistent with her testimony. However, she clarified that the medical report, even if it had been prepared in accordance with the required legal standards, which it was not, cannot be considered conclusive as to whether or not the rape occurred. She argued that, international law does not require corroboration of the testimony of the victim in cases of sexual abuse.

310. The representative also indicated that the international criminal courts have considered that the *actus reus* of the violation is the penetration, however slight, of the genitalia by the penis or any other part of the body or an object. She indicated that it is irrelevant that the definition of rape was agreed after the facts of this case, because rape was clearly illegal in Peru in 1992. She also argued that it was necessary to take into account the patterns of violence against women that existed in the context of the armed conflict in Peru committed by State agents and addressed specifically at women, affecting them in a way that was different than men, so that such violence constituted acts of discrimination against women. She also indicated that the failure to investigate the events described by the presumed victim contributed to the chain of tolerance of such acts. Lastly, she indicated that the State had not investigated the facts with due diligence and had made the situation worse by denying them, by the re-traumatization caused by her arrest and detention in Germany at the request of Peru, as well as by public attacks on her dignity and honor by high-ranking officials.

311. The State indicated that "the force used by the members of the National Police who entered the building where Ms. J. was arrested was necessary and proportionate to the objective sought;

that is, the arrest of presumed members of the terrorist organization, Shining Path, responsible for preparing *El Diario*." The State also indicated that "it has been proved that, from the very start, a representative of the Public Prosecution Service was present to certify the legality and non-arbitrary nature of the deprivation of liberty of [Ms. J.], as well as an adequate respect for [her] human rights." In addition, the State asserted that the instant case did not form part of "a general pattern of cases of sexual abuse," because "it took place in the context of the operations headed by the GEIN, which used specific methods that respected the rights of those arrested." Furthermore, the State indicated that the context, according to which the forensic physicians acted in complicity with the perpetrators, was not applicable to this case, because "the forensic medical examination was supervised and validated by Dr. Nancy Elizabeth De la Cruz Chamilco" who, in her testimony, denied having received "pressure or interference in [her] decisions as an expert witness." The State emphasized that other women detained during Operation Moyano did not show signs of having being victims of sexual abuse. It also stressed that the prosecutor from the Public Prosecution Service "has strongly denied that J. was blindfolded and threatened while she was being transferred from one place to another."

312. Furthermore, the State considered that the "contradictions incurred in by the petitioner between the initial petition and the [motions and arguments brief] concerning [the alleged rape] undermine the credibility of her arguments and reveal manipulation in order to exaggerate the facts […], because it is improbable that a supposed act of rape […], with the psychological consequences that this involves, would be subsequently denied by the petitioner." Likewise, it indicated that "in the face of this doubt, what is the State going to investigate, considering that the victim's statement is a key factor in order to determine whether an act of sexual […] abuse occurred, and based on this to initiate the respective investigations." In this regard, the State emphasized that "it is unclear whether, according to J. or the Commission, an insertion of this type [of the fingers in the vagina] occurred and the circumstances in which it occurred; and this is in addition to putting on record that J. did not denounce this situation before the competent domestic organs." It also indicated that "every act of rape cannot be classified outright as an act of torture." Furthermore, it affirmed that, on April 18, 1992, J. underwent a forensic medical examination, and the injuries encountered "were produced at the time of her arrest [when J. tried] to escape by the back door of the building."

C.2) Considerations of the Court

313. In order to analyze what happened to the presumed victim, the Court will take into account diverse indications that help determine what took place, in the following order: C.2.1) the context at the time of the events; C.2.2) the statements by Ms. J.; C.2.3) the forensic medicine examination; C.2.4) the testimony of the prosecutor of the Public Prosecution Service, and C.2.5) the failure to investigate the facts described.

314. In addition, the Court notes that the case file includes a psychological report prepared by the Traumatic Stress Clinic which describes several of the alleged acts of ill-treatment suffered by J. during the initial arrest and her detention in the DINCOTE. However, the said report indicates that the ill-treatment described in it was extracted from a document provided by Mr. Curtis Doebbler,[428] who initially represented Ms. J., so that it constitutes third-hand information and, consequently, the Court will not take it into account for the determination of the events that occurred in the context of this case. Documents and testimony were also provided that indicate that Ms. J. suffers from chronic post-traumatic stress as a result of the experiences undergone by the presumed victim while she was detained in Peru.[429] Nevertheless, the Court notes that the information contained in

---

[428] *Cf.* Report of the Traumatic Stress Clinic of November 28, 1996 (file of annexes to the Merits Report, annex 7, folio 82).

[429] *Cf.* Report of the Traumatic Stress Clinic of November 28, 1996 (file of annexes to the Merits Report, annex 7, folio 86), Affidavit prepared by witness Martin Rademacher on May 8, 2013 (merits report, folio 1246), and affidavit prepared by Bent Sørensen and Inge Genefke of the Anti-Torture Support Foundation on December 31, 2007, and presented in the context of Ms. J.'s extradition proceeding (file of annexes to the motions and arguments brief, annex 58, folios 3180 and 3181).

these probative elements does not allow it to determine whether it refers specifically to the facts of this case or whether it also cover the facts of the *case of the Miguel Castro Castro Prison v. Peru*.

C.2.1) The context at the time of the events

315. In the instant case, the Court has found it proved that the State's actions included a pattern of detentions that "consisted, first, in the violent arrest of the victim, accompanied by the search of the victim's home using the same violent methods." The detainee "was blindfolded or his face was totally covered" (*supra* para. 65). The CVR reported that "[o]nce the person had been deprived of liberty, he was taken to a place of confinement, which might or might not be a legal detention center. […] During the transfer, the detainee was subjected to torture and other cruel, inhuman or degrading treatment or punishment."[430]

316. Furthermore, the Court recalls that, during the armed conflict, numerous acts of rape were committed against Peruvian women by perpetrators from both the State and the subversive groups and, in the case of the State, "the sexual abuse was a generalized practice that was surreptitiously tolerated, but in some cases openly permitted by the immediate superiors" (*supra* para. 68). The CVR asserted that "the testimony provided […] includes not only accounts of rape. It also refers to different forms of sexual violence, such as sexual abuse, sexual blackmail, sexual harassment or inappropriate touching." However, the CVR recognized that "cases in which a woman [was] subjected to any of these practices are not denounced" and that "the domestic criminal laws did not assist a woman who was a victim of sexual violence to denounce these acts, due to the cumbersome procedures that the complaint entailed, as well as the humiliation and shame suffered by the victim."[431]

317. According to the CVR, sexual violence "occurred from the moment of the arrest, as well as during the transfer between the different State entities." In this regard, it indicated that the women who were detained "were subjected to inappropriate touching by all those who came near her," and "sexual abuse, inappropriate touching, and threats of rape" were common. In response to the numerous testimonies received, the CVR made a "special mention of the Lima premises of the National Counter-terrorism Directorate (DINCOTE), which has been identified […] as a place in which sexual violence occurred repeatedly." According to the testimonies, "[t]he ill-treatment began at the time of the arrest, during which the perpetrators identified themselves as members of the DINCOTE [… and] continued during the transfer to that entity." In addition, the CVR reported that the sexual violence occurred "also in the DINCOTE premises on the beach and at night."[432]

318. Regarding the State's argument that this case does not form part of the pattern described, because "it occurred in the context of the operations headed by the GEIN," the Court notes that the State did not present any evidence to prove that the operations carried out by the GEIN were different from the operations carried out by the DINCOTE in general. The GEIN was a group attached to the DINCOTE, and the above-mentioned conclusions of the CVR do not make a distinction between the different DINCOTE groups. Furthermore, the failure of other women detained in Operation Moyano or in other cases decided by the Inter-American Court to report sexual abuse is not evidence of what happened at the time of J.'s arrest and, consequently, does not disprove the findings and conclusions of the CVR, or their applicability to this specific case.

319. In addition, the Court notes that, according to the CVR, at the time of the facts, "the prosecutors called on by law to determine the existence of abuse and report this to the judiciary

---

[430] Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, pp. 240 and 241.

[431] Report of the Truth and Reconciliation Commission, volume VI, chapter 1.5, pp. 279 and 306.

[432] Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, p. 242. and chapter 1.5, pp. 315, 322, 324 and 348.

disregarded the complaints of the detainees and even signed statements without having been present while they were taken, so that they were "incapable of guaranteeing the physical and mental integrity of the detainee." Moreover, "[i]n cases in which a prosecutor was present, many deponents informed the [CVR] that instead of acting as a guarantor of their rights he or she was an authority who went unnoticed and, in many cases, endorsed these illegal practices." Also, at the time of the arrest, "the victim or their family members were forced to sign the search records."[433] The CVR also underscored:

> the questionable role played by forensic physicians. Most of the victims state that the forensic medical examinations that were performed by these medical professional were not thorough; in other words, they simply performed the medical examination as a mere formality […]. The unprofessional conduct of the forensic physicians has particularly serious consequences in cases of sexual abuse, because it condemns the crime to impunity.[434]

320. In this regard, Nancy Elizabeth De la Cruz Chamilco, who "supervised and validated" the medical examination performed on Ms. J. (*infra* para. 327 and *supra* para. 93), declared that during her "professional career of 31 years as a forensic physician she ha[d] never experienced pressure or interference with [her] decisions as an expert witness; acting always as a medical professional, objective, impartial and respecting scientific truth in the justice administration system."[435] This Court notes that the words of the witness do not deny the conclusions of the CVR and that, in any case, her intervention was subsequent to the medical examination performed on J., because she merely "supervised [administratively] and validated that the examination was appropriate."[436]

321. In general, the Court notes the similarities that exist between what the presumed victim testified at the domestic level, and the findings of the CVR. In this regard, the Court recalls that the CVR was created by the State (*supra* para. 54) and underscores that Peru even referred to the conclusions of this commission in its arguments regarding the description of the context that existed at the time of the facts.[437] Consequently, the similarities found are an important indication of what happened in the instant case.

C.2.2) The statements by Ms. J.

322. In the instant case, it is recorded in the case file that, in her statement before the police on April 21, 1992[438] (*supra* para. 83 and footnote 112), and also in her preliminary statement on June 10,[439] 15[440] and 19, 1992,[441] the presumed victim gave an account of the ill-treatment presumably

---

433 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, pp. 223, 241 and 252.

434 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.4, p. 224.

435 Affidavit prepared by witness Nancy Elizabeth De la Cruz Chamilco on May 8, 2013 (merits report, folio 1069).

436 Affidavit prepared by witness Nancy Elizabeth De la Cruz Chamilco on May 8, 2013 (merits report, folios 1068, 1070 and 1071). In this regard, the deponent indicated that "[w]hen signing the said forensic medicine certificate, the certification of the findings described is of a technical and administrative nature."

437 See, for example, the answering brief (merits report, folios 397 and 398).

438 On that occasion Ms. J. stated that: they took [her] by the hair and they took [her] to the back of the building; they blindfolded [her], and they put [her] against the wall." She also indicated that, "at the time of the arrest, [she] was beaten, sexually abused, in other words, touched all over." Statement of Ms. J. of April 21, 1992 (file of annexes to the answering brief, annex 31, folio 3669 and 3671).

439 On that occasion Ms. J. stated that: they took [her] by the hair, pointed a gun at [her] and about 15 people entered dressed in civilian clothing, all of them armed; and as [she] had been injured by the glass that had fallen on her back, they threw [her] on the floor and immediately tied [her] hands behind [her] back, and blindfolded [her]; they hit [her] and took [her] to the back of the premises, threatening and insulting [her]. When they tied [her] up, one of the men, who was dark-skinned and wore a yellow cap, hit [her] legs, touched her all over [her] body – patting [her] down according to him." In addition, she indicated that "they used their radios and told [them] that they would make [them] disappear and were going to take [them] to a barracks." She also stated that they then put her in a car which was "driving around all night until 6 a.m. when it stopped in front of the Police Station; all that time [she] had been blindfolded and tied up." Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3698).

suffered during the initial arrest. In general, an analysis of these statements reveals that Ms. J. indicated on at least two occasions that at the time of the initial arrest: (i) she had been beaten and pulled by the hair; (ii) a man had hit her legs and had touched her sexually, and (iii) she had been blindfolded. The Court considers that the statements by Ms. J. reveal this description of the facts consistently. Furthermore, these characteristics of the events also appear in the briefs filed by the presumed victim during the proceedings before the inter-American system.[442]

323. Regarding the alleged "sexual touching," the Court has established that sexual abuse is a particular type of violence that, in general, is characterized by occurring in the absence of persons other than the victim and the perpetrator or perpetrators. Given the nature of this type of violence, the existence of graphic or documentary evidence cannot be expected and, therefore, the victim's statement constitutes fundamental proof of the act.[443] Notwithstanding the legal definition of the facts established *infra*, the Court considers that this standard is applicable to sexual violence in general. In addition, when analyzing the said statements it must be borne in mind that sexual violence corresponds to a type of offense that the victim does not usually report,[444] owing to the stigma that reporting it usually entails (*supra* para. 316).

324. Furthermore, the Court considers that the variations in the legal definitions of sexual violence and rape that the presumed victim's representative has accorded to the facts throughout the proceedings before the inter-American system does not discredit the testimony provided in the domestic sphere by Ms. J. concerning the events that occurred.[445] Moreover, the Court notes that this is true even in relation to later statements made by the presumed victim. In this regard, the

---

440 On that occasion Ms. J. stated that, during the search of the building on Las Esmeraldas Street "they covered [her] eyes all the time." She also stated that "it is not true that I tried to escape the police; to the contrary when I realized that they were trying to open the door saying that they were the owners, I tried to clarify the error that I thought they were committing, and at that moment they broke the window and took me by the hair and also pointed a gun at me." Preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folio 3704).

441 On that occasion Ms. J. stated that she remained "more or less three hours, lying on the ground face down, with [her] eyes blindfolded and [her] arms behind, while someone was permanently treading on [her] leg." Preliminary statement of June 19, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 17, folio 4742).

442 *Cf.* Initial petition before the Inter-American Commission on Human Rights received on June 17, 1997 (file of the proceedings before the Commission, folio 585); Communication of the representative of July 11, 2008 (file of the proceedings before the Commission, folio 1703); Communication of the representative of October 23, 2007 (file of the proceedings before the Commission, folio 779); motions and arguments brief (merits report, folios 185 to 218) and brief with final arguments of the representative (merits report, folios 2074 to 2097).

443 *Cf. Case of Fernández Ortega et al. v. Mexico, supra. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010. Series C No. 215, para. 100, and *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216, para. 89.

444 *Cf. Case of Rosendo Cantú et al. v. Mexico, supra*, para. 95.

445 In the first briefs before the Inter-American Commission, the representative of Ms. J. at the time indicated that: "[t]he acts committed against Petitioner at the time of her arrest and detention at DINCOTE [...] included [... t]he sexually abusive search of Petitioner, whereby a GEIN officer placed his hands under her cloth[e]s and molested her body[, and t]he rape of Petitioner by the GEIN officer when he inserted his fingers inside her vagina while molesting her during her arrest" (original text in English). *Cf.* Initial petition before the Inter-American Commission on Human Rights received on June 17, 1997 (file of the proceedings before the Commission, folio 585). Subsequently, in October 2007 and July 2008, the representative clarified that "the original text in English [...] refer[red] erroneously to 'rape' instead of 'sexual abuse.' The petitioner was sexually assaulted by the agents who arrested her as described in the complaint in circumstances in which she was blindfolded and tied up and rendered powerless by the brute force of two men." Communication of the representative of July 11, 2008 (file of the proceedings before the Commission, folio 1703) and, see also, Communication of the representative of October 23, 2007 (file of the proceedings before the Commission, folio 779). Furthermore, in the proceedings before the Court, the representative indicated in her motions and arguments brief that what had occurred to the presumed victim constituted "a physical attack of a sexual nature (sexual violence) and not a rape." She explained that "[t]his correction of the facts described in the original petition was made at the first opportunity that J. had [following the change in the representative]." However, following the public hearing, the presumed victim's representative indicated that these acts were legally characterized as rape. In this regard, she indicated that: "the vagina is defined not only as a tract. The only things she said was that he did not enter her vagina, which does not mean that he did not introduce his fingers in the vagina; so that there is factually no contradiction."

Court has considered that a denial of the occurrence of a sexual attack that has been reported does not necessarily disprove the statements where it was indicated that it had happened, but must be analyzed taking into account the specific circumstances of the case and of the victim.[446] In addition, the legal definition of the acts that the presumed victim used in her statements must be assessed taking into account the usual meaning of the words used, which does not necessarily correspond to their legal definition. The relevant factor is to evaluate whether the acts described, and not the legal definition given to them, were consistent.

325. Ms. J. also mentioned in her accounts that: (i) a gun had been pointed at her;[447] (ii) she had remained lying on the floor with her arms behind her while someone trod on her legs;[448] (iii) she had heard that they were going to make her disappear or take her to a barracks,[449] and (iv) that, when they left the building on Las Esmeraldas Street, they had driven around until 6 a.m. when she was taken to the DINCOTE.[450] The Court notes that the mention of some of the alleged ill-treatment only in some of the statements does not mean that this is false or that the facts reported are not true.[451] In this regard, the Court takes into account that the events described by Ms. J. refer to a traumatic moment she underwent, and its impact could result in a certain lack of precision when recalling them.[452] Moreover, these accounts were mostly given as part of the same preliminary statement made in the criminal proceedings, which was suspended and continued on several occasions. Therefore, it is not reasonable to require that Ms. J. should testify on all the presumed ill-treatment of which she had been a victim every time she addressed the State authorities. The Court also notes that these were the only occasions on which a statement was taken from Ms. J. during the criminal proceedings and she was consistent in all her accounts of the events described. In addition, the Court notes that the first statement given by the presumed victim, before her preliminary statement, was given before police officials, while she was detained incommunicado in the DINCOTE. These conditions do not ensure a comfortable and secure environment that provides privacy and trust to give a detailed account of the alleged abuse[453] (*infra* paras. 328 and 337). Consequently, it is reasonable that Ms. J. did not recount all the presumed ill-treatment on that occasion.

326. It is also necessary to consider that the presumed victim never denied the alleged ill-treatment and, when she mentioned it, she did so without it being in response to any specific question asked during her statements. In addition, after describing the alleged ill-treatment, the interrogators continued taking her statement without asking any question as a result of what she had asserted. In sum, the Court considers that, in the different statements made by Ms. J. before the domestic authorities, the main circumstances concur.

---

446 *Cf. Case of Rosendo Cantú et al. v. Mexico, supra*, para. 95. Similarly, ECHR, *Teslenko v. Ukraine*, no. 55528/08, §§ 88, 95 and 96, 20 December 2011, and United Nations. *Istanbul Protocol. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter "Istanbul Protocol"), 9 August 1999, para. 99.vii.

447 *Cf.* Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3698), and preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folio 3704).

448 *Cf.* Preliminary statement of June 19, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 17, folio 4742).

449 *Cf.* Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3698).

450 *Cf.* Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3698).

451 *Cf. Case of Cabrera García and Montiel Flores v. Mexico, supra*, para. 113.

452 Similarly, see, *Case of Fernández Ortega et al. v. Mexico, supra*, para. 105, and *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 91.

453 *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 194, and *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 178.

C.2.3) The forensic medicine examination

327. On April 18, 1992, five days after Ms. J.'s initial arrest, she underwent a medical examination. The State argued that the injuries found during the examination were produced when she tried to escape from the building on Las Esmeraldas Street (*supra* para. 312). The representative indicated that the injuries revealed by the examination are the result of the ill-treatment that Ms. J. alleges she suffered (*supra* paras. 82, 83, 93, 322 and 325). The Court will therefore proceed to assess the said medical examination as a possible indication of what happened.

328. According to the testimony of Nancy Elizabeth De la Cruz Chamilco, this type of medical examination took an average of five minutes.[454] During the examination of Ms. J., injuries were found that were "visible, but not relevant" on the "posterior thorax and on her lower limbs."[455] The Court notes that the report does not record whether Ms. J. was asked how these injuries had occurred. In this regard, the Court considers that one of the purposes of the medical examinations performed when a person enters a detention or internment facility is to ensure the personal integrity of the person deprived of liberty and to verify complaints of possible ill-treatment and torture.[456] Thus, the medical report must include not only the injuries that are found, but also detailed information on the explanation given by the patients about how these injuries occurred, as well as the opinion of the doctor on whether the injuries are consequent with this explanation.[457] In addition, the medical examination must be performed in conditions where the persons deprived of liberty feel as comfortable as possible so that, if they so wish, they can describe any ill-treatment received. In this regard, it is essential that the medical examination be performed by suitable, trained personnel of the sex preferred by the victim, insofar as possible.[458] In the instant case, the medical examination was performed by two male forensic physicians (*supra* para. 93). The State has presented no evidence as to whether Ms. J. had been offered the possibility of a woman being present or about whether factors existed that prevented the State from ensuring the presence of a woman during the examination. However, the Court notes the testimony of Ms. De la Cruz Chamilco, who, when questioned about the duration of the examination performed on Ms. J., indicated that, "at times women detainees are reluctant to undergo the examinations, because they have to take their clothes off, and when those who examine them are male, [the examination] usually exceeds the five-minute average."[459] This response from the person who was the Director General of the General Directorate of Forensic Medicine of Lima of the Peruvian Institute of Forensic

---

454 Affidavit prepared by witness Nancy Elizabeth De la Cruz Chamilco on May 8, 2013 (merits report, folio 1070).

455 *Cf.* Affidavit prepared by witness Nancy Elizabeth De la Cruz Chamilco on May 8, 2013 (merits report, folio 1068).

456 See, for example, IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle IX (3), as well as ECHR, *Türkan v. Turkey*, no. 33086/04, § 42, 18 September 2008; *Salmanoğlu and Polattaş v. Turkey,* no. 15828/03, § 79, 17 March 2009, and *Korobov v. Ukraine,* no. 39598/03, § 70, 21 July 2011. In addition, the Bangkok Rules establish that: "Rule 7.1. If the existence of sexual abuse or other forms of violence before or during detention is diagnosed, the woman prisoner shall be informed of her right to seek recourse from judicial authorities. The woman prisoner should be fully informed of the procedures and steps involved. If the woman prisoner agrees to take legal action, appropriate staff shall be informed and immediately refer the case to the competent authority for investigation. Prison authorities shall help such women to access legal assistance. 2. Whether or not the woman chooses to take legal action, prison authorities shall endeavour to ensure that she has immediate access to specialized psychological support or counselling. 3. Specific measures shall be developed to avoid any form of retaliation against those making such reports or taking legal action. United Nations, General Assembly resolution 65/229, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, 16 March 2011, A/RES/65/229, Rule 7 (hereinafter "Bangkok Rules").

457 *Cf.* ECHR, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X; *Salmanoğlu and Polattaş v. Turkey,* no. 15828/03, § 80, 17 March 2009, and Istanbul Protocol, para. 187.

458 *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 194, and *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 178. See also, Istanbul Protocol, para. 154, and Bangkok Rules, Rule 10.2.

459 Affidavit prepared by witness Nancy Elizabeth De la Cruz Chamilco on May 8, 2013 (merits report, folio 1070).

Medicine at the time of the facts is an indication that the "reluctance" of the women to be examined by a male doctor, was not necessarily assuaged by the offer of a female doctor or the presence of a woman during the examination, but rather it was considered an inconvenience that could prolong the examination somewhat. The Court considers that this did not facilitate the creation of an environment that would generate the trust of the detainees to denounce possible acts of torture or sexual abuse, such as those described by the presumed victim. Therefore, the Court concludes that the report of the medical examination does not reveal the causes of the injuries found, or that during the examination Ms. J. was able to give her version of the events.

329. Furthermore, it must be pointed out that the absence of physical signs does not mean that ill-treatment has not occurred, because these acts of violence against the individual often do not leave permanent marks or scars.[460] The same is true in cases of sexual abuse and rape, in which their occurrence will not necessarily be reflected in a medical examination, because not all cases of sexual abuse and/or rape cause physical injuries or diseases that can be verified by a medical examination.[461]

330. Even though, in the instant case, the medical examination did not comply with the conditions mentioned *supra* and some of the ill-treatment alleged would not leave physical traces, the Court notes that the injuries found on J.'s legs and on the posterior thorax are consistent with her account of the events, in the sense that her back had been injured by glass, and she had been forced to the ground, and that a man had trod on her legs. Regarding the possibility that the said injuries had been caused when Ms. J. presumably tried to escape from the building on Las Esmeraldas Street, the Court notes that the use of force by the security forces should respect criteria of legitimacy, necessity, suitability and proportionality.[462] The State merely indicated in general that J.'s injuries had occurred when she tried to escape the arrest and it did not explain or present evidence as to exactly how these injuries occurred. To the contrary, the State indicate that the use of force was "legitimate," because the security forces were dealing with "an unknown number of persons who were presumably members of a terrorist organization, with the danger that this implied," without providing evidence that the persons who were being detained used any kind of force against the police.

331. Furthermore, the evidence in the case file is unclear as to whether Ms. J. really tried to escape by the back door of the building. On the one hand, the only document in the case file in this regard is the police attestation, which indicates that when the police arrived at the building "the occupants tried to escape by a back door, and were subsequently captured."[463] On the other hand, Ms. J. denies that she tried to escape and assures that "the door to Palermo [street] has a padlock on the outside.[464] In this regard, the record of the inspection states that the entry "on Palermo [street] was padlocked."[465] Neither the record of the search of the building on Las Esmeraldas where Ms. J. was arrested, nor the preventive detention order, the charges, or the prosecutor's report ordering the opening of the preliminary investigation, indicate that the presumed victim had tried to escape.[466] Moreover, in her statement before the Court, the prosecutor of the Public

---

460 *Cf.* Istanbul Protocol, para. 161.

461 *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 124, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 132. See also, ECHR, *M.C. v. Bulgaria*, no. 39272/98, § 166, ECHR 2003-XII.

462 *Cf. Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150, paras. 67 to 69, and *Case of Fleury et al. v. Haiti, supra*, para. 74.

463 Attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folio 3349).

464 Preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folio 3704).

465 Inspection of August 11, 1992 (file of annexes to brief dated August 14, 2013, folio 5527).

466 *Cf.* Record of search of premises and seizure of property from the building on Las Esmeraldas Street (file of annexes to the Merits Report, annex 28, folios 323 to 330); opening of the preliminary investigation of the Tenth Investigating Court of Lima

Prosecution Service did not mention this either.[467] Consequently, the Court finds that it has not been proved that Ms. J.'s injuries were caused because she tried to escape at the time of the arrest.

332. The Court notes that the medical examination was performed before Ms. J. had made a statement and indicated for the first time the facts that presumably occurred during her initial arrest. Once she had made a statement, the domestic authorities did not order any additional medical examination. Therefore, since the medical examination of April 18, 1992, did not include any type of examination relating to offenses of a sexual nature[468] (*supra* para. 93), the alleged sexual violence was never examined medically. In addition, neither did the domestic authorities carry out a psychological examination of the presumed victim.[469] This examination would have been particularly important in the instant case where some of the ill-treatment described by Ms. J. does not leave physical traces.

333. The Court considers that the evidence obtained during the medical examination plays a crucial role during the investigations conducted against detainees and in cases when the latter allege ill-treatment.[470] In this regard, it is extremely difficult for the victim to substantiate allegations of ill-treatment while in police custody, if he was isolated from the exterior world, without access to doctors, lawyers, family or friends who could provide support and gather the necessary evidence.[471] Therefore, the judicial authorities have the duty to ensure the rights of the detainee, and this entails obtaining and ensuring all the evidence that may prove the acts of torture, including medical examinations.[472] In addition, it is important to emphasize that, in cases in which there are allegations of supposed torture or ill-treatment, the time that has passed before the corresponding medical appraisals are made is determinant in order to conclude without doubt the existence of the harm, especially when there are no witnesses other than the perpetrators and the victims themselves and, consequently, the evidence may be very limited. This reveals that, for an investigation into acts of torture to be effective, it must be conducted promptly.[473] Therefore, the failure to perform a medical examination on a person who was in the State's custody or the performance of this examination without complying with the applicable standards, cannot be used to cast doubts on the truth of the presumed victim's allegations of ill-treatment[474] (*infra* paras. 341

---

on April 28, 1992 (file of annexes to the answering brief, annex 37, folios 3687 and 3689); charges brought by the Public Prosecution Service on January 8, 1993 (file of annexes to the answering brief, annex 45, folios 3747 to 3763), and criminal complaint of April 28, 1992 (file of annexes to the answering brief, annex 36, folio 3682).

467 *Cf.* Statement made by Magda Victoria Atto Mendives during the public hearing held in this case.

468 According to witness Nancy Elizabeth De la Cruz Chamilco, the examination conducted was "Forensic Medicine examination to determine the physical integrity, old or recent injuries; it was not the examination relating to sexual honor or sexual integrity, which is how examinations relating to offenses against sexual liberty are referred to," because the latter was not requested. *Cf.* Affidavit prepared by witness Nancy Elizabeth De la Cruz Chamilco on May 8, 2013 (merits report, folios 1070 and 1071).

469 In this regard, the Istanbul Protocol establishes that "[a] psychological appraisal of the alleged torture victims is always necessary and may be part of the physical examination, or where there are no physical signs, may be performed by itself." Istanbul Protocol, para. 104.

470 *Cf.* ECHR, *Korobov v. Ukraine,* no. 39598/03, § 69, 21 July 2011, and *Salmanoğlu and Polattaş v. Turkey,* no. 15828/03, § 79, 17 March 2009.

471 *Cf.* ECHR, *Aksoy v. Turkey*, 18 December 1996, § 97 Reports of Judgments and Decisions 1996-VI, and *Eldar Imanov and Azhdar Imanov v. Russia*, no. 6887/02, § 113, 16 December 2010.

472 *Cf. Case of Bayarri v. Argentina, supra*, para. 92, and *Case of Cabrera García and Montiel Flores v. Mexico, supra*, para. 135. See also, Istanbul Protocol, para. 77; ECHR, *Eldar Imanov and Azhdar Imanov v. Russia*, no. 6887/02, § 113, 16 December 2010.

473 *Cf. Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 111, and *Case of Bayarri v. Argentina, supra*, para. 93. In this regard, the Istanbul Protocol establishes that "[t]he timeliness of such medical examination is particularly important. A medical examination should be undertaken regardless of the length of time since the torture, but if it is alleged to have happened within the past six weeks, such an examination should be arranged urgently before acute signs fade." Istanbul Protocol, para. 104.

474 Similarly, see *Case of Fernández Ortega et al. v. Mexico, supra*, para. 112; ECHR, *Tekín v. Turkey*, 9 June 1998, § 41,

to 353). Likewise, in cases in which sexual abuse is alleged, the lack of medical evidence does not take away from the truth of the presumed victim's allegations.[475]

334. Consequently, the Court finds that the information revealed by the medical examination does not contradict the versions given by Ms. J.; rather, to the contrary, it is consequent with her allegations. Furthermore, the fact that no other examinations were performed to verify the occurrence of the ill-treatment described can be attributed to the State and cannot be used to disprove what the presumed victim has indicated.

C.2.4) The testimony of the prosecutor of the Public Prosecution Service

335. The State based part of its defense with regard to the ill-treatment described by Ms. J. on the fact that, at the time of the arrest, the prosecutor of the Public Prosecution Service, Magda Victoria Atto Mendives, was present to ensure the rights of Ms. J. (*supra* para. 311). During the public hearing Ms. Atto testified that:

> [She] entered first [in order] to ensure the legality of the action. Then the police personnel entered and there is always subjugation, efforts to evade this, efforts to flee, efforts to escape. Then, in [that] context, the police personnel have to […] subjugate, but without the intention, let's say, to be violent; it's an instinctive reaction.[476]

336. In relation to the arrest of Ms. J., she indicated that the presumed victim "was never abused" during her transfer to the DINCOTE, and that she "always ensure[d] the integrity of the individuals, [and that Ms. J.] was never blindfolded." She also assured that, "in all the actions that [she] took part in as deputy terrorism prosecutor, the integrity of the individual was always respected." Regarding whether there was any type of sexual abuse or rape, she stated that:

> At no time, because, in the records, [the parties] have, let's say, the privilege, […] to be able to report, through me, any anomalous situation that occurs and, as you will see, and I can ratify this, there was no situation of this type either. I was not informed; I was not advised [that she was being] subjugated, [or that she was being] abused, nothing at that time.[477]

337. First, the Court notes that the witness is unclear as to whether or not any type of violence was used when conducting the search of the building and subsequent arrest of the presumed victim. On the one hand, Ms. Atto Mendives indicated that "there was no violence in this specific case"; then, when questioned in this regard, she clarified that "there is also repression, reaction; people try to fend off or attack." The witness did not specify whether that reaction had occurred in this case, or what actions the police took to achieve the arrest; nor did she indicate that Ms. J. had tried to escape when she was arrested (*supra* para. 331). Second, the Court notes that the witness based her answer that Ms. J. had not undergone any sexual assault on the fact that the presumed victim had not told her so that it would appear in the record. The Court points out that the search record is not signed by Ms. J. and, according to the statement of the presumed victim, she "was

---

Reports of Judgments and Decisions 1998-IV; *Türkan v. Turkey*, no. 33086/04, § 43, 18 September 2008, and *Korobov v. Ukraine,* no. 39598/03, § 68, 21 July 2011.

475 *Cf.* Testimony of Patricia Viseur Sellers during the public hearing held in this case. See also, International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, Case No. ICTR-96-4-T, paras. 134 and 135; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1-T, para. 271; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Tadić*, Judgment of the Appeals Chamber, 15 July 1999, Case No. IT-94-1-A, para. 65; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo ("Celebici camp")*, Judgment of the Appeals Chamber, 20 February 2001, Case No. IT-96-21, paras. 504 and 505. Similarly, Article 96 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia and of the International Criminal Tribunal for Rwanda establish that, in cases of sexual assault "no corroboration of the victim's testimony shall be required."

476 Statement made by Magda Victoria Atto Mendives during the public hearing held in this case.

477 Statement made by Magda Victoria Atto Mendives during the public hearing held in this case.

never shown the said record when she was arrested."[478] The Court considers that it is unnecessary to rule on whether or not Ms. J. was able to denounce the alleged ill-treatment so that it would appear in the said record, because, even if she had been given the opportunity and did not do so, this does not mean that the ill-treatment she described did not take place. In this regard, it is essential to note that victims often abstain, based on fear, from denouncing acts or torture or ill-treatment, especially if they are detained in the same place that these occurred.[479] In addition, the Court reiterates that sexual abuse corresponds to a type of offense that victims frequently abstain from denouncing (*supra* para. 323). Furthermore, it is important to stress that, at the time the search was presumably conducted, it is possible that the alleged perpetrators of the ill-treatment were present, so that it was not a safe and comfortable location that provided privacy and trust to describe the alleged ill-treatment (*supra* paras. 325 and 328).

338. The Court also notes that, contrary to the prosecutor's assertion (*supra* para. 80), according to J., the representative of the Public Prosecution Service "was not present at the time of the police operation, [but arrived] later" (*supra* para. 84). The Court notes that, according to the search record of the building on Las Esmeraldas Street, the search commenced at 8.55 p.m. on April 13, 1992, and ended at 9.15 p.m. on April 14, 2013.[480] During the public hearing, the prosecutor stated that this was "an error in the preparation of the record, but did not invalidate [her] presence during the procedure." She also indicated that "it could be said" that the operation did not last a whole day; however, she "could not be more specific, because [they] were under great tension" and more than 20 years had passed.[481] In this regard, Ms. J. stated that they had not remained in the said building until 9.15 p.m. on April 14, but that, "at midnight, they took [her] out of the building to the car."[482] Consequently, the exact time at which the search of the building on Las Esmeraldas Street ended is unclear.

339. The Court also notes that, on April 13, 1992, while the operation in the building on Las Esmeraldas Street was possibly underway, other searches were being executed where prosecutor Atto Mendives had been present. In particular, according to the respective records, from 9.20 to 9.45 p.m. the home of Ms. J. was searched,[483] and from 9.45 to 10.50 p.m. the prosecutor was present during the search of four individuals at Bartolomé Herrera No. 667, Lince.[484] These coincidences were taken into account by the "faceless" Higher Court of Justice of Lima that decided to acquit Ms. J. (*supra* para. 103). This Court notes that there are indications that the prosecutor of the Public Prosecution Service was not present during the whole operation, contrary to what she and the State declared. Furthermore, the Court notes that the presence of the prosecutor of the Public Prosecution Service in procedures immediately following the arrest of Ms. J. and the search of

---

478 Preliminary statement of June 10, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 41, folio 3699).

479 *Cf. Case of Bayarri v. Argentina, supra*, para. 92, and *Case of Vélez Loor v. Panama, supra*, para. 236.

480 *Cf.* Record of search of premises and seizure of property from the building on Las Esmeraldas Street (file of annexes to the Merits Report, annex 28, folios 323 and 330).

481 *Cf.* Statement made by Magda Victoria Atto Mendives during the public hearing held in this case.

482 Preliminary statement of June 19, 1992, before the Tenth Investigating Court of Lima (file of annexes to the State's brief of June 24, 2013, annex 17, folio 4743).

483 *Cf.* Record of house search and seizure of property from the house on Casimiro Negrón Street of April 13, 1992 (file of annexes to the answering brief, annex 26, folios 3646 and 3650), and attestation No. 084–DINCOTE of April 25, 1992 (file of annexes to the answering brief, annex 23, folios 3348 and 3354).

484 The first individual search was conducted from 9.50 to 9.55 p.m.; the second from 9.56 to 10 p.m.; the third from 10.01 to 10.05 p.m., and the fourth from 10.06 to 10.10 p.m. *Cf.* Record of search of Luis Enrique Jara Castañeda (file of annexes to the State's brief of August 14, 2013, folios 5531 and 5533); record of search of Oscar Andrés Jara Mostacero (merits report, folios 2504 and 2506); record of search of Tania Santiesteban Luyo (file of annexes to the State's brief of August 14, 2013, folios 5543 and 5544); record of search of Rafael Gustavo Guevara de la Cruz (merits report, folios 2502 and 2503) and table of searches of individuals (file of annexes to the State's brief of August 14, 2013, folio 5555).

her home reveal a contradiction in the statement of Ms. Atto Mendives that, following the search of J.'s domicile, she was taken directly to the DINCOTE (*supra* para. 92).

340. In sum, the Court finds that, taken as a whole, these factors create doubt as to the absolute denial by Ms. Atto Mendives that Ms. J. suffered any violence including sexual violence, at the time of her arrest. In addition, the Court notes that, taking into account the context of violence and sexual abuse that existed at the time of the facts, such a categorical denial by the witness that this occurred "in all the actions that [she] took part in as deputy terrorism prosecutor," raises doubts about the truth of her assertions.

C.2.5) The failure to investigate the facts

341. Under Article 1(1) of the American Convention, the obligation to ensure the rights recognized in Articles 5(1) and 5(2) of the American Convention entails the State's duty to investigate possible acts of torture or other cruel, inhuman or degrading treatment.[485] This obligation to investigate is reinforced by the provisions of Articles 1, 6 and 8 of the Inter-American Convention against Torture that oblige the States "to take effective measures to prevent and punish torture within their jurisdiction," and also "to prevent and punish other cruel, inhuman, or degrading treatment or punishment." Also, according to Article 8 of that Convention, 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-founded 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 proceedings.

342. At the same time, following the entry into force for Peru of the Convention Belém do Pará (*supra* paras. 18, 19 and 37), the State was obliged to use due diligence to prevent, punish and eliminate violence against women. Pursuant to this, the Court has established in its case law that the provisions of Article 7(b) of the Convention of Belém do Pará stipulate and complement the State's obligations as regards compliance with the rights embodied in the American Convention,[486] such as the obligation to ensure the right recognized in Article 5 of the American Convention. In these cases, the State authorities must open, *ex officio* and promptly, a serious, impartial and effective investigation that examines possible acts that constitute violence against women,[487] including sexual violence. This obligation to investigate must take into account the duty of society to reject violence against women and the obligations of the State to eliminate it and to ensure that the victims can have confidence in the State institutions created to protect them.[488]

343. In addition, in cases where the victims allege that they have been tortured while in the State's custody, the Court has indicated that the State is responsible, in its capacity as guarantor of the rights embodied in the Convention, for respecting the right to personal integrity of every individual in its custody.[489] Furthermore, the Court's case law has indicated that whenever a person is deprived of liberty in a normal state of health and subsequently appears with health problems,

---

485 *Cf. Case of Ximenes Lopes v. Brazil. Merits, reparations and costs.* Judgment of July 4, 2006. Series C No. 149, para. 147, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 274.

486 *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs, supra*, para. 346, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 275.

487 *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs, supra,* para. 378, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 275.

488 *Cf. Case of Fernández Ortega et al. v. Mexico, supra,* para. 193, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 275.

489 *Cf. Case of Juan Humberto Sánchez v. Honduras, supra*, para. 99; and *Case of Mendoza et al. v. Argentina, supra*, para. 188.

the State must provide a satisfactory and convincing explanation for that situation.[490] Consequently, a presumption exists that the State is responsible for the injuries revealed by a persons who has been in the custody of State agents.[491] In this situation, the State has the obligation to provide a satisfactory and convincing explanation of what happened and to disprove the allegations of its responsibility, using adequate probative elements.[492]

344. On other occasions, this Court has stipulated the guiding principles that must be observed in criminal investigations into human rights violations.[493] In cases of violence against women, certain international instruments are useful for clarifying and giving content to the enhanced State obligation to investigate such cases with due diligence.[494] Among other matters, a criminal investigation into sexual violence requires that: (i) the victim's statement is taken in a safe and comfortable location, that provides privacy and confidence: (ii) the victim's statement is recorded in such a way as to avoid or limit the need to repeat it; (iii) the victim is provided with medical, psychological and health care, on an emergency basis and continuously if this is required, by a treatment protocol designed to reduce the consequences of the rape; (iv) a complete medical and psychological examination is performed immediately by appropriate trained personnel, of the sex indicated by the victim, insofar as possible, informing her that she may be accompanied by a person of her confidence if she so wishes; (v) the investigative actions are documented and coordinated and the evidence is handled diligently, taking sufficient samples, conducting tests to determine the possible authorship of the act, securing other evidence such as the victim's clothes, investigating promptly the site of the facts, and ensuring the proper chain of custody, and (vi) access to free legal assistance is provided to the victim during all stages of the proceedings.

345. In the instant case, the presumed victim gave an account of the alleged ill-treatment for the first time on April 21, 1992, in her initial statement before the State authorities, which, in this case, were the Police themselves. Subsequently, she again mentioned these facts in her preliminary statement (*supra* paras. 82, 83 and 322). The Court underscores that, due to the above considerations, the awareness of the alleged ill-treatment suffered by Ms. J., gave rise to the State's obligation to open an investigation into the facts *ex officio*. Nevertheless, according to the State itself, it has not yet undertaken any investigation. The State presented diverse justifications for why it had not opened an investigation and the Court will now examine them.

346. The State's first justification was that the statements made by Ms. J. were "fairly general," so that the domestic authorities had not identified "a specific situation that was contrary [to the right to personal integrity] and that could be identified as an act of torture in order to conduct an investigation (*supra* para. 301). The State also indicated, as a second justification, that, at the time of the events, it had no international obligation to investigate alleged "inappropriate touching," and that a mention of alleged "inappropriate touching" did not constitute "a reasonable indication that

---

490 *Cf. Case of Juan Humberto Sánchez v. Honduras, supra,* para. 100, and *Case of Mendoza et al. v. Argentina, supra*, para. 203.

491 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, paras. 95 and 170, and *Case of Mendoza et al. v. Argentina, supra*, para. 203.

492 *Cf. Case of Juan Humberto Sánchez v. Honduras, supra,* para. 111, *and Case of Mendoza et al. v. Argentina, supra*, para. 203.

493 These may include, *inter alia*: collection and preservation of probative elements in order to assist in any potential criminal investigation of those responsible; identification of possible witnesses and obtaining their statements, and determination of the cause, manner, place and time of the act investigated. In addition, an exhaustive investigation of the scene of the crime must be conducted ensuring that thorough analyses are performed by competent professionals, using the most appropriate procedures. *Cf. Case of Juan Humberto Sánchez v. Honduras, supra*, para. 128, and *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 178.

494 *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 194, and *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 178. Istanbul Protocol, paras. 67, 77, 89, 99, 101 to 105, 154, 161 a 163, 170, 171, 224, 225, 260, 269 and 290, and World Health Organizations, *Guidelines for medico-legal care for victims of sexual violence*, Geneva, 2003, *inter alia,* pp. 17, 30, 31, 34, 39 to 44 and 57 to 74.

could lead to the presumption that an offense of rape, as defined in April 1992, had possibly been committed." It indicated that, in any case, rape was an offense subject to private right of action at that time, so that the investigation could not be opened *ex officio*.

347. With regard to both justifications, the Court clarifies that the Inter-American Convention against Torture establishes two situations that give rise to the State's obligation to investigate: on the one hand, when a complaint is filed and, on the other, when there is a well-founded reason to believe that an act of torture has been committed within the sphere of the State's jurisdiction.[495] In these situation, the decision to open and conduct an investigation is not a discretionary power of the State, but constitutes a peremptory State obligation derived from international law and cannot be ignored or conditioned by domestic legal provisions or decisions of any kind.[496] In addition, as this Court has already indicated, even when the acts of torture or cruel inhuman or degrading treatment have not been denounced before the competent authorities, in any case in which there are indications that these have occurred, the State must open, *ex officio* and immediately, an impartial, independent and thorough investigation that permits a determination of the nature and origin of the injuries found, and the identification and prosecution of those responsible.[497] In the instant case, the Court considers that the statements made by Ms. J. in 1992 were clear in indicating that, at the time of the initial arrest, a gun was pointed at her, and she was blindfolded, and subjected to sexual touching, among other acts (*supra* paras. 322 to 326). In particular, regarding the expression "sexual touching," this Court disagrees with the State's observation that an act of sexual assault cannot be inferred from this expression. It is essential to take into account that victims of sexual abuse tend to use fairly unspecific terms when making their statements and not to explain graphically the anatomical particularities of what happened.[498] In this regard, the CVR indicated that "[i]t is usual that the deponents use ambiguous tor 'personal' expressions when describing the acts of sexual abuse to which they were subjected,"[499] and referred specifically to the use of the expression "inappropriate touching" as one of the ways in which the victims described acts of sexual abuse (*supra* paras. 316 and 317).

348. Regarding the inexistence of the international obligation to investigate sexual "touching" at the time of the events, the Court reiterates its consistent case law[500] concerning the obligation to investigate possible acts of torture or cruel, inhuman or degrading treatment. The Court also points out that, prior to the events of this case and at the time they were being investigated, Peru already had the obligation to investigate acts of violence against women, including sexual violence, and other international bodies, such as the United Nations Committee for the Elimination of Discrimination against Women and the Economic and Social Council had already ruled on this obligation.[501] In this regard, it should be indicated that, although the case law of this Court has

---

495 *Cf. Case of Vélez Loor v. Panama, supra*, para. 240, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 278.

496 *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs, supra*, para. 347, and *Case of Vélez Loor v. Panama, supra*, para. 240.

497 *Cf. Case of Gutiérrez Soler v. Colombia, supra*, para. 54, and *Case of García Lucero et al. v. Chile, supra*, para. 124.

498 Similarly, see International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, Case No. ICTR-96-4-T, para. 687.

499 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.5, p. 364.

500 See, for example, *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 172; *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, paras. 250 to 252; *Case of Bámaca Velásquez v. Guatemala. Merits, supra*, para. 120; *Case of Cabrera García and Montiel Flores v. Mexico, supra,* para. 135; *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 243; *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 274, and *Case of Mendoza et al. v. Argentina, supra*, para. 234.

501 Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, in force since September 3, 1981, and ratified by Peru on September 13, 1982, establishes that: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: […] (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of

interpretive authority for the obligations established in the American Convention,[502] the obligation to investigate and prosecute acts of torture or cruel, inhuman or degrading treatment is derived from the obligation to ensure the full exercise of the rights recognized in the Convention contained in Article 1(1) of the American Convention and does not depend solely on what this Court has reaffirmed in its case law. The guarantee that violations of human rights, such as to life and to personal integrity, be investigated is established in the American Convention and does not arise from its application and interpretation by this Court in the exercise of its contentious jurisdiction, so that it must be respected by the States Parties from the moment they ratify this treaty.[503] Therefore, the State's argument in this regard is not admissible.

349. Regarding the alleged impediments to investigate the facts imposed by domestic law, the Court recalls that it is a basic principle of international law, supported by international jurisprudence, that States must meet their obligations under international conventions in good faith (*pacta sunt servanda*) and, as the Court has already indicated and as established in Article 27 of the 1969 Vienna Convention on the Law of Treaties, a State may not invoke the provisions of its domestic law as justification for its failure to perform a treaty.[504] Accordingly, the State cannot excuse its failure to comply with the obligation to investigate the facts described because they were not codified at the time of the events. Nevertheless, the Court notes that the laws in force in Peru in 1992 did not establish a definition of the offense of rape that would exclude the possibility of "sexual touching" constituting rape.[505]

350. In addition, with regard to the impediment to opening an investigation *ex officio* because the offense of rape was subject to private right of action, the Court repeats that, when there is a well-founded reason to believe that an act of torture or ill-treatment has been committed in the sphere of the State's jurisdiction, the decision to open and conduct an investigation is not a discretionary power, but rather the duty to investigate constitutes a peremptory State obligation that arises from international law and cannot be disregarded or conditioned by domestic legal decisions or provisions

---

women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination." In this regard, in 1989, the Committee for the Elimination of Discrimination against Women indicated that: "Considering that articles 2, 5, 11, 12 and 16 of the Convention require the States parties to act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life, [… r]ecommends to the States parties that they should include in their periodic reports to the Committee information about: 1. The legislation in force to protect women against the incidence of all kinds of violence in everyday life (including sexual violence, abuses in the family, sexual harassment at the work place etc.)." Also, in 1992, the Committee for the Elimination of Discrimination against Women recommended that "States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, *inter alia*: (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including *inter alia* violence and abuse in the family, sexual assault and sexual harassment in the workplace." *Cf.* Committee for the Elimination of Discrimination against Women, General Recommendation No. 12, eighth session, 1989, and General Recommendation No. 19, eleventh session, 1992, available at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm. Regarding the Economic and Social Council, see, Resolution 1988/27 Efforts to eradicate violence against women within the family and society, E/RES/1988/90; the Report of the Secretary-General on the efforts to eradicate violence against women within the family and society (1987), E/CN.6/1988/6; Resolution 1990/15 Recommendations and conclusions arising from the first review and appraisal of the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women to the year 2000, E/RES/1990/68, and Resolution 1991/18 Violence against women in all its forms. See also, Report of the World Conference on Women, Nairobi, 15 to 26 June 1985, para. 76, Available at http://www.un.org/womenwatch/confer/nfls/Nairobi1985report.txt

502 *Cf. Case of Vélez Restrepo and family members v. Colombia, supra*, para. 241.

503 *Cf. Case of Vélez Restrepo and family members v. Colombia, supra*, para. 241.

504 *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 35, and *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 104.

505 Article 170 of the 1991 Criminal Code establishes that: "[a]nyone who, by violence or grave threat, obliges a person to carry out a sexual or similar act, shall be punished with imprisonment of no less than three and no more than six years. If the rape is carried out at gunpoint and by two or more individuals, the punishment shall be no less than four or more than twelve years" (file of annexes to the State's brief of August 14, 2013, folio 5328).

of any kind (*supra* para. 347). In addition, this Court notes that Article 7(b) of the Convention of Belém do Pará specifically obliges the States parties, as of its entry into force for each particular State, to use due diligence to prevent, punish and eliminate violence against women. Thus, when an act of violence is committed against a woman, it is particularly important that the authorities in charge of the investigation conduct it with determination and effectiveness, taking into account society's duty to reject violence against women and the obligation of the State to eliminate it and give the victims confidence in the State institutions created to protect them.[506] Consequently, States must ensure that their domestic laws do not impose differentiated conditions for the investigation of attacks on personal integrity of a sexual nature. In this regard, the Court notes that, under the laws currently in force in Peru, the investigation of offenses against sexual liberty can be opened *ex officio*.[507]

351. The third justification asserted by the State for not opening an investigation was that the presumed victim did not report the facts on occasions other than those described above. In this regard, the Court notes that it is not necessary for the presumed victim to report the facts more than once for the obligation to investigate to arise. Moreover, in cases of alleged sexual violence, the investigation should try insofar as possible to avoid the possible revictimization or reliving of the traumatic experience each time that the victim recalls or makes a statement about what happened.[508] Therefore, it is not reasonable to require victims of sexual violence to repeat the said ill-treatment of a sexual nature in each of their statements or each time that they address the authorities. Furthermore, the Court reiterates that, in the specific case of Ms. J., she reported the said ill-treatment on the two occasions she was granted to make a statement before the authorities: the police statement and her preliminary statement.

352. The fourth and last justification provided by the State is that, "it has been usual that those prosecuted for terrorism allege unduly that they have been victims of rape or other acts of a sexual nature, even though these assertions are not corroborated by the forensic medicine examinations performed, and their only purpose is to contest the legality of the criminal proceedings."[509] The Court observes that this argument reveals a notion that (i) automatically assumes that complaints of sexual violence are false, contrary to the obligation to open an investigation *ex officio* each time that a complaint is made or there are indications that this has occurred (*supra* paras. 341, 342 and 345); (ii) it is contrary to the context of sexual violence that existed at the time of the facts (*supra* paras. 315 to 317); (iii) it ignores the fact that not all cases of sexual violation and/or rape cause physical injuries that can be verified by a medical examination (*supra* para. 329), and (iv) it reveals a discretional and discriminatory standard, based on the procedural situation of the women, in order not to open an investigation into an alleged rape or sexual violence. In this regard, the Court recalls that the investigation that the State should open, once the State authorities are aware of the act, must be serious, impartial and effective (*supra* para. 342). Therefore, the initiation of the investigation cannot be conditioned by the person filing the complaint or by the belief of the authorities, before opening the investigation, that the allegations made are false.

353. In summary, this Court considers that, in this case, the State should have opened an investigation following the first complaint made by Ms. J. on April 21, 1992. The failure to investigate prevents the State from presenting a satisfactory and convincing explanation of the ill-

---

506 *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 193, and *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 177.

507 *Cf.* Law 27,115, which establishes the public criminal action for offenses against sexual liberty (file of annexes to the State's brief of June 24, 2013, annex 8, folios 4323 and 4324), and 1941 Code of Criminal Procedures, article 302 (file of annexes to the State's brief of August 14, 2013, folio 5159).

508 *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 196, and *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 180.

509 The State's answering brief (merits file, folio 498).

treatment alleged, and disproves the arguments concerning its responsibility, with adequate probative elements (*supra* para. 343).

C.2.6) Determination of the ill-treatment that occurred

354. Based on all the preceding considerations, the Court finds that it has been proved sufficiently that, at the time of the initial arrest, Ms. J. was blindfolded, beaten, and subjected to sexual touching, and that after leaving the building on Las Esmeraldas Street she was not taken directly to the DINCOTE but was in a vehicle for an indeterminate time, possibly while other buildings were searched. This determination is based on: (1) the context at the time of the events and the similarity of this with the facts related by Ms. J.; (2) the statements by Ms. J. before the domestic authorities; (3) the inconsistencies in the testimony of the prosecutor of the Public Prosecution Service; (4) the medical examination performed on Ms. J., and (5) the State's failure to clarify the facts. The Court also recalls that Ms. J.'s arrest was made without a court order and she was not brought before a court for at least 15 days (*supra* paras. 137 to 144). The conditions in which the arrest was carried out support the conclusion that the ill-treatment alleged by J. occurred.

355. The Court notes that the Commission and the representative also argue that, during the transfers, State official threatened Ms. J. several times, indicating that they were going "'to drive to the beach,' a phrase that was widely known in Peru as a threat of torture or assassination" (*supra* paras. 308 and 309). This argument has not been explicitly confirmed or refuted by the evidence in the case file. In particular, this Court underscores that, in her statements at the domestic level, Ms. J. made no mention of this. However, the Court indicated above that the date and time that the search of the building on Las Esmeraldas Street ended is unclear, and that Ms. J.'s detention was not recorded by the DINCOTE until 11.55 a.m. on April 15, 1992 (*supra* paras. 92, 338 and 339). According to the prosecutor of the Public Prosecution Service, before being taken to the DINCOTE Ms. J. was driven to her home in order to search it.[510] It is unclear where else Ms. J. was driven between her arrest and her entry into the DINCOTE. These facts accord credibility to Ms. J.'s statement that, after leaving the building on Las Esmeraldas Street, they had been driving around until she was taken to the DINCOTE. Furthermore, according to the CVR, "[i]t was common that women were threatened with being taken to the beach, [which] implied that they were going to be raped."[511] In summary, there is no evidence in the case file that disproves the truth of these allegations and of the statements made by Ms. J. at the domestic level; while these coincide with the context at the time of the facts, as well as with the other facts of the case. Consequently, the Court finds it reasonable to presume that during the said transfers, Ms. J. continued to be threatened by the police officials who had arrested her.

356. For the purposes of this Judgment, the indications that arise from the body of evidence are sufficient to reach the conclusion that Ms. J. suffered different types of ill-treatment at the time of her initial arrest. In this regard, as it has on other occasions,[512] this Court observes that reaching another conclusion, would mean allowing the State to shield itself behind the negligence and ineffectiveness of the investigation and the situation of impunity in which the facts of the case remain, in order to extract itself from its responsibility.

C.2.7) Legal characterization of the facts

357. In the instant case, two disputes exist in relation to the characterization of the ill-treatment verified above. On the one hand, the parties and the Commission differ as to whether what the

---

510 *Cf.* Statement made by Magda Victoria Atto Mendives during the public hearing held in this case.

511 Report of the Truth and Reconciliation Commission, volume VI, chapter 1.5, pp. 324 and 325.

512 *Cf. Case of Kawas Fernández v. Honduras. Merits, reparations and costs.* Judgment of April 3, 2009. Series C No. 196, para. 97, and *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 104.

presumed victim characterized as "inappropriate touching" constitutes sexual violence or rape. On the other, a dispute exists as to the characterization of the facts as torture.

358. Following in the steps of international jurisprudence, and taking into account the provisions of the Convention of Belém do Pará, the Court has considered that sexual violence is constituted by acts of a sexual nature committed on a person without their consent that, in addition to encompassing the physical invasion of the human body, could include acts that do not involve penetration or even any physical contact.[513]

359. Furthermore, pursuant to current jurisprudential and normative criteria in the sphere of both international criminal law and comparative criminal law, this Court has considered that rape does not necessarily entail non-consensual vaginal sex, as it was traditionally deemed. Rape should also be understood as acts of vaginal or anal penetration, without the consent of the victim, using other parts of the perpetrator's body or objects, as well as oral penetration by the male organ.[514] In this regard, the Court clarifies that, in order for an act to be considered rape, it is sufficient that penetration, however slight, occurs, as described above.[515] In addition, it must be understood that vaginal penetration refers to penetration by any part of the perpetrator's body or by objects of any genital opening, including the *labia majora* and *labia minora*, as well as the vaginal orifice. This interpretation is in keeping with the concept that any type of penetration, however slight, is sufficient for an act to be considered rape. The Court understands that rape is a form of sexual violence.[516]

360. In the instant case, the Court has already established that Ms. J. was subjected to sexual "touching" at the time of her arrest by a male State agent, taking into account: (1) Ms. J.'s statements before the domestic authorities: (2) the similarity of what Ms. J. described and the context of sexual violence verified by the CVR at the time of the facts; (3) the difficulty of proving this type of fact; (4) the presumption of truth that should be accorded to this type of complaint, which can be disproved by a series of procedures, investigations and guarantees that were not implemented in this case where no proof to the contrary was submitted, because (5) there are certain inconsistencies in the testimony of the prosecutor of the Public Prosecution Service; (6) the

---

513 *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits*, reparations and costs*, supra*, para. 306. See also, *Case of Fernández Ortega et al. v. Mexico, supra*, para. 119, and *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 109. See also, International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, Case No. ICTR-96-4-T, para. 688.

514 *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits*, reparations and costs*, supra*, para. 310.

515 *Cf.* International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1-T, para. 185; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Kunarac et al.*, Judgment of 22 February 2001, Case No. IT-96-23-T and IT-96-23/1-T, paras. 437 and 438; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Kunarac et al.*, Judgment of the Appeals Chamber of 12 June 2002, Case No. IT-96-23-T and IT-96-23/1-T, para. 127. Also, the Assembly of the States Parties to the Rome Statute of the International Criminal Court has indicated, in order to define the crime against humanity of rape and the war crime of rape, that rape occurs when "the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body." *Cf. Elements of Crimes,* 9 September 2002, ICC-ASP/1/3 (part-II-B), Article 7 (1) (g)-1 and Article 8 (2) (e) vi)-1. Available at: http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf. Special Court for Sierra Leone, *The Prosecutor v. Issa Hassan Sesay et al.,* Judgment of 2 March 2009, Case No. SCSL-04-15-T, paras. 145 and 146. This interpretation was also used by the CVR in its report, that "understand rape as a form of sexual violence that occurs when the perpetrator invaded the body of a person by a conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. This invasion must have been committed by force, or by the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent." *Cf.* Report of the Truth and Reconciliation Commission, volume VI, chapter 1.5, p. 265.

516 In this regard, see Article 2 of the Convention of Belém do Pará; International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, Case No. ICTR-96-4-T, para. 688.

medical examination does not contradict Ms. J.'s version of events, and (7) the State has not opened an investigation into these facts. The Court considers that this act entailed the physical invasion of Ms. J.'s body and, since the presumed victim's genital area was affected, this meant that it was of a sexual nature. In addition, the circumstances in which the acts occurred eliminate any possibility that there was consent. Therefore, the Court considers that the "inappropriate touching" of which Ms. J. was a victim constituted an act of sexual violence. Although victims of sexual violence tend to use unspecific terms when making their statements and not to explain graphically the anatomical particularities of what happened (*supra* para. 347), this Court considers that, based on the statements of the presumed victim in the file of this case, it is not possible to determine whether the said sexual violence also constituted rape as described above (*supra* para. 359).

361. The Court considers that the sexual violence perpetrated by a State agent of which Ms. J. was a victim and while she was being arrested is a serious and reprehensible act, taking into account the vulnerability of the victim and the abuse of power deployed by the agent. Regarding Article 5 of the Convention, the Court considers that the said act was both physically and emotionally degrading and humiliating, so that it could have had severe psychological consequences for the presumed victim.

362. Furthermore, this Court has indicated that the violation of an individual's right to physical and mental integrity has different levels that range from torture to other types of humiliations or cruel, inhuman or degrading treatment, the physical and mental aftereffects of which vary in intensity according to factors that are endogenous and exogenous to the individual (such as duration of the violation, age, sex, context and vulnerability) that must be analyzed in each specific situation.[517] In other words, the personal characteristics of a supposed victim of torture or cruel, inhuman or degrading treatment must be taken into account when determining whether their personal integrity was violated, because these characteristics may change an individual's perception of the reality and, consequently, increase the suffering and feeling of humiliation when subjected to certain acts.[518]

363. The Court has indicated that any use of force that is not strictly necessary due to the conduct of the person detained constitutes an attack on human dignity, in violation of Article 5 of the American Convention.[519] In the instant case, the State has not proved that the force used at the time of the arrest was necessary (*supra* paras. 330 and 331). In addition, the sexual violence of which Ms. J. was a victim also constitutes a violation of her right to personal integrity.

364. To define what should be understood as "torture" in light of Article 5(2) of the American Convention, according to the Court's case law, an act that constitutes torture occurs when the ill-treatment: (a) is intentional; (b) causes severe physical or mental suffering, and (c) is committed for an objective or purpose.[520] It has also been recognized that, under certain circumstances, threats and the real danger of a person being subjected to physical injuries produces such a degree of moral anguish that it can be considered psychological torture.[521]

365. The Court recalls that, at the time of Ms. J.'s initial arrest, she was blindfolded, hit and subjected to sexual touching and, after leaving the building on Las Esmeraldas Street, she was not

---

[517] *Cf. Case of Loayza Tamayo v. Peru. Merits, supra,* paras. 57 and 58, and *Case of Mendoza et al. v. Argentina, supra*, para. 201.

[518] *Cf. Case of Ximenes Lopes v. Brazil, supra,* para. 127, and *Case of Mendoza et al. v. Argentina, supra*, para. 201.

[519] *Cf. Case of Loayza Tamayo v. Peru. Merits, supra,* para. 57, and *Case of the Barrios Family v. Venezuela, supra*, para. 52.

[520] *Cf. Case of Bueno Alves v. Argentina, supra*, para. 79, and *Case of Mendoza et al. v. Argentina, supra*, para. 200.

[521] *Cf. Case of Cantoral Benavides v. Peru. Merits, supra*, para. 102*; Case of Maritza Urrutia v. Guatemala, supra*, para. 92; *Case of Tibi v. Ecuador, supra,* para. 147, and *Case of Baldeón García v. Peru, supra*, para. 119.

taken directly to the DINCOTE, but was in a vehicle for an indeterminate time while, possibly, other buildings were being searched, and during this time she was being threatened (*supra* paras. 354 to 356). When analyzing these facts, it is necessary to take into account that, since she was blindfolded, Ms. J. must have been disoriented, which probably increased her level of anxiety and terror about what could happen. These feelings increased when Ms. J. was driven for some time without a known destination, when it can be presumed that she was threatened by police agents (*supra* para. 355), without any type of legal guarantees. In this context, having been arrested by force, and having been the victim of sexual violence, Ms. J. ran a real and immediate risk that these threats would be carried through. This is also supported by the context that existed at the time of the events.

366. Based on all the circumstances of the case, the Court concludes that the ill-treatment to which Ms. J. was subjected at the time of her arrest constituted a violation of Article 5(2), which prohibits subjecting anyone to torture or to cruel, inhuman, or degrading punishment or treatment.

367. Furthermore, the Court has stipulated that although Article 11 of the American Convention is entitled "Protection of honor and dignity" [Translator's note: in the Spanish version; but "Right to Privacy" in the English translation], its content includes the protection of privacy.[522] Sexual life is one of the spheres protected by the concept of privacy.[523] The Court considers that the sexual violence of which Ms. J. was a victim supposed interference in the most personal and intimate aspects of her private life.

368. Based on the above, the Court concludes that the State is responsible for the violation of the rights to personal integrity, dignity and privacy, established, respectively, in Articles 5(1), 5(2), 11(1) and 11(2) of the American Convention, in relation to Articles 1(1) of this instrument and 6 of the Inter-American Convention against Torture. In addition, the Court notes that the State has not investigated the acts that violated Articles 5 and 11 of the American Convention (*supra* paras. 341 to 353), which signifies failure to comply with the obligation to ensure personal integrity and also the protection of privacy, as well as the obligation established in Article 7(b) of the Convention of Belém do Pará and Articles 6 and 8 of the Inter-American Convention against Torture, to the detriment of Ms. J. Consequently, the Court does not find it necessary to make an additional ruling, regarding the alleged violation of Articles 8 and 25 of the American Convention, to the detriment of J., based on these same facts.

D) Alleged ill-treatment suffered during the detention in the DINCOTE

D.1) Arguments of the Commission and of the parties

369. The Commission concluded that, "[o]n arriving at the DINCOTE, [Ms. J.] was obliged to sit on the cement floor and was not allowed to move or to speak, [and w]hen she asked to use the bathroom, the police responded negatively, so that she was obliged to urinate in a can in the presence of two male police agents." It indicated that "[s]he was not given any food or water from 6 a.m. to 8 p.m. on April 14, 1992"; "[s]he was hit on the face, obliged to remain standing facing the wall for the rest of the night, and heard the cries of other detainees who were being beaten." In addition, [s]he was taken to a cell that had a latrine without a door and the floor covered in cockroaches." Also, according to the Commission, Ms. J. "was coerced 'to collaborate' because, to the contrary, her sister, who was detained in the same place, would be made to suffer more"; she was "threatened with torture using 'the tub of water' and electric shocks," and with "being

---

[522] *Cf. Case of the Ituango Massacres v. Colombia, supra*, para. 193, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 166.

[523] *Cf. Case of Fernández Ortega et al. v. Mexico, supra,* para. 129, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra,* para. 276.

transferred to a floor 'infested by rats.'" It also indicated that "[d]uring the 17 days that she remained in the DINCOTE, on three occasions she was taken from her cell. On one of these occasions, they tried to take her out at 11 p.m. and when she refused, they threw a bucket of cold water on her and she was obliged to leave the cell to be taken to another one. On another occasion, she was taken from her cell at around 8.30 p.m. by a man she did not recognize, questioned about her presence in Ayacucho, and told that if she did not cooperate her sister would be in danger." The Commission also indicated that "Ms. J. was subjected to prolonged incommunicado without any judicial control and subjected to [ill-treatment]."

370. The representative alleged that "[d]uring [her] detention […] J. was threatened that her sister, who had been detained and was released 17 days later, would be tortured. The only reason for her sister's detention was to exercise psychological torture over [Ms. J.] so that "she would confess.'" In this regard, the representative indicated that the State had not denied this, and had failed to explain why J.'s sister was arrested.

371. The State argued that "Ms. J. had not stated that she had suffered acts of torture or cruel, inhuman or degrading treatment as a result of her presence in the DINCOTE building before any domestic instance (police, prosecution, or judicial)." It also indicated that "[t]he DINCOTE had facilities equipped for the search and detention of presumed perpetrators of the crime of terrorism, as well as special isolation cells; also, women detainees were supervised by female personnel." It asserted that "if she had suffered ill-treatment in the DINCOTE," this would have been reflected in the medical report prepared on April 18, five days after her entry into the DINCOTE.

D.2) Considerations of the Court

372. The Court recalls its considerations *supra* on the absolute prohibition of subjecting anyone to torture or cruel, inhuman or degrading treatment or punishment, the obligation to investigate such facts, and the obligation to act with due diligence to prevent, punish and eliminate violence against women (*supra* paras. 303, 304, 341 and 342). In addition, the Court has indicated that, pursuant to Article 5(1) and 5(2) of the Convention, any person deprived of liberty has the right to detention conditions compatible with his or her personal dignity. Since the State is responsible for detention facilities, it is in the special position of guarantor of the rights of anyone who is in its custody.[524] Thus, the State must ensure that the manner and method of deprivation of liberty does not exceed the inevitable level of suffering inherent in detention.[525] In this regard, the Court has considered that poor physical conditions and hygiene of places of detention,[526] as well as the absence of adequate light and ventilation,[527] may, in themselves, violate Article 5 of the American Convention,

---

[524] *Cf. Case of Neira Alegría et al. v. Peru. Merits.* Judgment of January 19, 1995. Series C No. 20, para. 60, and *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 26, 2012. Series C No. 244, para. 135.

[525] *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay, supra*, para. 159, and *Case of Mendoza et al. v. Argentina, supra*, para. 201.

[526] In this regard, Rule 10 of the United Nations Standard Minimum Rules for the Treatment of Prisoners establishes that: "[a]ll accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation." Meanwhile, Rule 12 stipulates that "[t]he sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner." In this regard, Rule 5 of the Bangkok Rules establish that "[t]he accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating." United Nations, General Assembly resolution 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, 16 March 2011, A/RES/65/229. See also, *Case of Díaz Peña v. Venezuela, supra*, para. 135.

[527] Regarding access to daylight and fresh air, Rule 11 of the United Nations Standard Minimum Rules for the Treatment of Prisoners establishes that: "[i]n all places where prisoners are required to live or work, (a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the

depending on their extent and duration and the personal characteristics of the person experiencing them, because they can cause sufferings of an intensity that exceeds the limit of inevitable suffering resulting from the detention, and because they result in feelings of humiliation and inferiority.[528] In addition, States may not cite financial problems to justify detention conditions that do not comply with the minimum international standards in this area and that do not respect the dignity of the human being.[529]

373. The Court notes that, contrary to the ill-treatment that occurred during the initial arrest, the presumed victim did not describe the alleged ill-treatment that occurred during Ms. J.'s detention in the DINCOTE in any of the statements she made at the domestic level. The description of this ill-treatment is found in different briefs of the presumed victim in the context of the proceedings before the inter-American system, particularly in her initial petition before the Inter-American Commission. The Court reiterates that, owing to fear, the victims often abstain from reporting acts of torture or ill-treatment, especially if they remain detained in the place where such acts occurred (*supra* para. 337). Thus, the Court underlines that M.s J.'s first statement was made before police officials while she was still detained in the DINCOTE (*supra* para. 95), while her preliminary statement was given while she was detained in Santa Mónica de Chorrillos.[530]

374. The Court takes note of the similarities of the context that existed at the time of the events with the alleged ill-treatment suffered by Ms. J. (*supra* para. 67). Despite this, the Court notes that, in the absence of other evidence regarding the specific facts of this case,[531] in particular the statement of the presumed victim in this regard, the context alone is not sufficient to prove what happened. Therefore, the Court considers that it does not have sufficient evidence to establish that Ms. J. suffered the ill-treatment that the Commission alleges occurred during the time she was detained in the DINCOTE.

375. In addition, the Court recalls that the State has the obligation to open an investigation *ex officio* whenever it is made aware of the possible occurrence of acts of torture or cruel, inhuman or degrading treatment (*supra* paras. 341, 342 and 347). Nevertheless, the Court notes that there is no record in the case file that the State was informed of the ill-treatment that Ms. J. underwent in the DINCOTE, or that it has been advised of this internally. Consequently, the Court considers that it has not been proved that the State failed to comply with its obligation to investigate the said alleged acts.

*

---

entrance of fresh air whether or not there is artificial ventilation; (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight." In relation to access to the open air and physical and recreational training, Rule 21 of the United Nations Standard Minimum Rules for the Treatment of Prisoners establishes that: (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits. (2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided." See also, *Case of Díaz Peña v. Venezuela, supra*, para. 135.

528 *Cf. Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela, supra*, para. 97, and *Case of Díaz Peña v. Venezuela, supra*, para. 135.

529 *Cf. Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela, supra*, para. 97, and *Case of Díaz Peña v. Venezuela, supra*, para. 135.

530 *Cf.* Chorillos Women's Maximum Security Prison, Report No. 331-97-DIV-EP-MSMCH of August 29, 1997 (file of annexes to the answering brief, annex 35, folio 3680).

531 The Court notes that the testimony of Klemens Felder described some of the alleged ill-treatment suffered by Ms. J. during her time in the DINCOTE. The Court points out that Mr. Felder, who did not know Ms. J. at the time of her detention, was not a witness to these facts; rather his presumed knowledge of them comes from Ms. J. In addition, the Court reiterates that the documents and statements that described the psychological effects on the presumed victim do not constitute sufficiently relevant indications to prove the occurrence of the said acts (*supra* para. 314). *Cf.* Affidavit prepared by the witness Klemens Felder on May 8, 2013 (merits report, folios 1232 and 1234).

376. Regarding the fact that the presumed victim was kept incommunicado, this Court has already indicated that under international human rights law it has been established that incommunicado must be exceptional and that its use during detention may constitute an act contrary to human dignity,[532] because it may result in a situation of extreme mental and moral suffering for the detainee.[533] Similarly, as of its first judgment, the Inter-American Court has considered that prolonged isolation and coercive incommunicado represent, in themselves, forms of cruel and inhuman treatment, harmful to the mental and moral integrity of the individual, and of the right of all those detained to the respect due to the dignity inherent in the human being.[534] Furthermore, State must ensure that those deprived of liberty may have contact with the members of their family.[535] The Court also notes that the Procedural Norms for police investigations, the preliminary investigation, and the prosecution of offenses committed for terrorist purposes, in force at the time of Ms. J.'s detention in the DINCOTE, stipulated that:

> If essential for the elucidation of the offense, the provincial prosecutor shall request the corresponding investigating judge to authorize that the detainee be kept incommunicado for no more than ten days. Incommunicado does not prevent private conversations between the defense counsel and the detainee, which may not be prohibited by the police authority in any case, and does not require prior authorization, informing the provincial prosecutor.[536]

377. The Court notes that Ms. J. has stated that "all the time [she] was in the DINCOTE, she was incommunicado."[537] Likewise, J.'s mother and Emma Vigueras indicated that, while J. was in the DINCOTE, she was kept incommunicado and her lawyer could only see her once without being able to speak with her in private.[538] The State did not submit any evidence in this regard.

378. The Court notes that the evidence provided by the parties reveals that, during her detention in the DINCOTE and at least as of April 16, 1992,[539] Ms. J. only had contact with her defense counsel at the time of her police statement.[540] The Court also stresses that, while she was detained in the DINCOTE, the presumed victim did not have contact with her family. The State has not proved that, in the instant case, it was essential to subject J. to the said incommunicado, or that this was implemented pursuant to domestic law. In this regard, the Court recalls that

---

[532] *Cf. Case of Cantoral Benavides v. Peru. Merits, supra*, para. 82, and *Case of De La Cruz Flores v. Peru, supra*, para. 127.

[533] *Cf. Case of Suárez Rosero v. Ecuador. Merits, supra*, para. 90, *and Case of De la Cruz Flores v. Peru, supra*, para. 127.

[534] *Cf. Case of Maritza Urrutia v. Guatemala, supra*, para. 87, and *Case of De la Cruz Flores v. Peru, supra*, para. 127.

[535] *Cf.* African Commission on Human and Peoples' Rights, *Law Office of Ghazi Suleiman v. Sudan,* Communications Nos. 222/98 and 229/99 (2003), para. 44.

[536] Law No. 24,700, Procedural norms for police investigations, the preliminary investigation, and the prosecution of offenses committed for terrorist purposes, article 2 (file of annexes to the answering brief, annex 5, folio 3244).

[537] Preliminary statement of June 15, 1992, before the Tenth Investigating Court of Lima (file of annexes to the answering brief, annex 42, folio 3709).

[538] J.'s mother testified that "[d]uring the 17 days [that J. was detained in the DINCOTE], she was kept in total incommunicado. [She] was unable to see her. Only one lawyer was able to visit her, but was unable to speak to her in private." Affidavit prepared by J.'s mother on June 13, 2006, for the case of the Miguel Castro Castro Prison (file of annexes to the motions and arguments brief, annex 1, folio 3000). Meanwhile, Emma Vigueras testified that "the DINCOTE kept [Ms. J. and other detainees] incommunicado." Sworn statement made by Emma Vigueras on May 15, 2000 (file of annexes to the motions and arguments brief, annex 2, folio 3009).

[539] According to the record of the search of Ms. J.'s home on April 16, 1992, she and her younger sister were present for this search. *Cf.* Record of house search of April 16, 1992 (file of annexes to the answering brief, annex 26, folio 3651).

[540] The Court notes that, the record of the search executed on April 16, 1992, establishes that the search was carried out in the presence of Ms. J. and her younger sister, and that both had signed it. The record does not establish that the owner of the building, J.'s mother, was present during the operation. However, it indicates that the owner had refused to sign. Therefore, it is unclear whether Ms. J. had seen her mother on that occasion, especially considering that this would contradict the statement by her mother *supra* (para. 377).

incommunicado is an exceptional measure to safeguard the results of an investigation, and can only be applied if it is ordered in accordance with conditions previously established by law.[541] The Court considers that the incommunicado to which Ms. J. was subjected in this case was not in keeping with the exceptional nature of this type of detention, especially considering that domestic law only allowed 10 days of incommunicado and following judicial authorization, and it has not been proved that this procedure was followed in this case. Consequently, the State violated Article 5(1), in relation to Article 1(1) of the Convention, to the detriment of Ms. J.

E) Other alleged violations of personal integrity

379. The Commission also indicated that "the State violated the right recognized in Article 5(4) of the Convention," because "during the time that [Ms. J.] was deprived of liberty in the Castro Castro Prison, she was kept with persons who had been convicted." For its part, the State indicated that this argument could not be examined in the instant case, because it had already been decided by the Court *supra* (paras. 29 to 31).

380. This Court has considered that Article 5(4)[542] of the American Convention imposes on States the obligation to establish a system for classifying prison inmates, in order to ensure that those who are being prosecuted are segregated from those who have been convicted, and that the former are treated in a way that is appropriate to their status as persons who have not been convicted.[543] These guarantees may be understood as a corollary to the right of a person who is being prosecuted to the presumption of innocence until his or her guilt has been established legally, which is recognized in Article 8(2) of the Convention. The State must prove the existence and operation of a classification system that respects the guarantees established in Article 5(4) of the Convention, as well as the existence of exceptional circumstances if it does not separate persons being prosecuted from persons who have been convicted.[544] The Court has also established that the segregation of those prosecuted from those convicted requires not only that they are kept in different cells, but also that those cells are located in different sections within each detention center, or in different establishments if possible.[545]

381. In this case, it has not been proved that there was a classification system for prisoners that segregated those being prosecuted from those who had already been convicted in the Miguel Castro Castro Prison. To the contrary, the State improvised a single system for consolidating prisoners, without implementing adequate regimes for inmates accused of, and convicted for, offenses of terrorism and treason.[546] Therefore, the Court finds it proved that, while Ms. J. was detained in the Miguel Castro Castro Prison, she was not segregated from the prisoners who had been convicted as Article 5(4) of the Convention requires. In this regard, the State did not cite the existence of exceptional circumstances to justify the temporary failure to separate those being prosecuted from those who had been convicted. Consequently, the State violated Article 5(4) of the American Convention, in relation to Article 1(1) of this instrument.

382. The representative also argued that the detention in Germany had a "re-traumatizing" effect on J. In this regard, she indicated that this detention was carried out at the request of the Peruvian

---

541 *Cf. Case of Suárez Rosero v. Ecuador. Merits, supra*, para. 89.

542 Article 5(4) of the American Convention stipulates that: "[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons."

543 *Cf. Case of Tibi v. Ecuador, supra*, para. 158, and *Case of Yvon Neptune v. Haiti, supra*, para. 146.

544 *Cf. Case of Yvon Neptune v. Haiti, supra*, para. 146.

545 *Cf. Case of Yvon Neptune v. Haiti, supra*, para. 147.

546 *Cf.* Report of the Truth and Reconciliation Commission, volume VII, chapter 2.68, p. 769, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs, supra*, para. 197.10.

State, and noted that it had exacerbated J.'s situation, contrary to fundamental human rights principles. In this regard, the Court finds that the possible effects that Ms. J.'s detention in Germany might have caused her cannot be attributed to the Peruvian State.

X
REPARATIONS
(*Application of Article 63(1) of the American Convention*)

383. Based on the provisions of Article 63(1) of the American Convention,[547] the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to make adequate reparation,[548] and that this provisions reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[549]

384. The Court has established that the reparations must have a causal nexus with the facts of the case, the violations that have been declared, the harm substantiated, and the measures requested to redress the respective harm. Accordingly, the Court must observe the concurrence of these factors in order to rule appropriately and according to law.[550]

385. Bearing in mind the violations of the Convention declared in the preceding chapters, the Court will proceed to examine the claims presented by the Commission in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation in order to establish the measures designed to redress the harm caused to the victim.[551]

386. The Court recalls that, in this case, it determined that the specific claims for reparations of the representative were not admissible due to late presentation (*supra* paras. 6 and 33). Consequently, in this chapter it will only examine the Commission's claims for reparation and the corresponding arguments of the State. Despite this, the Court notes that, in the motions and arguments brief presented within the appropriate time frame, the representative included some requests that the Court will take into account in the corresponding section.

A) Injured party

387. The Court reiterates that, in the terms of Article 63(1) of the Convention, the injured party is considered to be the person who has been declared a victim of the violation of any right recognized in this instrument. Therefore, the Court finds that Ms. J. is the "injured party," and as a victim of the violations declared in Chapters VIII and IX she will be the beneficiary of the following measures ordered by the Court.

---

547 Article 63(1) of the American Convention establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

548 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Luna López v. Honduras, supra*, para. 213.

549 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 25, and *Case of Luna López v. Honduras, supra*, para. 213.

550 *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Luna López v. Honduras, supra*, para. 215.

551 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 a 27, and *Case of Luna López v. Honduras, supra*, para. 214.

388. The Court repeats that, in keeping with its case law,[552] it will not consider the next of kin of the victim as an injured party and will not rule on the requests made by the representative in their favor (*supra* para. 25).

B) Obligation to investigate the facts that gave rise to the violations, and to identify, prosecute and punish those responsible, as appropriate

389. The Commission asked the Court to order the State "[t]o investigate the facts that violated the American Convention, in an impartial and effective manner and within a reasonable time, in order to clarify them completely, identify the masterminds and perpetrators, and impose the corresponding penalties." The Commission also asked the Court to order the State "[t]o establish the corresponding administrative, disciplinary or criminal measures to respond to the acts or omissions of the State officials that contributed to the denial of justice and the current impunity of the facts of the case."

390. The State indicated that "at the time of the facts, the domestic authorities did not observe any well-founded reason […] or receive a complaint by the petitioner with regard to any type of violation of her human rights […] that would justify opening the pertinent investigations, [and, s]ubsequently, this situation became materially impossible" owing to Ms. J.'s departure from the country. It affirmed that "if the Inter-American Court declares the violation of the American Convention based on any of the acts denounced by the petitioner, the Peruvian State will be obliged to take the pertinent measures to clarify the supposed responsibility of the public officials."

391. The Court has determined in this Judgment that the State violated, to the detriment of Ms. J., Articles 5(1), 5(2), 11(1) and 11(2) of the American Convention, in relation to Article 1(1) of this instrument and Article 6 of the Inter-American Convention against Torture, owing to the ill-treatment suffered by Ms. J. at the time of her initial arrest, and also Article 8 of the Inter-American Convention against Torture and Article 7(b) of the Convention of Belém do Pará, because the State did not investigate the violation of personal integrity perpetrated against Ms. J. (*supra* paras. 302 to 368).

392. Consequently, as it has established on other occasions,[553] these facts must be investigated effectively in proceedings against those presumably responsible for the attacks on personal integrity and privacy that occurred. Accordingly, the Court decides that the State must open and conduct effectively a criminal investigation into the acts that violated Article 5(2) of the Convention and that were committed against Ms. J., in order to determine the eventual criminal responsibilities and, as appropriate, apply the legal penalties and consequences. This obligation must be met within a reasonable time, taking into consideration the criteria indicated for investigations in this type of case (*supra* paras. 341 to 352). In addition, The State must expedite the pertinent disciplinary, administrative of criminal actions in the event that, during the investigation into the said facts, it is revealed that there were procedural or investigative irregularities related to them.[554]

C) Other measures of integral reparation: rehabilitation, satisfaction and guarantees of non-repetition

---

[552] *Cf. Case of the Ituango Massacres v. Colombia, supra*, para. 98, and *Case of Díaz Peña v. Venezuela, supra*, para. 150.

[553] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, para. 174, and *Case of Mendoza et al. v. Argentina, supra*, para. 344.

[554] *Cf. Case of Cabrera García and Montiel Flores v. Mexico, supra,* para. 215, and *Case of Mendoza et al. v. Argentina, supra*, para. 344.

393. The Commission asked, in general, that the State be ordered "[t]o establish integral reparation in favor of Ms. J. for the human rights violations that are declared. […] This reparation should include both the pecuniary and the non-pecuniary aspects. If the victim so wishes, it should provide the pertinent measures of rehabilitation for her physical and mental health condition." For its part, the State indicated that "[i]n its judgments in similar cases, the Inter-American Court has recognized […] that, in the face of this type of situation – terrorism – reparation is made by new trials conducted in keeping with international standards that satisfy the guarantees of due process. Thus the criminal proceedings opened against Ms. J. before the National Criminal Chamber abides by both the recommendations made by the Commission and the mandates of the Inter-American Court, as well as the precepts of the Peruvian Constitutional Court, respecting all the guarantees of due process."

394. International case law and, in particular, that of the Court has established repeatedly that the judgment constitutes *per se* a form of reparation.[555] Nevertheless, considering the circumstances of this case and the harm to the victim derived from the violation of Articles 5, 7, 8 and 11 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, the Court finds it pertinent to determine the following measures of reparation.

C.1) Rehabilitation

395. The Court notes that, when she arrived in the United Kingdom, Ms. J. had tuberculosis, which she probably contracted while she was in prison (*supra* para. 114). In addition, she was unable to endure being in small spaces and frequently cried when confronted with memories of her past experiences.[556] According to a psychological report prepared by the Traumatic Stress Clinic, Ms. J. suffers from complex chronic post-traumatic stress (*supra* para. 114). The report indicated that, as described by Ms. J., she relives the events through images, nightmares and flashbacks. This may be caused by internal or external stimuli that represent an aspect of her traumatic experience. These circumstances are accompanied by intense psychological stress with tachycardia, sweating, dizziness, nausea and, sometimes, vomiting. In addition, Ms. J. states that she avoids certain thoughts, feelings or situations related to the events; for example, she avoids people from her country and speaking her own language. Ms. J. also suffers from moderate to severe depression and severe anxiety.[557] This diagnosis was corroborated by Thomas Wenzel, Chair of the World Psychiatric Association, Section on "Psychological Consequences of Torture and Persecution."[558]

396. Notwithstanding the foregoing, the Court notes that, based on the information provided, it is not possible to determine precisely whether the psychological and psychiatric effects described are a consequence of the facts of this case or of the case of the *Miguel Castro Castro Prison v. Peru,* in which Ms. J. was also declared a victim of the violation of her personal integrity, in particular of torture and other forms of cruel, inhuman and degrading treatment.[559] The Court recalls that, in the case of the *Miguel Castro Castro Prison v. Peru,* the Court ordered:

> With regard to the victims who substantiate that they are domiciled abroad and prove before the competent domestic organs, in the manner and within the time frames established in paragraph 433.c.v) and vii) of [that]

---

555 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 29, 1996. Series C No. 29, para. 56, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, supra*, para. 250.

556 *Cf.* Letter from Dr. Gill Hinshelwood dated October 26, 1994 (file of annexes to the Merits Report, annex 9, folio 93).

557 *Cf.* Report of the Traumatic Stress Clinic dated November 28, 1996 (file of annexes to the Merits Report, annex 7, folios 81 a 89).

558 *Cf.* Medical report of Dr. Thomas Wenzel dated March 10, 2008 (file of annexes to the motions and arguments brief, annex 60, folio 3192).

559 *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs, supra*, para. 293, 300, 333.

judgment, that as a result of the facts of [that] case they need to receive appropriate medical or psychological treatment, the State must deposit in a bank account indicated by each victim the sum of US$5,000 (five thousand United States dollars), so that this sum can contribute to the said treatment.[560]

397. The Court has not received any information that the State has complied with this measure of reparation. In the instant case, the Court has established that Ms. J. was a victim of a violation of Article 5(2) of the Convention at the time of her initial arrest (*supra* paras. 313 to 368). The Court considers that, owing to the severity of the said facts, it is possible that they resulted in medical consequences that must be remedied, without prejudice to the reparation established in the case of the Miguel Castro Castro Prison. Consequently, as it has in other case,[561] the Court finds it necessary to establish a measure of reparation that provides appropriate treatment for the psychiatric or psychological problems caused to the victim. The Court observes that Ms. J. does not live in Peru, so that, if she requests psychological or psychiatric treatment, the State must award her, once, the sum of US$7,000.00 (seven thousand United States dollars) for the expenses of psychological or psychiatric treatment, as well as for medicines and other related expenses, so that she may receive this treatment in the places where she resides.[562] Ms. J. must advise whether she wishes to receive psychological or psychiatric treatment within six months of notification of this Judgment.

C.2) Satisfaction: publication and dissemination of the Judgment

398. If Ms. J. wishes, and advises the Court to this effect, the State must publish, as the Court has ordered in other cases:[563] (a) the official summary of this Judgment prepared by the Court, once, in the official gazette; (b) the official summary of this Judgment prepared by the Court, once, in a national newspaper with widespread coverage, and c) this Judgment in its entirety, available for one year, on an official website. The State must make these publications within nine months of notification of this Judgment, if Ms. J. wishes these publications to be made.

C.3) Guarantees of non-repetition: request to adapt domestic law

399. The Commission asked the Court to order the State "[t]o complete the process of adapting the provisions of Decree-Law 25,475 that are still in force and the incompatibility of which with the American Convention was declared in the [… Merits] Report." The State indicated that "part of this recommendation had already been complied with by adapting and rectifying the law with another law that respected the due guarantees." Regarding Article 13(c) of Decree-Law No. 25,475, the State indicated that, "in the opinion of the Peruvian Constitutional Court, this provision is not unconstitutional or incompatible with the American Convention […]; thus, this restriction is valid."

400. First, this Court recalls that the laws applied in this case have already been examined in previous judgments of the Court. In this regard, the Court reiterates its previous considerations when exercising its competence to monitor compliance with judgment in the cases of *Castillo Petruzzi et al., Loayza Tamayo* and *Lori Berenson v. Peru*, in the sense that the State has adopted measures to comply with the reform of domestic law as a result of the violations declared in the respective judgments.[564]

---

560 *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs, supra*, para. 450.

561 *Cf. Case of Barrios Altos v. Peru. Reparations and costs.* Judgment of November 30, 2001. Series C No. 87, paras. 42 and 45, and *Case of Mendoza et al. v. Argentina, supra*, para. 311.

562 *Cf. Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 270, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 340.

563 *Cf. Case of the Las Dos Erres Massacre v. Guatemala, supra*, para. 270, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 340.

564 *Cf. Case of Castillo Petruzzi et al. v. Peru. Monitoring compliance with judgment, supra*, considering paragraph 19; *Case of Loayza Tamayo v. Peru. Monitoring compliance with judgment, supra*, considering paragraph 34, and *Case of*

401. In its Orders in those cases, the Court found that Peru had adopted measures aimed at rescinding some domestic norms that were contrary to the Convention by annulment, reform or a new interpretation. These reforms took into account, *inter alia*: (i) the infringement of the guarantee of an ordinary judge by the use of "faceless" judges; (ii) the questioning of the presumption of innocence by opening the preliminary investigation with an arrest warrant; (iii) the prohibition to recuse judges, and (iv) the violation of the right to file an application for *habeas corpus*. In this regard, the Court added that some norms of a legal nature had been issued in this regard, the content of which was designed to comply with some standards of international human rights law.[565]

402. In the above-mentioned cases, due to the inexistence of a specific and actual dispute between the parties with regard to the scope of the reforms ordered, the Court proceeded to terminate the monitoring of compliance with the measure of reparation concerning the obligation to adapt domestic law to the standards of the American Convention.[566] The Court emphasized that, even though some aspects of the counter-terrorism laws had not been examined in those Orders, this was not an obstacle to their future analysis in the context of other contentious cases.[567]

403. Consequently, the Court will not rule on the provisions specifically analyzed in the Orders on monitoring compliance in the cases of *Castillo Petruzzi, Loayza Tamayo* and *Lori Berenson Mejía.* Furthermore, it will not rule on the provision relating to the obligation to hold the trial in private hearings established in Article 13(f) of Decree-Law 25,475, because Legislative Decree No. 922 establishes the public nature of the oral hearing for offenses relating to terrorism, save in exceptional cases.[568] According to information provided by the State, this decree provides "the current legal framework for terrorism trials."

C.3.1) The legal restrictions that prevent offering as witnesses those who intervened in the elaboration of the police attestation

404. The Court considered that Article 13(c) of Decree-Law No. 25,475 applicable to the proceedings against Ms. J., prevented her from exercising the right to question the witnesses who had intervened in the elaboration of the police attestation (*supra* paras. 208 to 210), in violation of her right to defend herself. The Court notes that, when analyzing this provision, the Constitutional Court found that the impossibility of calling as witnesses those who intervened in the police attestation was not unconstitutional, because it was a reasonable measure to protect the rights of those who had intervened in the police investigation. In addition, according to the Constitutional Court, this restriction did not affect the possibility of offering and taking other pertinent probative measures, because the police attestation is just one more probative element and does not have the status of conclusive proof; furthermore, it is not prohibited to question the content of the police

---

Lori Berenson Mejía v. Peru. Monitoring compliance with judgment, supra, considering paragraph 16.

565 *Cf. Case of Castillo Petruzzi et al. v. Peru. Monitoring compliance with judgment, supra*, considering paragraphs 12, 13, 15, 18 and 19, and *Case of Lori Berenson Mejía v. Peru. Monitoring compliance with judgment, supra*, considering paragraph 17.

566 *Cf. Case of Castillo Petruzzi et al. v. Peru. Monitoring compliance with judgment, supra*, considering paragraph 25; *Case of Loayza Tamayo v. Peru. Monitoring compliance with judgment, supra*, considering paragraph 34, and *Case of Lori Berenson Mejía v. Peru. Monitoring compliance with judgment, supra*, considering paragraph 34.

567 *Cf. Case of Castillo Petruzzi et al. v. Peru. Monitoring compliance with judgment, supra*, considering paragraph 25; *Case of Loayza Tamayo v. Peru. Monitoring compliance with judgment, supra*, considering paragraph 34, and *Case of Lori Berenson Mejía v. Peru. Monitoring compliance with judgment, supra*, considering paragraph 21.

568 *Cf.* Legislative Decree No. 922 of February 11, 2003, article 12 (file of annexes to the answering brief, annex 15, folios 3301 and 3302).

attestation by means of the right to challenge evidence that may be biased (*derecho de tacha*) which may eventually be used against it.[569]

405. The State also indicated that, "in the practice, police officials are summoned to hearings and attend them, and this provides guarantees for the right of the persons accused of the crime of terrorism to be able to defend themselves. In this regard, it can be affirmed that the prohibition contained in the legal norm has been overcome in the practice." The State mentioned several cases in which the police who had taken part in the elaboration of the police attestation had appeared to testify. Similarly, the deponent for information purposes, Federico Javier Llaque Moya, indicated in this regard that:

> Those who intervened in the attestation have appeared as witnesses in numerous proceedings; their testimony is assessed during the judicial investigation stage by the criminal judge and then subjected to cross-examination in the trial by the Criminal Chamber. To date, this practice has been used so as not to obstruct the right of defense of the person who considers the appearance of such witnesses necessary.[570]

406. The case file before the Court also contains a decision of the National Criminal Chamber in which police agents appeared who had taken part, for example, in the operations of the search and the arrest of the accused.[571]

407. This Court recalls that it has established that not only the elimination or enactment of norms under domestic law guarantees the rights contained in the American Convention, pursuant to the obligation contained in Article 2 of this instrument. In addition, the implementation of State practices resulting in the effective observance of the rights and freedoms recognized therein is also required. Consequently, the existence of a norm does not, in itself, guarantee that its application is appropriate. The application of the norms or their interpretation as jurisdictional practices and an expression of the legal order must be adapted to the objective sought by Article 2 of the Convention. In other words, the Court underscores that judges and organs for the administration of justice at all levels are obliged to exercise *ex officio* "control of the conformity" of domestic norms with the American Convention; evidently, within the framework of their respective competences and the corresponding procedural regulations. In this task, they must take into account not only the international treaty concerned, but also how it has been interpreted by the Inter-American Court, ultimate interpreter of the American Convention.[572]

408. Based on the above, the Court considers that it is not necessary to order the reform of Article 13(c) of Decree-Law No. 25,475, in the understanding that, according to the information provided to the case file, judicial practice has allowed the questioning of officials who took part in the elaboration of the police attestation in specific cases.

D) Obligation to respect the guarantees of due process in the criminal proceedings opened against Ms. J.

409. The Commission asked the Court to order the State "[t]o annul any expression of the State's punitive powers against J., in which the procedural defects persist that were evident in the trial held in 1992 and 1993 and that gave rise to the violations of the American Convention. Specifically, the

---

569 *Cf.* Judgment of the Constitutional Court of January 3, 2003, File No. 010-2002-AI/TCLIMA, conclusions 147 to 159 (merits report, folios 1573 to 1577).

570 Testimony of Federico Javier Llaque Moya during the public hearing held in this case.

571 *Cf.* Judgment of the National Criminal Chamber of May 25, 2006 (file of annexes to the answering brief, annex 61, folios 4166 to 4168).

572 *Cf. Case of Almonacid Arellano et al. v. Chile, supra*, para. 124, and *Case of Castañeda Gutman v. Mexico. Monitoring compliance with judgment.* Order of the Court of August 28, 2013, considering paragraph 23.

State should ensure that no proceedings are held against Ms. J. based on the evidence obtained illegally and arbitrarily, as described in the [...] Merits Report."

410. In her motions and arguments brief, the representative requested "[t]he lifting *ipso facto* of the arrest warrant for J. in Peru" and "the final archiving of the proceedings opened against her, that began in 1992 and was re-opened after 2001."

411. The State indicated that "the punitive claims of the Peruvian State continue to be legally sound [...] and are founded on law, because they are based on a self-corrective measure that the State itself sought to accord to the trials held in that decade." In addition, it indicated that "[c]urrently, the procedural defects referred to by the Inter-American Commission in its Merits Report no longer persist in the proceedings opened against Ms. J.; they have been rectified and the proceedings are being conducted with the appropriate guarantees of due process and based on laws that respect human rights." It also stressed that "renouncing the obligation and the right to administer justice (*ius puniendi*) would imply convalidating the impunity of the serious illegal acts committed by the terrorist movements against the Peruvian State."

412. The Court recalls that criminal proceedings against Ms. J. are currently ongoing, during which it has been declared that there are grounds to proceed to an oral hearing for the offenses of apology of terrorism (article 316 of the Criminal Code) and membership in a terrorist organization (article 322 of the Criminal Code). This Court has concluded that this criminal prosecution does not constitute a violation of the principle of *non bis in idem* (*supra* paras. 256 to 273). Therefore, the reparation requested by the representative that the proceedings against Ms. J. be archived is not admissible.

413. Nevertheless, the Court recalls that the State is obliged, owing to the general obligation to respect rights and to adopt provisions of domestic law (Arts. 1(1) and 2 of the Convention) to take the necessary measures to ensure that violations such as those that have been declared in this Judgment do not occur again within its jurisdiction.[573] Thus, as the Court has ordered in other cases,[574] the State must ensure that the proceedings against Ms. J. observe all the requirements of due process of law with full guarantees of a hearing and defense for the accused and, to this end, the State must take into account the Court's conclusions in Chapters VIII and IX of this Judgment and ensure that the violations of due process verified in them are not repeated, and also, if appropriate, determine the effects of the violations found in this Judgment on the criminal proceedings underway against Ms. J.

E) Compensation for pecuniary and non-pecuniary damage

414. The Commission asked, in general, that the State be ordered to provide integral reparation in favor of Ms. J., which should "include both the pecuniary and the non-pecuniary aspects" *supra* para. 393). The State did not respond to the Commission's request specifically.

415. The Court has developed in its case law the concept of pecuniary damage and has established that this supposes the loss of, or detriment to, the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.[575] Furthermore, international jurisprudence has established

---

[573] *Cf. Case of Suárez Rosero v. Ecuador. Reparations and costs.* Judgment of January 20, 1999. Series C No. 44, para. 106, and *Case of De la Cruz Flores v. Peru, supra,* para. 117.

[574] *Cf. Case of De la Cruz Flores v. Peru, supra,* para. 118.

[575] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Luna López v. Honduras, supra*, para. 246.

repeatedly that the judgment may constitute *per se* a form of reparation.[576] The Court has also developed in its case law the concept of non-pecuniary damage, which can include the suffering and affliction caused to the direct victims, the impairment of values that are of great significance for the individual, and also the changes of a non-pecuniary nature in the living conditions of the victims or their family.[577]

416. In the instant case, this Court has considered it proved that Ms. J. had a bachelor's degree in law at the time of her arrest. Even though Ms. J. has received an income after leaving Peru, the Court considers that it should establish, in equity, compensation for Ms. J.'s loss of earnings. In addition, the Court finds it reasonable to presume that the facts of this case have caused Ms. J. to incur expenses, such as medical care. Also, the Court considers that, owing to the violations declared in this Judgment, it can be presumed that these caused serious non-pecuniary damage, because it is inherent in human nature that any person who has suffered a violation of his or her human rights experiences suffering.[578]

417. The Court does not have sufficient probative elements to determine with precision the pecuniary and non-pecuniary damage caused in the instant case. However, based on the criteria established in the Court's consistent case law, the circumstances of the case, the nature and severity of the violations committed, as well as the physical, moral and psychological suffering caused to the victim,[579] the Court finds it pertinent to establish, in equity, for pecuniary and non-pecuniary damage the sum of US$40,000.00 (forty thousand United States dollars), which must be paid within the respective time frame established by the Court (*infra* para. 429).

F) Costs and expenses

418. As the Court has indicated on previous occasions, costs and expenses are included in the concept of reparation established in Article 63(1) of the American Convention.[580] Costs and expenses are part of the concept of reparation, because the actions taken by the victims in order to obtain justice at both the domestic and the international level, entail disbursements that must be compensated when the State's international responsibility has been declared in a guilty verdict.[581]

419. The representative asked for "reimburse[ment of] the costs and expenses disbursed by J. over the time – since 1997 – that this case has been processed by the inter-American system." She also requested the "reimbursement of legal fees and the hours spent by the legal representatives working […] on this case."[582] In addition, the representative advised that, following the delivery of the final written arguments, she had incurred expenditure of US$866,522. On that occasion, she indicated that, in total, the "costs of litigation, during the stage of the proceedings before Court are [US$15,980,522].

---

[576] *Cf. Case of El Amparo v. Venezuela. Reparations and costs.* Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of Luna López v. Honduras, supra*, para. 265.6.

[577] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Luna López v. Honduras, supra*, para. 251.

[578] *Cf. Case of Reverón Trujillo v. Venezuela, supra*, para. 176, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, supra*, para. 303.

[579] *Cf. Case of Ticona Estrada et al. v. Bolivia, supra*, para. 109, and *Case of the Río Negro Massacres v. Guatemala, supra,* para. 309.

[580] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, supra*, para. 315.

[581] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs, supra*, para. 79, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, supra*, para. 316.

[582] In this regard, she indicated "as a reference point, an hourly rate according to the rates applied by the UK Attorney General's Panel of Counsel, of £120 an hour."

420. The State recalled that the Court had not admitted the representative's claims concerning reparations and costs because they were time-barred. Regarding the requests made on July 29, 2013, the State "rejected the new claims made by the representative regarding expenses […] because the expenses must be directly related to this case and the development of the proceedings in it, and those sums that do not correspond to the specific case and/or are not strictly related to it are excluded."

421. The Court recalls that, in the instant case, the representative's claims are admissible as regards the costs and expenses produced following the presentation of the motions and arguments brief (*supra* para. 33). The Court has indicated that the claims for costs and expenses of the victims or their representatives, and evidence that supports them, must be submitted to the Court at the first procedural moment granted them; that is, in the motions and arguments brief, without prejudice to the possibility of updating those claims subsequently, in keeping with the new costs and expenses incurred during the proceedings before this Court.[583] In addition, the Court reiterates that it is not sufficient to merely forward probative documents; rather the parties must also include arguments that relate the evidence to the fact that it is considered to represent and that, in the case of alleged financial disbursements, the items and their justification must be clearly established.[584]

422. The Court notes that the expenses of the representative, incurred after the presentation of the motions and arguments brief, for which evidence was provided, amount to approximately US$237,880.14.[585] Nevertheless, some vouchers refer to expenses covered by resources from the Victim's Legal Assistance Fund,[586] and some vouchers refer, in general, to expenses for office supplies, without an indication of the specific percentage that corresponds to the expenses for this case.[587] In fairness, these concepts have been deducted from the calculation made by the Court. In addition, those expenses the *quantum* of which is not reasonable will be deducted from the assessment made by the Court. Also, as it has in other cases, the Court can infer that the representative incurred expenses during the processing of the case before the inter-American human rights system derived from the litigation and from attending the hearing held before the Court and, consequently, they will be taken into account when establishing the respective costs and expenses.

423. Consequently, the Court decides to establish a reasonable sum of US$40,000.00 (forty thousand United States dollars) for costs and expenses for the work carried out in the litigation of the case at the international level, including the expenses arising from the participation of the two lawyers who collaborated in the defense of the case as of the public hearing. The amounts mentioned must be delivered directly to Ms. J. The Court considers that, during the proceeding of

---

583 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 275, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, supra*, para. 317.

584 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 277, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, supra*, para. 317.

585 The representative provided a copy of the invoice of an expert in lip-reading. However, this expertise was not presented to the Court so that is cost will not be taken into account.

586 The Court notes that the representative provided two vouchers for the payment of lunch for the whole team of lawyers, as well as a voucher for the expenses incurred by a representative during his stay in San José that were not covered by the Victims' Legal Assistance Fund. In this regard, the Court recalls that the Victims' Legal Assistance Fund covered the payment of a per diem of one of Ms. J.'s representatives. *Cf.* Invoices dated May 16, 2013 (file of annexes to the final written arguments of the representatives and to the brief dated June 24, 2013, folio 4947), and invoice and receipt dated May 17, 2013 (file of annexes to the final written arguments of the representatives and to the brief dated June 24, 2013, folio 4951).

587 *Cf.* Invoice dated June 26, 2013, for £207.96 (pounds sterling) (file of annexes to the final written arguments of the representatives and to the brief dated June 24, 2013, folio 4959).

monitoring compliance with this Judgment, it may establish that the State should reimburse the victim or her representative the reasonable expenses incurred at that procedural stage.

G) Reimbursement of expenses to the Victim's Legal Assistance Fund

424. The presumed victim, through her representative, requested the support of the Victim's Legal Assistance Fund of the Court in order to cover expenses of the litigation before the Court, such as "the translation of a document from German to Spanish, the photocopies of the motions and arguments brief, sending the annexes of this brief to Costa Rica, and also the expenses arising from the participation in the public hearing in this case."

425. In an Order of the acting President of April 16, 2013, authorization was given for the Fund to cover the necessary travel and living expenses to receive the testimonial statement of J.'s sister during the hearing, as well as for the representative or, if appropriate, the person that she might appoint for this purpose, to appear at the public hearing. It was also established that the necessary assistance would be provided to cover the costs of preparing and sending the affidavit of one witness.

426. The State was able to submit its observations on the disbursements made in the instant case, which amounted to US$3,683.52 (three thousand six hundred and eighty-three United States dollars and fifty-two cents). Peru considered "that the details of the expenses indicated as regards the items covered […] and the total amount […] have been certified by the Court's Secretariat, so that they have sufficient credibility." Nevertheless, the State reiterated that "the petitioner failed to justify a supposed absence of financial resources at the appropriate time," and indicated that, before ordering the reimbursement to the Fund of the expenditure incurred, the occurrence of violations of the American Convention must be determined.

427. First, the Court notes that, according to article 3 of the Rules of the Court for the Operation of the Legal Assistance Fund, the determination of the admissibility of the request to have access to the Legal Assistance Fund is made by the President of the Court. This Court notes that, in its answering brief, the State had already argued that the presumed victim had not justified her absence of financial resources. In this regard, in his Order of October 24, 2012, the acting President considered "sufficient evidence of the presumed victim's current lack of financial resources, her affidavit, as well as the other probative elements provided," and established that "the request submitted to have access to the Court's Legal Assistance Fund was in order."[588] Therefore, the Court considers that the State's repetition of the said objection is inappropriate.

428. Consequently, in application of article 5 of the Rules for the Operation of the Fund, the Court must assess whether it is appropriate to order the defendant State to reimburse the Legal Assistance Fund the disbursements made. Owing to the violations declared in this Judgment, the Court orders the State to reimburse the said Fund the sum of US$3,683.52 (three thousand six hundred and eighty-three United States dollars and fifty-two cents) for the expenses incurred. This amount must be reimbursed to the Inter-American Court within ninety day of notification of this Judgment.

H) Method of complying with the payments ordered

429. The State must make the payment of the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this Judgment directly to Ms. J., in the bank account that the victim indicates for this purpose. Ms. J. must provide the information on this

[588] *Case of J. v. Peru. Victim's Legal Assistance Fund.* Order of the acting President of the Court of October 24, 2012, considering paragraphs 9 and 13.

bank account within six months of notification of this Judgment. The State must make the payment of the respective compensation within one year of notification of this Judgment, in accordance with the following paragraphs.

430. Should the beneficiary die before the respective compensation is delivered to her, it shall be delivered directly to her heirs in accordance with the applicable domestic law.

431. The State must comply with its monetary obligations by payment in United States dollars.

432. If, for reasons that can attributed to the beneficiary of the compensation or her heirs, it is not possible to pay the amounts established within the indicated time frame, the State shall deposit these amounts in her favor in an account or certificate of deposit in a solvent Peruvian financial institution, in United States dollars, and in the most favorable financial conditions permitted by banking law and practice. If the corresponding compensation is not claimed, after 10 years the amounts shall be returned to the State with the interest accrued.

433. The amounts allocated in this Judgment as compensation and to reimburse costs and expenses must be delivered to Ms. J. integrally, as established in this Judgment, without any deductions arising from eventual taxes or charges.

434. If the State incurs in arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Peru.

XI
OPERATIVE PARAGRAPHS

435. Therefore,

THE COURT

DECIDES,

unanimously,

1. To reject the preliminary objection filed by the State concerning the temporal competence of the Court to rule on the alleged violation of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women, in accordance with paragraphs 18 to 21 of this Judgment.

DECLARES,

unanimously, that:

2. The State is responsible for the violation of the right to personal liberty, recognized in paragraphs 1, 2, 3, 4, 5 and 6 of Article 7 of the American Convention, in relation to Articles 1(1) and, as appropriate, 2 of this instrument, to the detriment of Ms. J., in accordance with paragraphs 125 to 132, 137 to 144, 152, 156 to 168, 170, 171 and 201 of this Judgment.

3. The State is responsible for the violation of the judicial guarantees of the competence, independence and impartiality of the judicial authorities and the reasoning of judicial decisions recognized in Article 8(1) of the Convention, the right of defense embodied in paragraphs (b), (c), (d) and (f) of Article 8(2) of the Convention, the right to the presumption of innocence, recognized in Article 8(2), as well as the right to public proceedings, recognized in Article 8(5) of the Convention, all in relation to Article 1(1) and, as appropriate, Article 2 of this instrument, to the

detriment of Ms. J., in accordance with paragraphs 166 to 168, 181 to 189, 194 to 210, 215, 217 to 220, 224 to 229, 233 to 248 and 286 to 295 of this Judgment.

4. The State is responsible for the violation of the rights to personal integrity, to dignity and to privacy recognized, respectively, in Articles 5(1), 5(2), 11(1) and 11(2) of the American Convention, in relation to Articles 1(1) of this instrument and 6 of the Inter-American Convention to Prevent and Punish Torture, owing to the ill-treatment of Ms. J. during her initial arrest, as well as for failure to comply with its obligation to guarantee, by an effective investigation of these facts, the rights embodied in Articles 5 and 11 of the American Convention, in relation to Article 1(1) thereof and to Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture and Article 7(b) of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women, in accordance with paragraphs 313 to 368 of this Judgment.

5. The State is responsible for the violation of the right to personal integrity, recognized in Article 5(1) and 5(4) of the American Convention, in relation to Article 1(1) of this instrument, because Ms. J. was kept incommunicado while she was detained in the DINCOTE and owing to the failure to separate Ms. J. from inmates who had been convicted while she was detained in the Miguel Castro Castro Prison, in accordance with paragraphs 376 to 378 and 380 to 381 of this Judgment.

6. The State is not responsible for the violation of the right to the protection of the home recognized in Article 11 of the American Convention, in relation to Article 1(1) thereof, in relation to the search conducted of the house on Casimiro Negrón Street, to the detriment of Ms. J., in accordance with paragraphs 146 and 147 of this Judgment.

7. The State is not responsible for the violation of the right of defense, to the detriment of Ms. J., owing to the legal restrictions relating to the means and opportunities to argue preliminary issues, or for the alleged coercion imposed on Ms. J. when detained so that she would presumably incriminate herself, in accordance with paragraphs 211 to 214 and 372 to 374 of this Judgment.

8. The State is not responsible for the violation of the principle of *non bis in idem*, recognized in Article 8(4) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Ms. J., in accordance with paragraphs 256 to 273 of this Judgment.

9. The State is not responsible for the violation of the principle of legality and non-retroactivity, recognized in Article 9 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Ms. J., in accordance with paragraphs 277 to 284 and 295 of this Judgment.

10. It is not in order to make a ruling on the alleged violation of Article 11 of the Convention owing to the search of the building on Las Esmeraldas Street; on the alleged violation of Article 8 of the Convention, owing to the presentation and assessment of the evidence in the ongoing criminal proceedings against Ms. J., or on the alleged violation of Article 7(6) of the Convention, owing to the supposed factual impossibility of filing applications for *habeas corpus* before August 1992, in accordance with paragraphs 145, 249 to 251, 297 and 172 of this Judgment.

11. It is not in order to make a ruling on the alleged violations of Articles 8 and 25 of the American Convention with regard to the failure to investigate the ill-treatment suffered by Ms. J., on the occasion of her initial arrest, in accordance with paragraph 368 of this Judgment.

12. The Court does not have any evidence to conclude that the offense of apology of terrorism for which Ms. J. is being tried, has prescribed so that her trial for this offense constitutes a violation of the principle of legality, in accordance with paragraph 296 of this Judgment.

13. The Court does not have any evidence to conclude that Ms. J. was a victim of certain specific ill-treatment that is alleged to have occurred during her detention in DINCOTE or that the State has been advised of these facts at the domestic level, so that it has failed to comply with its obligation to investigate the said supposed facts, in accordance with paragraphs 372 to 375 of this Judgment.

AND ESTABLISHES

unanimously, that:

14. This Judgment constitutes *per se* a form of reparation.

15. The State must open and conduct effectively the criminal investigation into the acts committed against Ms. J. that violated personal integrity in order to determine the eventual criminal responsibilities and, as appropriate, apply the penalties and consequences established by law, taking into account the provisions of paragraphs 391 and 392 of this Judgment.

16. The State must award Ms. J., once, the amount established in paragraph 397 of the Judgment, for the expenses of psychological or psychiatric treatment, so that she may receive this care in her place of residence, should Ms. J. request this treatment.

17. The State must make the publications indicated in paragraph 398 of this Judgment, within nine months of its notification, in the terms of the said paragraphs of the Judgment.

18. The State must ensure that the proceedings underway against Ms. J. observe all the requirements of due process, with full guarantees of a hearing and defense for the accused, in accordance with paragraph 413 of this Judgment.

19. The State must pay the amounts established in paragraphs 417 and 423 of this Judgment, as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, in the terms of the said paragraphs of this Judgment.

20. The State must reimburse the Victim's Legal Assistance Fund of the Inter-American Court of Human Rights the sum disbursed during the processing of this case, as established in paragraph 428 of this Judgment.

21. The State must provide the Court with a report on the measures adopted to comply with this Judgment within one year of its notification.

22. The Court will monitor full compliance with this Judgment, in exercise of its attributes and in fulfillment of its obligations under the American Convention on Human Rights, and will consider this case concluded when the State has complied fully with all its provisions.

Done, at San José, Costa Rica, on November 27, 2013, in the Spanish language.

Manuel E. Ventura Robles
Acting President

Alberto Pérez Pérez

Eduardo Vio Grossi

Roberto F. Caldas

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Manuel E. Ventura Robles
Acting President

Pablo Saavedra Alessandri
Secretary