American University International Law Review

Volume 25
Issue 4 *Volume 25, No. 4*

Article 4

2010

The Judgment Against Fujimori for Human Rights Violations

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TRANSLATION

THE JUDGMENT AGAINST FUJIMORI FOR HUMAN RIGHTS VIOLATIONS*

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* Editor's Note: *ILR* editors typically check Bluebook citation form and verify the substantive aspects of both the text and footnotes. In this instance, *ILR* has edited citation form to the greatest extent possible. However, in order to maintain the integrity of this executive summary, *ILR* did not make substantive edits. The original Spanish text was published in October 2009 in Peru by the National Coordinator of Human Rights. All "publisher's notes" herein are from that text. For more information, see Coordinadora Nacional de Derechos Humanos Homepage, http://www.dhperu.org (last visited July 12, 2010).

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ABBREVIATIONS

AI: Amnesty International

AIE: Wiretap intelligence officer

AIO: Operative intelligence officer

APRODEH: Association for Human Rights

BAC: Civic Action Base

BIP: Paratrooper Infantry Battalion

BOPE: Army Protection Operations Battalion

BREDET: Special Detectives Brigade

CAEN: Center for Advanced National Studies

CCD: Democratic Constituent Congress

CCFFAA: Joint Command of the Armed Forces

CEAPAZ: Center for Peace Studies and Action

CGE: Peruvian Army Headquarters

CONPRAMSA: Consultores y Constructores de Proyectos América, S.A.

COLOGE: Army Logistics Command

COPERE: Army Personnel Command

COMACA: Commanders, Majors and Captains

COINDE: Army Training and Doctrine Command

COFI: Operational Command of the Internal Front

CSJM: Supreme Council of Military Justice

DESTO: Detachment

DIFAP: Intelligence Division of the Peruvian Air Force

DIGEOPTE: Army Ground Operations Division

DIRSEG: State Security Department

DIRIN PNP: Intelligence Division of the Peruvian National Police

DIRCOTE: Counter-Terrorism Division

DINCOTE: National Counter-Terrorism Agency

DINTE: Army Intelligence Directorate

DIFE: Special Forces Division

DIEMFA: General Staff Division of the Armed Forces

DUFSIDE: Sole Operational Directive of the Army Intelligence System

EBI: Basic Intelligence Training

ECtHR: European Court of Human Rights

EMC: Joint Chiefs of Staff

EP: Peruvian Army

FAP: Peruvian Air Force

FFAA: Armed Forces

FFOO: Law Enforcement Personnel

GEIN: Special Intelligence Group

IACtHR: Inter-American Court of Human Rights

IACHR: Inter-American Commission on Human Rights

ICC: International Criminal Court

IGE: Army General Inspectorate

JAPE: Office of the Chief of Army Personnel

JEMGE: Office of the Army Chief of Staff

JPE: Special Criminal Court

ME: Peruvian Army Manual

MRTA: Tupac Amaru Revolutionary Movement

MOF: Organization and Functions Manual

OEI: Special Intelligence Operation

OAS: Organization of American States

OEI: Special Intelligence Operation

OPA: Political-Administrative Organization

PCM: Presidency of the Council of Ministers

PCP – SL: Communist Party of Peru – *Sendero Luminoso* [Shining Path]

PNP: Peruvian National Police

P/O: Plan of Operations

ROF: Organization and Functions Regulations

SICAM: Military Field of Action Intelligence System

SCIDH: Judgment of the Inter-American Court of Human Rights

SICAN: Military Field of Action Intelligence System

SIDE: Army Intelligence System

SIE: Army Intelligence Service

SINA: National Intelligence System

SIN: National Intelligence Service

SRM: Second Military Region

SSCIDH: Judgments of the Inter-American Court of Human Rights

SSTC: Judgments of the Constitutional Court

STC: Judgment of the Constitutional Court

STCE: Judgment of the Spanish Constitutional Court

STEDH: Judgment of the European Court of Human Rights

STSE: Judgment of the Spanish Supreme Court

TOF: Final Original Text

TOI: Initial Original Text

TRC: Truth and Reconciliation Commission

UN: United Nations

UNE: National University of Education

PREFACE[1]

On April 7, 2009, the Special Criminal Chamber of the Supreme Court handed down a historic unanimous judgment convicting former dictator Alberto Fujimori on four charges of human rights violations: the multiple murders of La Cantuta and Barrios Altos, and the kidnappings of Samuel Dyer and journalist Gustavo Gorriti.

The Court, which conducted proceedings that were exemplary in their meticulousness and impartiality, held that the crimes committed by Fujimori were proven "beyond all reasonable doubt," and therefore convicted him as an *autor mediato* [indirect perpetrator or perpetrator by means] within the framework of an organized apparatus of power. The Court also found that the cases of Barrios Altos and La Cantuta were crimes against humanity.

The judgment establishes clearly the decade-long criminal relationship between Fujimori and Vladimiro Montesinos, and Fujimori's relationship with the high commanders of the Armed Forces as Commander in Chief of the Armed Forces and Head of State, which facilitated the implementation of a systematic policy of human rights violations that included at least 50 other documented cases perpetrated by the Colina group.

One enormously important aspect of this judgment is that it vindicates the dignity of the victims of Barrios Altos and La Cantuta, as it was recognized officially for the first time in that they did not belong to a terrorist organization and, therefore, were not terrorists.

For all of this, the Court has sentenced Fujimori to 25 years in prison. It is our opinion that this is a fair sentence, consistent with the law and proportional to the aberrant nature of the crimes perpetrated.

Before the eyes of the world, Peru has rendered justice on behalf of the victims who clamored for it without being heard for 17 years. This event represents a milestone in the struggle for justice and respect for human dignity.

The conviction of the former dictator sets a historic precedent with regard to crimes against humanity perpetrated from the highest

1. Ronald Gamarra Herrera, Address at the Press Conference Announcing Judgment Convicting Former President Alberto Fujimori Fujimori (Apr. 7, 2009).

spheres of power, which are most often met with impunity. The relatives of the victims and the human rights organizations commend the Court's decision to set an example in its punishment of Fujimori, who committed crimes in complicity with Vladimiro Montesinos in this and in many other cases of human rights violations, as well as in multimillion-dollar crimes involving corruption and the theft of State resources that are still pending judgment.

The National Coordinator of Human Rights underscores the integrity of the Justices who sat on the Special Criminal Court. Throughout the trial they demonstrated impartiality, transparency and objectivity, ensuring fairness and due process in the case, in which Fujimori enjoyed the greatest latitude and guarantees to assert his defense.

This case sets a historic precedent that vindicates the Peruvian Judiciary due to the moral reserve embodied by few judges such as those who made up the Special Criminal Court. The same can be said for the representatives of the Office of the Attorney General.

We hope that this historic judgment will serve as an example for other cases of human rights violations that are currently pending. In the interest of the truth and justice to which the victims, their relatives and all of society are entitled, such violations must not be met with impunity.

This year, 2009, will be remembered as the year in which justice was served upon a former president who symbolizes much of the worst that our society has been capable of expressing in recent decades. Let us not rejoice in the conviction of a man and the sorrow of his family. Let us rather take comfort in what it represents in terms of the message of equality before the law, of consolation for the thousands of victims he created without remorse, and of legitimacy for our democracy that is so fragile, and which he set out to destroy.

On this day, I want to pay homage to the perseverance and courage of the relatives of the victims of Barrios Altos and La Cantuta, who never gave up and were not intimidated in the face of corrupt and homicidal power, and who persisted until justice was served. This well-deserved triumph is theirs. To them, to these mothers and sisters, belongs this vindication that justice has delivered today with regard to their loved ones, murdered by the person who has been found guilty and sentenced today. To you,

mothers of La Cantuta and Barrios Altos, and on your behalf, to all of the relatives of the victims of all of the cases of human rights violations that cry out for justice in our country, our deepest embrace.

Ronald Gamarra Herrera

Executive Secretary

National Coordinator of Human Rights

INTRODUCTION[2]

As part of its legal dissemination and promotion activities surrounding the trial and the judgment in the Fujimori case, the National Coordinator of Human Rights presents to the legal community in particular, and to the public in general, a selection of paragraphs from the judgment handed down last April 7, 2009 by the Special Criminal Chamber of the Supreme Court, which sentenced former president Alberto Fujimori Fujimori to 25 years in prison (hereinafter "judgment").[3] The selection, it should be noted, has been made bearing in mind the objective public for which this publication is intended, that is to say, legal practitioners: judges, prosecutors, attorneys and law students, among others. Given the undeniable value of the legal contributions of the judgment, we think it is extremely important for it to be disseminated promptly with a view to the effective litigation of cases involving serious human rights violations. This will enable national legal practitioners to contribute, from their respective occupations, to the strengthening of the Rule of Law in Peru, based on their full understanding and subsequent implementation of the different substantive and procedural legal points developed in the judgment. Likewise, because of its use of international and comparative law sources, the judgment undoubtedly can be used as a point of reference in societies undertaking similar processes to fight against impunity, not only regionally but also worldwide.

This introduction makes reference to four points that, in our opinion, are worth highlighting because of their practical application in previous criminal cases—in the prosecution of state agents as well as of members of the terrorist organization Shining Path—and in the unquestionable practical effects they will have on future cases.

2. Introduction by Juan Pablo Pérez-León Acevedo, Legal Advisor to the National Coordinator of Human Rights.

3. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru).

1. EVIDENCE

The Court asserts that in a "free evidence" system like Peru's, no special or exclusive means of proof are required to prove a particular fact; rather, the criteria that must be followed in the weighing of evidence are materiality and relevance.[4] Examining the different categories of evidence, the Court arrives, *inter alia*, at the following conclusions:

- Pretrial investigations may be accorded weight as evidence or may form part of the weighing of the evidence.[5]
- The statement given by a witness in another, allegedly related, criminal proceeding cannot be used if the person was not offered as a witness in the current oral proceedings and no irreparable reason for his absence has been proven (principle of immediacy and confrontation).[6]
- By its nature, witness testimony is reproducible at trial so that it can be contested.[7]
- Newspaper articles may be a sufficient means of proving and verifying the alleged criminal conduct. In particular, the existence of news items in the newspapers is evidence of the public repercussion of a specific act or event. They reflect incontrovertible facts or statements from public figures or government employees, and have not been refuted or subject to questioning. It is an objective news item, and therefore the concept of the hearsay witness does not apply.[8]
- The information or statements contained in a book are public and voluntary and, at the same time, involve the expression of some knowledge before society.[9]
- Although the absence of uniformity in the totality of a witness's statements (including statements made by the

4. *Id.* ¶ 57.
5. *Id.* ¶ 65.
6. *Id.* ¶ 71. This differs from the case of statements made in Congress, which are not recognized as evidence.
7. *Id.* ¶ 72.
8. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 73, Sala Penal Especial de la Corte Suprema [Special Criminal Session of the Supreme Court], Apr. 7, 2009 (Peru).
9. *Id.* ¶ 74.

accused or an expert witness) does not favor an initial opinion of merit, it is absolutely possible for there to be a retraction or change to one's version of the events. In this case, the totality of witness statements must be examined internally as well as in relation to the other evidence in the case, to determine which of the versions is the most consistent with the events. It is not necessary for there to be effective confrontation at the time the pretrial statement is given; only the opportunity for confrontation is required.[10]

- With respect to the book of transcriptions of the "Vladivideos": i) the subject matter does not fall within the personal realm that is typically private or subject to express legal protection, due to the fact that the statements were not made under duress and the issues discussed were of public importance; ii) because they are written transcripts of conversations contained in audio recordings or videos, they are copies. This does not prevent them from being examined as documents, as they reflect the idea set forth in an original document—the audio recordings or videos.[11]
- The statements of Vladimiro Montesinos made before other authorities (congressional, prosecution and judicial) can be used and are fully admissible, on the exceptional and irreparable grounds arising from Montesinos's refusal to testify in spite of having been summonsed and made to appear at the hearing.[12]
- The Record of Congressional Debates is the source of the evidence that, at the same time, contains specific information that was provided by a specific person. These records are instruments that contain statements, and are viewed as such.[13]
- Army Manual ME 38-20 existed and was implemented, having been officially approved, and therefore, was the official Army doctrine.[14] Manual ME 38-23, in turn, described the mission of

10. *Id.* ¶ 75.
11. *Id.* ¶ 77.
12. *Id.* ¶ 83.
13. *Id.* ¶ 84.
14. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 88, Sala Penal Especial de la Corte Suprema [Special

the countersubversion teams.[15] Manual ME 41-7, "Unconventional Countersubversive War," outlines a rigorous doctrine to confront armed subversion, in which part of the strategy aims to eliminate the leaders of the armed insurgent organization, and relaxes and softens the mechanisms of control with respect to international humanitarian law, constitutional government and human rights.[16]

- The law does not prohibit in general the submission or use of documents in ongoing proceedings prior to the conclusion of the original proceeding in which they were initially offered.[17]
- The existence of the so-called Plan Cipango, which led to the formation of the Colina Special Intelligence Detachment, was proven.[18]
- The speech of Army General Hermoza Ríos highlights the qualities of the Colina group when it had already committed various crimes, which demonstrates actual and institutional support.[19]
- The declassified documents from the U.S. Department of State are admissible as evidence in a limited or referential sense.[20]
- The Court acknowledges the intrinsic value of the decisions of the Inter-American Court of Human Rights [IACtHR] in general, and of the judgments in the Barrios Altos and La Cantuta cases in particular. Without prejudice to the facts proven,[21] it specifies that the relevance of those facts in terms

Criminal Session of the Supreme Court], Apr. 7, 2009 (Peru).

15. *Id.* ¶ 91.
16. *Id.* ¶ 114.
17. *Id.* ¶ 95.
18. *Id.* ¶ 96.
19. *Id.* ¶ 98.
20. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 102, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru).
21. Basically: i) the existence of the Colina group; ii) that the serious acts committed by this group fall within the framework of systematic repression, to which certain sectors of the population were subjected with the full knowledge of, and even orders from, the highest-ranking leaders of the Armed Forces, the intelligence services and the Executive Branch and; iii) that the crimes committed could not have been committed without the knowledge of, and superior orders from, the highest levels of the Executive Branch, including the President of the

of the criminal law, the application and interpretation of the relevant criminal provisions and, if appropriate, the determination of the sentence, are the exclusive jurisdiction of the criminal court. It further adds that the criminal court is where the evidence necessary for a conclusive ruling as to the guilt or innocence of the accused will be examined.[22]

- The same reasoning should be applied with regard to the judgments of the Constitutional Court handed down in the respective *amparo* [appeal for relief under the Constitution for a case of violation of civil rights] or habeas corpus cases.[23]
- The probative value of the Final Report of the Truth and Reconciliation Commission [TRC] lies in the so-called contextual facts, referring to the existence of numerous forced disappearances and arbitrary executions attributed to State agents, as part of a widespread and systematic practice.[24]
- The reports from the Inter-American Commission on Human Rights and Amnesty International convey the human rights situation in a country.[25]
- There is no reason to exclude the effective cooperation judgments from the body of the evidence. The position of the *arrepentidos* [cooperating witnesses under the Repentance Act] with respect to their prior statements goes to the weight of the witness testimony, not of the legality of hearing it.[26] With respect to documentary evidence, it must be recalled that the IACtHR has established that although items published in the print media are not documentary evidence *per se*,[27] newspaper articles may be important if they corroborate other evidence or confirm the public nature and general knowledge of the

Republic. *See id.* ¶ 105.

22. *Id.* ¶ 106.

23. *Id.* ¶ 107.

24. *Id.* ¶ 123.

25. *Id.* ¶ 131.

26. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 142, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru).

27. Velásquez-Rodríguez v. Honduras Case, Merits, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 146 (July 29, 1988).

pertinent facts.[28] In addition, the IACtHR has established that some journalistic articles have probative value when they print the text of public statements made by high-ranking government employees or when they corroborate testimony.[29] In cases of forced disappearances, the IACtHR has granted special relevance to circumstantial evidence (for example, police reports)[30] and presumptions.[31] Due to the fact that, by nature, forced disappearances seek to erase all traces of evidence, the IACtHR has held that it is possible to conclude that a person has disappeared if the plaintiff: i) demonstrates the existence of an official practice of disappearances, or at least the State's tolerance of such a practice; and ii) establishes a link between the specific disappearance and the State practice.[32] Turning to the text of the ICC Statute,[33] we find that it establishes that the ICC shall determine the relevance or admissibility of any evidence considering, *inter alia*,[34] the following: i) its probative value, ii) its relevance to the case;[35] and iii) any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness. The foregoing is covered in greater detail in the ICC's Rules of Procedure and Evidence[36] and, essentially, also reflects the practice of the International Criminal Tribunals for the former

28. Ivcher-Bronstein v. Peru Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 70 (Feb. 6, 2001).

29. Velásquez-Rodríguez, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 146.

30. Blake v. Guatemala Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 49 (Jan. 24, 1998).

31. "Street Children" (Villagrán-Morales et al.) v. Guatemala Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 63 (Nov. 19, 1999).

32. Velásquez-Rodríguez v. Honduras Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 125 (July 29, 1988).

33. Adopted by Legislative Resolution No. 27517 of September 16, 2001, which adopts the ICC Statute. The Rome Statute of the ICC was ratified pursuant to Article One of One of Supreme Decree No. 079-2001-RE, published on 10-09-2001. The ICC Statute entered into force on July 1, 2002.

34. Rome Statute of the International Criminal Court, art. 69(3), U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

35. *Id.* art. 69(4).

36. Rules of Procedure and Evidence of the ICC, ICC-ASP/1/3, rules 63-75 [hereinafter ICC Rules of Procedure].

Yugoslavia and Rwanda[37] and the Special Court for Sierra Leone.[38]

2. AGGRAVATED KIDNAPPING, MURDER, GRIEVOUS BODILY HARM, CRIMES AGAINST HUMANITY: BARRIOS ALTOS AND LA CANTUTA

It should be specified that, because of the date of the events at issue in the case and the still nascent state of the adaptation of our domestic laws to the different international instruments that define acts classified as crimes against humanity when committed in a widespread or systematic manner, the Court determines the defendant's individual criminal responsibility based on the crimes defined in our code. It thus abides by an unconditional observance of the principle of legality. With respect to kidnapping, the Court finds that the offense of aggravated kidnapping, with the aggravating circumstance of cruel treatment, has been committed against Gustavo Gorriti and Samuel Dyer.[39]

The Court additionally finds, consistent with the execution of the act and the motives for the deaths that occurred at the tenement house in Barrios Altos (Barrios Altos Case) and on Avenida Ramiro Prialé (La Cantuta Case), that: i) the commission of the crime was prepared in advance, which assumes the existence of a preconceived plan, at least in the guidelines for its execution; ii) for that purpose, a special intelligence detachment was formed, whose missions included killing those it believed to be linked to the political or military apparatus of the terrorist organization "Shining Path." The Court adds that the individuals who carried out these acts did so with complete coldness and determination, with the understanding that

37. With respect to requirements and examples of relevant evidence and the exclusion of evidence, see Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-A, Judgment, ¶ 129 (June 1, 2001); Prosecutor v. Kupreskic, Case No. IT-95-16-T, Decision on Evidence of the *Good Character* of the Accused and the Defence of *Tu Quoque* (Feb 17, 1999); Prosecutor v. Brdanin, Case No. IT-99-36-T, Decision on the Defence of "Objection to Intercept Evidence", ¶ 53 (Oct. 3, 2003).

38. With respect to the production of evidence based on the action of the Truth and Reconciliation Commission of Sierra Leona, see Prosecutor v. Norman, Case No. SCSL-04-14-AR73, Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", ¶ 26 (May 16, 2005).

39. Judgment, ¶¶ 678 et seq., 823.

they were taking part in a military operation to eliminate members of the Shining Path, which resulted in 25 deaths between the two cases. The above was confirmed by their advantageous use of special circumstances of time and place, the unexpected nature of the attack and the defenseless state of the victims. Therefore, the accused was convicted of the offense of aggravated murder, the aggravating circumstance being malice aforethought.[40] In the case of the four victims of the offense of bodily harm, the Court considered the aggravated definition, given the establishment of: i) the basis of "imminent danger to the life of the victim" or ii) the basis of "injuries that cause permanent disability." Added to this is the subjective element, in this case the *animus vulnerandi* or *laedendi* to cause the serious injury to the victim.[41]

With respect to the classification of the crimes of murder and grievous bodily harm as crimes against humanity, due to the context in which they were committed, the Court begins by making reference to the different international legal instruments in which crimes against humanity are defined, including the ICC Statute.[42] It is well established that crimes against humanity go beyond the scope of conventions (treaties) or written texts, as their commission is also prohibited by customary norms; however, the Court, as previously indicated, recognizes that the definition of the offense from the ICC has still not been incorporated into our laws, and therefore the principle of legality is respected unconditionally.[43]

The definition the Court provides, based on the respective customary rule, is consistent with Article 7 of the ICC Statute in stating that the attacks must take place during the course of a widespread (number of victims or scale of the attack) or systematic

40. *Id.* ¶¶ 700, 823.

41. *Id.* ¶¶ 702-09.

42. The following are among those mentioned: i) Charter of the International Military Tribunal at Nuremberg art. 6.c, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279; ii) Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946, T.I.A.S. No. 1589; iii) Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, U.N. Doc. S/25704 at 36, annex (1993) (May 25, 1993); and iv) Statute of the International Criminal Tribunal for Rwanda, art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 6, 1994).

43. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 711, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru).

(existence of a policy or preconceived plan) attack against the civilian population (objective element), and that the agent or actual perpetrator must have knowledge of the broad and general context in which the acts take place; that is, that such conduct is part of an attack with the specified characteristics (subjective element).[44] Such elements have been developed extensively in the case law of the International Criminal Tribunals for the former Yugoslavia[45] and Rwanda[46] and by the ICC itself in the affirmation of the charges in the case of Katanga and Ngudjolo Chui[47] as well as in the recent arrest warrant against Sudanese President Al Bashir.[48]

Next, the Court notes that the term murder, as it is phrased in the Statute and as recognized in the case law of the International Criminal Tribunal for Rwanda ("kill or cause death"),[49] is not the same as Article 108 of the Peruvian Criminal Code, which sets forth the elements of the offense of murder.[50] Finally, the Court does not

44. *Id.* ¶¶ 714-16.

45. Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, ¶ 206 (Mar. 3, 2000) (regarding widespread nature); Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment, ¶ 35 (Nov. 29, 2002) (regarding systematic nature); Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 659 (May 7, 1997) (regarding knowledge).

46. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sep. 2, 1998) (regarding widespread nature); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 123 (May 21, 1999) (regarding systematic nature); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 71 (Dec. 6, 1999) (regarding knowledge).

47. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 389-402 (Sep. 30, 2008).

48. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶¶ 81-89 (Mar. 4, 2009). Available (in English) at: http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf [last visited May 25, 2009].

49. Akayesu, ICTR-96-4-T, ¶ 598.

50. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 713, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru). Although the Court does not make reference to the text of the Elements of Crimes set forth in the ICC Statute, the Court's conclusion essentially goes in the same direction, insoafar as the text states: "That the perpetrator has killed one or more persons, including through the imposition of conditions of existence aimed deliberately at causing the destruction of part of the population," and it further specifies in a footnote that the phrase "killed" is interchangeable with the phrase "caused death." Elements of Crimes, Rome Statute, *supra* note 34, art. 7(1)(b); Crime against humanity of extermination and footnote No. 8, respectively, *available at* http://www.icc-

address the issue of whether grievous bodily harm can, based on the conditions under which it was inflicted, be categorized as a crime against humanity. It is our opinion that such classification is possible within the residual category of conduct involving inhumane acts, included in Article 7(1)(k) of the ICC Statute (which does not include expressly the act of causing bodily harm) based on the content of that international instrument itself, as well as on relevant international case law, provided that it is proven that the offense was committed with the intent to inflict serious physical or mental injury to the victim. Basically, the (failed) intent to kill cannot be transformed into intent to cause serious physical or mental injury.[51]

3. PERPETRATION BY MEANS OF CONTROL OVER AN ORGANIZED APPARATUS OF POWER

The Court begins with a general reference to *autoría mediata* [perpetration by means or indirect perpetration], identifying three types: i) control by error (control over the action of the person who executes the crime by means of deception); ii) control by coercion (control over the action of the person who executes the crime by means of threat or intimidation); and iii) perpetration by means of control over an organized apparatus of power.[52] It then refers to Article 23 of the Criminal Code of Peru, which addresses perpetration by means in the following language: "Any person who carries out the punishable act, by himself or through another, and those who commit it jointly. . . "[53] Given the facts and context of the case, the Court examines in detail the context that gave rise to the doctrine of perpetration by means of control over organized apparatuses of power, developed originally by German jurist Claus

cpi.int/NR/rdonlyres/15157C68-85AE-4226-B41A-C6F6E6E21026/0/Element_of_Crimes_Spanish.pdf (last visited May 18, 2009).

51. *Id.* art. 7. […] (k) Other inhumane acts of a similar character intentionally causing great suffering, or *serious injury to body or to mental or physical health.* (emphasis added). The phrasing of the text of the Elements of Crimes of the ICC Statute is identical. Pro Katanga, ICC-01/04-01/07, ¶¶ 463-65, *available at* (in English) http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf (last visited May 25, 2009). Decision based on: Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Judgment, ¶ 117 (Dec. 17, 2004).

52. Barrios Altos, et. al., AV 19-2001, ¶¶ 718-22.

53. *Id.* ¶ 722.

Roxin.[54] The Court, along this line of reasoning, looked to comparative jurisprudence[55] as well as national case law. With regard to the latter, the trial and appeal judgments in the case of Abimael Guzmán are highlighted in particular.[56] What follows is the detailed analysis of the premises for the establishment of this type of responsibility. Thus, the Court identifies as a general premise the existence of the organization, which entails the assignment of roles, and the development of an operational life of these power structures that is independent of its members.[57] Next, the Court lists and explains extensively the objective elements/requirements[58] and the subjective elements/requirements.[59] Two objective requirements are cited: i) command authority, that is, the high-level strategic capacity, of the "person in the background," to give orders or assign roles to the part of the organization subordinate to him [two levels are identified: formal orders common in state organizations, and orders given for their actual effectiveness, common in organized apparatuses of power designed from their inception to be totally separate from the legal system]; and; ii) deviation from the law, that is, the functioning of the apparatus as a whole outside the legal system, producing unlawful effects as a unit that acts totally outside the law. In the specific case of state criminality, the central authority at the high strategic level of the State uses the structures of the state apparatus for the commission of international crimes.

There are also two subjective requirements/elements that are mentioned: i) fungibility, that is, that the physical perpetrator can be substituted or exchanged by the superior to execute the crime. This feature has been explained graphically by Roxin through the changeable or substitutable wheel or cog (immediate or direct perpetrator) in the power machine (apparatus of power) and; ii) the

54. Theory originally developed in 1963.

55. Reference to the Eichmann and Staschynski cases, the conviction of the Military Juntas of Argentina and case law from the German Supreme Court.

56. Respectively: Guzmán Case, Case No. 560-2003, National Criminal Court, Oct. 13, 2006 (Peru); Guzmán Case, Case No. 560-2003, Second Temporary Criminal Chamber of the Supreme Court, Dec. 14, 2007 (Peru).

57. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 726, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru).

58. *Id.* ¶¶ 729-36.

59. *Id.* ¶¶ 737-40.

predisposition to carry out the unlawful act, which refers to a psychological predisposition of the direct perpetrator with respect to carrying out the order that entails the commission of the crime. In this context, commission of the unlawful act is ensured by the internalized interest and the conviction of the direct perpetrator that such act take must place. Finally, the Court ends this part by addressing the treatment of perpetration by means and superior responsibility in international criminal law, correctly differentiating between the former, which is a by commission (orders), and the latter, which is by omission—that is, when the superior fails to comply with his duty to prevent, monitor and punish all crimes that are committed, or may be committed, by his subordinates.[60]

In applying the above conceptual framework to the specific case at hand, the Court establishes that the defendant, in his status as holder of the highest position of the State, of the National Defense System in particular, and as the Commander in Chief of the Armed Forces, abused his position of authority by creating an organized apparatus of power based on the SINA's central and derivative units, which included the commission of the offenses of murder and grievous bodily harm in Barrios Altos and La Cantuta, in the context of the fight against subversion. Those crimes, in addition to the unlawful acts conducted in the basement of the SIE, were carried out by the COLINA group, which was hierarchically subordinate to the organized apparatus of power under the control and will of the defendant. Such situation, based also on similar experiences within Latin America, has been described appropriately by the Court as "Dirty War," a concept that is related to the term "Criminal State."[61]

Finally, as an additional remark, the Court's legal analysis is not only consistent with judgments from other national courts and the prevailing criminal law doctrine but also with recent decisions of the

60. The mode of superior responsibility (by omission) is contained expressly in the Yugoslavia Statute, *supra* note 42, art. 7.3, the Rwanda Statute, *supra* note 42, art. 6(3) and Rome Statute, *supra* note 34, art. 28.

61. The Court has held that the phrases "Criminal State" and "Dirty War" carried out by state organizations can be considered quantitative modes of the same type of action or *modus operandi* for carrying out acts such as forced disappearances, extrajudicial executions and torture. In the former, the widespread nature of the criminal acts spans different spheres of the State, whereas the latter is predominated by the sector-based and selective activity of strategic bodies and special operations. *See* Barrios Altos, et. al., AV 19-2001, ¶ 747.

ICC. The Peruvian State is a party to the ICC Statute, and it is in the process of being incorporated into our domestic law. Indeed, in applying Article 25(3)(a),[62] of the ICC Statute, which is essentially similar to the content of our Criminal Code, the ICC recently issued a decision ordering the arrest of the sitting President of Sudan, Al Bashir, which reads, in pertinent part, as follows:

> **CONSIDERING** that there are reasonable grounds to believe that Omar Al Bashir has been the *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the abovementioned GoS counter-insurgency campaign;
>
> **CONSIDERING,** further, that the Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan . . . .[63]

62. Rome Statute, *supra* note 34, art. 25. "Individual criminal responsibility. […] 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: […] (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;" [emphasis added].

63. ICC, Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest issued, ¶¶ 7-8 (Mar. 4, 2009) *available a*t http://www.icc-cpi.int/iccdocs/doc/doc644487.pdf (last visited May 25, 2009). For more details, see Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶¶ 209-18 (Mar. 4, 2009). The above only confirms what the ICC had already established in prior decisions. The Decision on the Confirmation of Charges in the case of Prosecutor v. Katanga and Ngudjolo Chui is of particular value in the analysis of what the ICC understood the objective elements of the modality to be. Indeed, it is indicated first that:

> 496. A concept has developed in legal doctrine that acknowledges the possibility that a person who acts through another may be individually criminally responsible, regardless of whether the executor (the direct

4. REPARATIONS

In this part, the Court basically seeks to answer the following question: Is it proper to issue a judgment ordering the payment of civil reparations *ex delicto* to the victims and relatives for the acts perpetrated against them, when there is already an international judgment that addresses that same issue?[64]

Upon establishing that the human rights violations affecting the victims in the Barrios Altos and La Cantuta cases were evaluated by the IACtHR from the logical perspective of international human rights law,[65] the Court indicated that, insofar as: i) the victims are identical, and; ii) they pertain to a single event, having identified the victims and their relatives as well as the specific reparations, it is not possible for them to receive—in the Court's opinion—a double or additional compensation. The Court asserted that this would result in the unjust enrichment of the victims or their successors,[66] and therefore a double payment for damages was impossible.[67] Based on

perpetrator) is also responsible. This doctrine is based on the early works of Claus Roxin and is identified by the term: "the perpetrator behind the perpetrator" (*Täter hinter dem Täter*).

497. The underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator. As such, in some scenarios it is possible for both perpetrators to be criminally liable as principals: the direct perpetrator for his fulfillment of the subjective and objective elements of the crime, and the perpetrator behind the perpetrator for his control over the crime via his control over the will of the direct perpetrator.

The paragraphs that follow (500-518) specify that the objective elements of perpetration through another person are: i) Control over the organization; ii) Organized and hierarchical apparatus of power; and iii) Execution of the crimes secured by almost automatic compliance with the orders. *See* Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sep. 30, 2008) *available at* http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf (last visited May 25, 2009). On the concept of perpetration by means in the context of macro-criminality, see also Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 332 (Jan. 29, 2007), *available at* http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF (last visited May 25, 2009).

64. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 778, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru).

65. *Id.* ¶ 779.

66. *Id.* ¶ 780.

67. *Id.* ¶ 781.

the case law of the IACtHR,[68] the Court, in its best judgment, rejected the prosecution's argument whereby it asserted

> that the IACtHR had not considered the facts, for purposes of compensation, in their real aspect—that is, as grave violations of human rights.[69]

The Court next examines other reparations claims that are non-pecuniary in nature. In doing so, it acts in accordance with the latest developments on the issue of reparations in international law, in which reparations are the broader category, and compensation is merely one specific type. This has as a correlative, in addition to the UN Principles and Directives[70] and the relevant case law of the IACtHR[71] (cited by the civil party and included in the Judgment), the express provisions of ICC Statute,[72] which are beginning to be

68. *Id.* ¶ 780. The references are: Case of the "Mapiripán Massacre" v. Colombia, Merits, Reparations and Costs, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 211, 214, 287 (Sep. 15, 2005); Case of La Cantuta v. Peru, Merits, Reparations and Costs, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 210, 213 (Nov. 29, 2006).

69. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶¶ 782-86, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru)..

70. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, at 789-791, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

71. Case of Barrios Altos v. Peru, Reparations and Costs, 2001 Inter-Am. Ct. H.R. (ser. C) No. 87, ¶¶ 29, 33, 38 (Nov. 30, 2001); Case of La Cantuta v. Peru, Merits, Reparations and Costs, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 204, 205, 213, 216 (Nov. 29, 2006). References made in Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 778, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru)..

72. Rome Statute, *supra* note 34, art. 34.

> Reparations to victims. 1. *The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims* and will state the principles on which it is acting. 2. *The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.* […].

Id. (emphasis added); *see also*, ICC Rules of Procedure, *supra* note 36, at 97(2). Taking into account the scope and extent of any damage, loss or injury, the Court

interpreted by the ICC itself.[73] In resolving these non-pecuniary claims, the Court ruled that the twenty-nine recognized victims in the Barrios Altos and La Cantuta cases did not have ties to the terrorist acts of the Communist Party of Peru/Shining Path and were not members of this criminal organization.[74] The Court responds in this part of its holding to the pertinent part of the prayer for relief filed by the victims, who requested the issuance, as a measure of satisfaction, of an official statement or court decision to restore the dignity, reputation and rights of the victims, as well as of the individuals close to them.[75] Finally, the Court found that the payment of compensation would entail necessarily what it called "double compensation" by creating, in its opinion, a double payment. As a general observation, we should not lose sight of the fact that in the judgments of the Barrios Altos and La Cantuta cases the IACtHR determined that the Peruvian State was responsible, and therefore, as

may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.

2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims *and to suggest various options concerning the appropriate types and modalities of reparations*. […]. (emphasis added), *available at*: http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7B3E8B115E886/140167/Rules_of_procedure_and_Evidence_Spanish.pdf (last visited May 25, 2009).

73. We must take into account that the ICC is the first international criminal court that recognizes the participation of victims as such and not merely as witnesses, which was the practice of the international criminal courts that preceded it. Among other decisions on the issue of the participation of victims in the international criminal proceedings of the ICC, there are the following: Situation in the Democratic Republic of the Congo, Situation No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6 (Jan. 17, 2006) *available at* http://www.icc-cpi.int/iccdocs/doc/doc183441.PDF; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Appeals of the Prosecutor and the Defense of the Decision of the Trial Chamber I on the Victims' Participation (Jan. 18, 2008) *available at* http://www2.icc-cpi.int/iccdocs/doc/doc409168.PDF (Last visited May 25, 2009); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Indirect Victims (Apr. 8, 2009) *available at* http://www.icc-cpi.int/iccdocs/doc/doc662407.pdf (last visited May 25, 2009).

74. Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases, Case No. AV 19-2001, ¶ 827, Sala Penal Especial de la Corte Suprema [Special Criminal Chamber of the Supreme Court], Apr. 7, 2009 (Peru).

75. *Id.* ¶ 789.

part of the reparations it ordered the Peruvian State to pay the respective compensation to the victims; on the other hand, in the case of the judgment issued last April 7th, we are dealing with a decision from a national criminal court that, had it included the compensation order, would have ordered that it be paid by convicted defendant Alberto Fujimori.

With regard to the Barrios Altos Case, the Court indicates based on the information submitted that the compensation has been paid to the victims. With respect to the La Cantuta Case, the Court stated that although the payment of the money damages to the victims by the State has not been verified, the Peruvian State—according to the IACtHR's Judgment—paid out three million *soles* between 1996 and 1998; it added that the military criminal court judgment regarding the La Cantuta Case confirms the payment of the civil reparations. Nevertheless, the Court does not examine the potential effects, in terms of the reparations, of the fact that in one case (La Cantuta) there is a conviction from a military court, whereas in the other case (Barrios Altos) there is still no such judgment, as the respective criminal case—concerning the members of the Colina Group—is pending.[76]

However, what the Court understood as "unjust enrichment" is what finally prevented it from granting a "double compensation or payment" to the victims. In addition to the aforementioned considerations of the differences (State responsibility before the IACtHR versus criminal responsibility before the Court), the purpose of the compensation in question must be specified. The case law of the IACtHR, which the Court cites as one of its central grounds, does not prohibit (at least not expressly) additional compensation in cases of convictions in domestic criminal cases. What the case law of the IACtHR has sought and understood fundamentally, according to the notion of "unjust enrichment," is for exorbitantly high amounts (for example, millions of dollars to a single victim) not to be awarded; it has also stressed that compensation (and in general) reparations are not punitive in nature,[77] and must be proportional to the human rights

76. *Id.* ¶ 777.

77. Case of Garrido and Baigorria v. Argentina, Reparations and Costs, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 43 (Aug. 27, 1998).

violated.[78] In light of the facts and amounts involved in the Barrios Altos and La Cantuta Cases (especially in the first case), it would seem that if defendant Fujimori had been ordered to pay compensation to the victims, it would not have given rise to unjust enrichment, which is what the Court ultimately intended to prevent. This assertion would further find support in the judgment rendered in the Castillo Páez Case and in the provisions of the ICC Statute.[79]

78. Case of the 19 Tradesmen v. Colombia, Merits, Reparations and Costs, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶¶ 283-85 (July 5, 2004).

79. In the Castillo Páez Case, in which the IACtHR ordered the Peruvian State to comply with the respective reparations (including the payment of compensation), the First Temporary Criminal Chamber of the Supreme Court ordered the payment of compensation without making reference to any limitation on "double compensation," "double payment" or "unjust enrichment". See, respectively: Case of Castillo-Páez v. Peru, Reparations and Costs, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43 (Nov. 27, 1998); Case of Castillo-Páez, R. N. No. 2779-2006, Supreme Court, First Temporary Criminal Chamber (Dec. 18, 2007) (Peru) *available at* http://www.justiciaviva.org.pe/nuevos/2008/agosto/21/sentencia_castillo_paez.pdf (last visited May 25, 2009). With respect to the ICC Statute (mainly Article 75), we find that: i) there is no express or implied prohibition against the payment of double reparations, and; ii) Article 75(6) establishes that: "Nothing in this article shall be interpreted as prejudicing the rights of victims [including the right to reparations] under national or international law." Rome Statute, *supra* note 34, art. 75.

THE JUDGMENT AGAINST FUJIMORI FOR HUMAN RIGHTS VIOLATIONS: SELECTION OF KEY PARAGRAPHS

PART ONE: FACTUAL BACKGROUND

Chapter I: Criminal Evidence

§1. Introduction

¶1. Statement of the Case. Facts alleged.

51. [. . .] The facts that would establish this secret and clandestine strategy or method, of course, do not require that the evidence produced be supported exclusively, under the requirement of materiality of the evidence, by written regulations. These facts, by their very nature, cannot be set forth or ordered through regulatory documents, even in the denunciation of the creation and actions of an organized apparatus of power inside the State itself, which carries out clandestine and substantially criminal operations. The respective orders and instructions, in the specific context of the case in question—for acts such as forced disappearances, arbitrary or extrajudicial executions, grievous bodily harm and kidnappings—are not drawn up in laws, and it is certainly very unlikely that they would be set out in writing or through another administrative mechanism typical of the *modus operandi* of an administrative or governmental entity. The decisions that involve human rights violations made inside an organized apparatus of power, therefore, are not justified or supported by regulatory instruments. It is precisely the clandestine nature of the unlawful practice of an organization that rules out, for obvious reasons, the possibility of verifying its existence and the acts that it commits by means of regulatory instruments [. . .].

56. [. . .] The Office of the Public Prosecutor aims to prove the existence of a policy—the strategy for implementing the dirty war. Such policy would demonstrate the "political element" of the crimes against humanity. [The Court indicates that such policy may be proven in the following manner:] The existence of that "policy" can be proven based on the finding of legal provisions, administrative decisions or official directives, but they are not a necessary requirement. Thus, for example, the European Court of Human

Rights allows for such a practice or policy to be identified through (i) an accumulation of identical or analogous violations, sufficiently numerous and interconnected so as to be not mere isolated incidents or exceptions, but rather a pattern or system; and (ii) the official tolerance of State authorities. The latter is understood as the fact that the superiors, in spite of having knowledge of the violations, refuse to take measures to punish those responsible or to prevent the repetition of the violations, or they express their indifference by refusing to conduct an adequate investigation into the truth or falsehood of the alleged abuses.[80]

57. In addition, the requirement should be noted (strictly speaking, criteria that must be followed for the admission of evidence) of *materiality*, in addition to pertinence, in a "free evidence" system such as ours. Such a system establishes the free evaluation of evidence, that is, freedom of choice and use of the different means of proof. This means, as a rule, that no special or exclusive type of evidence is required to prove a particular fact. The procedural doctrine indicates that through materiality that the law makes it possible to prove the fact under examination—or part of it—with a specific piece of evidence. Therefore, it must be duly noted if there are any prohibitions against evidence or if the law stipulates that a particular fact must be proven with a specific means of proof. With respect to the facts alleged, the *thema decidendi*, in accordance with the preceding paragraphs, there is no procedural rule that precludes the establishment of some point of those facts with a specific means of proof. There are no exclusions, exceptions or limitations with regard to the matter. Obviously, as noted by FLORIÁN, the evidence must be lawful, appropriate and conclusive. As such, the evidence offered in the case shall be examined and weighed pursuant to these standards.

¶2. The charges and the principle of correlation

[. . .]

¶3. Proceedings with respect to legally admissible evidence.

65. In terms of the submission of facts to the case, a pretrial investigation (even one conducted at the preliminary stage by the

80. Ireland v. The United Kingdom, 25 Eur. Ct. H.R. (ser. A) 5 (1978); Akdivar and Others v. Turkey, 1996-IV Eur. Ct. H.R. 1192 (1996).

Police or the Office of the Public Prosecutor) may be accorded weight as evidence, or it may form part of the weighing of the evidence (a general prohibition is unacceptable) provided that, from the internal perspective, it meets the legal requirements or formalities of the venue where it is produced. The defendant's opportunity to challenge its production (specific requirements of confrontation), bearing in mind the peculiarity of the evidence in question, is vital (*objective requirement*). Furthermore, there must be some circumstance derived from the notions of non-repeatability—or fleetingness or unavailability—and urgency that make it impossible to reproduce at trial (*substantive requirement*); that would be the case, for example, of the irreparable absence of a witness or expert witness. It must be noted, in this hypothetical of exception, that there is a set of minimum guarantees in the acquisition of the source of the evidence as well as in its conservation and in its submission at trial. This is the *procedural requirement*, which is satisfied with the reading of the record, or other equivalent means, under conditions that allow the defense to raise any objections to those proceedings.

§2. Evidentiary issues.

[. . .]

¶1. Initial objections to the evidence raised by defendant Fujimori Fujimori's counsel.

[. . .]

¶2. Evidence offered by the Office of the Attorney General

71. STATEMENTS MADE IN OTHER CASES. [. . .]

> 4. In principle, there are no internal limits to the transfer of evidence in the case of official expert opinions, reports and documentary evidence. It is sufficient for it to be in the source proceeding in order to be incorporated into the case underway. The relevant provision states as follows: "*Without need for such grounds to be present. . .*"
>
> 5. There are restricted grounds or specific limits for the production of other evidence, including testimony—statements from defendants and witnesses, confrontation hearings, identifications, on-site inspections—and objective and irreproducible proceedings. It is required that the transfer be indispensable due to the fact that in the case receiving the

> evidence "*. . .the production* [of the evidence] *is impossible to obtain or difficult to reproduce due to the risk of loss of the source of evidence or threat to a witness."* This assumes the verification of a reasonable cause that prevents the production of the evidence in the case receiving it. Such limit would be based on the fact that a statement of a witness who failed to appear at trial prevents the Court from hearing and seeing, in accordance with the principle of immediacy, and the parties from being able to make the pertinent challenges. Therefore, the statement of a witness given in another criminal proceeding—presumably a connected one—cannot be used when that witness has not been offered in the current oral proceedings, and grounds for his irreparable absence have not been verified. As such, the inclusion of the previously mentioned statements and declarations is denied.

72. PRETRIAL STATEMENTS MADE IN THE CASE [. . .] Witness testimony is, by nature, reproducible at trial in order to be subject to confrontation, and if it is not produced, even though it is possible to do so, that statement taken during the investigative phase of the proceedings cannot be used, unless by resorting to its reading based on some serious absolute or preventive reason. They would have to be reasons independent of the will of the parties and the Court—legal or factual *force majeure*—that prevent the witness from appearing at trial and entail the exhaustion of all legally provided possibilities for the reproduction of testimony at trial. Along these lines, the European Court of Human Rights recalled in the Case of Isgró v. Italy (Judgment of February 19, 1991, paragraph thirty-four), that: "*The evidence normally must be presented before the defendant at a public hearing, with a view to adversarial argument, but the use of statements that go back to the preliminary investigation stage is not inconsistent in and of itself with sections 3(d) and 1 of Article 6* [of the European Convention on Human Rights, a provision similar to Article 8.2(f) of the American Convention on Human Rights], *without prejudice to the rights of the defense; as a general rule, they require that the accused be granted a sufficient and adequate opportunity to challenge the testimony against him and to examine the witness, at the time of the statement or subsequently."*

Consequently, the reading of the pretrial statements[81] is unacceptable if the witness was not requested to appear at trial, and there is no reasonable and well-founded reason for his absence. Therefore, the Court will not consider the evidence of the two witness statements read.

The case of the statements of Army General Pérez Documet is different. A request was made for the reading of his pretrial statement in this case at page seven thousand seven hundred and ninety of the record, of his statement to the police at page fifteen thousand seventy five [given before the DIRCOTE], of his testimony given before the First Special Court of Lima at page fifteen thousand eighty-five, of his pretrial statement given before the Fifth Special Criminal Court of Lima at page forty-one thousand six hundred and seventy-one, and of his statement given before the TRC. As this witness made use of his right to remain silent during the trial, bearing in mind the charges for these same acts in related cases pending before the Superior Court of Lima, it is proper to consider these statements due to this exceptional situation.

Another situation that allows for the consideration of pretrial statements is that of Army General Rojas García. He testified at trial, and the questions also emphasized the answers he had given before the investigating court [page nineteen thousand six hundred and twelve]. As such, it is important to take cognizance of that statement not only to measure the degree of credibility of his testimony at trial but also in order to, in the case of inconsistencies, to be able to use it in its place.

73. We turn now to the possibility that information gathered by the communications media can be considered proven, insofar as it reflects incontrovertible facts of general knowledge or the statements of political organizations or public figures (or reports on the experiences of different social actors, which usually involves a specific perception of an external reality that is perceived and transmitted by the journalist who participates in it) that have not been

81. The Office of the Public Prosecutor likewise offered the reading of the pretrial statements given before the Investigating Judge by Orlando Enrique Moncayo Peña and José Luis Bazán Adrianzén, and the preliminary victim's statement of Susana Higuchi Miyagawa. The defense has opposed their inclusion (Publisher's note).

refuted or questioned in the case. Journalistic information operates, then, as *prima facie* evidence that if it is not refuted and called into question, comes to have full evidentiary effects. (The refutation or questioning, obviously, must be serious and significant, one that is merely procedural is not sufficient). It is clear that another point of validity or, rather, of the validity of the information, is that it not be an isolated news article. The bulk of the journalistic information incorporated into the case reflects a general, informative content, commonly accepted by the print media, and it refers to public events or events of general political relevance. [. . .] It should be noted that only content that is introduced objectively by the professional author of the information can be admitted with full probative value; the value judgments that may be brought into a news article are thus excluded. In addition, strictly speaking, the defense has not questioned the legitimacy or origin of the press clippings; rather, it has questioned their sources. Consequently, journalistic articles can be a suitable means to verify and prove the acts at issue in the trial; in particular, the existence of a news item in the newspaper is proof of the public repercussions of the specific fact or event.

[. . .]

In short, journalistic publications are admissible evidence that can be weighed together with other evidence in a joint and comprehensive manner; they are not witness testimony, and therefore are not subject to the same treatment. As such, they can be weighed outside the rules governing testimony, and the concept of hearsay witness does not come into play because it is a matter of objective news that, furthermore, is in the public domain. This is, of course, provided that the two above-mentioned conditions are met: they reflect incontrovertible facts or statements from public figures or government employees, and they have not been refuted or called into question.

74. BOOKS OF DIFFERENT WITNESSES. [. . .] Books, and even interviews, contain spontaneous statements; they are not formal interrogatories, and since, by their nature, they are not testimony, they must not be subject to the same procedural rules. The requirements demanded in the case of a statement cannot be imposed upon them; nor can it be required that they be produced before the judge or during the trial. The information or assertions contained in a

book are public and voluntary and entail the expression of some knowledge before society. They cannot be ignored based on the understanding that they are not testimony, which does not mean that their authors may be called to testify. In that case, there would be two types of evidence: documentary and testimonial, which require different procedures. In the case of the latter, on one hand, there would be the documents, which include out-of-court statements usually brought into the case through documentary evidence; on the other hand, the authors would be examined at trial, which is a different kind of evidence, although they would have to be examined jointly and weighed together.

Once it is acknowledged that the book is a valid source of information for the case, documentary evidence would consist of its being read, nothing more. It is not necessary for it to be confirmed, or for its author to be questioned about all of the events recounted in it, or questioned with regard to their terms. A different issue is, of course, the probative value—with respect to the information included therein—that should be assigned to the book. Much will depend upon its content and, later, on whether the information in it can be confirmed or supported through other means of proof.

75. INCONSISTENT STATEMENTS. [. . .] The statements of a witness must be submitted to a serious credibility analysis, and if the witness has made statements about the same facts in other venues, it is appropriate to take them into account and assess them fully. Undoubtedly, an absence of uniformity in the totality of a witness's statements, including those of a defendant or an expert witness, does not contribute to an initial opinion of merit; nevertheless, it is absolutely possible for there to be a retraction or change to one's version of the events. As such, in this case, in order to determine which of the versions is most consistent with the events (which is an issue of credibility, not legality, as an essential element in the shaping of the court's opinion on the basis of the facts argued) the totality of witness statements must be examined internally as well as in relation to the other evidence in the case. It is a requirement of reasonableness in weighing the evidence, which is deepened when it is appropriate to use the pretrial statement, given its lack of immediacy and the hypothetical greater credibility of the statement provided at trial. Therefore, it must rest on their objective similarity, which requires corroboration by other peripheral circumstances or

evidence. It is incumbent upon the Court to differentiate, verify and interpret the terms and scope of the contradictions, weighing them for evidentiary purposes according to its best judgment.

It is therefore feasible, with the due precautions, to confer greater credibility upon one statement over another, including those given in other venues and before the prosecution, police and congressional authorities—as they are, strictly speaking, investigation proceedings—over those given before the trial Court. This will depend upon whether such statement is more coherent in terms of the specific assertions it sets forth, the information it provides, the presence of other peripheral circumstances or the presence of external facts or indicia that give it sufficient objectivity (objective credibility) to make reasonable its favorable assessment as opposed to the other statement. It is without question, however, that the witness's contrasting statements must emerge during the course of the trial or examination by any other means that guarantee the defendant's right of confrontation, and it is sufficient that the questions and answers given at trial make express reference to such pretrial statements, so long as the contradictions are made clear so that a timely explanation may be given.

The fact that the defense attorney was not present during these statements—those provided during the investigative phase itself as well as those given in other proceedings—does not render them excludable, as there is no lack of defense; a statement that is made spontaneously is still of value and cannot be left out. Indeed, it does not give rise to a lack of defense because the witness is examined at trial even though his contradictions are not read and weighed. In fact, the affiant's acknowledgement during the trial that he made a prior statement in such terms could be sufficient for these purposes. As stated earlier, it is not necessary for there to be effective confrontation at the time the pretrial statement is given; it is only required that there be an *opportunity for the defendant to challenge it.* It is clear that it is not always legally and physically possible to meet the requirement of effective confrontation. As such, it is sufficient to meet the legal and constitutional requirements of that investigative proceeding. It is the subsequent opportunity for confrontation at trial that fulfills the requirement of confrontation and makes up for any observable deficit or omission during the investigation phase of the proceedings. Meeting these confrontation

requirements makes it is possible to examine the contradictory statements and give credence to one witness statement or another to provide the basis of the conviction.

77. BOOK PUBLISHED BY CONGRESS: TRANSCRIPTION OF VIDEOS AND AUDIO RECORDINGS.

[. . .]

> 2. Even though the issue has not been raised, it is appropriate to specify that the conversations in question, recorded by order of one of the parties, do not violate the right to privacy in communications or the right to individual privacy. Both fundamental rights are contained autonomously in the Constitution, in Article 2, numbers (10) and (7), respectively.
>
> The right to privacy in communications is procedural in nature [Final Judgment of May [14th, 2007], Motion for Nullity No. 926–2006/ AV, Fourth FJ]. It protects speakers from any form of interception or capture of the communication by outside third parties, whether government agents or private individuals. Its purpose is the confidentiality of the communication process as well as the content of the communication. However, the right to privacy in communications is independent of the content of the communication, which may or may not be private. In this case, this fundamental right is not adversely affected, to the extent that the recording was not made by order of one of the participants in the communication process. If the constitutional provision protects the communication and not what is communicated, then no infringement has occurred if one of the parties to the communication discloses the news, unless, clearly, the information adversely affects the right to privacy; there is no confidentiality when some event is recounted or a remark is made to another party to the communication.
>
> The right to individual privacy, on the other hand, has a *substantive* content or character. As such, the Constitutional Court has held that the individual may carry out the acts he deems in his interest in order to withdraw from others, because it is an area exclusive of others in which he has the right to prevent intrusions and where every invasion that disturbs the individual right to secrecy, solitude or isolation is prohibited in the interest of the free exercise of one's individuality outside of and prior to the social realm (STC

No. 6712–2005–HC/TC, of October [17th, 2005]). This right affects and protects specific expressions of private life and is covered by a special protection by virtue of being related directly to the dignity and development of one's personality. In the instant case, the recorded material does not fall within this personal sphere that is inherent to privacy or subject to express legal protection, not only because the parties to the communication revealed their thoughts and points of view voluntarily and without coercion, but also because the conversations themselves are of public significance in terms of the issues discussed. They were derived from the government functions of at least one of the parties; his personal or private life was not at stake, and the communications were conducted on government premises, in the office of a government employee. Furthermore, if the communications involve criminal propositions or conduct that could be a public action crime, there is no constitutional right to secrecy.

3. The book, procedurally, is a document insofar as it is a written medium or a representation that expresses a specific reality that precedes the case and is independent of it; it is submitted to the case essentially for evidentiary purposes. Moreover, it is also a public document, as it comes from or has been placed into circulation by State entities (in this case the Congress), and it refers to or is derived from audio recordings and videos that are in the institution's archives.

4. Given that it is a compilation of written transcripts of conversations contained in audio recordings or videos, it is a copy (the original documents would be the actual audio recordings or videos), which does not cause it to lose its consideration as a document, since it reflects an idea embodied in an original document (the audio recordings or videos).

5. To the extent that what has been offered is, strictly speaking, the book and not the audio recording or video, as it is a written medium containing the transcript of a specific conversation, the manner in which it is properly introduced is by its reading. It is not by listening or viewing, which is conceivable only in the case of the presentation of the respective audio recordings or videos. Furthermore, the book contains an out of court transcription of documents that are in a government archive, and it was made by the proper authority in accordance with the legally provided

> congressional procedure. A copy will be potentially inadmissible only if one of the parties challenges its authenticity, in which case it is appropriate to compare its content to the original document.
>
> 6. The defense has not asserted that the content of the document is false, or that it has been tampered with in regard to the original source. It has only questioned the materiality of the book to the extent that the audio recording or video should have been produced, which—as stated previously—is not procedurally acceptable. Given the origin of the book under examination and the way in which it was put together, it is impossible to deny it the character of valid evidence relevant to the forming of the Court's opinion.

[. . .]

81. On this basis, the probative value of the written documents offered and, previously, of the CD offered by the Office of the Public Prosecutor regarding what was forwarded by Congress, can be diminished. It shall be analyzed, therefore, *together with* the witness testimony, not *in place of* it. Merino Bartet has not only revealed what he did as a SIN advisor, but he has also submitted accompanying information that he copied from the computers of the office of SIN advisers—information that he has subsequently identified comprehensively in all of the other venues and individually before Congress. The credibility of the witness may very well rest exclusively on his oral testimony. Therefore, if the CD and the written documents that were transcribed are also taken into consideration by the Court in arriving at its decision, this method can in no way be considered improper in conferring validity upon it or characterizing it as sound evidence.

The identification made by Merino Bartet, author of the files—and, by exclusion, of the ones from the Huertas Caballero file, since files were copied only from two computers in the office that both of them occupied—has been produced, and therefore they can be considered proven; moreover, this identification has been made within the context of his narrative of what he did as a SIN official. The defense has been able to challenge them one by one, but there are no grounds to reject them generally. The requirement of individual identification, especially in a context involving a large number of documents that came from electronic files, is not provided

for by law. Some documents have been submitted in a computerized format that their author has recognized as accurate, and, on having been identified as such, the defense cannot challenge them generically. There is no material defect in the identification made by Merino Bartet and, therefore, the authenticity of those files cannot be denied.

[. . .]

83. Is the use of statements that Montesinos Torres has given before other government entities, namely congressional, prosecution and judicial, precluded? The answer is no. Those statements are fully admissible as evidence. The assertions they contain shall be examined individually and with the totality of the evidence produced.

Those statements can be used because there is an exceptional and irreparable cause derived from Montesinos Torres's refusal to testify. He was summonsed but invoked his right to remain silent. It is obvious that when a co-defendant decides not to testify, in the exercise of his right, that right is absolute; but once he does so in any place, he is understood to have waived that right and, therefore, his statement can be used. The refusal to testify, as is easily inferred, leaves the parties' attorneys without an opportunity for examination and cross-examination. This conduct is not the fault of the State or the Court, which has summonsed him, but of Montesinos Torres, who refuses to testify. Therefore, the Court has met its obligation to summon him to allow the defense the right to confront his statement; the right existed and was granted, although the witness declined to testify.

The value of Montesinos Torres's statements, as that of all other statements (from other witnesses) that properly may be considered, inasmuch as they meet the previously specified requirements (absolute impossibility or serious difficulty that reasonably prevents the witness's appearance at trial, that is, irreparable absences), is clear through documentary, not testimonial, means; this is because they are not witnesses, strictly speaking, in that they did not appear at the hearing. However, they have done so—have made spontaneous statements—in other cases, which is the same, for example, as having done so in a book, since one is just as much an out of court statement as the other.

84. THE RECORD OF CONGRESSIONAL DEBATES [. . .] The Record of Congressional Debates that was read contains, on one hand, the presentation of the Ministers of Defense and the Interior, Army Generals Malca and Briones, on the killings in Barrios Altos; in addition, it includes the participation of the senators, in particular the speech given by Senator Diez Canseco Cisneros, who discussed the so-called "*Ambulante*" Plan of Operations. It also offered the Record of Congressional Debates of the Democratic Constituent Congress during the sessions that dealt with the congressional debates for the enactment of Laws 26291, 26479 and 26492, the so-called Cantuta Law and Amnesty laws, which are fully admissible as documentary evidence. Their capacity to be weighed as evidence does not require the individuals who spoke before Congress to be brought into the trial as witnesses. As previously specified, not every statement made by an individual can be reduced to testimonial evidence. In the case of the Record of Congressional Debates, that is the source of the evidence, which in turn contains specific information that was provided by a specific person, fully identified, in compliance with congressional guidelines or practices. They are instruments that contain statements, and are weighed as such.

[. . .]

86. It is not simply a question of a pretrial proceeding[82] that, by its very nature, is unrepeatable and unavailable; rather, it was conducted by the Criminal Judge in the regular exercise of his investigative authority, under seal, which was lifted after the proceedings were conducted (as stated in the decisions at page sixty-three thousand five hundred and eighty-four, of May [3rd, 2002], page sixty-three thousand five hundred and sixty-three, of April [19th, 2002]), which is permitted under Article 73 of the Code of Criminal Procedure. This confidentiality is justified by the need to guarantee the success

82. In relation to the proceeding (conducted by the Judge of the Fifth Special Criminal Court) to exhibit documents from Army Headquarters–SIE and DINTE, including documents such as communications referring to the transfer of personnel from different Army offices, including the CCFFAA, to form the Colina Detachment under the command of Army Commander Rodríguez Zabalbescoa; documents which confirm the activities of personnel linked to the Colina Detachment; Reports from the operative intelligence officer (including the members of the Colina Detachment) and the return of materials (supplies, engineering materials and war materiel) lent to the Colina Detachment. (Publisher's Note).

of the investigation and prevents communications in the case that might cause the individuals involved in the punishable act to flee, and/or destroy or tamper with the sources of evidence.

The decision that ordered the exhibition of the evidence has a minimal, but reasonable basis: it identifies the proceeding, specifies the reasons for it to be carried out, and indicates that it must so proceed in order to prevent it from being leaked—which would be feasible if a request is made to the military institution itself. This last argument is the one that essentially justifies the secrecy of the investigation: the documents being sought are linked to the criminal act of a military intelligence detachment that, as is public and well-known, had officially been denied; further, they belonged to the archives of an intelligence organization, which by its very nature made secret court proceedings advisable. It is true that it is a proceeding that comes from a different, but connected, case. Its unrepeatable or unavailable nature justifies its use, in view of its relevance and usefulness to this case. As such, it shall be weighed under the rules of documentary evidence.

Finally, reiterating what has been underscored throughout this Chapter, the presence of the accused's defense attorney or the person who may be adversely affected by the proceeding and its findings is unacceptable in these types of urgent pretrial investigation proceedings. Simultaneous confrontation of the evidence, due to its very nature and the secrecy that such proceedings involve, was not possible. The deferred or successive confrontation of the evidence was possible insofar as all of the parties had knowledge of this proceeding from the time this Court took the case from the lower court; the defense knew about it even earlier, and therefore were able to prepare the necessary defense in response.

[. . .]

88. [. . .] The Manual examined [Manual ME 38-20] contains at least three points of interest:

> 1. On page eight, addressing "Basic Considerations," subsection d) states: "According to doctrine, intelligence activities are designed to search for and obtain information, or to deprive the enemy of it/(counterintelligence). However, particular to the OEI considered in this manual, they can also

> be directed towards causing harm to the adversary (sabotage, kidnappings, etc)."
>
> 2. On page ten, Section III "Special Intelligence Operations and Special Counterintelligence Operations," point 9) Special Intelligence Operations, number (1) Espionage, states: "It is the obtaining of secret information, through the use of spies with a high level of technical training, by which classified information is obtained for an organization, in violation of the laws governing the area or country where it is going to be conducted."
>
> 3. On page thirty-five of Chapter Five, "Planning and Preparation of a Special Intelligence Operation," Section I, General Comments, point forty-one, "Levels of Planning," subsection a), reads: "For the planning and execution of special intelligence operations (OEI), the National Intelligence Service (SIN) is considered to be the highest level of planning and decision-making, as the head of the Intelligence System; as the Central or Sponsoring Agency, the Army Intelligence Directorate (DINTE) or its counterpart in other institutions, and as the Executive Body, the Army Intelligence Service (SIE) or its counterpart in other institutions." Subsection b) states: "Planning of the highest level. At this level, the OEI are the result of needs the government may have in order to meet its objectives; likewise, those that may be a product of the needs of the TG (CCFFAA) are considered to be of the highest level." With regard to the execution of the OEIs, point fifty-five, subsection a) "the determination of objectives," states: (1) "Objectives may be imposed if it is a matter of providing support to the TG in order to satisfy needs of the Operational Force, or also may be imposed by the SIN in order to meet the general needs of the National Intelligence System. The Central Entity (DINTE) shall select its objectives in order to meet the needs of the SIDE."

90. [. . .] Although other high-ranking Army officials have not acknowledged it, whether because they are outside the sphere of military intelligence or because they did not use it during their service [such is the case of the SIE chief in [1992], Army Colonel Pinto Cárdenas; of Army General Luis Salazar Monroe—who stated that he did not recall having read the Manual, only of having seen the concepts; of Nicolás Hermoza Ríos; of José Valdivia Dueñas; of

Salazar Monroe—who stated that he did not use this Manual during his time as a SIN official in [1992]], it should be noted, according to the statements of the directors of the DINTE, the Commander General of COINDE, SIE Chief in [1991], and according to the proceedings conducted for the production of evidence, that this manual not only existed and was implemented; it was also officially approved and, therefore, expressed the official doctrine of the Army during that period—the same time during which the terrorist violence had been unleashed and the terrorist organizations were being confronted. Many of those who deny or diminish the importance of its existence have criminal cases stemming from the exercise of their duties. This allows for the rejection of their assessments, strengthened all the more by the previously highlighted documentation and presentations.

It is unacceptable in view of the above documentation, and the last official letter, from the DIGEOPTE, mentions something unheard-of: that an Army Manual, duly approved, registered and numbered, was a mere draft that was meant to be confirmed—and even more so, that such was the case for several years.

91. ME 38–23, the Basic Teams Manual, which addresses the work procedures of the Basic Intelligence Teams, establishes at page forty-one that the operational technique to be used is consistent with that provided in the doctrine contained in Intelligence Operations Manual ME 38–20. This further reinforces the validity and implementation of this last Manual; it is impossible to maintain that a document that has not been approved could be referred to expressly in another Manual, or even a draft of it.

Point thirty-two, "Countersubversion Teams," subsection a), states: "*Mission. Prevent, detect, locate, identify, neutralize and/or eliminate persons, networks or organizations engaged in subversive activities against military security.*" Army General Rivero Lazo, Director of the DINTE, in the thirty-ninth session, acknowledged the existence and validity of the aforementioned Manual. He even noted that he studied it in [1972], when he took a basic intelligence course. The manual was republished several times, and he exhibited one from [1999], which is the same as the one published in [1991]. Army General Robles Espinoza based part of his presentation on this Manual, to the point of specifying that the president's

congratulations for Army Captain Martin Rivas's promotion enabled the requirements of this Manual to be met, as it meant having a higher rank to give orders.

[. . .]

Given these conditions, the veracity of the official letter from the DIGEOPTE (No. 760/DIGEOPTE/V–3C/07.08 of August [11th, 2008]) is questionable. This letter reported that ME 38–23 was a draft to be confirmed, which had not been approved by Army General Pedro Villanueva Valdivia. ME 38–23, a copy of which was submitted by the Office of the Public Prosecutor during the twelfth session, had been identified by the highest ranking military intelligence official. Therefore, beyond the fact that Army General Villanueva Valdivia does not recognize or does not remember having approved it, its existence, validity, and implementation are supported by the evidence. The objection of the defense is overruled.

[. . .]

95. The documents submitted by Marcos Flores Alván in the effective cooperation proceedings were also included in other criminal proceedings before the first one ended. One of the essential features of the effective cooperation proceedings is, precisely, the verification of the accuracy of the information provided by the applicant, based on which the judge will determine the admissibility and scope of the reward benefit. However, the law does not prohibit the offering or use of documents in general in open proceedings prior to the end of the original proceedings in which they were initially submitted. There may be many grounds or circumstances that determine the advance use of this information—the law does not impose any limitation—but at the same time it will be incumbent upon the judge in the case where this information is introduced to weigh it autonomously and give it the appropriate weight in relation to the other evidence produced. The inclusion of this evidence, furthermore, does not adversely affect the defendant's right, nor does it give rise to a lack of defense, since he has knowledge of it and is in a position to see it and offer the appropriate defense. What is presented before the court conducting the effective cooperation proceedings, and the decisions that arise therefrom, in no way places conditions on the presentation of evidence and the analysis and decision that must be handed down in other cases; obviously, they

must be weighed and reviewed, compared to and checked against the particular evidence in those cases.

The documents submitted by Flores Alván must be examined according to the account that he provided. Some of them—on which defense counsel's questioning is focused—are only written expressions, made in advance, of what he saw and the specific experiences he had, as well as transcripts of accounts or circumstances, in the manner of recollections, appointments made by a superior officer, or relevant events that occurred in the Detachment to which he belonged. It is clear, for example, that the list of officers is not, strictly speaking, a document—the fact that it was not prepared in advance is well known—and that many of the documents he presented do not meet many of the administrative requirements imposed by the internal practices and directives of military intelligence (stamps, signatures, the author's signs of identification, the receiving entity, etc.). However, the characteristics of the Colina Detachment must be taken into account, starting with the typically-criminal acts that it perpetrated—which would tend to relax the inclusion of information that might "upset" the continuity of the Detachment and the integrity of its members—which, for reasons that will be seen, was the essence of its creation and operation. Its value, therefore, cannot be ruled out in advance; rather, it must be submitted to the respective analysis, and only to that extent can the corresponding evidentiary significance be excluded, if appropriate.

96. "Plan Cipango" [. . .]

> 1. [. . .] According to its content, the chief of the operation is Army General Rivero Lazo, the control officer will be Army Lieutenant Colonel Rodríguez Zabalbeascoa, and the case officers will be Army Captains Martin Rivas and Pichilingue Guevara. The chief of the operation shall maintain constant coordination with Commander General of the Army, the Chief of the CCFFAA and the Chief of the SIN. The DINTE shall be in charge of directing the operation, which shall be under the direct command of the Commander General of the Army, and shall coordinate its duties with the SIN command group. In Part One, entitled "Situation," it sets forth the need to take active measures—including intelligence measures—to protect the public from the advance of terrorist subversion. Part Two, "Mission," indicates that the DINTE will conduct a systematic infiltration of intelligence officers in the city of

> Lima, Huaral and Huacho, with a view to detecting, locating and identifying the members of the Central Committee and National Leadership of the PCP–SL and the MRTA, in support of the military and intelligence operations of the Second Military Region, the CCFFA and the DINTE. Part Three, "Execution," specifies that the operation will have three stages: selection and retraining of twenty-five intelligence officers, infiltration of fifteen officers into area companies to seek information, and analysis of appropriate information in order to convert it into operational intelligence.
>
> The Part entitled "Appendices" lists five appendices: personnel, weapons and munitions, equipment, funding, and diagram of the zone. The provision of weapons and ammunition (HK–P7 pistols, FAL and others), equipment (cars and pickup trucks) and funding for operational and administrative costs shall be the responsibility of the Office of the Treasurer of the DINTE.
>
> [. . .] 4. The changes observed among the three plans detailed are not significant. Flores Alván himself has mentioned that the document was subject to changes once the plans began to take shape and be implemented. Particularly demonstrative is official letter No. 5690/DINTE of August [30th, 1992] (page [8,400]), in which Army General Juan Rivero Lazo addresses the Commander General of the Thirty-first Infantry Brigade of Huancayo, and states that with the approval of the Cipango P/O the Commander General of the Army had ordered the formation of a Special Team within the DINTE; that the Cipango P/O is a classified document; that Petty Officer Second Class military driver Vera Navarrete by virtue of both decisions was transferred to the DINTE as of January, [1992]. Army General Rivero Lazo (thirty-ninth session) acknowledged that he signed it, although he denied having made any P/O Cipango or having knowledge of its content. Army Colonel Silva Mendoza, Assistant Director of the DINTE in [1992], acknowledged (in the thirty-second session) the drafting of the aforementioned official letter—based on the approval of the Cipango P/O and the existing documentation at the DINTE—as well as of radio message No. 260 B4.a02.37, of March [4th, 1992] (page 8,402]), which requests the forwarding of wages for January and February and other items pertaining to Vera Navarrete because his placement in that unit had been canceled.

> 5. Consequently, a Cipango P/O did exist, and based on it, the Colina Special Intelligence Detachment was formed; of this there is no doubt whatsoever. According to what wiretap intelligence officer Flores Alván has stated, the above-cited official letter and the identifications made by Army General Rivero Lazo and Army Colonel Silva Mendoza are conclusive with respect to the matter. This conclusion is strengthened by the documentation obtained by the Judge of the Fifth Special Criminal Court of Lima, which proves incontrovertibly the creation of various documents for the establishment and operation of this Detachment.

97. Marcos Flores Alván turned over to the Office of the Attorney General twenty-six applications for retirement dated December [15th, 1991]. The defense acknowledges that they are original documents and that some members of the Colina Detachment signed them, but they take issue with them because there is no evidence that they were forwarded; there is no stamp and signature acknowledging receipt. The essential matter, however, is the reality of these retirement applications, which have been acknowledged by several members of the Colina Special Intelligence Detachment, and the certain fact that it is a typical intelligence procedure—fictitious separation from service—pertinent to the members of Special Detachments who undertake specific OEIs whose disclosure could give rise to institutional problems.

98. [. . .]

> 1. In this speech,[83] the following is of note: (1) Conducting the war against terrorist subversion requires political decisiveness, which was the leadership that the politician had to assume; and this meant assuming responsibility for leading the war. (2) Now there is a legal framework and there is political leadership. (3) In this war, which is political and must be given political treatment, there is a visible part—the visible troops, who work with the strategic objectives established to win over the population and to confront armed terrorists—and there is an invisible part, which is "you," who fulfill one of the strategic objectives of the pacification policy in the military field. (4) The population is now being won over because the intelligence community has been better understood and better harmonized, as an Intelligence System

83. Speech of Army General Hermoza Ríos (Publisher's Note).

that does not seek premature results and is concerned that the intelligence be timely and that it get to the right people quickly. (5) You have great motivation, as Major Martin said, you are anonymous, but you are motivated by what he talked about, by pure patriotism. (6) Well, I congratulate you. We are paying attention to everything that you do, and we are here to support you in everything. You should not hesitate to express your needs through your chief, Major Martín, captain, the DINTE General, as it is our obligation to solve your problems for all of you. [. . .]

4. It is clear, as Flores Alván acknowledges, that he recorded the speech given by Army General Hermoza Ríos, and that what he submitted was a transcript of it. That document is part of his witness statement, and as such it must be weighed. In addition, Army General Hermoza Ríos acknowledges that the words he spoke are essentially those that appear in Flores Alván's transcript, and he has also explained its content. The argument then, is framed in terms of the attendees of that military meeting, whether it was held for the members of the Colina Special Intelligence Detachment or for all of the members of the SIE, and whether the activities of that Detachment were authorized or supported in general terms.

5. The express mention of Martin Rivas is significant, including when he is identified as chief of the group. That reference demonstrates that the meeting was not for all of the SIE personnel but rather for the Colina Detachment; otherwise, he would not have singled out Martin Rivas, who, given his rank, could not have been chief of all the detachments or members of the SIE. In addition to the foregoing, we have not only the reference made by Flores Alván but also those of the rest of the members of the Colina Detachment.

6. As far as the interpretation of the speech is concerned, it is clear that he is not praising criminal acts expressly; nor does he approve of a policy of dirty war mainly under the responsibility of military intelligence. However, the act of emphasizing the qualities of the group at a time when it had already committed several crimes, only demonstrates a real and institutional support—through his representations—of the clearly criminal activities of a detachment that, as will be seen in the following Chapters, was engaged basically in the elimination of persons under the alibi of their links to

> terrorism. Accordingly, the objections of the defense are overruled.

102. The documentary nature of the information[84] under examination is beyond debate. Its particularity lies in the fact that it is written information that reveals a set of communications exchanged between the Embassy of the United States in Peru and the United States Department of State, access to which was possible—as has been explained sufficiently by expert witness Katherine Doyle—by virtue of an internal procedure under U.S. law, the legality and admissibility of which is not in question under our own laws.

The communications in question contain not only intelligence analysis, evaluations of the situation in the country with respect to the events pertinent to this trial and the dates on which the public inquiries and the investigations took place, which was covered intensely by the national press; they also report on interviews or information provided by various sources, some identified and others not (mainly they mention their institutional location or position, in order to assess the degree of reliability of the information). In other cases, they report on meetings and direct conversations with the Head of State and with other government officials, a succinct account of which they set forth, and to which they add their own assessments.

There is no doubt that such documents constitute evidence that may be examined by the Court in determining the facts and resulting liabilities. It should be taken into account, as an initial reference point for its examination, that they were created by third parties—United States government employees in the context of their diplomatic duties—without further personal interest in the events they summarized contemporaneous to their occurrence. They reflect information provided—in several passages—by "intelligence sources" that portrays the exchange of information on this activity. Naturally, the reality of the facts and the perpetration imputed to defendant Fujimori Fujimori cannot be based exclusively on those documents; their mere mention and individual analysis will not allow for them to be either rejected or considered proven. Consequently,

84. Declassified documents from the U.S. Department of State (Publisher's Note).

the proper weight to be assigned to them is only referential, or rather, limited, and they necessarily must be contrasted with the other evidence presented in the case—as does the expert opinion report written by expert witness Katherine Doyle. They can be used, in any case, to corroborate the testimony and documentary evidence on the record; but they have no probative value in and of themselves.

As previously stated, it is clearly unacceptable, in view of the information contained in a document—insofar as it has been provided by a specific person—to understand that person to be the source of evidence and that, as such, to consider that the information must be introduced into the case only through witness testimony. The information is contained in the document; it is an expression that was recorded in that out-of-court instrument. It is true that the individuals referred to could have been summonsed to appear as witnesses (the parties, all of them, decided not to do so) and examined at trial, but in this case such examination would serve two purposes: as testimony and as an attestation of the authenticity of the document, that is, as a kind of document comparison.

Internally, the declassified documents establish **(1)** as an independent piece of information (made clear by its very fact), the concern of the United States government over the events and the reports of human rights violations motivated by the fight against terrorist subversion; and **(2)** as a telling piece of information (which will be confirmed by the analysis to be conducted in due time), the government line against a serious and transparent investigation to find out who was involved in the crimes that had publicly come to light. Likewise, it firmly establishes a very clear fact: the pressure from the U.S. government, which demanded a consequence to such a sensitive matter, beginning with the public announcements of the Peruvian government on the implementation of a policy respectful of human rights. It also establishes in particular the conversations that the ambassador had with the defendant, conveying the concern of the U.S. government. The latter reveals that defendant Fujimori Fujimori, at a minimum—based on this demand from the U.S.—was fully aware of the importance of the crimes of Barrios Altos and La Cantuta, which went beyond the national sphere. It is impossible to maintain that the defendant was unaware of the consequences of what had happened, or that he put forth a determined effort to

establish the facts and punish those responsible for the crimes perpetrated; judging by what later occurred, he failed to do so.

The documents also demonstrate that the Government of the United States already had intelligence information, with a certain degree of solidity—so assessed by them—about the influence of Montesinos Torres, his special advisory relationship with defendant Fujimori Fujimori and the role he played in the Intelligence System. They were also aware, through an unidentified intelligence source, of the dual policies that Montesinos Torres sponsored: one public and the other confidential, which included the special operations units of the Army, trained in extrajudicial killings in the fight against terrorism. The reality of this—in the case of the latter—is quite clear in the actions and crimes of the Colina Special Intelligence Detachment, as will be examined and established in other Chapters of this judgment. Based on these considerations and the relative weight assigned to them, the declassified documents are admitted as documentary evidence.

105. It is important to differentiate the merit of a judgment of the IACtHR as precedent, the jurisprudential lines it draws in interpreting the American Convention on Human Rights and its extension to national law.[85] The relevant issues here are the actual

85. The judgment states the following in a footnote:

> 81. The Constitutional Court has held that treaties provide a framework for the interpretation of the rights recognized in the Constitution, which means that the concepts, scopes and spheres of protection enshrined in such treaties establish parameters that should play a part, if appropriate, in the interpretation of a constitutional right.

(STC 01124–2001–AA/TC, of July [11th, 2002], FJ 9). Likewise, beyond the criterion of interpretation of fundamental rights in accordance with international human rights law, it is understood that the latter concept is not restricted only to international treaties on human rights to which the Peruvian State is party (IV Final and Transition Provision of the Constitution) but rather that it also encompasses the case law on those international instruments that may have been issued by the human rights protection bodies (STC 04587– 2004–AA/TC, of November [29th, 2005], FJ 44). The IACtHR itself has stated that:

> . . . [it] corresponds to a basic principle of the law on the international responsibility of the State, which is supported by international case law; according to this, a State must comply with its international treaty obligations in good faith […] a party may not invoke the provisions of its internal law as justification [to escape its pre-established international responsibility].

Case of Baena-Ricardo et al. v. Panama, Competence, 2003 Inter-Am. Ct. H.R. (ser. C) No. 104, ¶ 61 (Nov. 28, 2003). Consequently, this Criminal Court must

compliance with a specific judgment, which is of indisputable and direct application domestically (*enforceability*),[86] and the statement of proven facts that an IACtHR judgment contains, and its general effects beyond the decision itself. This is especially relevant if it concerns a criminal case—that is, if the IACtHR's judgment is *prejudicial* with respect to a criminal case it addresses, as would be the case of the Barrios Altos and La Cantuta judgments as they relate to this criminal case. The discussion therefore focuses on the Barrios Altos and La Cantuta judgments. The Velásquez Rodríguez judgment provides, in any case, a framework for assessing institutional mechanisms of forced disappearance, the concepts of which, in pertinent part, will be valuable in organizing the evidentiary guidelines in factually similar or comparable cases. The IACtHR has made the following assertions, and clearly so in the La Cantuta judgment, specifically in paragraphs 80.18, 81 and 96, in which the following were stated as proven facts:

> 1) That diverse evidence caused the Colina Group, whose members participated in the events of the instant case, to become well-known to the public. Colina was a group related to the SIN whose operations were known by the President of the Republic and the Commander General of the Army. It had a hierarchical structure and its personnel received, besides their compensations as officers and non-commissioned officers of the Army, money to cover their operating expenses and personal monetary compensation in the form of

follow the interpretation of the IACtHR on human rights matters, noting especially that the criminal matters are linked directly to the scope of human rights on which there are existing judgments, [and to] the specific compliance with a particular judgment of indisputable and direct application in our domestic system.

86. The judgment states the following in a footnote:

> 82. The establishment of the facts and the IACtHR's legal determination with regard to them within the scope of its jurisdiction, where it determines the responsibility of the State, naturally cannot be misrepresented or ignored at the national level, and must be respected—and enforced—by the domestic courts. It is the so-called "direct effect" of the judgment of the IACtHR, by virtue of which the States that have been a party to the case must obey and comply with that judgment. Velásquez-Rodríguez v. Honduras Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 28-29 (July 29, 1988). Consequently, its binding nature is not limited only to the judgment; rather, it extends to the conclusions of law that explain, justify and state the grounds for the measures taken, as well as indicate the criteria that must be followed, the limits or scope of the measures, or the proceedings necessary for compliance with the judgment.

> bonuses. The Colina Group carried out a State policy consisting of the identification, surveillance and elimination of those persons suspected of belonging to insurgent groups or who opposed to the government of former President Alberto Fujimori. It operated through the implementation of systematic indiscriminate extrajudicial executions, selective killings, forced disappearances, and torture.
>
> 2) That those serious acts fall within the systematic mechanism of repression to which certain sectors of the population were subjected as they had been labeled as subversive or somehow contrary or in opposition to the Government, which was known to or even ordered by the highest command of the armed forces, the intelligence services and the then-governing Executive, by means of the State's regular security forces, the operation of the so-called "Colina Group," and a framework of impunity favoring these violations.
>
> 3) That the planning and execution of the detention and subsequent cruel, inhumane, and degrading treatment, extrajudicial execution, and forced disappearance of the alleged victims, carried out in a coordinated and concealed way by the members of military forces and the Colina Group, could not have passed unnoticed by or occurred without the superior orders of the Executive Branch and the military forces and intelligence bodies at that time, especially the chiefs of intelligence and the President of the Republic himself.

106. The Peruvian State admitted the facts alleged in the case brought by the Inter-American Commission on Human Rights, but the IACtHR also found that the facts had been proven based on the evidence on record in the case. The State's admission was not immediate—there were prior proceedings at the Court, and the preliminary stage concluded before the Inter-American Commission on Human Rights; rather, it came about after these events, once a new government was established through the democratic procedures provided for in the Constitution. The defense has even mentioned specific evidence that was noted in the judgment of the IACtHR, which in its opinion are blatantly insufficient; however, such analysis is inadequate to diminish the merit of the international decision, given that the IACtHR weighed the evidence and

conducted a trial consistent with the principles of international human rights law. Apart from that, there are no reasonable bases or indicia to consider that the State's acceptance was fraudulent. Further, the fact that no decisions have been issued in the national courts, at this time, finding that the facts at issue in the international case have been proven, in no way places conditions on the State's capacity to admit the charges arising from the international responsibility attributed to it; there is no national or international provision or legal principle that prohibits it.

Nevertheless, beyond the intrinsic value of the decisions of the IACtHR in general and of the judgments in the Barrios Altos and La Cantuta cases in particular, it is notable that, without prejudice to the facts proven, their relevance under the criminal law, the implementation and interpretation of the pertinent criminal provisions and, if appropriate, the determination of the sentence, are within the exclusive jurisdiction of the Criminal Court. The IACtHR does not determine the guilt or innocence of an individual—the international court determines the international responsibility of the State for a violation of treaty provision—and it is in the criminal court where the evidence necessary for a final judgment on the guilt or innocence of the defendant will be examined. Otherwise, the evidentiary phase of the criminal trial would be unnecessary. The attribution of international responsibility of the State has its own criteria, which cannot be extended automatically to the field of criminal responsibility—although they cannot be simply left out; for that, a judgment is required, which shall be a conviction if the presumption of innocence is overcome. Such judgment does not exclude, incidentally, taking into account both international decisions as an important element, with a persuasive weight that is determined, in particular, by the common scope of judicial latitude in the court's consideration of cases before it, the contextual facts, and the patterns of State conduct and that of its leaders at a specific time.

107. The same reasoning is essentially applicable with regard to the judgments of the Constitutional Court handed down in the *amparo* or habeas corpus cases filed by the defendants accused of committing these acts (who are allegedly members of the Colina Special Intelligence Detachment, linked to it, or members of the SIN, and are accused of crimes against life, crimes against the rights or freedoms of others, and crimes against humanity) as well as crimes

against government and its administration. Thus, the Constitutional Court:

> 1) Assumed the so-called theory of coordination, which would overcome the dualist theory with respect to the primacy of international law over domestic law or vice versa. This approach seeks a comprehensive solution and the building of jurisprudence based on the relationship between the Inter-American human rights system and national constitutional law, which gives priority to the effective protection of the fundamental rights of Peruvian citizens.
>
> 2) It found that through the amnesty laws the drafters of the criminal law intended to cover up the commission of crimes against humanity, and to guarantee impunity for grave human rights violations; this is the context in which the criminal activities of the so-called Colina Group unfolded. The Court considered those laws null and void, and found that they lacked, ab initio, legal effects. This was due to the existence of a systematic plan to promote impunity with regard to human rights violations, based on these central themes: the deliberate prosecution of common crimes by military courts, and the issuance of amnesty laws during that time period—which in any case revealed the lack of a government willingness to investigate and punish the perpetrators with sentences appropriate to the seriousness of the crimes committed.
>
> 3) It accepted what the IACtHR had previously declared proven facts with respect to the Colina group, that is, its insertion in the State's military and intelligence services, and its compliance [with] State policy through systematic acts of indiscriminate extrajudicial executions, selective murders, forced disappearances and torture.
>
> 4) It acknowledged, as previously stated, the legal validity of those facts that have been submitted, examined and proven before the international human rights protection bodies. However, in defining this declaration, it acknowledged the need for a criminal investigation, which entails a range of action exclusive to the jurisdiction of the criminal courts; it involves the application of provisions of criminal law and criminal procedure, but is in no way disconnected from constitutional law and international human rights law.

108. Consequently, the merit and importance of the decisions of the IACtHR and of the Constitutional Court cannot be simply dismissed. The legal findings they contain must be respected in terms of the affirmation and interpretation of the treaty rights and fundamental or constitutional rights of the individual. The criminal case, so ordered by both courts in protecting the constitutional or treaty claims, has its own purpose and specific rules; nevertheless, the essence of what has been determined in international or constitutional courts cannot be ignored. At the same time, what other evidence may contribute to the case, and the rules for attributing responsibility pursuant to the criminal law, cannot be denied either.

¶3. Evidence offered by the civil party.

[. . .]

113. The purpose of Manual ME 41–7 "Unconventional Countersubversive War," according to Article 1, is to establish procedures for the planning and execution of National Territorial Defense (DIT) operations. Its purpose is to serve as a guide for the various commanders and General Staffs to standardize procedures regulating the planning and execution of the operations of National Territorial Defense. It addresses the general characteristics of subversion and specific points on countersubversive operations, within the framework of the National Territorial Defense doctrine (page one). This Manual, in addition to specifying the channel of authority in the countersubversive war, indicates in number 74, *"Disruption of the Armed Subversive Groups,"* that, *"considering that the Countersubversive War is eighty-percent intelligence and twenty percent operations, the following actions must be established in the intelligence and operations fields."* As for the phases of countersubversive operations, specifically in the intervention phase (number 78) there is reference to the destruction of the local Political-Administrative Organization (OPA), which means the elimination of its members. Section II, Operations against the Political-Administrative Organization, indicates that the destruction of the central system is achieved through the elimination of its leaders, which is considered necessary to put a halt to the advance of subversion (number 83, General Information). Finally, in Chapter II, Complementary Aspects, Section I: Intelligence, under "Sources of

Information" (number 210), the six intelligence objectives are set forth.

In the eighty-second session, Army General Hermoza Ríos acknowledged the validity of the Manual and indicated that he was its main promoter as Commander General of the COINDE, and that its doctrine did not change when he was Commander General of the Army. He explained that the essence of the Manual is to gain the support of the population, and that the terms *elimination* or *destruction* are understood in the context of a direct armed confrontation. He stated that when there is a "red zone" there is direct armed confrontation, and in that case, it is within the objective of pacification to eliminate, confront and eliminate [sic] armed subjects in combat.

114. Manual ME 41–7 defines an Army field of action within the context of an unconventional war against terrorist subversion, which was what Peru underwent in 1990-1992. That Manual, which complements—and does not contradict—the previously examined Initial Text, not only emphasizes the role of military intelligence in the internal conflict but also—beyond gaining the support of the population (Articles 67(a), 69(a) and 73)—has the essential aim of disrupting the armed subversive groups, in such a way that provides for the elimination of commanders, leaders and ideologues in the field of operations, including those from the OPAs. In addition, in the case of an intervention in "red zones" (areas controlled by the subversives or with significant subversive activities), the third step is the destruction of the OPAs, which aims to eliminate its members. It is further understood that the destruction of the OPAs is achieved through the elimination of their leaders.

A selective logic is evident, from a perspective of unconventional warfare, that is aimed at the identification of subversive elements and their elimination or death. The Manual, regardless of other considerations, outlines a rigorous doctrine for confronting armed subversion, in which part of the strategy is directed at eliminating the leaders of the armed insurgent organization. Of course, it does not contain a direct authorization to kill at any cost whomever can be identified as a terrorist leader—whether national, regional or local. However, to a great extent it softens the targets and procedures for their elimination, so as to relax the mechanisms of control and the

safeguards for conduct that adheres to the canons of international humanitarian law and respect for constitutional government with a view to combating terrorist subversion in a manner both effective and respectful of human rights. Under these premises and limits, the objections of the defense are overruled.

115. SPECIAL INTELLIGENCE REPORT NUMBER 001–X24J.A.6. In the one hundred and twentieth session, in presenting Issue VIII "*The existence of a systematic pattern of human rights violations,*" the civil party submitted four documents: 1) the previously-cited Special Intelligence Report of November [10th, 2001], from Intelligence Headquarters at the Ministry of the Interior –Search Bureau, DIRBUS–entitled "*Possible extrajudicial executions – Ayacucho 1991,*" (at page forty-one thousand eight hundred and seventy-nine); 2) a copy of the document entitled "*Congratulations,*" dated November [18th, 1991], signed by Army General Hugo Martínez Aloja, which congratulates several intelligence officers, including Fabio Urquizo Ayma (at page forty-one thousand seven hundred and twenty-five); 3) a copy of the document entitled "*Congratulations,*" dated August [8th, 1991], signed by Army General Hugo Martínez Aloja, in which he congratulates Fabio Urquizo Ayma and others (at page forty-one thousand seven hundred and twenty-six); 4) a copy of the Standard Personnel Efficiency Report on Technical Officers and Noncommissioned Officers, dated December [31st, 1991], pertaining to Fabio Urquizo Ayma [. . .].

118. The documentation that was submitted was provided, as indicated by the civil party that offered it into evidence, by the Documentation Center of the Office of the Ombudsman. There are no valid reasons to doubt that they are documents that were in an official registry and that they were provided at the request of the civil party. On the other hand, while the intelligence report submitted does not contain the document signed with the number one, entitled "Agent Carrión 1991," its complete transcript is inserted in the body of the report, which allows for reliable information of its content (See pages forty-one thousand eight hundred and seventy-nine (back) to forty-one thousand eight hundred and eighty-six, with the exception that the transcription was done on both sides of each page). There is no doubt as to the fact that it is a military intelligence document. The intelligence report from the Ministry of the Interior

reasonably establishes that the crimes it reports were committed by military intelligence officers and were understood as special intelligence operations, subject to superior orders and based on a mindset of elimination of individuals linked to the terrorist subversion of the PCP–SL. Apart from that, the document found at the residence of operative intelligence officer Favio Urquizo Ayma recounts a type of Army intelligence conduct—centered in this case in Ayacucho, the Department of Peru that was hit the hardest by the terrorist subversion of the PCP–SL—and the design of missions to eliminate or murder citizens considered to be affiliated with terrorism and instrumental to its criminal objectives. From this perspective such document, which is fully admissible as evidence, has the following evidentiary significance: it contributes to the determination that means of elimination of persons considered intelligence targets or objectives were used, institutionally and from the Army. The intelligence report from the Ministry of the Interior has established, based on the police intelligence techniques, **(1)** the reality of a *modus operandi* of a Special Intelligence Detachment in Ayacucho; **(2)** that information was exchanged about the reality of the deaths in question; and **(3)** that one of the operative intelligence officers who perpetrated the crimes was Urquizo Ayma. The first and the last points are relevant to the instant case in order to demonstrate that, behind the official speeches, the authorities opted for an unlawful and legally unacceptable way to fight terrorist subversion. What occurred in Ayacucho, at least, in [1991], would be a demonstration, a statistically solid example, of the phenomenon of illegitimate violence that emanated from the State itself.

[. . .]

123. The Final Report of the TRC is a public document. The TRC was an entity created by the Executive Branch with a specific, preestablished purpose, of prominent public importance, and its members were appointed by an official act of government. They had the status of government employees, and therefore the activities they conducted and the documentation that the Commission created are official in nature. The court's assessment of that documentation will depend upon the characteristics of the facts it covers, the scope and nature of its conclusions and the evidence it provides.

1. It is clear, on one hand, that with regard to those facts that must be litigated, something presented on its own merit cannot be considered legally proven. That is what this Supreme Court held in Case No. 1598–2007/Lima, FJ 17, in ruling that, ". . .the conclusions of the above-cited Report [Final Report of the TRC] are not binding upon the court, other than to acknowledge its undisputed legal weight and source of reference."

2. However, the criterion will be different with respect to contextual facts, that is, those concerning the general situation of the subversive phenomenon and the conduct of State agents in confronting it. The characteristics of the Final Report, the material it analyzed (which it compiled, organized and compared) and the methods used (its interdisciplinary, scientific nature, the verifications that the sources warranted and the database that was built for that purpose, as a result of the task imposed by the creation of the TRC) make it possible to grant it—or essentially its verification of factual situations—undisputed probative value, unless specific evidence or consolidated judicial information diminishes its value, which has not occurred in the instant case. This Supreme Court, in Final Judgment No. 918–2006/Junín, of June [7th, 2006], in Point Three of the Conclusions of Law, assuming this criterion, first, declared that the TRC report is a public document, and second, upheld part of the statement of proven facts in the description of the plan of attack near the town of Pichanaki, which resulted in the killing of numerous members of the community of Delta in the Pichanaki district.

3. From this perspective, the IACtHR in numerous judgments in which Peru has been a party has recognized the evidentiary merit [of the TRC report]. Thus, in its judgment in the Case of Cantoral Huamaní et al., of July [10th, 2007], the Court stated in paragraph ninety-two: ". . .The Court has given special weight to the CVR [TRC] report as relevant evidence in the determination of the acts and international responsibility of the Peruvian State in several cases that have been submitted to its consideration." In paragraph two hundred and twenty-four of the La Cantuta judgment, it stated: ". . .the work undertaken by said Commission constitutes a major effort and has contributed to the search for and establishment of truth for a period of Peru's history. However, and without failing to recognize the foregoing, the Court deems it appropriate to specify that the "historical truth" contained in said report does not complete or substitute

> the State's obligation to also establish the truth through court proceedings. . ."
>
> 4. The Constitutional Court, along the same lines as the IACtHR, assumed the probative value of the Final Report of the TRC and, on its merit, declared, for example, that that Report proved that the acts attributable to the group that called itself the "Colina Group" represented a widespread and systematic pattern of human rights violations, expressed in such acts as the disappearances of La Cantuta and of journalist Pedro Yauri, as well as the murders of numerous students at the National University of Central Peru and the Barrios Altos massacre [STC 2798–2004–HC/TC, of December [9th, 2004], paragraph twenty-five, Case of Vera Navarrete].

124. In conclusion, based on the Final Report of the TRC, it can be affirmed with certainty that the numerous forced disappearances and arbitrary executions perpetrated during the years 1990-1993, those attributed to State agents, constituted a widespread and systematic practice, and in certain circumstances—especially in the areas declared to be under a state of emergency—selective. Furthermore, a standard *modus operandi* was followed, basically in the case of the forced disappearances [see footnote ninety-eight].

125. In his book *Fuerzas Armadas – Lecciones de este siglo*, [*Armed Forces: Lessons from this Century*], Army General Hermoza Ríos presents four summaries of the terrorist activities from [1990-1996]. If the years [1990-1992] are taken into account, it adds up to a total of eight thousand two hundred and fifty-nine (8259) violent terrorist acts (chart at page 21). However, by comparison, the chart on pages 175-176 (which is broken down by location of the attack rather than by type, which the first chart highlights) shows, contradictorily, that the total number of terrorist attacks in [1992] was one hundred and forty-seven (147), in spite of the fact that three thousand six hundred and twenty-two (3622) violent terrorist acts had been counted previously. This inconsistency diminishes the convincing force of the information it provides, and therefore it is impossible to refute successfully the figures and analysis of the TRC.

[. . .]

128. It is clear that the PCP–SL declared "strategic equilibrium" and that it stepped up its terrorist attacks or actions in Lima—there is

no contradictory opinion on this point—in 1992, when the democratic constitutional order was disrupted. But it is also obvious that the PCP–SL failed to meet its objectives, and that the State had begun years earlier to defeat it strategically. The PCP-SL was unable to attain hegemony in the countryside, much less besiege the cities; it neither managed to attain political equality nor to dismantle the State based on its own forces. The considerations of Merino Bartet, Degregori Caso and Fernández Dávila Carnero are solid and have not been successfully refuted by other, contrary statements, such as those of Jiménez Baca and Jhon Caro [even the president of the CCFFAA at that time, Army General Hermoza Ríos, and the SIN Chief, Army General Julio Rolando Salazar Monroe, support this line of thinking: there was no strategic equilibrium, which is why the assertions in Hermoza Ríos's book can be qualified as propagandistic and mere justification, without any real basis, of the actions taken by the regime at that time]. Therefore, based on this assertion, any justification of the changes to the institutional system lacks solidity and, on the contrary, reveals intentions other than the publicly declared extreme need to save the country; furthermore, it is not possible to declare the supposed salvation of democracy by denying it in practice and taking control of its basic institutions.

[. . .]

130. The following are pertinent highlights of the reports[87] presented orally:

> 1. The report of the Inter-American Commission stated that the armed conflict that broke out in Peru beginning in [1980] led to the declaration of a state of emergency over a large area of Peruvian territory, and that this conflict caused law enforcement personnel to employ methods that violate human rights. It stated that the United Nations Working Group on enforced or involuntary disappearances of persons as well as the Peruvian government itself have registered more than five thousand complaints involving disappearances ([1983-1990]), and also reports the commission of attacks on personal safety, individual freedom, due process and freedom of expression, without any perpetrators being punished accordingly. The Commission's report also states that, according to the figures

87. Reports of the Inter-American Commission on Human Rights and Amnesty International (Publisher's note).

detailed by human rights bodies, forced disappearances and summary executions continued during the defendant's regime. It states that as a result of the coup d'état various individual rights were violated, and that this event resulted in several very serious acts, such as the death of prisoners at the Castro Castro Prison, the disappearance of numerous people in El Santa, at La Cantuta University, of Pedro Yauri, of attorney Wilfredo Terrones Silva and professor Teresa Díaz Aparicio of the National University of San Marcos.

2. The 1991 Amnesty International report found that three hundred people disappeared during that year after being detained by the law enforcement personnel. It stated that a National Commission to guarantee respect for human rights was proposed, but that such Commission never materialized. It further stated that three hundred new cases involving the disappearance of detainees were reported, of which eighty-nine were freed, twenty-four turned up dead; nothing was ever heard about the rest. Finally, it said that frequent reports were received of abuse and torture, as well as the rape of rural women, and that no official investigations had been opened into those matters.

3. The 1992 Amnesty International report indicated, in addition to several individually identified acts involving human rights violations, that more than three hundred people had disappeared and at least sixty were executed extrajudicially by law enforcement personnel or by paramilitary groups. Dozens of cases of torture and abuse were reported, and the government had still failed to shed light on thousands of human rights violations documented since [1983]. The report stated that in the month of September the government issued a presidential directive on respect for human rights acknowledging that the disappearances of five thousand people had been reported since [1981]. However, no effective results were seen in terms of investigating and punishing the State agents involved in these illegal acts, in spite of the international calls and exhortations to do so. The directive simply conveyed the fact that forty-eight servicemen had been disciplined, which meant that law enforcement personnel enjoyed near total impunity, notwithstanding the overwhelming evidence of their responsibility.

4. The 1993 Amnesty International report stated that at least one hundred and thirty-nine people had "disappeared" and at

> least sixty-five were executed extrajudicially by law enforcement personnel. Reports were also received of widespread torture and abuse. It stated that large regions of the country remained under military control, and that cases of forced disappearance and extrajudicial executions continued to be reported, without any results in terms of their investigation. It stated that Amnesty International's requests for the establishment of specific facts, such as those surrounding the deaths at the Castro Castro Prison and La Cantuta, and requests to investigate the numerous cases of human rights violations, were not accepted.

131. It is clear that the Reports of the IACHR and Amnesty International are, strictly speaking, written documents. They record an expression of intellectual content; they represent the physical materialization of a thought. Both entities, one of which belongs to the Inter-American human rights protection system, and the other being a non-governmental human rights organization, transmit through their reports a specific knowledge of the human rights situation in a particular country and a particular context. Neither the legal requirements for their existence nor the requirements for their validity as documentary evidence are subject to debate. In terms of their evidentiary effectiveness—the accuracy of their content—it must be noted that the statistics or figures they provide, intrinsically vital as far as the "contextual facts" are concerned, are essentially consistent with those presented by the TRC, the evidentiary solidity of which has been affirmed at this point. The reports indicate the source, although in general terms. They contain information provided by non-governmental organizations, public complaints and their own documents on specific cases. It is sufficient, with respect to the matter, that the information is consistent with the records of the TRC, which are extensively documented and have not been disproved. Furthermore, there are two notable pieces of information that have already been confirmed: **a)** former president Alberto Fujimori's own government acknowledged the forced disappearances that had taken place in the country, and that there were five thousand such cases; and **b)** in spite of his declarations of oversight over human rights crimes committed by State agents, those crimes were never investigated, explained and punished, either in specific cases or with respect to the general trend. Consequently, the objections of the defense with regard to the questioned reports are overruled.

¶4. Evidence submitted by the defense.

[. . .]

134. [. . .] There are discrepancies in his pretrial statements[88] with regard to certain matters concerning the Intelligence Note, as he first stated that he had not discussed its content with defendant Fujimori, but later mentioned that he had done so, and that he had even delivered it personally to defendant Fujimori Fujimori. Nevertheless, it is a discrepancy that—although it does not prove that Vice President San Román Cáceres informed defendant Fujimori Fujimori immediately of what had taken place in Barrios Altos and that Fujimori had access to the above-cited Intelligence Note—neither does it deny the reality of that information and the media's knowledge of it from at least December of [1992], although there is information indicating that that Note had already been circulating months earlier.

Finally, on the issue of the discrepancies among the statements of a single witness, that is, the diversity of statements, it is essential that they be subject to confrontation and verification at trial. From that point forward it is the responsibility of the adjudicating court to undertake the reasoned and reasonable weighing of the credibility of the various individuals, in accordance with the principle of immediacy. The existence of contradictions, retractions or corrections to parts of an account of the facts does not signify the absence of prosecution evidence. It is unacceptable to maintain that for such reason the evidence and the information that it contains is cancelled out or rendered ineffective. It is an issue pertinent to the weighing the evidence; it affects the Court's opinion in its weighing of the evidence, not the weighability itself. Accordingly, it is incumbent upon the Court to compare different versions and draw a conclusion according to the ordinary principles of experience with regard to its respective veracity, bearing in mind its internal consistency as well as its consistency with the other evidence in the case. In the instant case, witness San Román Cáceres was examined at trial and attention was called to what he said in his different statements given before other (investigative, prosecution and congressional) government entities. Some parts of his witness

88. Reference to the statements of Máximo San Román Cáceres.

statements—only some passages of his detailed account—are inconsistent and, given the absence of positive proof to strengthen the account given at trial, it is not possible to give full credit to the latter. Accordingly, the Court concludes that such divergence, in light of the totality of the evidence produced [with a view to an assessment of all of the evidence together, which is the evidentiary method that forms the adequate basis, grounds and explanation of the conclusive judgment reached] cannot be disregarded.

139. The effective cooperation procedure governed by Law No. 27388, which has been incorporated into the new Code of Criminal Procedure, established the mechanism of plea bargaining. This has given rise procedurally to so-called *"rewards-based criminal law,"* which rests on the concept of the *arrepentido* [cooperating witness under the Repentance Act]. Its philosophy is determined by the need to fight impunity and break the law of silence prevalent in organized crime, as well as to serve as a tool for the prevention of crimes involving grave social harm. One of the principles on which this special procedure is based is *effectiveness*, so that the cooperation the criminal offers the justice system is useful. Notably, the cooperation and the accompanying information must be relevant—that is, it must lead to the discovery of criminal acts and prove the involvement of other individuals. The information must be authentic, complete and accurate, and the judgment that is issued, insofar as it grants benefits to reward informants who have committed crimes, must appropriately reflect the severity of the admitted or uncontested charges, and the proven value of the information produced by the cooperating witness. Accordingly, one of the essential phases of the proceeding in question is the corroboration of the information by the Office of the Public Prosecutor (art. 6, para. 2 of the Regulations).

Based on the aggregate of information on the alleged criminal participation of the "repentant" defendant [*arrepentido*]—essentially, the investigations or cases pending against him—he decides voluntarily to cooperate with the government, and either admits to the charges or does not contest them. The court's supervision of the Cooperation and Benefits Agreement is limited on this point. It requires only the voluntariness of the defendant's submission to the proceedings and his assisted knowledge of their scope, as well as indicia of criminality or "probable cause" of his involvement in the crimes of which he is accused and based on which he is negotiating a

benefit as a reward for his cooperation. Another aspect of the judicial oversight, beyond the appropriate legal authorizations concerning the subject and purpose of the proceedings, has to do with the benefits granted and the obligations imposed, with the criterion of proportionality among the weight of the information corroborated, the severity of the charges and his responsibility for the act.

The defense, with respect to the judicial supervision of the Cooperation and Benefits Agreement, questions first of all the court's classification of the facts as criminal offenses in terms of what has been admitted with respect to some facts: the *arrepentidos* said that they took part in specific crimes as backup—that is, they did not fire the shots that killed the victims; nevertheless, they were convicted as perpetrators or co-perpetrators. [Another *arrepentido* stated that he had been a driver, that he transported the officers to carry out the criminal act. Likewise, one of the operative intelligence officers acknowledged having participated in the events but asserted that he did not shoot at any of the victims, notwithstanding the accusation of another member of Detachment, who in turn was incriminated by the former]. This classification is not relevant to conclude that the position of the prosecutor and the Court was fraudulent. A criminal act was found to exist, it was determined that the cooperating witness took part in it, and he was convicted in a criminal trial without his opposition. It is possible to consider, based on what the cooperating witnesses have stated, that they took part in the offense not as co-perpetrators but rather as accomplices. However, such classification does not invalidate the judgment or the cooperation itself, since they took part in the act in either case—which the defense does not question. Further, it can be assumed that their account of their own criminal involvement downplays their role in the act.

141. On the other hand, it is true that the cooperating witnesses denied the charges at a certain point prior to the effective cooperation proceedings, and assumed a defensive stance from which they radically rejected the accusations against them. Such situation, as has been emphasized repeatedly, in and of itself does not invalidate their subsequent testimony or statements. For this the Court must bear in mind the reasons for the change in the witness's version of the events, the explanations provided and the respective internal consistency and comparative analysis, as well as the presence of

other objective, external elements that enable corroboration. In addition, the fact that some *arrepentidos* do not admit certain charges in no way influences the fate of the effective cooperation proceeding. This charge is simply excluded from the scope of the proceeding and is subject to the results of the adversarial proceedings in progress. Likewise, the fact that a cooperating witness who does not oppose a charge is included in the corresponding agreement and is approved in the judgment does not invalidate the proceeding or give rise to the inference that the judgment was obtained fraudulently; the law and its regulations authorize this judicial course of action. The focus is not on this matter, but rather on the evidence of criminality—unquestioned by the *arrepentido*—with respect to the charges that were admitted or uncontested.

142. The cooperation judgments have approved the agreements because they find that they meet the legal requirements and pass the proportionality test. They are final judgments, whose legality, proportionality and judicial merit cannot be denied or dismissed by this Court. Whether or not certain information is considered corroborated in the effective cooperation proceeding is not subject to review in this case; any defects it may have cannot be litigated in the adversarial proceedings. Notwithstanding, it is clear that what these judgments acknowledge with respect to the content, existence and validity of specific information—that they affirm that it has been corroborated—does not predetermine the assessment [or] the findings of fact that the Court must render in the adversarial proceedings that may take place as a result or in relation to the information offered by the *arrepentido*. It is clear that in the criminal court the judgments are not prejudicial to other future judgments in other cases. Obviously the statement of proven facts has clear merit as a public document, but those facts do not predetermine or anticipate similar judgment in other criminal cases. Regarding "Plan Cipango," those judgments of course will not be mentioned as proof of its existence; rather—as it indeed occurred—an independent assessment shall be made in terms of the evidence presented (see paragraph 96).

Consequently, there are no grounds for the evidentiary exclusion of the effective cooperation judgments, without granting or acknowledging prejudicial effect. The position of the *arrepentidos* with respect to their prior statements is an issue that goes to the

weight of the testimony, not the legality of its assessment. The objection is overruled.

[. . .]

§3. Audio and video evidence.

[. . .]

¶1. Evidentiary Objections.

148. "[. . .] Regardless of whether this video document[89] was stolen, it lacks constitutional relevance, as in any case it has been proven that one of the parties at the scene of the interview—a SIN employee, obviously authorized by and known to the interviewer and the interviewee, especially if the interview took place at that institution's headquarters—was the person who recorded the event. Beyond any defect in the video specifically, the "questionable" editing of its content for purposes of putting together a specific video document is consistent with a news report. A very clear assumption of "*mitigation of the link*" has arisen, as the interviewer affirmed the reality of the prior conversations and the advance participation of Montesinos Torres, who was giving advice or instructions to Army General Picón Alcalde as to how he should testify.

It is of interest for evidentiary purposes to note, on the one hand, the presence of Montesinos Torres in an interview that, according to the SIN strategy, was necessary in order to reinforce specific messages; and on the other hand, the statement of an important figure cited in Army General Robles Espinoza's public denunciation, in the context of legal persecution against Robles Espinoza and a smear campaign in which the Army was involved, en masse, through its senior officers. There is no question that the interview took place at the SIN headquarters; that Montesinos Torres took part, at least in the prior stages, and was telling the interviewee what to say; and that he emphasized the drastic action of the military court, while Army General Picón Alcalde was convinced that the denunciation was unfounded. Journalist Guerrero Torres has acknowledged what Montesinos Torres said, although he has stressed that he neither interrupted the interview to speak nor controlled the interview.

89. Journalist Alejandro Guerrero Torres's interview of Army General José Picón Alcalde. (Publisher's note).

However, that information is meaningless for purposes of the evidentiary issue and the information sought. Consequently, the objection of the defense is overruled.

The question is also raised of whether the rule of *impartiality* has been violated, as the video that was viewed was put together expressly for use in this case. What is relevant, however, are not the journalist's remarks or the additions to certain events that were filmed previously—which is what, strictly speaking, violates this requirement (which is very well-known in Italian procedural doctrine); what is useful in evidentiary terms, or rather, the typically documentary consideration for complying with the applicable procedural requirements, is the scene that contains a specific piece of information, aside from the fact that commentary or other film clips were added later. If the information is self-sufficient, and is able to capture a specific message, without any danger of confusion or distortion, it is improper to invalidate its evidentiary potential. In the instant case, in light of the above paragraphs, this has been satisfied: *Army General Picón Alcalde testified against his classmate and close personal friend, Army General Robles Espinoza, outside his own realm; he was not at CSJM headquarters. He was following his own motives, and was under the influence of Montesinos Torres,* de facto *chief of the SIN (the institution that led the smear campaign against General Robles Espinoza), which even led him to issue an opinion in the case of La Cantuta that no members of the Army were involved in the crime.*

150. The defense challenges the lawfulness of the audio recordings[90] claiming the violation of two fundamental rights: privacy and the right against self-incrimination. First, there is mention in the audio recordings of family issues, health and personal problems; it is therefore alleged to have private content. In addition, they mention facts that implicate the speakers—some of whom have denied the charges—as the possible perpetrators of a crime; this is relevant especially since the right against self-incrimination arises when, in facing criminal prosecution, an individual decides whether to confess, contest the charges or remain silent. The topics covered in

90. Audio recordings turned over by journalist Uceda Pérez, which came from the recordings made by operative intelligence officer Sosa Saavedra (Publisher's note).

the conversations recorded by one of the parties to it (operative intelligence officer Sosa Saavedra) deal with the amnesty, their ties to the Army and the promises of support they had received. Of course, but still in that context, they mention personal problems and the need for financial support as a result of their imprisonment—information that, incidentally, is not relevant for these purposes and bears no significance in the elucidation of this case. It is it clear, from a substantive perspective, that the important topics covered in that conversation do not affect those exclusively personal areas that belong to a sphere of privacy shielded from the acts and knowledge of others. Everything said in the conversations, including the mention of financial needs and health problems—presented in general terms, without the specificity that could entail the communication of compromising information, or information not meant to go beyond the circle of people present—lies outside the very restricted sphere of one's own individual privacy.

The remarks and statements that one person makes to another in a voluntary conversation, free of duress, do not violate the right to privacy; nor can its recording be called fraudulent. There is not even a reciprocal right to confidentiality or a mutual duty to imply that the person to whom a communication is conveyed has an obligation of discretion or silence.

The right against self-incrimination, which is an instrumental right included in the right to a defense, functions with respect to state agents and prevents defendants—or people who may become defendants—from being forced or tricked into making a statement and admitting criminal responsibility. Such is not the case with regard to conversations held between individuals in which ideas are transmitted and information or expressions are exchanged voluntarily.

151. The defense also questions the relevance of the audio tapes because they are not original, and it has not been verified that they are true copies of the originals. According to the assertions of Ricardo Uceda Pérez at page thirty-seven thousand seven hundred and twenty-seven of his writing, operative intelligence officer Sosa Saavedra gave him the originals of the audio recordings. He obtained copies, one of which is the one he sent to the Court. In that writing, and in his testimony at trial, journalist Uceda Pérez stated that Sosa

Saavedra turned over the audio recordings to him voluntarily, and he made a copy, which he used as a source for his book *Muerte en el Pentagonito* [*Death at the Pentagonito* (Army Headquarters)]. The conversations themselves have been acknowledged by Navarro Pérez and Chuqui Aguirre, who was the most direct in doing so; he identified not only his own voice but also those of everyone whose voice appears on it. Rivero Lazo has identified his voice in some parts—he claims not to have known that he was being recorded, and that is why the conversation is natural—while Sosa Saavedra admits that he is the one who recorded the tapes and turned them over to Uceda Pérez, but states that he did not authorize him to turn them over; he has the originals. Pichilingue Guevara denied recognition of the recorded voices. It is therefore inferred, from the statements of Uceda Pérez and from the identifications made at the hearing, that the conversations contained in the audio recordings did in fact take place. As such, the determination of its authenticity is confirmed. Sosa Saavedra does not allege that the audio recordings presented by Uceda Pérez are false; he only questions the fact that Uceda Pérez had turned them over. However, as previously indicated, there is no duty of mutual confidentiality between the parties to a conversation. Chuqui Aguirre endorses them absolutely. There are no objections from Navarro Pérez or Rivero Lazo. Although Rivero Lazo states that in part, while listening to them, he went by the subtitles because he had trouble hearing (recently stated and not alleged at the time he testified), such circumstance is not a determining factor to reject the authenticity of the audio recordings. Furthermore, it should be made clear that the clean-up and subtitling that was ordered with respect to those audio recordings (as noted on the record in the corresponding session) did not involve any changes or manipulation. The parties knew about both "versions" (the one turned over by Uceda Pérez and the materials returned subsequent to the technical procedures), and had the opportunity to review them and, if appropriate, to object to them. The questioning is dismissed. The audio recordings are fully admissible as evidence.

153. THE AUDIO RECORDING ENTITLED "FUJIMORI-MONTESINOS CONVERSATION." [. . .] As stated earlier, the confidentiality of communications, whether telephonic or other, can be violated only by third parties who intercept communications held by others. This means that there is a particularly intense need for

their protection, especially in view of technological advances that could facilitate their vulnerability and jeopardize the very system of fundamental rights. The special importance of this right demands great care in ensuring that it only can be overcome through a court order, which must be rigorously proven, as must any assertion that one of the participants in the conversation was the one who recorded and disseminated it. Consequently, if one of these circumstances is not proven adequately on the record, that is, that the recordings were obtained lawfully—the burden of proof being on the party offering the evidence—they will be inadmissible as documentary evidence. Army General Hermoza Ríos did not record the conversations that he had with Montesinos Torres, and his inference that Montesinos Torres recorded and disseminated them lacks categorical evidentiary support. It has not been proven that the conversations were intercepted with judicial authorization, which would be relatively easy to prove. Therefore, the audio recording in question is excluded from the evidence.

[. . .]

155. AUDIO RECORDING ENTITLED "STATEMENT OF VLADIMIRO MONTESINOS TO TELEMUNDO." This is, in fact, from a statement that Montesinos Torres recorded surreptitiously—without the knowledge and authorization of prison authorities—and turned over to the press, which saw to its distribution. According to the news report of *Canal Dos* [Channel 2] that was attached to the audiotape from Telemundo, the Ministry of Justice disclosed the measures taken in light of what had occurred, including the disciplinary action taken against the prison warden, and provided an account of the events, indicating that a list of questions was sent to Montesinos Torres for him to answer. This fact is insignificant to the exclusion of the statement, since it does not affect the essence of the statement as far as its voluntariness and authenticity as a document are concerned.

In that statement, Montesinos Torres questioned why the defendant [Fujimori] was not facing up to the charges against him and stated, among several issues, the following: **1.** That the intelligence services operate in secret and always act along the fluid line between legality and illegality, often breaking the rules. **2.** That he worked under the orders of President Alberto Fujimori Fujimori,

followed his instructions strictly so as to make it possible for him to remain in government, increase his power and consolidate his political plans, even attaining his reelection for the 2000-2005 term. **3.** That, therefore, as political leader and head of state, he must answer for what his subordinates did or failed to do, including the commission of acts that go against the rules in force.

It should be noted that every video or recorded tape is an audio or video document, as the case may be, and must be assessed as such. Furthermore, this recording was in the public domain and was at no time denied by Montesinos Torres. Its authenticity is not in question. As noted earlier, the fact that Montesinos Torres was not cross-examined at trial, for a reason not attributable to the Court, does not prevent the analysis of prior statements (in which, clearly, he waived his right to remain silent); they are known to the parties, who have had the opportunity to introduce evidence to dismiss them, minimize them, or even discredit their effects. Insofar as it is documentary evidence, its content—Montesinos Torres's statement—can be examined as an out-of-court statement, although cross-examination is not applicable because the documents would be read or viewed or listened to. As such, the objection is overruled.

[. . .]

159. [. . .] The document[91] has been viewed in the proper proceedings, and it has been identified by two of the people who took part in the meeting. Consequently, all possible limitations to the document viewed are overcome by the express acknowledgement of its participants. Furthermore, it is clear that this document was sent by Congress to the Office of the Public Prosecutor once it was announced that a criminal complaint would be filed against the defendant, and that Office in turn attached it to its formal complaint as evidence. Consequently, the objection is overruled.

160. [. . .] With respect to the matter, it is clear that it is a fluid dialogue between Montesinos Torres and Briones Dávila and Luisa María Cuculiza, and that in referring to the matters of Barrios Altos

91. Vladivideos marked with numbers 880/881 [This is footage of a meeting held at the SIN on April [29th, 1998], which includes two separate events: the first is a conversation among Luisa María Cuculiza, Juan Briones Dávila and Vladimiro Montesinos Torres; and the second is a conversation among the three aforementioned individuals and Alberto Fujimori Fujimori].

and La Cantuta, he mentions the SIE expressly and rules out the SIN. It is also clear that he pointed to the chair where the highest ranking official sits—which is the place the defendant occupied and sat in when he entered the Chamber—and stated emphatically *"everything comes from here."* In all of his statements he clearly rejected the SIN's perpetration of the act, so it is possible that this statement was meant to indicate the defendant and the Intelligence System. Nevertheless, it is a phrase or accusation that is not very clear on the matter of who gave the order for the two criminal acts, or for all of the ones Montesinos Torres cited at the meeting. In any case, those words and that gesture are not unequivocal statements that defendant Fujimori Fujimori had given the criminal orders, taken part in them or known of the course of events. They allow for several interpretations, such as those that have been given by the people at that meeting, the prosecutor, the civil party and the defense. As such, they require other supporting evidence that will be examined at the appropriate time; on their own, they are neither sufficient nor categorical as incriminating evidence.

¶2. Evidence offered by the Office of the Attorney General

161. VIDEO ENTITLED "*LOS SIAMESES*" ["THE SIAMESE TWINS"] [. . .] The objections as to relevance must be overruled, because what is relevant in these cases are the sources of these film scenes. They are public, from a journalistic source, and publicly known because they were broadcast on various television news programs, including open signal television such as channel 2, *Frecuencia Latina*. The important point, it must be stressed, are the defendant's statements—not the additions and news commentary. They help show the content of the defendant's statements at a certain point, but there is no serious risk of misrepresentation or possibility of confusion with respect to them. Furthermore, the images and words have been acknowledged by the defendant. In addition, it is obvious that some phrases concerning who served in his government from the time he took power must be weighed with the totality of the evidence produced and, if appropriate, their convincing force and their merit as incriminating circumstantial evidence must be determined.

162. VIDEO ENTITLED "MESSAGE FROM MARTIN RIVAS" [. . .] In this "message" Army Major Martin Rivas states that the acts

attributed to him—Barrios Altos and La Cantuta—were a government decision; otherwise, it would be impossible to explain the Cantuta Law, the rolling out of the tanks, the antiterrorist laws, the amnesty laws, let alone for so much to be done just to defend one Army major. He states that the amnesty laws did not protect him; rather, they protected those in government and those responsible for the State policy implemented, the responsibility for which lies, in any case, with the President of the Republic as Commander in Chief of the Armed Forces and his advisor who governed with him, Vladimiro Montesinos Torres [. . .] There is no doubt of the authenticity of the video footage in question. Martin Rivas himself has acknowledged it. The argument that he was deceived and that it was simply a rehearsal does not withstand even the least analysis. Martín Rivas knew that he was being filmed and that the footage would be used by journalist Jara Flores; that was the testimony of the journalist at trial. His statements are convincing and well thought out, and are aimed not only at explaining a very serious event but also to defend himself from the charges against him. Furthermore, it is a video document. As such, it is subject to the rules of identification and a determination of authenticity, overcome successfully in this case. It has already been established that, as such, it serves not only to judge the credibility of his testimony at trial but also, if appropriate, it can replace it if the evidence of the case so determines. The reasoning for this has already been stated repeatedly in this Chapter. The objection is overruled.

163. AUDIO RECORDING OF THE INTERVIEW OF OPERATIVE INTELLIGENCE OFFICER JESÚS SOSA SAAVEDRA CONDUCTED BY JOURNALIST MARÍA ELENA CASTILLO, OF THE NEWSPAPER "LA REPÚBLICA." In these statements, Sosa Saavedra mentions that the special intelligence detachment in question did exist, although not with the name "Colina" but rather "Lima." He acknowledges that that is what it was called, that there are even documents under that name, and that it was Martin Rivas who gave it that name. He states that the first operation was Barrios Altos and that it was ordered by Montesinos Torres, to whom they reported on the job done. Martin Rivas, Pichilingue Guevara and Rodríguez Zabalbeascoa went; he states that they, as members of the military, had not wanted to work for Montesinos Torres but rather for the Commander General of the Army. He states

that the rest of the operations were ordered by the Commander General of the Army, General Hermoza Ríos, and that he even congratulated them and offered to have a luncheon for them. He states, nevertheless, that the order for La Cantuta was to make arrests, but that Martín Rivas ordered them to kill; he states that the group answered administratively to the DINTE, which is why Rodríguez Zabalbeascoa was present as the coordinator between the Detachment and the DINTE. He states that Martin Rivas would coordinate directly with Army General Hermoza Ríos, and that the Colina Detachment was formed in the COFI, while Montesinos Torres was first starting to gain power.

[. . .]

The defense questions the audio recording because it is documented testimony, and testimony can only be introduced through a live witness. This objection, asserted repeatedly throughout this phase of the trial proceedings, is baseless. It must be emphasized that tape recordings are governed by the rules of documentary evidence. And if the person interviewed acknowledges his voice and the content of what is stated therein, it is improper to exclude it from the evidence. Sosa Saavedra says that he does not recall everything that he stated there, especially the quote against Montesinos Torres. However, what has been set out above is convincing, there is no evidence whatsoever that any phrase was added or that the statement was misrepresented; and as far as the reference to Montesinos, it is simply a retraction, although without any explanation to justify the change in story. The objection is overruled.

[. . .]

165. [. . .] In the instant case,[92] the place where the meeting was held (the SIN) the content of the presentation, the status of the attendees (pro-government members of Congress) and the role of Montesinos Torres, who boasts of his power and his connection to former president Alberto Fujimori Fujimori, are all of note. This scene demonstrates the significant role that Montesinos Torres played, in spite of his formal title, in the real operational structure of the regime and its view of the countersubversion strategy.

92. Interview with Sosa Savedra by Mabel Huertas on Día D (Channel 9).

166. [. . .] The defense questions the procedure by which the video evidence is introduced[93] when it is testimony, and also complains of the lack of requisite impartiality. These objections, however, are not sound. It is indisputable that the videos are documentary evidence, and that their fundamental content, which has been subject to identification, is the statement of Army General Hermoza Ríos. Its authenticity has not even been disputed, and its content and message are very clear: he confronted the public inquiries and the questions raised before Congress, he branded it an offense to the military institution, and declared that he would not allow it. From there, as is well-known to the public, there was a reaction from the military, which included a parade of tanks and public demonstrations of support for the senior officer, in spite of the evidence of criminality with respect to the perpetration of the serious acts condemned. The objection is overruled.

¶3. Evidence from the civil party.

[. . .]

¶4. Evidence from the defense.

[. . .]

§4. Other evidentiary arguments from the defense.

[. . .]

¶1. Congressional Proceedings

175. With respect to the congressional procedure of *acusación constitucional* [similar to impeachment proceedings], it is relevant to bear in mind two specific provisions: (i) Article 100 of the Constitution, which establishes that "*the defendant shall have the right, in these proceedings, to defend himself pro se and with the assistance of counsel before the Permanent Committee and before the full Congress;"* and (ii) Article 89 of the Regulations to Congress, which provides three basic stages of the *acusación constitucional* procedure, and recognizes that the defendant may be assisted or represented by counsel. Article 89 further provides that the debate of the *acusación constitucional* before the full Congress shall not be suspended due to the defendant's or his attorney's

93. Video containing the public statements of Army General Hermoza Ríos.

unjustified failure to attend, as determined by the Congressional Board. In such case, upon verification that notice was properly served upon the accused and his defense counsel, the *acusación constitucional* shall be debated and voted upon.

176. The meaning and scope of the *acusación constitucional* procedure have been defined by the Constitutional Court. In STC number 0006–2003– AI/TC, of December [1st, 2003], it was classified as a duly regulated political legal proceeding, conducted before Congress. In such proceeding, the legislative body must have determined the likelihood of the facts alleged in the accusation, and found that those facts are consistent with the legal definition of a crime or crimes committed by a public servant, previously and unequivocally established under the law, and as such warranting criminal prosecution. It is a preliminary impeachment hearing to shed light on accusations of the alleged legal and criminal liability of high-ranking government employees pursuant to Article 99 of the Constitution for crimes allegedly committed in the performance of official duties. Once Congress has determined that, in its opinion, there are sufficient facts evidencing the commission of such crimes, it acts as the prosecuting entity. It sets aside the official rights and privileges of the dignitary, suspends him from the performance of his duties, and brings him before the criminal court.

[. . .]

177. The political nature of the Congressional trial (without prejudice to the assessment of whether there is evidence of criminality in the conduct attributed to a high-ranking government official), and its effect of relieving the defendant of the official rights and privileges vested in him, and given its role in relation to the regular criminal courts as a mere prosecuting entity—understood in a broad sense—is clearly established. Such is also the case insofar as, from a procedural law perspective, the decision of Congress is established as a condition or requisite for it properly to proceed; it is a procedural element that determines the initiation and validity of the criminal case, but nothing more.

Consequently, because of their political effects, it is not possible to equate such proceedings with a criminal court case. The criminal case establishes the facts of an event—its goal is to shed light on it—and the responsibility of an individual. If appropriate, it determines

the application of the criminal law and the imposition of a sentence or preventive measure, without prejudice to the civil reparations. The congressional investigation only yields political consequences or effects at the heart of the bodies of the Legislative Branch; it does not impose criminal sanctions. However, strangely, from the perspective of comparative law, the Congressional resolution to bring the *acusación constitucional*, which has a criminal content, has binding effects for the initiation of the criminal case—but that in no way "transforms" the preliminary impeachment hearing into a legal or court case.

From this perspective, not all of the requirements or guarantees of a court case can be transferred to the preliminary impeachment hearing. Of course, the right to a defense must be respected in its essential content: knowledge of the charges, the assistance of counsel, participation in the investigation proceedings, the opportunity to present arguments and to contest the charges. In the case of the congressional proceedings, as previously stated, the defendant has the right to defend himself *pro se* and with the assistance of counsel before the Standing Committee and before the full Congress. In the preliminary impeachment hearings before Congress, as opposed to the criminal case, due to the conflicting rights and the effects that the sentence entails, the defense is limited, with regard to the assistance of counsel, to the right to name his own attorney. This right cannot be hindered or impeded; however, it is not an obligation of the State to appoint an attorney in the absence of the defendant's designation, as it is in a criminal case [ECtHR Judgment of January [21st, 1999], Case of Van Geyseghem].

Along these lines, the Regulations to Congress recognize legal defense as a right, not as an obligation of the State that requires the legislature to appoint an attorney if the defendant fails to do so. Furthermore, they consider it an elective right in that the defendant may choose not to name an attorney. In the case that an attorney has been named, his failure to appear does not suspend the proceedings, and proof of the service of notice to the defendant is sufficient to meet the legal requirements for the defendant to be able to assert his right. That has been done in the instant case. To assert the interpretation, as the defense has, that the proceedings are null and void due to the absence of appointed counsel in view of the voluntary nonappearance of the defendant's own attorney, when the law does

not require it—and does not even allow it—would be to open the door to the failure of any investigation.

178. Irrespective of the above, the main point is that we are not dealing here with congressional *acusación constitucional* proceedings leading to the criminal case, but rather with proceedings held in Congress that lack such procedural or court nature, whose documentary character is beyond all discussion. As already stated repeatedly: it is improper to require criminal trial guarantees and evidentiary rules in proceedings that do not, because of their nature, require them. The congressional proceedings (statements, expert testimony, identifications, the production of different kinds of documents and information) are out-of-court sources of evidence. They are incorporated into the case and examined therein according to the means by which they are introduced—in this case as documentary evidence. As such, they do not require prior confrontation, because sources of evidence never do. The objections of the defense are therefore unacceptable. All of the congressional investigative proceedings, by their nature documentary, insofar as they have been subject to debate, may be used by the Court.

¶2. The pretrial investigation proceedings and the right to the assistance of counsel

179. [. . .] It has been known since the beginning of the case that defendant Fujimori Fujimori was in Japan; the Investigating Judge specified that he fled the country to avoid prosecution by the Peruvian justice system. In spite this fact, he was not declared a fugitive immediately nor, therefore, was he assigned court-appointed counsel. The Court notes that the right to a defense is a guarantee and, as such it is the State's duty properly to provide it. If it fails to do so, the pretrial investigation proceedings will not be admissible as evidence.

[. . .]

181. However, the following must be reiterated: (i) that the right to a legal defense recognizes within its scope the principle of interdiction in the case of a lack of defense, which at the heart of the case means the exclusion and censure of a deprivation or limitation of the essential opportunities provided by all the rights instrumental to a defense, including the right to be assisted by counsel; (ii) that observance of the interdiction in the case of a lack of defense is

directed at the court and prevents its orders from harming the defendant's legal situation arbitrarily; therefore, if the lack of defense is created by the defendant's own reasons and volition, entails an attitude voluntarily adopted by the defendant, or is due to the lack of diligence or expertise of his defense counsel, it does not exist as such; (iii) that, in the instant case, the defendant knew of the existence of a criminal case against him—a fact he has not denied—and decided not to comply with the judicial summons in the case, which academically and legally is called not absence but rather contempt of court; (iv) that the ruling of absence or contempt is a procedural act that creates such status, and its issuance requires that all necessary means be exhausted to put the defendant on the right path, at which point he is assigned court-appointed counsel; (v) that, in the instant case, once the investigating court officially verified the defendant's deliberate avoidance and his willful failure to comply with the court summons, he was formally declared in contempt of court and a fugitive (there are two such orders in this consolidated case) and he was assigned a court-appointed attorney; (vi) that, therefore, a material lack of defense was not an issue in the pretrial investigations because the lack of representation at that phase was due to the defendant's own attitude; moreover, the Chambers of the Investigating Judge did not deny access to the proceedings or hinder the assistance of a private attorney, which the defendant failed to name; (vii) that the opportunity for confrontation, central to the lines of defense required in the investigating court, was not diminished or maliciously impeded, and therefore the pretrial investigation proceedings cannot be preliminarily rejected or considered irrelevant in terms of their admissibility according to the circumstances of the case.

Chapter II: Alberto Fujimori's assumption of the presidency and the bases of his regime

§1. The presidential election.

¶2. The new government strategy

[. . .]

190. The foregoing demonstrates that significant changes were made beginning on July [28th, 1999], starting with the preeminence of the SIN and the central role of Montesinos Torres in the definition

of those changes. In this new functional and political aspect, the SIN was authorized to conduct operational intelligence, thus rendering it more accountable to the President of the Republic. Its most important regulatory reference initially was Legislative Decree No.746, which, incidentally, was not the only reference, given the dynamics of an entire process involving the cooptation of the Armed Forces and the PNP and the significant role—undoubtedly excessive and illegitimate—of the SIN [. . .]

§2. The coup d'état of April [5th, 1992]

¶1. Circumstances and prior acts.

[. . .]

197. The coup d'état was not impromptu. There were several prior meetings between the high command of the Armed Forces and the National Police and Alberto Fujimori and his presidential advisor, held on April 3 and 4, 1992, and attended by the following individuals: Nicolas Hermoza Ríos, Salazar Monroe, Carmona Acha, Velarde Ramirez, Robles Esponiza and Pizarro Castañeda. All of them, as previously stated, were Heads of the Armed Forces and the Police and have acknowledged their attendance at said meeting (Operative Point 197, p. 197-199).

¶2. The Message to the Nation and the deprivations of liberty

[. . .]

199. Defendant Fujimori Fujimori ordered the Armed Forces and the PNP to take immediate actions to guarantee the measures announced and to ensure order and national security. This is evidenced by the fact that that the Army, Navy, Air Force troops, and National Police, took control of the city of Lima and the main cities in the provinces. Congress was occupied, as were the Palace of Justice, media facilities and public areas, while political figures and well-known journalists were deprived of their liberty.

[. . .]

¶4. Immediate measures and consequences

206. The coup d'état that defendant Fujimori Fujimori ordered on April 5, 1992, in spite of the fact that on July 20, 1990, he had taken a solemn oath to defend the Constitution and promised to fight for democracy, was a clearly unconstitutional and criminal act with no

mitigating circumstances. This act resulted in the installation of a dictatorship. There is no justification for the criminal illegality of his conduct, nor any legally or constitutionally relevant motive that would prevent the political censure and criminal prosecution of its participants. The rejection of the coup d'état internationally was unanimous. The pressure that the OAS and the most important democracies brought to bear upon the *de facto* regime resulted in a set of commitments and agreements for the restoration of democratic order.

Chapter III: The President of the Republic and the control of terrorism

[. . .]

§2. The President as Commander in Chief of the Armed Forces and the PNP

[. . .]

216. The head of state as commander in chief of the Armed Forces and National has discretionary powers. Therefore, the president—the operator or agent of such authority—enjoys the freedom to choose the course of State action, and his decision is an exclusive manifestation of his power. As held by the Constitutional Court, the constitutional framework does not establish specific conditions, precautions or procedures with regard to these types of powers, unlike those that are regulated. Rather, the constitutional framework sets forth only the respective allocation of powers. As such, the manner, timeliness, convenience or inconvenience of that allocation is subject to the political criterion of whomever exercises the authority. For this reason, the acts that fall within the purview of the head of state's authority are not justiciable, unless the courts responsible for the oversight and defense of constitutionality declare their own jurisdiction over the issue.

[. . .]

¶2. Actual exercise of leadership of the Armed Forces

220. Presidential military authority, in the terms set forth above, was a recurrent invocation and practice of defendant Fujimori Fujimori in his relations with law enforcement personnel, when

facing the public, and in the context of the fight against terrorist subversion.

§3. The military powers of the President of the Republic

[. . .]

¶2. Political command authority over the military

224. Assuming these guidelines, several general and senior officers of the Armed Forces and the PNP testified at the trial. Their testimony established the constant exercise of Fujimori Fujimori's political authority over the military as commander in chief of the Armed Forces and National Police. This authority was expressed outwardly through binding governmental or presidential directives relative, mainly, to the fight against terrorist subversion. Thus, among others, it is necessary to highlight the statements of Army Generals Cubas Portal, Rojas García, Rivero Lazo, Luis Salazar Monroe, Robles Espinoza, Hermoza Ríos and Briones Dávila, as well as that of Army Colonel Pino Benamú.

¶3. Effective command authority over the military

[False]

227. The foregoing leads to the conclusion that whomever has command authority unfailingly has operational command. That is to say, this person has the power to give orders and the ability to exercise that power over a specific unit, with the consequent duties and responsibilities that come with it. Nevertheless, whomever has operational command does not always have authority or strategic command in the strict sense of the term over a specific unit.

Now, effective military command, or operational command *stricto sensu* is commonly held by professional servicemen, given the technical characteristics required for its efficient exercise. In the case of the head of the Peruvian State, this expression of military power is not entirely perceptible, since this power amounts to a function that involves merely the execution of policies and strategies designed and shaped by the political military leadership—that is, by the entity in charge of the National Defense and Security System, whose highest decision-making body is the National Security Council (which in the previous decade was called the National Defense Council) and which is presided over by the President of the Republic.

¶4. Military powers of the commander in chief

228. In view of the foregoing, it can be asserted that the Constitution grants the head of state military powers for national defense that are developed prominently in terms of political authority over the military. Nevertheless, the constitutional provisions do not specify the scope of effective military command or operational command, strictly speaking, that he could exercise when a number of factors are combined.

The subordication of the Armed Forces and the National Police is established immediately because the Constitution refers to a category of leadership. As such, the premise is one of operational command arising from the interaction of hierarchical steps in a vertical line.

Moreover, by classifying such leadership as "supreme," the operational command that it embodies is the maximum possible in the Armed Forces and the National Police. In this way, the chain of operational command (not of political command authority) culminates, by express constitutional mandate, in the institution of the President of the Republic.

229. However, this operational command must be expressed lawfully only in the areas where the military command relationships do not operate, so as not to infringe upon the authority of others—that is, to not act in disregard of the command authority of others. It is, consequently, an authority with which to respond to assumptions of fact, and to fill in the gaps that result from the command structure of the clearly defined system of powers. Therefore, the orders issued by the President of the Republic in the exercise of his role as commander in chief or maximum operational commander of the Armed Forces and National Police hierarchies, do not necessarily require any particular formality. They may be written, verbal, express or implied. It should be made clear that the procedural requirements of an order are reserved exclusively for the military command relationships within the organizational structure of the specific military units, which are frequently governed by a strict procedure that establishes the observance of legal formalities for the order and a written record of it.

¶5. Defendant Fujimori Fujimori as Commander in Chief of the Armed Forces

[. . .]

232. Consequently, all of Alberto Fujimori Fujimori's activities as Commander in Chief of the Armed Forces and the PNP that have been reviewed and proven on the record demonstrate the military authority that the constitution confers upon the head of state. It is proven, then, that defendant Fujimori Fujimori undoubtedly exercised political authority over the military as well as effective military authority, thus outwardly expressing his command authority and maximum operational command over the Armed Forces and the PNP, at a strategic political level, and at a tactical and operational level, which included specific personnel or units.

[. . .]

§5. The President of the Republic and the SIN

¶1. Regulatory changes.

[. . .]

241. The major change, from a regulatory standpoint, was consolidated with the enactment of Legislative Decrees No. 743 (the National Defense System Act), and 746 (the National Intelligence System Act), both of November 12, 1991. The general thrust of these changes are that the SIN, accountable directly to the President of the Republic, is now considered the central and governing organization of the SINA, which is composed of (in addition to the SIN) the intelligence agencies of the Ministries of the Interior, Foreign Affairs, Economy and Finance, and Education, the intelligence bodies of the defense sector, and the intelligence bodies of other government ministries and entities. It has the status of a government ministry, is a budget sector agency and adopts its own regulations. It produces national, field and operational intelligence, and is responsible for integrating the intelligence gathered in the political, economic, psycho-social and military fields—while still producing the first three kinds—for the President of the Republic and the main agencies of the National Defense System. Principally, it can conduct operational intelligence actions according to the different disturbance factors affecting National Security and National Defense (Article 10).

According to Legislative Decree No. 743, the SINA is part of the National Defense System (Article 11(c)). SINA's role is to provide the President of the Republic and the main National Defense System

agencies the intelligence required for the planning and conduct of National Defense (Article 19). The SIN Chief is the highest ranking official of the SINA, and is appointed by the President of the Republic (Article 19). [. . .]

¶2. Explanations based on the exercise of power

243. All of the foregoing is explained by defendant Fujimori Fujimori's interest in positioning Vladimiro Montesinos Torres as the great coordinator of the intelligence system and the one to channel his decisions into the military sphere. Fujimori Fujimori did this because he required the centralization of military power and control of the intelligence and military spheres, in order to carry out his countersubversive strategy and to establish a system for the exercise of power that served his political objectives.

[. . .]

Chapter IV: The Armed Forces and the Government of Alberto Fujimori Fujimori

[. . .]

§2. Organization and operation of the Armed Forces

[. . .]

255. In conclusion, the power that Army General Hermoza Ríos held as of December 19, 1991, in the previously mentioned positions (Commander General the Army, president of the CCFFAA and Chief of the COFI), was well-known and definitive, at least formally. He concentrated the dominant power of the military in all the operations against terrorist subversion, and was in practice the highest military chief, to whom, in this field, all of the armed forces institutions were subordinate. However, this unity and concentration of military power, of course—as established in the preceding Chapters—was under the supreme leadership of the commander in chief, that is, accountable directly to the President of the Republic, defendant Fujimori Fujimori. Moreover, the President had positioned Montesinos Torres as an operator and intermediary in his relations with the Armed Forces, when Montesinos Torres was also the *de facto* head of the SIN, and with it the entire SINA.

[. . .]

§6. The absolute interference of Army General Hermoza Ríos in the Armed Forces

[. . .]

272. There is also no doubt that Army General Hermoza Ríos, in his capacity as Commander General of the Army, was authorized to exercise his power to intervene in all spheres and functional levels of the Army.

[. . .]

273. All of these events, without a doubt, would not have been able to take place without the knowledge, approval and active involvement of the senior military commander. His rank and the military post or position that he held, and the very operation of the military structure (hierarchical, disciplined and extensively formalized, with rigid levels of internal information and specific control of the activities of its members), would have made it impossible for everything that took place—and it was a lot, in terms of extent, intensity and time frame—to have occurred behind his back and, moreover, without his malicious interference.

274. In light of Hermoza Ríos's major interference, the Court rejects the explanation that he was ignorant of what occurred. The degree of his power within the Armed Forces demonstrates that it was near absolute. The Court also takes into account, as information that reveals his knowledge and participation in the events, the absence of immediate sanctions and corrective measures. These two points, taken together, reveal with abundant clarity the degree of involvement of the highest levels of the military in the commission of the crimes at issue in this case.

Chapter V: The National Intelligence Service

§2. Placement of Vladimiro Montesinos Torres within the SIN

280. It is clear that Montesinos Torres attained, his position position because President's Fujimori Fujimori order. The defendant initially sought to appoint him as SIN Chief, but given the objections of the president of the Council of Ministers, Hurtado Miller, he opted for the position of advisor to the Office of the Senior Director of the SIN. At first it was informal, and later, when faced with public outcry, it became formal. Defendant Fujimori Fujimori was not

unfamiliar with Montesinos Torres's history, through journalistic information as well as directly (Bulletin No. 001–SIE407 addresses this issue). Furthermore, his background could not be overlooked, as the appointment of a government employee to an important position with major ramifications for public policies on political matters, intelligence and security necessarily required sufficient investigation of his résumé and his public and professional career.

§3. Influence of Vladimiro Montesinos Torres in the SIN

[. . .]

282. The testimony of Degredori [sic] Caso, Máximo San Román Cáceres, Benedicto Jiménez Baca, Pino Benamu, Robles Espinoza, Hermoza Ríos, Human Azcurra and Jara Flores only corroborate Montesinos Torres's control, as a direct representative of defendant Alberto Fujimori Fujimori, in the spheres of Defense, the Interior and Intelligence, where, at least during the early years of the regime at issue in this case, an atypical model of national government was consolidated.

284. In view of the above-cited statements, it can be concluded that the nominal SIN Chief during that period of time was Army General Salazar Monroe, while the actual Chief, who in fact assumed the authority inherent in the position, was presidential advisor Montesinos Torres.

¶2. Involvement in the regulatory restructuring of the SIN and the National Defense System

[. . .]

288. It is clear, then, that under the direction of Montesinos Torres (who in fact was a direct subordinate of defendant Fujimori Fujimori, to whom he was accountable, to the exclusion of other top government officials), operational intelligence became an activity that fell within the purview of the SIN. This was achieved through Legislative Decrees 743 and 746. This activity had in fact already begun in January of [1991], as will be explained in detail below, but—as previously explained—was not provided for legally in Legislative Decrees No. 270 and 271, which only authorized the SIN to produce strategic intelligence (See Article 2 of Legislative Decree No. 271).

It is therefore reasonable to consider that the ultimate goal of Legislative Decree No. 746, beyond making the operations more integrated and efficient—that is, authorizing the execution of special intelligence operations pursuant to its Article 10(c)—was to concentrate and direct the totality of the State's intelligence activities and to impose the interference of the SIN at all levels of government, even under penalty of criminal sanctions. Indeed, Article 16 of Legislative Decree No. 746 established that the intelligence bodies of the Ministries of the Interior, Foreign Affairs, Economy and Finance, Education and Defense had a mandatory obligation to provide the documentation, information and intelligence requested of them; the same applied to other ministries, public agencies, and local and regional governments.

[. . .]

291. The set of rules established by the SIN was compatible with the needs of the countersubversive strategy of the Armed Forces: the increase of power and the discretion to act. The proposals of the SIN, which became rules with the force of law, consisted precisely of elevating the status and importance of the SIN within the SINA, to enable it to centralize and control the activities and budget of the police and military intelligence services.

¶3. Management of the SIN's Budget

[. . .]

293. It has been proven, consequently, that by the end of [1990] Montesinos Torres already had institutional control over the military and intelligence. He participated as a personal representative of President Fujimori Fujimori in meetings with the Minister of Defense and the CCFFAA. In fact, he had become the spokesman of the Armed Forces before the President of the Republic, which meant that the senior military officers did not have direct access to the president but rather had to go through Montesinos Torres. This was confirmed by Merino Bartet [. . .].

§4. The SIN and special intelligence operations

[. . .]

300. In conclusion, it was from and beginning with the SIN—under the direction of Montesinos Torres—that the state apparatus

was organized and restructured to deal with, among other things, the fight against terrorist subversion. An organized apparatus of power was set up for such purposes, to the point that it directed the totality of the State's secret services, and centralized the intelligence activities and gave them new importance.

It bears repeating that presidential advisor Montesinos Torres, among other undertakings: (i) suggested and obtained the appointment of senior military officers of the Army and the PNP (the appointments of Army Generals Hermoza Ríos, Salazar Monroe, Zegarra Delgado, Torres Aciego and others are relevant, as well as that of PNP General Cuba y Escobedo); (ii) proposed, from the SIN, the laws pertaining to the SIN and the SINA, including those concerning defense and public security; (iii) concentrated, from the SIN, the intelligence information from all spheres of national activity, which would be provided to President Fujimori Fujimori, and for which an intelligence channel was established to facilitate the receipt of the intelligence produced by the appropriate agencies of the Armed Forces and the National Police, including the SIN itself; and (iv) acted on behalf of the President of the Republic and, on his instructions, intervened in the ministries and other organizations involved in national defense and public security.

Chapter VI: The National Intelligence Directorate and the Army Intelligence Service

[. . .]

§2. General Rivero Lazo, Director of the DINTE

¶2. Administration of the executing unit. Funding of the Colina Detachment

309. The transfer of the Executing Unit of the SIE to the DINTE indicates that the financial control of the activities of the Army intelligence agencies was the responsibility of the DINTE. The execution and control of expenditures were even demonstrated through extraordinary budget allocations and special payments that were made to the Colina Special Intelligence Detachment. The new director of the DINTE, Army General Chirinos Chirinos, wanted to control this specific area of the DINTE in relation to the Colina

Detachment, but was unsuccessful in his attempts, as discussed below.

¶3. Participation of the DINTE in the creation of the Analysis Group

310. Army General Rivero Lazo acknowledged that he became the head of the DINTE on January [2nd or 3rd, 1991], and that ten days later he received an invitation from the chief of the SIN to coordinate intelligence tasks. There is no doubt that immediately after Army General Rivero Lazo became the director of the DINTE, an Analysis Group was formed at the at the request of the SIN to examine documents in the possession of the GEIN [Special Intelligence Group] of the DIRCOTE, and that it was controlled by the DINTE as well as the SIN, at their respective levels; it is understood that at that time the SIN began to control the SINA.

[. . .]

312. Consequently, the DINTE was tied to the Analysis Group and, in a way, controlled its work, although the SIN—which had already assumed *de facto* leadership of the SINA—was the one that created it and, obviously, exercised complete control over its work.

¶4. Participation in the events in Barrios Altos

313. There is sufficient evidence of the involvement of the DINTE in the arbitrary executions in Barrios Altos. The statements of Army Colonels Pino Benamú and Silva Mendoza are important in this respect.

¶5. Participation in the crimes at La Cantuta

314. There is no doubt that he [Rivero Lazo] was involved in the acts perpetrated at La Cantuta University on July [18th, 1992]; his involvement was as Army Intelligence Director.

On this point, it is important to note the statement of Army General Pérez Documet, Commander General of the DIFE, who was in charge of the Civic Action Base at La Cantuta. This Army General stated that on July [18th, 1992], the Commander General of the Army, Army General Hermoza Ríos, called him on the phone and ordered him to support Army General Rivero Lazo, Director of the DINTE, by providing the assistance of Army Lieutenant Portella Núñez. This order was carried out. He stated that Army Major Martin Rivas came to his office at around seven o'clock in the

evening, saying that he had come on behalf of Army General Rivero Lazo. Rivas explained to him that they needed Army Lieutenant Portella Núñez because he had served at the Civic Action Base at La Cantuta, and they needed him to identify certain individuals who were going to be interrogated. Accordingly, General Pérez Documet ordered the Army Lieutenant to provide the support that Army General Rivero Lazo needed. He stated that that the next morning he was informed that Army Major Martin Rivas had taken students and a professor from La Cantuta University, killed them, and buried them. He further stated that on July twentieth of the same year, Army General Rivero Lazo called him and suggested that he remove Army Lieutenant Portella Núñez from Battalion No. 39, where he was serving, and to keep him near his office. When he asked Rivero Lazo the reason for this suggestion, he answered that it was necessary to instruct Army Lieutenant Portella Núñez as to what he would say about the events of July [18th, 1992]. He stated that he told Army General Rivero Lazo in response that if he wanted to instruct Army Lieutenant Portella Núñez, he should request that he be posted to the DINTE. He stated that the following day General Hermoza Ríos called him into his office and rebuked him for his lack of cooperation. Pérez Documet stated that he told Rivero Lazo that he had always cooperated, but that he could not get involved in what took place at La Cantuta. This response undoubtedly annoyed General Hermoza Ríos, who for that reason ordered him to leave.

¶6. Participation in the subsequent acts of concealment

315. The DINTE intervened in all of the institutional mechanisms that were conceived of to deny the events of Barrios Altos and La Cantuta, and to question the public information that pointed in that direction. [. . .]

§5. Special intelligence operations

Approval and execution by the DINTE and the SIE

321. The DUFSIDE—updated by the DINTE in November of [1994], when Army General Hermoza Ríos was the Commander General of the Army, contains all of the rules and provisions issued by the DINTE that were in force up to that time. It prescribed that the SIE was the only agency authorized to plan and execute special intelligence operations, but that its execution necessarily required the

approval of the DINTE. The SIE, as the executive body of the DINTE, was directly responsible for seeking information for Basic Intelligence Training (EBI), and for providing it to the DINTE and to the bodies of the SIDE, according to the DINTE's orders.

Army Colonel PINO BENAMÚ stated that the SIDE was governed by the DUFSIDE, that it was a regulatory document, formally and officially in force in the year [1991]. He stated that all of the officers who went to work at the SIDE agencies had to read it, and that they even would sign a confidentiality agreement, given that it was a highly classified ("secret") document that was under no circumstances to be removed from the headquarters to which the officer had been assigned [this is indicated in number 4.c of the DUFSIDE instructions].

[. . .]

Chapter VII: The Colina Special Intelligence Detachment

§1. Background

¶2. The Analysis Group

325. The existence of the Analysis Group has not been denied by any of its members, or by the agencies to which they belonged.

[. . .]

326. The Analysis Group was formed at the request and under the control of the SIN, without detriment to the overriding involvement of the DINTE, between January and August of [1991]. The trial testimony of Cuba y Escobedo, Jhon Caro, Miyashiro Ayashiro, Vidal Herrera, Jiménez Baca, Rivero Lazo, Salazar Monroe, Rodríguez Zabalbescoa, Martin Rivas, Pichilingue Guevara, Flores Alvan and Pino Benamu confirm the existence and purpose of the Analysis Group.

327. The following points stand out from the above individuals' testimony:

1. The Analysis Group was made up of members of the SIE, the SIN and Naval Intelligence.

2. The Analysis Group was established at the request and under the control of the SIN, under the responsibility of Montesinos Torres, who exercised complete control over its

> work, without being dissociated from the DINTE. It started with the SIE members and their chief, Army Lieutenant Colonel Rodríguez Zabalbeascoa. Defendant Fujimori Fujimori was not unaware of the existence of the Analysis Group, as was also established in Chapters IV and VI of this Part Two.
>
> 3. The meetings and the agreement to form the Analysis Group were coordinated from January of [1991], and its presence within the GEIN of the DIRCOTE was imposed by the SIN. Its objective was to obtain intelligence information on the PCP–SL, as established in Chapter IV of Part Two of this judgment. In June of that year, when the Team withdrew from the GEIN, the written Manual—in fact the initial original text—was turned over to the then-PNP Commander Jiménez Baca. The document served as the basis for his presentation before the Army High Command, as discussed below.

¶3. The meeting of the Army High Command

328. The meeting of the military high command at the Peruvian Army Headquarters was held in June of [1991]. Those who took part in it have not denied that it took place. The date on which it was probably held, bearing in mind the first presidential memorandum and the date on which the Colina Detachment was formed, was June twenty-sixth. Army General Rivero Lazo, Army Lieutenant Colonel Rodríguez Zabalbeascoa and Army Majors Martin Rivas and Pichilingue Guevara also confirm this.

[. . .]

330. Consequently, Army Captain Martin Rivas's presentation to the Army High Command was not an everyday presentation. Its importance has been underscored by then Army Chief of Staff, Army General Hermoza Ríos, who at the end of that year was appointed Commander General of the Army and at the beginning of [1992] was named president of the CCFFAA.

It is notable that the very dynamics of the meeting of the Army High Command rule out the possibility that on that occasion they would have simply been made aware, without further detail and analysis, of what was happening and of the institutional and operational news from the large units. This is true especially if the PCP–SL and the MRTA had suffered several setbacks in the fight

against subversion, while at the same time they were dispersing their activities in a disorderly manner, which required an operational response that had to be prepared by the CCFFAA. Army Captain Martin Rivas even specified that the order was given to expand the initial original text; although it was thought that the analytical focus was correct, the military responses were criticized because it was a descriptive document. Therefore, the text was completed in November of [1991], although clearly parallel to the activities of the Colina Detachment.

Army Captain Pichilingue [Guevara] stated that that signified the exchange and verification of information and data.

[. . .]

§2. Formation of the Colina Special Intelligence Detachment

334. Memorandum No. 5775–B–4.a/DINTE of August [22nd, 1991], signed by the Director of the DINTE, Army General Rivero Lazo (the document contains handwritten notes, which Army Colonel Silva Mendoza identified as his own), can be classified as the official document that consolidated the creation of the Colina Detachment. This document ordered the SIE Chief to arrange for the presence of personnel for August [23re, 1991], at the SIE Maintenance Storehouse in Las Palmas. They would be under the command of Army Lieutenant Colonel Rodríguez Zabalbeascoa. The memorandum lists the names of nine operative intelligence officers, including Suppo Sánchez, Carbajal García, Arce Janampa, Coral Goycochea, Alarcón Gonzales, Caballero Zegarra, Gamarra Mamani, Salazar Correa and Benites León [under the heading that corresponds Benites León there is an indication of "no" and Yarlequé—who ultimately became a member of the Detachment—is indicated]. Further, it orders the delivery, for Monday, August [25th, 1991], of various items of equipment, weapons and ammunition, including six HK P–5 pistols, six HK P–7 pistols, twenty grenades, two desks, two mattresses and other items, plus two cameras, three Walkie Talkies, sleeping bags, night vision goggles, six pairs of handcuffs and six coveralls.

[. . .]

339. There were also changes within the Detachment, without detriment to its financial support, as is normal in any fully active

institution. It should be noted that in the documentation created with respect to such matters, in many written communications, there is express mention of *"Desto Colina."* This means, clearly, that the Detachment was a unit, strictly speaking a Special Detachment, within the SIDE.

[. . .]

341. Another element of the Colina Detachment's activities was the creation of the shell company *Consultores y Constructores de Proyectos América Sociedad Anónima*, or *Conpramsa*. This company was incorporated on November [13th, 1991], and the shareholders are listed as Army Captains Martin Rivas and Pichilingue Guevara, Army Commander Rodríguez Zabalbeascoa, and Army General Rivero Lazo. On September ninth of the following year, there was a capital increase and partial amendment of the bylaws, in the minutes of which operative intelligence officer Juan Pampa Quilla acted as the attorney. The officers involved stated that it was a business that belonged to Army Captain Pichilingue Guevara and his family, to whom a loan was given, and that their appearance as shareholders in the company was a result of the nonpayment of the loan. Such statements are, in and of themselves, implausible. The four shareholders did not state that they were active-duty servicemen; they signed the minutes and the document recorded by the notary; they were members of the DINTE, and they were linked to the Colina Detachment and to Plan Cipango. In addition, wiretap intelligence officer Flores Alván explained that Conpramsa was a front for the Detachment. He stated that he went to work there in about November of [1991], that he rendered his service at that company, and also that when the events of La Cantuta took place he was left operating the company's equipment (the company had communications equipment). He further stated that in June of [1992], the company's business name was changed to *Proyectos América*, which was in operation until [1993], because a scandal broke when it became public knowledge that the company belonged to the Colina Detachment.

§3. The mission of the Colina Detachment

342. Wiretap intelligence officer Flores Alván, who transcribed Plan Cipango, stated that it created the Colina Special Intelligence

Detachment. It established the mission that the SIE or the DINTE was to carry out an orderly, systematic infiltration of intelligence officers in the city of Lima, as well as in the towns of Huaral and Huacho for purposes of detecting, locating and identifying the members of the Central Committee and the National Leadership of the PCP–SL and MRTA, respectively, in support of the military and intelligence operations of the Second Military Region, the CCFFAA and the DINTE. This formal document, which resulted in an entire administrative movement involving the deployment of personnel, budget allocations, logistics, and a structured level of coordination at the command level, placed the DINTE in charge of the Operation, and the SIE in charge of providing logistics and administrative oversight and control. In the appendix, Army General Rivero Lazo was assigned as Chief of the Operation, Army Lieutenant Colonel Rodríguez Zabalbeascoa was named the Control officer, and Army Captains Martin Rivas and Pichilingue Guevara were the designated Case Officers. This structure is even similar to that set forth in Section III of Manual ME 38–20, under "Intelligence Networks," specifically the "Indirect Control Network." According to this form of control, the executive body delegates control and leadership over the officers directly to the case officer, and maintains overall control of the network. The Manual provides that this shall be the usual method for the establishment of the networks, because of the advantages of the decentralization of command and the security of the network [See No. 30.b. Section III. of ME 38–20, Intelligence Networks]. Indeed, in the text, a central agency is considered before the executive body—which essentially would be the DINTE or the SIN. The documents created as a result of the activities of the Colina Detachment, which were provided by the *arrepentido* wiretap intelligence officer Flores Alván, recount that, at least between March and August of 1992, briefing notes, reports and official letters were issued with express reference to Plan Cipango. These three documents support the assertion that Plan Cipango defined the activities of the Colina Detachment. The Court has before it not only the assertions of specific operative intelligence officers but also documents created by the Detachment itself or by reason of its activities.

343. The initial assertion of the operative intelligence officers is the same as what is indicated in Plan Cipango. However, some of the

members of the Colina Special Intelligence Detachment maintain that only after the killings or arbitrary executions of Barrios Altos did they understand that the Detachment's mission was to eliminate people. This information can be dismissed, given the preparations made for the execution of the crime, the fact that they carried offensive weapons, and the manner and circumstances in which the arbitrary executions in Barrios Altos took place. Furthermore, there was no punitive or disciplinary response from the institution as a consequence of the events, and many other crimes were carried out subsequently that involved forced disappearances and extrajudicial executions—to the point that they even carried picks, shovels and lime with them in order to bury their victims in secret. This corroborates the statements of operative intelligence officers Ortiz Mantas, Gamarra Mamani and Coral Goycochea, and even that of operative intelligence officer Tena Jacinto. They all knew about the Detachment's basic mission: arbitrary executions, forced disappearances and extrajudicial executions, in a common pattern.

[. . .]

§4. Internal structure and reporting relationships of the Colina Detachment

[. . .]

348. [. . .] The Colina Detachment had to report its activities to the SIN, specifically to Montesinos Torres, as soon as it conducted any OEIs. There are express references by members of Colina Detachment to Montesinos Torres's involvement or leadership. The statements of PNP Colonel Jiménez Baca and PNP General Vidal Herrera corroborate this, as they maintain that all activities pertaining to the control of subversion had to be reported personally to Montesinos Torres.

§6. Meetings of the Colina Detachment and the rewarding of its members

350. The Colina Detachment held one of its most important meetings on June 27, 1992, at the invitation of the Commander General of the Army himself, Army General Hermoza Ríos. That meeting signified for most of its members an incentive for the work they had been performing; by that time they had already carried out

approximately six special intelligence operations. They felt that they had the backing of the most senior military chief and head of the countersubversive operations, as he was president of the CCFFAA and chief of the COFI. Flores Alvan, Lecca Esquen, Hinojosa Sopla and Hermoza Ríos testified about this meeting.[94]

[. . .]

§7. Internal operations in the development of OEIs (sections 352 to 355 of the Court's holding)

353. The activities of the Colina Detachment, consequently, were decided at levels much higher than the Detachment itself, especially in the cases of OEIs that resulted in the deaths of individuals. The positions and individuals cited in their planning and preparation go beyond even military intelligence itself, and reside at levels that are clearly higher. Not only was it a matter of defining the target of the attack and carrying out the actions necessary for their realization—with all of the attendant internal organization, prior planning, effective training, readiness for attack, and discipline and order in its execution—but also of reporting and submitting to oversight and subsequent evaluations. A mission accomplished is not reported in order for the superior simply to be informed; rather, it is for a set of activities that go beyond the mere control of the specific actions taken.

354. The special intelligence operations carried out by the Colina Detachment consisting of arbitrary and extrajudicial executions and forced disappearances (known to date) were the following:

1. At the tenement house in Barrios Altos, on November 3, 1991.

2. In the district of Pativilca, in the towns of Caraqueño and San José, on January 28, 1992.

3. In the district of El Santa in Chimbote, in the urban settlements of "La Huaca," "Javier Heraud" and "San Carlos," on May 2, 1992.

94. See this same section of the Court's holding, which has been omitted from this summary, for the content of these individuals' statements (Publisher's note).

4. In the city of Huacho, against journalist Pedro Herminio Sauri Bustamante, on June 24, 1992.

5. In the same district of Huacho, against the Ventocilla family, on June 24, 1992.

6. In Chorrillos, in Metropolitan Lima, in the urban settlement of "Pescadores," against Fortunato Gómez Palomino, in May or June of 1992.

7. At La Cantuta University, on July 17, 1992.

8. In Ate–Vitarte, in the vicinity of the Carretera Central [Main Highway], on an unspecified date in 1992.

355. The following individuals were the targets of special intelligence operations consisting of surveillance and tracking:

1. Members of the *Asociación de Abogados Democráticos* [Association of Democratic Attorneys], including attorneys Crespo, Cartagena and Huatay.

2. The chief of the Annihilation Command of the PCP–SL in Metropolitan Lima and other alleged members of that terrorist organization, including Comrade Joel and Angélica Salas de la Cruz.

3. Left-wing political leaders Yehude Simon Munaro and Javier Diez Canseco.

4. Army General Robles Espinosa (tracking with a view to detention). Operative intelligence officer Mesmer Carles Talledo, accused of being a PCP–SL infiltrator within the SIDE, was also arrested and interrogated. Surveillance was also conducted in volatile areas with a strong presence of terrorist individuals, such as the urban settlements of Huaycán and Raucana in Metropolitan Lima. Operations were conducted to seize explosive material in the possession of terrorists (one unsuccessful case occurred on July 26, 1992 in Matucana); and there was an intervention in Chanchamayo.

The acts described above will be discussed later in greater detail in the Chapter on other crimes of the Colina Detachment.

Chapter VIII: Special Intelligence Operations

§1. Scope of the concept of Special Intelligence Operation.

356. Special Intelligence Operations [hereinafter OEI] were, as explained at the trial by Army Colonel Silva Mendoza (SIE chief in 1991), "special and secret operations to meet specific, important intelligence and counterintelligence objectives for purposes of obtaining information and/or causing harm to the adversary." He added, from the perspective of his military experience, and invoking subsection (g) of Article 4 of ME 38–20, Special Intelligence Operations Manual, that the phrase "cause harm" means to strike, take down, and eliminate—that is, kill. He further stated that document analysis cannot be called OEI, which was noted in regard to the congratulations that former president Alberto Fujimori Fujimori bestowed upon the group of officers that included Martín Rivas, Pichilingue Guevara and Rodríguez Zabalbeascoa.

For his part, Army Colonel Pino Benamú,[95] Assistant Director of the Internal Front of the DINTE in 1991, stated—without getting into security details—that special intelligence operations were performed by a multi-purpose group with officers with special qualifications (wiretapping, physical penetration) who could engage in espionage and terrorism, and whose mission was to obtain information or cause harm to the adversary.

357. The operative intelligence officers, tried for the same acts that defendant Alberto Fujimori Fujimori is accused of, admitted conclusively in their trial testimony in this case that they belonged to the Colina Special Intelligence Detachment. They further acknowledged that it was a group designed to conduct OEIs resulting in death, which were called for and directed by Army Major Martín Rivas. [. . .] *(The Court has received various statements—at least 13 statements—that support this assertion.)*

358. The similarity in the planning and execution of the OEIs described by the operative intelligence officers who were members of the Colina Detachment is not by chance. Such description, in general terms, fits and is consistent with procedures regulated precisely in Manuals—Army doctrines that set forth, in theory, the

95. Statement of Army Colonel Pino Benamú at the thirty-fifth session.

form, structure and conduct of the OEIs—and in Directives with nuances tailored to their needs.

The following are the four official texts relevant to the case:

> 1. Special Intelligence Operations and Counterintelligence Manual me 38–20 [. . .].
>
> 2. Basic Teams Manual me 38–23666, in Military Intelligence of the Peruvian Army [. . .].
>
> 3. Manual me 41–7, Unconventional Countersubversive War [. . .].
>
> 4. Sole Operational Directive of the Army Intelligence System (hereinafter DUFSIDE) [. . .].

359. The senior Army officials who have testified confirmed that the previously cited Manuals and the Directive did in fact govern and were used by the different bodies within the institution [. . .]. *(the Court considered the statements of: Army General Robles Espinoza, Army General Ramal Pesantes, and Army Colonel Pino Benamú).*

360. It follows from the above that, indeed, an organization was devised clearly for purposes of conducting special intelligence operations. Its management, planning and operation—including that of the Intelligence Team itself—undoubtedly was governed by the Manuals and the DUFSIDE, inevitable in the military culture. it must be stressed that this structure, or rather, organizational system with respect to the OEIs was based on Manuals (which are instruments that set forth the doctrine that specifically summarizes and consolidates an institutional practice, explains its operation and rationalizes or orders or defines the conduct of its members) and Directives (which in the case of the Colina Detachment were used to form the group and, to a certain degree, to govern its activities and internal logic). The participation of the DINTE and of the SIN is evident [. . .].

§2. The Colina Detachment and the Execution of OEIs.

[. . .]

363. The OEIs of Barrios Altos and La Cantuta were developed based on a plan that had the assistance of higher levels of authority.

A. OEI in Barrios Altos:

1. This operation was likewise led by then-Army Captain Martin Rivas—backed by Captain Pichiligüe Guevara—and executed by the Colina Detachment. Their immediate superior, after Army Colonel Rodríguez Zabalbeascoa, was Army General Rivero Lazo, Director of the DINTE in 1991.

2. The next highest level, above Army General Rivero Lazo, was the SIN, specifically its *de facto* Chief Montesinos Torres. The following evidence (testimonial and documentary)—essentially consistent in their accusations and results, and therefore plausible—provide an account of the above: [. . .] *(The Court considered the statement of operative intelligence officer Sosa Saavedra; an unnumbered, unsigned and undated Intelligence Note turned over by Maximo San Román; a report entitled* Sociedad para el crimen [Partnership in Crime]*; and statements from wiretap intelligence officer Flores Alván, operative intelligence officer Chuqui Aguirre, and journalist Hume Hurtado).*

B. OEI at La Cantuta University:

1. This operation was led by Army Major Martín Rivas, backed by Army Captain Pichilingüe Guevara. The next highest level of authority above Army Colonel Navarro Pérez was Army General Rivero Lazo, Director of the DINTE.

2. Army General Rivero Lazo's immediate superior was Army General Hermoza Ríos, as Commander General of the Army in 1992, who ordered that things be facilitated for the Colina Detachment so they could take action against the nine students and one professor from La Cantuta University. This intervention, which will be explained in detail later, has been substantiated by the following DIFE members who, in one way or another, acted in compliance with the order: Pérez Documet, Miranda Balarezo, Córdova Rodríguez, Berteti Carazas, Velarde Astete and Aquilino Portella [. . .].

3. The other authority that took part in the planning of this OEI, according to the Manuals and testimony, was the SIN, principally Montesinos Torres [. . .]. *(The Court considered the statements of journalist Jara Flores, journalist Cruz Vílchez, defendant Alberto Fujimori Fujimori, and Army General Hermoza Ríos).*

> 4. It can be further inferred, as will be addressed in greater detail in the corresponding Chapter, that although defendant Fujimori Fujimori did not say anything in particular about the OEIs, and specifically denied his involvement in this OEI, it was clear that he was aware of everything that happened, and of the very management of this operation. This is particularly so, bearing in mind that as President of the Republic, Commander in Chief of the Armed Forces, he was the highest ranking official of the National Defense System and the person to whom the SIN, which was immediately accountable to him, reported its activities directly, and that he had even given Montesinos Torres sufficient power to control that institution and the entire SINA; this is all the more true if, once the first indications of the crime came to light publicly and consistently, he headed an extraordinary effort to cover it up and to persecute those who denounced it.

364. A particularly important piece of information related to the execution of this OEI and the participation of the President of the Republic concerns the memorandum (at page five hundred and eighty-one) of July 30, 1991, sent to the Minister of Defense. This document states: "[. . .] *said members of the Armed Forces have taken part in successful special intelligence operations that have enabled significant advances in the fight against subversion"* [. . .].

Reference is made to work that was done on documentary information obtained in GEIN operations against Shining Path leaders. They prepared a report based on that information, and the results were presented by Army Captain Martin Rivas at Army Headquarters. It is notable, however, given the regulatory definitions pertinent to the OEIs and the statements made by Army Colonel Silva Mendoza (SIE Chief in [1991]), that a document analysis project cannot be considered a special intelligence operation. As such, it must be inferred that the work performed may have had to do with other acts. [. . .]

365. FUNDING OF THE OEIs

> 1. Vladimiro Montesinos Torres admitted his criminal responsibility for the offense of illegal assumption of authority. He stated that he engaged in such conduct by order of the President of the Republic Alberto Fujimori, and with the knowledge of the presidents of the Council of Ministers and the SIN chief. He also acknowledged that he handled

> funds from the budget item "reserve one and two" as well as of other allocations made to the SIN, although he denied that this management of funds took place since 1991.[96] Army General Salazar Monroe was the one who had indicated that such was the case from the time he became head of the SIN in [1991].
>
> 2. Army General Salazar Monroe, chief of the SIN, stated that Montesinos Torres managed certain budget items called "Reserve one" and "Reserve two," that they were turned over to him by order of the President of the Republic, and that it was Montesinos Torres who was directly accountable to the president. In addition, he inferred that the Colina Detachment would receive extra acknowledgements and bonuses; he has no doubt about this because he has now seen Montesinos Torres's payment of different public figures recorded on video. He further added that it was common knowledge that the SIN would give money to the newspapers, and that the money was distributed by Montesinos Torres.[97]
>
> 3. Army Colonel Pino Benamú stated that he had knowledge that the SIN used to finance intelligence operations; that Montesinos Torres managed the SIN's budget; that he did not know the details, but that Montesinos Torres would have the funds available and have them sent to the intelligence offices of the institutions; that General Rivero Lazo told him at the beginning of his tenure at the DINTE that they were going to have a good year of work because they were going to receive resources from the SIN.
>
> 4. Operative intelligence officer Chuqui Aguirre mentioned that Montesinos Torres took part in the evaluation of the Colina Detachment's objectives [. . .].
>
> 5. Operative intelligence officer Marco Flores Alván indicated that Montesinos Torres had a lot of power within the Army and told them at that time that the doors were open to them for anything they might need.

96. Pretrial statement of Montesinos Torres, at 46, 644, Case No. 14–2001 (Peru).

97. Pretrial statement of Army General Salazar Monroe, at 30, 675, Fifth Special Criminal Court of Lima (Peru).

> 6. Declassified document No. 1990LIMA12513 (at page 6,298) recounts a report sent from the Embassy of the United States in Lima to the U.S. Secretary of State in Washington. The report indicated that a former Navy intelligence officer had informed the Embassy that the plan (an anti-subversive plan composed of two phases; the first of which was public and emphasized human rights, while the second phase was confidential and would include special army operations trained in extrajudicial killings) was supported by presidential advisor Montesinos Torres, although it was also mentioned that Montesinos Torres was losing support because of the denunciations against him.

366. It is clear that the execution of a series of OEIs over a long period of time and based on a Plan of Operations with a broad scope—the only way to explain the validity, operation, and activity level of the Colina Detachment—had to have been financed with extraordinary funds. The receipts and account statements that have been admitted into the court record demonstrate at least part of the scale of the Colina Detachment's activities. The statements in their entirety point to funding from the SIN channeled to the DINTE itself. There are numerous witness statements that coincide in this respect, in which Montesinos Torres is always present in a leadership role. On this basis, and according to the accounts that had to be settled, is clear that the President of the Republic had at least a general knowledge of the events. This assertion is strengthened by the special and intense connection and reporting relationship of Montesinos Torres to defendant Fujimori Fujimori.

Chapter IX: Barrios Altos attack

§1. Proof of the charge.

367. On November 3, 1991, at about two o'clock in the afternoon, a neighborhood chicken barbeque was held at the tenement house at No. eight hundred and forty (840) Jirón Huanta, Barrios Altos – in the city center of Lima, in order to raise money to repair the property's water and drainage system. The barbeque was organized by local residents, in particular by Filomeno León León and Manuel Ríos Pérez. The leaders of the Colina Special Intelligence Detachment [of the SIE–DINTE] became aware of this activity days earlier through operative intelligence officer Douglas Hiver Arteaga

Pascual, also known as Abadía [PCP–SL infiltrator]. They considered it to be a mode of operation of the Shining Path, to pass on information to its leaders and top officials, as well as to raise funds for the organization. As such, with the knowledge, approval, or acquiescence of the highest ranking members of the Army, the SINA and defendant Fujimori Fujimori, they decided to make a surprise raid on that tenement house and kill those who might be involved with the terrorist organization, which was very active in Lima. *(As a result of the armed attack, nine people were killed and four were seriously wounded)* [. . .].

[. . .]

§4. Comprehensive assessment of the evidence produced.

[. . .]

441. Furthermore, it is indisputable that it was a "crime of state."[98] The actual perpetrators were military intelligence officers who belonged to a special intelligence detachment, and this was even inferred from the beginning of the police investigation, in both the psychological report and in the report signed by PNP General Jhon Caro (Report No. 095–DIRCOTE). In terms of their administrative placement, they were tied to the Peruvian Army and to the DINTE, as well as to the SIN, on a more extensive, functional level—as is deduced, in essential terms, from the anonymous Intelligence Note that Vice President San Román Cáceres received regarding the existence of the Colina Detachment, the commission of the Barrios Altos crime, the incorporation of the Detachment into the SINA and the involvement of Montesinos Torres as the most important figure in the operational model of the Intelligence System at that time. The perpetrators, over and above operational command, under the responsibility of Army Captain Martin Rivas at the scene of the crime, obeyed superior orders that were clearly and reprehensibly illegal, and therefore excluded from any justification or exoneration. They proceeded according to a typical and planned military operation of elimination of alleged subversives—so clear, in fact, that plans were even developed for some officers to provide false information at the scene of the crime, which explains the initial and

98. Trial statement of expert witness José Antonio Martín Pallín in the ninety-fourth session (Peru).

confusing news information that was disseminated immediately following the events [a demonstration of this method is seen in the news article in *La República* on November 5,1991]. These were tasks for which they had been assembled, and with that goal they prepared or trained at La Tiza, a military facility, not part of the SIDE structure, for which there must have been express permission from the highest levels of the military institution. They departed from La Tiza to carry out the crime and returned there after having accomplished the assigned "mission."

442. The manner and circumstances of the commission of the crime have been demonstrated with the abundant prosecution evidence discussed: the prior information obtained through an infiltrated officer about the place and the people who would be there; the indispensable surveillance conducted in advance and in the moments prior to the attack; the use of government vehicles with tinted windows and emergency lights for the execution of the mission; the studied and decisive attitude exhibited [for which they trained once the target was established]; and the presence of a military troop transport vehicle right in Plaza Italia, which enabled them to surprise the police officers guarding the DIRIN police facilities and the San Andrés police station and to gain access to the scene of the crime without impediment. This evidence paints a picture of the characteristics of the attack and its military logic. The order to attack, or "green light," was given when the operation was devised, and again shortly prior to the attack; that order came—as it only could—from senior levels, to the SIN itself. The multiple references to Montesinos Torres are relevant in this respect. There was still an administrative structure designed for that purpose, the central focus of which was the very establishment and operation, within the SIDE, of the Colina Detachment, tied fundamentally to the SIN. The members of the Detachment remained at the Army facilities because of their status as active duty servicemen. They had their headquarters and carried out their military training at the SIE storehouse and at La Tiza Beach, respectively. These facts are so well known that it is reasonable to think [as indicated in the article *Sociedad para el Crimen* and by Vera Navarrete, among others, in his supplemental statement of September 27, 2001, as well as by Flores Alván, at the fifteenth session of the trial proceedings, and Chuqui Aguirre in the testimony he provided at the one hundred and

twenty-fifth session of the parallel case, Case No. 28–2001], in spite of the specific tendency toward secrecy in intelligence activities, that the existence of the Detachment itself and the suspicion surrounding its activities were not unknown to the members of the military institution. Indeed, as evidenced in the documentation seized by court order, and that produced by cooperating witness Flores Alván, specific administrative procedures typical of the Army were followed for the extra payments that they would receive, the transfers, the equipment, and other allocations or acquisitions.

443. It is true that the members of Special intelligence Detachment "Colina" have denied the charges since 1993. It is stated on the record that the first statement from a member of the Colina Detachment, Nelson Rogelio Carbajal García, provided in his pretrial statement in the case before the military criminal court for the Barrios Altos Case [page 2,523], was produced on April third of that year. However, beginning in 2001, and in the years following, many of them retracted and admitted the existence of the Colina Special Intelligence Detachment and their assignment to it.

[. . .]

During the trial, of the eighteen witnesses accused of being members of the Colina Special Intelligence Detachment, the following testified and admitted said criminal affiliation: Flores Albán (fifteenth session), Alarcón Gonzáles (sixteenth session), Tena Jacinto (sixteenth session), Suppo Sánchez (seventeenth session), Chuqui Aguirre (eighteenth session), Sauñe Pomaya (nineteenth session), Lecca Esquen (twenty-first session), Paquiyauri Huaytalla (twenty-first session), Hinojosa Sopla (twenty-second session), Ortiz Mantas (twenty-second session), Atuncar Cama (twenty-third session), Gamarra Mamani (twenty-fourth session), Coral Goycochea (twenty-fifth session), and Sosa Saavedra (eighty-fifth session). The following individuals denied the charges: Pino Díaz (twenty-fifth session), Vera Navarrete (twenty-fourth session, in spite of the fact that on September 27, 2001, he admitted that he had been assigned to the Colina Detachment; then, after that date, he again retracted his statement as of April 24, 2002, in his pretrial statement before the ordinary court (at page [30,874]), Pichilingue Guevara (twenty-eighth session) and Martin Rivas (twenty-ninth and thirtieth

sessions). Rodríguez Zabalbeascoa refused to testify at this trial and also denied the charges in other venues.

444. The retractions in question, which recount the existence of the special intelligence detachment and its members and the Barrios Altos operation, are more coherent and are consistent with the evidentiary results. Added to this is the content, discussed and assessed in the corresponding Chapter, of the documentation found by the Criminal Court Judge at the Peruvian Army Headquarters, which is conclusive on the matter. The information that the members of the Colina Detachment have introduced by way of retraction (in addition to the incriminating testimony of Sosa Saavedra, the last member of the Detachment to be captured by the police) regarding their material assistance in the acts is consistent with the statements of the victims and eyewitnesses, as well as with the news reports and journalistic investigations. The denials of Martin Rivas, Pichilingue Guevara and Rodríguez Zabalbeascoa have been weakened by the totality of the prosecution evidence previously set forth. There is relevant incriminating circumstantial evidence that proves their material assistance, not only in terms of the general justification (supposedly ideologically based on the concept of "low-intensity warfare") of such atrocities offered by Martin Rivas and included in the book *Ojo por Ojo* [An Eye for an Eye], but also the acknowledgement he made before journalist Gilberto Hume Hurtado, and the results of the investigations of journalist Uceda Pérez, set forth in his book *Muerte en el Pentagonito*, and journalist Cruz Vilchez in the article *Sociedad para el Crimen*.

445. There is no reasonable cause that would explain false self-incrimination on the part of the members of the Colina Special Intelligence Detachment, let alone cooperation judgments that are effective or satisfied without reasonable incriminating bases—there being no material grounds whatsoever to weaken their potential—especially if their statement not only involves third parties, but also harms them personally. Experience tells us that no one incriminates himself falsely, in spite of a conscious certainty of being able to withstand a conviction, unless there is a higher motive, ethically more valuable, that explains it. That has not been proven in this case. Likewise, it is unreasonable to think that out of mere hatred or some other contemptible motive, with the exclusive purpose of involving third parties, a person would be willing to undergo a term of

imprisonment for extremely serious crimes. Naturally, the "positivized" legal rule provides—on the practical basis of what is called "insufficiently reliable evidence"—that if third parties are involved, objective information and specific evidence to corroborate the co-accusation are essential. In this case, there is no doubt that the intelligence officers who admitted to the facts did so in light of the numerous pieces of evidence that, in one way or another, incriminated them with a solid degree of probability. The investigations, pushed forward steadily after the fall of defendant Fujimori Fujimori's regime, began solidly to approach the full discovery of what the Colina Detachment had done and the orders it had carried out. The degree of involvement of the different military, intelligence and other government authorities was so deep and serious that, as the Court understands it, it caused those at the lowest level of the criminal culture established at the SINA to break the silence—a crucial step in uncovering organized structures and learning of their criminal mindset. They decided to reveal what had happened and, in so doing, obtain benefits in exchange for cooperation.

446. In conclusion, the Barrios Altos massacre was carried out by the members of the Colina Special Intelligence Detachment. It was its first mission involving the physical elimination of people. Based on this objective piece of information, which has been proven conclusively, it is evident that the Detachment carried out this operation (so understood by the military intelligence sectors) following military guidelines and obeying higher orders, which, due to its very nature and the level of those who made it, had to be part of a larger plan. It is not too much to assert, as Martin Rivas noted in his statement to journalist Humberto Jara, that this order took shape pursuant to the emergence of the Colina Detachment, as the beginning of a type or mode of response to the urban actions of the PCP–SL and of a criminal policy to eliminate evading the legal route, all those persons whom the intelligence services understood to have organizational ties to the terrorist movements. The operations that would later take place—La Cantuta and others to which the members of the Colina Detachment have confessed—only confirm this institutional practice, so absolutely contrary to the requirements of the Rule of Law; it is further confirmed by the acts of concealment

that took place once the circumstantial evidence of such operations and of the involvement of the Colina Detachment began to mount.[99]

Chapter X: Attack at the National University of Education "La Cantuta"

§1. Proof of the charge.

[. . .]

449. On Thursday, July 16, 1992, at around nine fifteen at night, members of the PCP–SL blew up two vehicles loaded with some five hundred kilos of ANFO on Tarata Street in the Miraflores district. This terrorist attack killed twenty-two people, injured more than a hundred, rendered some two hundred residences uninhabitable, destroyed several buildings and, obviously, caused serious alarm among the public.

[. . .]

450. As a consequence of the terrorist attack on Tarata, it was decided at the highest levels of power to conduct an immediate response action that would be the responsibility of the Colina Special Intelligence Detachment. That is how Army Major Martín Rivas designed and executed the respective plan of operations. The same day on which the operation began, July 17, 1992, operative intelligence officer Hinojosa Sopla was ordered to conduct a reconnaissance of the University and take photographs of the place. He was detected, intercepted, and beaten by some students, although he was protected immediately by infiltrated operative intelligence officer Tena Jacinto, who was able to free him without further trouble.[100]

[. . .]

99. In arriving at these conclusions, the Court found it relevant to take into consideration the following: *§ 2. Evidentiary information*, *supra* ¶¶ 368-81, from the various statements of victims, as well as of eyewitnesses, hearsay witnesses, police officers, generals, and the members of the Colina Detachment themselves. It likewise took into account *§ 3. Individual assessment of the evidence*, *supra* ¶¶ 382-439, such as expert witness evidence, documentary evidence, effective cooperation judgments, journalistic reports, the books, the video and audio evidence and the Final Report of the Truth and Reconciliation Commission.

100. That decision resulted in the incursion into La Cantuta University, in which nine students and a professor were victims. (Publisher's note).

§4. Comprehensive assessment of the evidence produced.

[. . .]

531. What stands out about these facts is the level of involvement, in order to facilitate and realize the crime, of several Army units or organizations, without whose participation the murders in question would not have been able to be perpetrated. Particularly relevant in enabling the incursion into La Cantuta University was the assistance of the commander general of the DIFE, the prior order of the commander general of the Army, and the active participation of the director of the DINTE and his immediate subordinate, the deputy director of the Internal Front. This involvement was even manifested in the events that took place in the immediate aftermath, with the transfer of two lieutenants from the DIFE, who happened to play an important role in the unfolding of the criminal events: Portella Núñez and Velarde Astete. The former was sent to the DINTE—something unusual for a young officer untrained in intelligence matters—and the latter was transferred to Paratrooper Infantry Battalion 39, away from the leadership of the Civic Action Base at La Cantuta.

[. . .]

532. [. . .] The foregoing, consequently, reveals not only the level of institutional influence of the Colina Special Intelligence Detachment—which undoubtedly went beyond the SIDE—but also the personal and material involvement of the senior Army commanders and, likewise, of the SIN, which, given the logic of the real operation of the system and its decision-making authority in matters concerning the fight against terrorist subversion, was not unconnected to the events.

[. . .]

533. One piece of information that must be determined is whether the order received by the operational chief of the Colina Detachment, Army Major Martin Rivas, was to kill or simply to detain the victims of La Cantuta.

[. . .]

Consequently, bearing in mind the string of serial crimes perpetrated by the members of the Colina Detachment, the training and preparation inherent in their logic of military intervention of

intelligence targets, the extent of the operation in question (it involved the mobilization of several sections of the Army), the subsequent concealment maneuvers (which came from the highest levels of the Army and, later, as will be seen in another Chapter of this judgment, from the SIN and the regime as a whole), the absence of immediate reprisals against Army Major Martin Rivas, the continuation of the Detachment's operations, and the assertions of several officers that rule out any possibility to the contrary, it is clear that the order, from the outset, was to kill the victims of La Cantuta.

534. With respect to the authority that ordered or approved the La Cantuta operation, regardless of what will be set forth in the corresponding Chapter on defendant Fujimori Fujimori, *(according to the statements of the members of the Colina Detachment)* [. . .] [:]

535. There is no doubt of the involvement of the highest levels of authority at the DINTE and the Peruvian Army Headquarters—but not only of the Army, there is also no doubt of the involvement of the SIN, as the highest body and authority within the SINA. Army General Hermoza Ríos himself affirmed before the Court that he found out about the events the day after they happened, from Montesinos Torres, who informed him that members of the SIE had conducted a special operation at La Cantuta and that the orders received had been exceeded; he had already informed the President of the Republic of this fact, which was confirmed by the director of the DINTE, Army General Rivero Lazo, and he allowed him to report it to the Minister of Defense, Army General Malca Villanueva.

[. . .]

Consistent with these conclusions, what Army Major Martin Rivas stated to journalist Humberto Jara Flores is significant. He noted on that occasion that an action of the magnitude of the La Cantuta operation, according to the logic of response that entailed devising an attack as brutal and damaging as the Tarata attack, could not have been authorized but by the highest authorities of the State (including Hermoza Ríos, Montesinos Torres and Fujimori Fujimori). This account, aside from his denial at trial, is consistent with the facts and the evidence in the case. That is to say, i) the Colina Special Intelligence Detachment operated based on a specific plan and with organizational guidelines and control from the highest levels of the Army and the intelligence agencies; ii) the operations it carried out

did not take place in isolation or due to the harsh words of an Army captain or major, but rather corresponded to a military and political objective of greater significance; iii) the most relevant mission of the Colina Detachment was the physical elimination of alleged subversives—all of it actions revolved around this objective—in terms of both the need to destroy the leadership elements (or those that played a strategically important role in the subversive organization at a given time) and the demand for a precise response to terrorist actions in which they could have been involved, or the hierarchical position or functional level that the alleged subversive might hold. This mission thus sought the destruction of terrorist leaders and top officials, thereby allowing the terrorist organization to expand and cause harm. Such objectives, obviously, could not have been met without an organization within the State that was subject to and compliant with orders from specific high-up government positions—civilian and military—and which, when the time came, defined the guidelines for protecting or covering for their most important members. This explains, in the end, everything that was done to prevent the establishment of the facts. It explains the fact that only following international condemnation and the fall of the political regime in question was it possible to conduct broad-ranging investigations and prosecutions.[101]

Chapter XI: Kidnapping of Gustavo Andrés Gorriti Ellenbogen

[. . .]

§4. Comprehensive assessment of the evidence produced.

555. Aside from the fact that the immobilization of an individual in a domicile, or a closed space, strictly speaking, is already an illegal deprivation of liberty and a kidnapping [. . .], common

101. In arriving at these assertions, the Court took into account the following: *§ 2. Evidentiary Information, supra* ¶¶ 457-76 such as the journalistic documents, documents submitted by former SIN advisor Rafael Merino Bartet, declassified documents from the U.S. State Department, audio documents, court decisions and reports of the TRC, judgments of the Inter-American Court of Human Rights and the reports of Amnesty International. The documentary evidence also includes the books. The testimonial evidence included the testimony of witnesses linked directly or indirectly to the events, servicemen, civilians, statements from members of the Colina Detachment, journalists, and others.

experience indicates that the kind of illegal deprivation of liberty that numerous individuals were subjected to [. . .] in the basement of a military intelligence agency [. . .], first of all, was not carried out based on the unilateral decision of a subordinate of the President of the Republic, outside the sphere of his knowledge and decision; and second, had to have formed part of a previously designed plan, in which there must have been i) an analysis of the advisability and usefulness of doing it; ii) the identification of the affected persons according to their activity and degree of "dangerousness" to the objectives of violating the constitutional order; iii) the definition of the intervention teams; iv) the coordination and specification of the detention centers or places; v) the establishment of a reasonable time for the victims to remain under such conditions of deprivation of liberty, and so on.

556. The coup d'état, obviously, was not a sudden decision caused by an initial move by Congress to review Legislative Decrees issued on matters of intelligence, the Armed Forces and National Security or Pacification. It was a carefully thought-out measure, which entailed an authoritarian concept of the exercise of government power. It involved the Armed Forces and the SINA, directly under [Fujimori's] command as President of the Republic, and was carried out after an entire process of reorganizing the military and intelligence structures. At the same time it entailed taking absolute control of all State authority without the participation of the opposition and of persons who did not share the president's political ideas. In this context of the alteration of the entire political system it is clear, in view of his position at the apex of the State structure, that he not only entrusted the operational design of the corresponding intervention measures to those who, by reason of their duties, were located within the state apparatus and had professional knowledge and control over the intelligence bodies and means of military repression, and were followers of his political strategy and ideology; he also, undoubtedly, had to approve of them, since a measure of such magnitude and relevance could not remain entirely in the hands of his subordinates. This hierarchical structure of the state apparatus—or a sector of it, specifically—of which the defendant availed himself establishes, as a consequence of the events, the fact that he knew about and authorized, at least broadly speaking, all of the measures carried out, including those restrictive of individual

freedom. He exercised organizational control—especially of the Armed Forces, the SIN and the PNP—by virtue of his position as President of the Republic, which included being Commander in Chief of the Armed Forces, and placing individuals who served his authoritarian agenda in key positions within the military and intelligence system. He thus controlled the Armed Forces and the SINA particularly intensely, which enabled the disruption of democratic order and the resulting enforcement of the measures that deprived the liberty of those he understood to be his opponents or who, at the time the new regime was installed, might hinder or seriously upset his plans. It is reasonable to understand that the coup d'état would not otherwise have been able to unfold and later be affirmed. It is important to stress that the deprivations of liberty of several individuals at the time of the coup d'état were not lifted once the press reported them [. . .]; rather, those persons remained detained for several more days. Furthermore, no investigation was conducted into these acts, which were carried out allegedly unbeknownst to, and against, the will of the head of state, let alone was anyone ever punished for planning and giving the order to kidnap and hold the victims incommunicado. That explains, reasonably, that the measures in question were not unusual or outside the design of the coup. The events that took place prior to the execution of the plan of operations for the coup, when all of the intervention measures were taken against individuals and government institutions, and in the period immediately afterwards [. . .], reveal clearly that there could have been no ignorance of the detentions[.] [I]ndeed, the events reveal that they took place precisely because they were included as a necessary part of the plans to attack the constitutional system.

[. . .]

Chapter XII: Kidnapping of Samuel Edward Dyer Ampudia

[. . .]

§4. Comprehensive assessment of the evidence produced.

568. [. . .] The use of agencies that did not have the power to make arrests—which is the case of the intelligence bodies or secret services of the State—and the clear abuse of power that it signified,

points to the existence of an unlawful institutional mechanism guided by provisions other than the ones that corresponded to it legally.

[. . .]

571. The intervention of the State intelligence bodies [. . .]; the failure to conduct a disciplinary investigation, in light of a model of official conduct, of the exercise of power that was so clearly harmful to the internal institutional system governing the SINA and the Army [. . .]; the fact that government authorities through other agencies, in this case the National Tax Authority [SUNAT], would pursue a criminal prosecution against the victim [. . .]; the seriousness of the events; the persistence of the harm done to the victim; and the obvious persecution—unreasonable by any reckoning—against an individual, could not go unnoticed at the highest levels of national authority. What happened to the victim is not an isolated act [. . .]; it involves a number of connected events, a chain of events, to negate an individual in his social relations. Therefore, it is impossible to analyze them in an isolated manner.

572. [. . .]Fujimori's knowledge [. . .] can also be inferred, concurrently, from what took place after the events [. . .]. The defendant himself [. . .] publicly approved tax and criminal persecution [. . .] without ordering the appropriate investigative, disciplinary and criminal measures, and justified implicitly what happened to [the victim], and approved the arbitrary persecutions that the State implemented under his leadership.

[. . .]

574. The defense has questioned the evidentiary rules that support the analysis of the circumstantial evidence, asserting that the hearsay testimony lacks effective probative value [. . .]. The questioning is based on the subsidiary nature of the hearsay testimony, on the fact that the direct witness could have testified but did not, and on the absence of additional information, duly proven, to corroborate the account of such witnesses.

On this point, it is appropriate to specify the following:

> 1. A hearsay witness, in principle, is not prohibited under our laws of criminal procedure. The law, as a consequence of the principle of the free weighing of the evidence, or the use of the court's best judgment, does not exclude its validity and effectiveness [knowledge of the facts may have been obtained

by verbal communication, by means of information technology, by having heard a conversation between other persons to which the witness is not a party, and so on]. There is no cause for inadmissibility based on the origin of the testimony he may provide, and there are no limitations with respect to the proceedings in which they can be used. The problem, essentially, is the veracity and credibility of his testimony. It must be made clear, however, that hearsay testimony on its own cannot be considered indirect or circumstantial evidence or indicia, let alone be limited exclusively to identifying the person who actually has direct knowledge of the facts about which he is testifying, nor used simply to confirm the statement of the main witness. The scope of such testimony is defined according to what he knew, the circumstances of the source of such knowledge, the personal characteristics of the hearsay witness and of the eyewitness, and so on.

2. It is obvious, however, that if the testimony of a hearsay witness is unique or singular, in the sense that there is no direct or circumstantial corroborating evidence, it cannot be considered by the adjudicating court in order to justify a conviction. Such testimony is considered "inadvisable" as evidence; that is, it involves serious risks, as its indirect nature can mean a significant loss of reliability. Additional criteria of reliability of the testimony in question are required beforehand, and to favor the principle of immediacy, to wit: (i) it must be, preferably, primary information heard by the witness himself—which is part of what is required in the absence of the witness's direct perception of the facts; and (ii) the statement of the eyewitness—whose identification must be provided by the hearsay witness—must have been unobtainable for just cause. Eyewitnesses, therefore, have absolute preference [eyewitness testimony is accorded not exclusiveness, but preference, which is overcome when there is just cause for the absence of that witness]. In this case, due to the subordinate character of hearsay testimony, it is a matter of finding (a) the presence of a proven, exceptional situation of effective and actual impossibility or serious impossibility of obtaining the direct statement of the main witness (death, unknown whereabouts, residence abroad, minor witnesses requiring special protection, and so on); and (b) the assumption of the pursuit of serious and organized crime, which makes it difficult to obtain eyewitnesses. As such, it is necessary to acknowledge the reasons or grounds for the inadmissibility of such testimony when a proven

> presumption of the unavailability of the eyewitness has not been established, in which all legal possibilities for obtaining his testimony have been exhausted.
>
> [. . .]
>
> 4. Beside the fact that before the examining court [. . .] the presumed source of knowledge did not support the assertions of the hearsay witness, it is relevant to note that this does not rule out flatly the value itself and the consequent positive assessment of the hearsay testimony, although greater care is required in its assessment. It is necessary to turn to other information or facts, to other means of proof, such as direct or circumstantial evidence, even if not testimonial in nature. The Court must turn to complementary sources that point in the same direction and lead unequivocally to an evidentiary result obtained through indirect or circumstantial evidence. The reasonable caution to which it is subjected is its particular characteristic; that is its nature of complementary evidence. From this point forward the solution is reached in each specific case based on the circumstances of the fact alleged and the evidence in that case.
>
> [. . .]

Chapter XIII: Other crimes of the Colina Special Intelligence Detachment

[. . .]

¶*2. Comprehensive assessment.*

[. . .]

586. This plurality of criminal acts, the cover of the military and intelligence apparatus that necessarily had to have been provided for the perpetration of the crimes, and the subsequent cover-up and persecution of those who denounced the events, also convinces the Court that the crimes in question were not isolated acts; nor could they have been committed without, at least, the criminal intent of the highest military and intelligence authorities. As such, killing people was not a deviant act of subordinate Army officers or superiors. It was decidedly a strategic institutional mindset—in short, a specific policy of repression in order to confront terrorist subversion in certain spheres outside democratic and constitutional law. Of course,

it is not that the entire military and police apparatus was engaged in this criminal mission; rather, a very clearly defined sector of it, focused on some divisions and functions of the SINA, was geared toward this highly selective mission that concentrated on specific areas and individuals. It was neither massive nor rash, but rather selective and limited to particular individuals and to specific situations or triggering contexts.

[. . .]

588. The investigation of the TRC [was] conducted according to its own method, which certainly is not the investigative method inherent to the criminal case [focused on specific, individually identified acts, and meant to establish—confirm or rule out—the criminal involvement of specific individuals]; nor does it adopt the same requirements the court does in forming its opinion as to the degree of certainty when it discusses the operation and activities of the Colina Detachment [. . .].

Chapter XIV: Acts subsequent to the crimes of Barrios Altos and La Cantuta

[. . .]

§3. General assessment.

[. . .]

625. The Constitutional Court, citing the United Nations Set of *Principles* for the *Protection* and *Promotion* of *Human Rights* Through Action to Combat *Impunity*, defined impunity as "*the* de facto *or* de jure *inexistence of the criminal responsibility of perpetrators of human rights violations, as well as of civil, administrative or disciplinary liability, because they escape all investigation that would lead to their accusation, arrest, prosecution and, in the case of conviction, the imposition of appropriate sentences, including compensation for the harm caused to their victims*."[102] As follows from what has been set forth in this Chapter, that was what in fact happened in Peru. Real mechanisms were used, and various provisions were issued to hinder or impede the

102. STC No. 2488-2002-HC/TC, at Conclusion of Law No. 5, Constitutional Court, Mar. 18, 2004 (Peru).

establishment of the facts and, when the time came, to prevent the full enforcement of the punishment imposed. Moreover, as previously established, such a vast plan of action, one that was consistent over time, can only be explained by the involvement of the country's leader.

What occurred following the commission of the crimes only confirms one of the common features of a crime of state [. . .]. According to expert MARTÍN PALLÍN, [. . .] the common feature of a crime of state is the existence of a plan or design in which, as the case may be, law enforcement personnel and, in general, the top leaders of the State participate. This criminal plan not only provides for the execution of the crimes anticipated but also takes the measures necessary to prevent physical signs or traces of them and to erase the direct evidence. Should circumstantial evidence be discovered that points to the involvement of state agents, of the state apparatus, it provides for the obstruction of the investigation with every type of means within the State's reach—deny its existence, deny public information, assert the confidentiality of government information, and so on—and if the investigation cannot be halted, it provides for interference in the punitive consequences, whether by turning to symbolic punishments or making use of amnesty.

Chapter XV: The participation of Alberto Fujimori Fujimori

[. . .]

§3. The directive power of defendant Fujimori Fujimori

633. The President of the Republic, as Commander in Chief of the Armed Forces, has broad military authority that emanates from the Constitution itself (both the prior Constitution and the one currently in force), which assigns him the power of ultimate authority over all the executive bodies of the National Defense System. As such, (i) he presides over it; (ii) he organizes, distributes and stipulates the use of the Armed Forces and the PNP; (iii) he makes use, from a general executive level, of the Armed Forces—in short, he establishes defense policy and, more specifically, military policy, even as the military command in the strict sense of the word provides the pertinent information and advice (for which purpose suitable

agencies are formed); and (iv) he exercises effective command over them, he directs them, and his provisions or orders must be obeyed.

The primacy of the republican principle leads to the subordination of the Armed Forces to the constitutional system, and in the presidentialist regimes command over them is incumbent upon the President of the Republic. If the national political model is that the President of the Republic is Head of State, Chief of Government, Commander in Chief of the Armed Forces and, furthermore, the personifies the nation—a presidential model that has a strong Executive—it is inconsistent with the defense argument that the President of the Republic must limit himself solely to issuing general policies, being part of an advisory group without his own powers, and not giving specific orders to the Armed Forces. This role of presidential leadership, command and authority—as an expression of the principle of civilian supremacy—is confirmed by the key fact that the Armed Forces are not constitutionally autonomous bodies; they are part of the Executive Branch, which entails the exercise of its authority to order, coordinate and direct the actions of the Armed Forces, and to define the strategic objectives of defense and military policy. It also means that the president of the CCFFAA and the commanders general of the institutions of the armed forces are appointed and removed by the President of the Republic, and that in a state of emergency he can order that the Armed Forces assume control of national order—without that excluding, incidentally, the effective political leadership incumbent upon him as head of state—which authorizes him to order specific measures that allow the restriction of rights by the Armed Forces.

(i) One notable factor in this sphere of powers of the President of the Republic is the *political* factor, by virtue of which the strategies that define and shape the National Defense System—presided over by the head of state—are established by the top agencies. In turn, the executing bodies are the Armed Forces and the PNP, of which the President of the Republic is likewise the chief.

(ii) Another relevant factor is the *discretionary nature* of such activity, based on which [the president] can choose the course of action that is appropriate to take, and define its content. This can be explained by the fact that this power of the Commander in Chief of the Armed Forces and the PNP, bearing in mind its inherent

characteristics, is not regulated or limited by law. This absence of regulation only enables greater political discretion in his military authority and in the field of national defense, although clearly it is not a matter of unlimited discretion that shields unlawful acts.

[. . .]

635. The military power that the Constitution confers upon the head of state is developed at the level of political command over the military. He represents the highest decision-making body, and the Armed Forces are subordinate to him in his capacity as commander in chief. The Head of State, as is evident, has effective authority with respect to the Armed Forces and therefore, they must obey the orders that he issues within the scope of ordinary and constitutional legality. The members of the armed forces obviously cannot question them or fail to carry them out, save, of course, in the case of exceptions derived from the constitutional system itself and from the clear illegality of an order.

The defense insists upon asserting the differences between the political command and the effective or military command of the President of the Republic. The latter, as IGNACIO DE OTTO notes, is a requirement that is merely practical, not constitutional. It carries with it the understanding that the technical characteristics of military activity mean that it is normally entrusted to professional servicemen; it is seen, as is clear, in the practical relations between governments and the institution of the military. Aside from the manner in which the effective Armed Forces/Government relations were located within the regime presided over by the defendant, the word *command* and its derivatives, CASADO BURBANO alerts us, is used in a *political* sense, when, for example, talking about supreme command, high command, high commander or commander in chief, to refer to purely political duties. The president's orders to the Armed Forces do not necessarily require specific formalities. Therefore, in the varied and broad scope of his presidential involvement, the orders he issues can be verbal or written, express or implied, publicly known or confidential—which was precisely the recurrent practice of the defendant.

[. . .]

§6. Analysis of circumstantial evidence and determination of guilt

658. As established from the beginning [Part Two, Chapter I, § 1], and as follows from all of the foregoing thus far in this judgment, the factual conclusions are based on CIRCUMSTANCIAL EVIDENCE, which is used to establish the manner of occurrence of a fact not directly proven, based on another fact, known and proven in the case, using for this step the criteria of logic and experience. This is sufficient for the Court to begin performing its duty to weigh the evidence pursuant to Article 280 of the Code of Criminal Procedure.

The correction of this method of proof, or, more specifically, the Court's method of weighing specific facts or circumstances duly verified in the case, which is fully accepted by the Supreme Court [En Banc Decision No. 1–2006/ESV–22, of October 13th, 2006], which declares that Final Judgment No. 1912–2005/ Piura, of September [6th, 2005] is binding precedent], and which is no more uncertain or subsidiary in nature than direct evidence, must meet a set of substantive and procedural requirements. It highlights, on one hand, (i) the existence, as a general rule, of a plurality of predicate facts or circumstantial evidence, duly proven in accordance with the requirements of evidentiary law (the circumstantial evidence must be able to be considered procedurally accurate, which means that it is *reliable*); they must also be peripheral or concomitant with respect to the factual information to be proven, and be interrelated with the core fact, which is the requirement of relevance. The probative quality of the circumstantial evidence is fundamental, must be well established in the case, and its power of indication must be such that it leads straight to the fact that is meant to be established. This analysis also highlights (ii) the rationality of the inference obtained—between the circumstantial fact and the consequent or criminal fact there has to be a natural connection, or a logical or causal link, an absolute harmony, that enables the inference to be made without any other possible reasonable alternative. It is appropriate, therefore, to identify the different indicia or incriminating pieces of information pursuant to the requirements of reliability and relevance, which entails the determination of the sufficiency of the circumstantial evidence selected based on the probative activity undertaken. This in turn will shape the Court's opinion with regard to an inference, the reasonableness of which must be supported general principles of experience, rules of logic or scientific principles. As a procedural

requirement, both elements or requirements must be stated clearly in the judgment.

659. Two precautions must be taken into consideration:

1. The weighing of the circumstantial evidence, obviously, must not be done by isolating the incriminating indicia individually. They must be weighed as a whole, and the logical inference must be based on them. Naturally, an additional requirement is the absence or insufficiency of contrary circumstantial evidence (predicate facts that support evidence to the contrary, the occurrence of which—if proven—prevents logically accepting that the fact in question actually occurred).

2. The validity of the general principles of experience, which tie the predicate fact to the consequential fact and lead to the understanding that the conclusion is derived from the evidence examined: (i) must be based on general knowledge or scientific knowledge; (ii) there must be no applicable general principles of experience that are equally well-founded, that is, it must not be possible to reach alternative conclusions that enjoy the same degree of probability; and, (iii) the conclusion arrived at through the circumstantial reasoning must not contradict other facts declared proven. If the conclusion regarding the existence of the fact and the culpability of the defendant is unequivocal—or objectively unequivocal, which excludes an interpretation of the circumstantial evidence that leads to the understanding that the events may have occurred differently from the main fact—then it must be understood that the constitutional presumption of innocence has been overcome, and therefore that the conviction is justified substantially with full respect for the principle of the prohibition against arbitrariness.

PART TWO: CONCLUSIONS OF LAW

Chapter I: Crimes committed

§1. The crime of aggravated kidnapping: Gorriti Ellenbogen – Dyer Ampudia.

[. . .]

680. The criminal offense of kidnapping violates the legally protected right of freedom of movement, which is nothing more than

the victim's ability to be able to fix freely his position in space, moving or staying in a desired place.

The basic elements of the offense, in terms of an *objective statutory definition*, requires the perpetrator to deprive the victim of his individual freedom without a justified right, reason or authority to do so.

> 1. The perpetrator can be any person, including a government employee.
>
> 2. With respect to the substantive definition of the offense in question, it is required that a person be deprived of his ability to move from one place to another—to decide the place he is going to be or not be located—even when the victim is allowed a certain area of movement that he cannot physically overstep, the offense is constituted precisely due to the existence of such preventive limits. The Court has ruled in similar terms in Final Judgment of June [9th, 2004], No. 975–2004/San Martín. Deprivation of liberty may arise, indistinctly, by different means, and can materialize in different forms. It is necessary, of course, that the agent act unlawfully—which includes all those cases of excess in the exercise of a right, authority or position—and that the act in question is performed without the consent of the victim.
>
> 3. The normative element of the legal definition is the intrinsic illegality of the deprivation of liberty; Article 152, paragraph one, of the Criminal Code states: ". . .without a justified right, reason or authority." The victim must not have given his consent, and it must be an imposition that is unjustified in light of the general causes for justification, in factual or legal situations that determine their existence, or because such causes do exist, the perpetrator deprives another of his liberty in an abusive manner, beyond the justified need or through procedures prohibited by law.

[. . .]

685.

2. [. . .] Under the Criminal Code of [1991], there is no independent legal definition of the criminal offense of arbitrary deprivation of liberty committed by a government employee or public servant as mere *de facto* event occurring outside the course of a legal proceeding. The regulation contained in the Code does not

include a dual systematization that differentiates conduct relevant to the deprivation of liberty according to the status of the perpetrator. The status of the perpetrator as a public servant represents, in principle, neither a privilege nor a specific aggravation. Consequently, with the sole exception of unlawful or arbitrary detention by a judge, justified by virtue of being within the framework of a legal proceeding—external *de facto* circumstances—the Criminal Code currently in force has left the regulation of all deprivations of liberty exclusively to Article 152, whether carried out by private individuals or public servants.

3. The legal definition of general abuse of authority, first of all, does not protect an individual's freedom of movement; rather, it is meant as a precaution to ensure the proper discharge of the public servant's duties. Second, it does so subsidiarily, only with respect to crimes committed by public servants. Kidnapping is legally classified as a common crime—its perpetrator could be anyone—insofar as there is no criminal law concept that considers the deprivation of freedom of movement (potential and individual freedom of movement) committed by a public official. Accordingly, it is not possible to maintain, as it was under the previous Criminal Code, that it is classified as an offense that can be committed only by private citizens. It should be emphasized that the subsidiary nature of the offense of general abuse of authority stems from the fact that all crimes against government and its administration committed by public servants always presuppose the violation of an official duty; they assume an abuse of authority. In addition, the offense defined as abuse of authority is formed by the violation of the duty to adhere to the law to which the public servant is bound, in the specific sphere of his activity. It does not require that the arbitrary act adversely affect private interests, as would be the case of the freedom of movement of citizens; that circumstance, in any case, is an additional harm not covered by the offense of abuse of authority. It must be taken into account that an act that infringes upon freedom of movement comprises all acts committed by the perpetrator "without a right," which is at the core of the crime of kidnapping. Therefore, the implementation of Article 376 of the Criminal Code would, by any reckoning, be insufficient to encompass that criminal conduct, as it covers an area that goes beyond mere abuse of office. Such "abuse of authority" more properly should be assessed as a constituent element

of a kidnapping offense committed by means of the violation of institutional powers.

[. . .]

687.

2. [. . .] Individual freedom, which entails the fundamental right not to be detained by the police except where there is a well-founded court order or an in flagrante delicto arrest, was specifically suspended, and not repealed, when the state of emergency was declared (or, strictly speaking, extended) [. . .]. Under those conditions, it is not that the state of emergency does away with the legally protected interest of individual freedom; there is only a type of authorization so that under certain conditions an individual's freedom may be restricted, for which there would be some grounds of justification pursuant to law (Article 20(8) of the Criminal Code). Therefore, the legally protected interest remains in force and must continue to be respected, except where proper within the legally authorized limits. However, the legal guarantee of habeas corpus cannot be suspended, as emphatically held by the IACtHR in Advisory Opinions No. 8/87 [. . .] and 9/87 [. . .]. From this same perspective, it should be noted that the powers arising from the control measure under the state of emergency were limited to the control of terrorist actions, to all those persons who reasonably could be linked to these criminal acts and to the organizations that promoted and supported them.

3. A state of emergency, by its very nature, is declared for the defense of the constitutional government and the system of values it recognizes and protects, to deal with emergency situations and thereby to preserve the highest values of a democratic society, as stated in paragraph 20 of Advisory Opinion No. 8/87. A state of emergency cannot be invoked for purposes of a coup d'état—in order to establish and consolidate it, which in itself amounts to the denial of Constitutional government—let alone with respect to citizens who are not linked to terrorist subversion.

[. . .]

689. [. . .]

1. As held by the Supreme Court in Final Judgment No. 3840 97/Ayacucho, of October 9, 1997, a perpetrator by means

must be held responsible to the degree that the main act coincides with his intent; he must not be responsible for the excess committed by the agents he used, as he does not have power or control over the act. [. . .]

[. . .]

691.[. . .]

1. The understanding of what cruelty is must not be formed based on the classification of manslaughter as murder. In each case [. . .] it must start with the basic criminal concept and, thus, it is possible to determine when the criminal goes beyond the discomfort that the perpetrator "normally" causes to commit the basic crime in question. Cruelty is a circumstance (physical/psychological or emotional) that must be assessed normatively. Its reference is always the conduct of the perpetrator, in its objective and subjective aspects—that is, the addition of other harm, strictly unnecessary, to the victim, outside the harm of the kidnapping: the absolute restriction of freedom of movement; the perpetrator's assumption of the unnecessariness of his action; and the deliberate nature of the excess, of causing unnecessary suffering to the victim.

2. The endangerment of the life or health of the victim requires the performance of acts—à propos of the act of kidnapping or of the conditions in which the victim is held—with sufficient magnitude or relevance to cause a specific risk to his physical safety or health. Subjectively, the key is the perpetrator's awareness of the danger to the victim brought on by the acts carried out to kidnap him or keep him detained. The intent of the perpetrator must encompass not only the act itself of kidnapping and holding the victim, but also the understanding that the actions carried out are creating a situation that entails real risks to the victim; that is, the perpetrator must be aware of the danger.

[. . .]

694.[. . .]

1. Cruel treatment, as previously described, is not only an attack on the physical safety of the individual; it also diminishes his mental or emotional welfare—understood as the freedom of self-determination and of action according to one's decision, which rejects all conduct that entails a feeling

> of degradation or humiliation, ridicule or indignity. It is, under our criminal law, a specific aggravating circumstance that, as such, requires something additional in view of all conduct that involves the illegal deprivation of a person's liberty, of his possible and individual freedom of movement.
>
> 2. International human rights law prohibits torture and cruel, inhuman, or degrading treatment or punishment.103 If torture is excluded, which is considered an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment (United Nations Declaration against Torture of 1975), in that it is impossible to draw a precise dividing line between such categories of acts, it is clear that cruel treatment, inasmuch as it is inflicted by a public official or other person in the exercise of public duties, at his instigation, or with his consent or acquiescence—a "qualified" perpetrator—can be defined as such an act that deliberately causes pain and suffering but which, due to its level of intensity, is not sufficiently severe to be classified as torture or bodily harm. In international case law, as REMOTTI CARBONELL explains, the use of criteria of seriousness and harmfulness have been imposed, qualified by endogenous and exogenous factors, all of which must be evaluated in each specific case.104 However, those references to international law must

103. Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (adopted by Legislative Resolution No. 13282 of Dec. 9, 1959); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 7, U.N.Doc. A/6316 (Dec. 16, 1966) (adopted by Executive Order No. 22128, of Mar. 28, 1978 and ratified by the Constitution of 1979); and Organization of American States, American Convention on Human Rights art. 5(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S 123 (adopted by Executive Order No. 22231, and ratified by the Constitution of 1979). The following have been added to these general provisions: United Nations Convention against Torture, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) (adopted by Legislative Resolution No. 241815, of May 24, 1988); and Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67 (adopted by Legislative Resolution No. 25286 of December 4, 1990).

104. Ireland v. The United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 162 (1978) (criterion adopted by the European Court of Human Rights in the Case of Ireland v. The United Kingdom, ECtHR Judgment of January 18, 1978, which also recognized that the "seriousness" is due to its "relative" nature, and depends "*on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc*"); Case of Loayza-Tamayo v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 167 (Sep. 17, 1997) (the IACtHR adopted the same standard, in discussing the

> be defined according to the normative requirements of the legal definition of aggravated kidnapping, and the set of circumstances they include. Accordingly, they establish the necessary normative level or magnitude for a particular act to be classified as "cruel treatment."
>
> 3. In this case it is necessary to bear in mind that the people who deprived and kept the victims deprived of their liberty were State agents carrying out superior orders [. . .]. The victims were taken to illegal detention centers [. . .]. No legally provided, regular procedure was followed—especially with regard to notice of charges and official, public information as to their whereabouts, and legal status—and those measures were taken in the context of an altered constitutional order or in the exercise of power of an authoritarian government [. . .].
>
> 4. The State agents involved acted with glaring illegality and arrogance. They used their authority in a manner that was contrary to their obligations as State agents [. . .]. It took place in the context of an authoritarian regime, in which the victims could not expect treatment that was predictable or formally protected by the pre-existing legal standards, especially since they were taken to and held at an improper institution, which belonged to the secret services of the State— profoundly intimidating in and of itself—which made them even fear for their fate. It is obvious, as the IACtHR noted, that the victims' feelings of fear, of fear for their fate, was aggravated not only by the very illegality of the deprivation of liberty or act of kidnapping—which deepened its intrinsic vulnerability—but also due to the circumstances in which it was carried out, derived from the place of detention, the people who kept the victims in custody, and from the characteristics of the political regime that supported them.[105]

The cruel behavior of those who ordered and carried out the act of kidnapping and the authorities and custodians who maintained the kidnapping—this additional aggressive conduct, perfectly known to the perpetrators and assumed by the victims, the intensity and

various degrees of treatment, the physical and psychological effects of which vary in intensity according to the endogenous and exogenous factors that must be proven in each specific situation).

105. Loayza-Tomayo, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 57.

seriousness of the harmful action, the multiplicity of participants in the commission of the acts—was expressed (i) in the form of the detention carried out by State agents—dramatic in the first case and with an absence of reasonable and well-founded explanations in both cases; (ii) in the characteristics of the transfer of the victims to the SIE—the cocking of weapons, concealment of the identity of the captors, prevention of recognition of the detainee by other members of the military; and (iii) in the language used, in the initial isolation and in the warnings as to the severity of the consequences that the victims' alleged conduct would have on them, and in the absence of any determination of their legal status, in spite of it being—which was obvious—an operation conducted by State agents, and therefore, one with an abusive or arbitrary aspect that made clear to the victims that there was a lack of judicial protection and of personal safety and calm. In the case of the victim Dyer Ampudia, the persistence of the deprivation of liberty coincided with an exceptional fact: he remained deprived of his liberty in spite of a negative conclusion of the police authority, which shows clearly an intimidating intention to break him mentally. From a subjective perspective, the totality of the factual characteristics enumerated reveals that the State agents who physically carried out the kidnapping—and those who ordered it—proceeded without the least basic sense of humanity or respect for the individual; they sought deliberately to intensify the suffering of the kidnapping victim (the means, context and objectives were themselves meant to intensify the suffering of the victim) in a way that was unnecessary relative to a simple kidnapping, to keep him anxious about what was going to be done with him, even excluding him from his daily activities (which were taken into account to kidnap him) and in that way, simultaneously, negate them in his social function temporarily, for the political benefit of the regime in power.

Not only, as has been set forth previously, are there differences between treating a kidnapping victim with cruelty and killing a person with great cruelty; it is also necessary to understand the scope of cruel treatment in kidnapping. Taking on a dogmatic, traditional, and fundamentally objective interpretation, appropriate to the obviously cruel manner of killing a person—which is what murder requires under our laws—is not consistent with the different criminal and political meaning assigned by law to each aggravating factor.

To this is added an internal analysis of the aggravating circumstances provided for the offense of kidnapping. The analysis of cruel treatment is framed by two circumstances:

(i) A second degree aggravating circumstance is the one embodied in Law No. 26222 of August 21, 1993, without modification to the first degree aggravating circumstance of cruel treatment. In this scenario, the perpetrator must cause serious bodily harm to the victim, or seriously harm his mental or physical health, or cause the victim's death [. . .] [C]ruel treatment cannot be identified by acts of torture that speak to the seriousness of the acts and the detrimental consequences to the victim. Serious bodily harm and, obviously, death, do not fall within the circumstance of "cruel treatment," as when they occur they form part of this especially aggravating circumstance, which represents a lesser objective magnitude.

(ii) The circumstance of cruel treatment has always been an alternative aggravating factor to abusing, corrupting, or "*. . .endangering [. . .] the health of the victim.*" The perpetrator must cause, in addition to the kidnapping itself, specific suffering in relation to the victim's physical or mental well-being, but from which no well-founded risk to his health is derived—obviously, to his life, either—let alone, as has been set forth previously, grievous bodily harm or death (the consistency with slight bodily injury, then, is obvious). Therefore, cruel treatment is equivalent to all objective or subjective mistreatment (threats, ideological pressure, causing anxiety or unease) sustained by the victim, but which do not lead to death, serious harm to his body or physical or mental health, or significant risk to his health.

[. . .]

§2. The crime of murder: extreme violence and malice aforethought.

697. The subject of the Court's analysis is the crime of murder, under the circumstances of extreme violence and malice aforethought. Murder with extreme violence means to kill another for an inhumane or futile motive or reason. It is a circumstance that lies within the framework of culpability, as a category that encompasses the formation of the perpetrator's criminal intent [. . .]; it reflects an intent that belongs to the subjective and personal sphere of the

perpetrator. Murder with malice aforethought stresses a specific circumstance of execution, by virtue of which the perpetrator ensures the execution of the crime and prevents the risk of self-defense on the part of the victim (strictly speaking, it is a circumstance that entails greater cowardice of action, and the greater objective dangerousness of the perpetrator's conduct) without ignoring the subjective aspect of the perpetrator, who uses the victim's defenselessness or takes advantage of it in the commission of the act. The Final Judgment of July 6, 2004, No. 999–2004/Tacna, concurred that it is a circumstance that is mixed in nature.

698. An important element of the circumstance of *extreme violence* in a homicide has is that the motive or the cause of death is despicable (absence of defined objective) or contemptible (brutal, extreme violence in its determination). The motive in question is not valid or significant. The case law of the Supreme Court refers to a criminal act carried out without any apparent explicable reason or motive, with a perverse instinct or for the mere pleasure of killing [Final Judgments of May 27, 1999, No. 2343–99/Ancash, and January [22nd, 1999], No. 4406– 98/Lima]. It also states that the reason or motive is insignificant, futile or inhumane, disproportionate, despicable and base [Final Judgments of January 12, 2004, No. 2804–2003/Lima Norte; January [21st, 2005], No. 3904–2004/ La Libertad; and September 9 2004, No. 1488–2004]. There is, based on what has been set forth above, disproportion between the motivating reason and the seriousness of the homicidal reaction, which can be identified in homicides perpetrated for perverse amusement, bloodlust, criminal vanity, out of a prideful or arrogant nature, and so on.

It is not a question—as HURTADO POZO explains—of simple clumsy, cruel or brutal execution; in the assertion of ARIAS, it is necessary to assess the motive with which the perpetrator acts, his bloodthirsty instinct, aside from which it must be disproportionate, despicable and base, which reveals in the perpetrator an inhumane attitude, contrary to the basic sentiments of social solidarity. The latter is called brutal perversity of determination.

699. The circumstance of *malice aforethought*, taken from the Hispanic source, has four requisite elements: a) *Normative*, only applicable to crimes committed against persons; b) *Objective*, based

in the *modus operandi* and referring to the use of means, modes or manners of execution designed to ensure them, eliminating any possible defense of the victim; c) *Subjective*, whereby the perpetrator has to have sought deliberately, or at least taken the opportunity consciously, to try to eliminate all resistance on the part of the victim; and d) *Teleological*, whereby it must be proven whether in fact, in the specific case, a situation of total defenselessness was effectively created.

The relevant point is, first of all, the use of means or modes that tend to ensure the execution of the homicide; second, the certainty of its execution and the absence of risk to the perpetrator; and, finally, the perpetrator's awareness of the defenselessness of the victim and the choice of means and manners of ensuring the homicide.

This has been established in the case law of the Criminal Chamber of the Supreme Court [Final Judgments of May 27, 1999, No. 1425–99–Cusco; and May 25, 2004, No. 880–2004/Arequipa]. The crucial point with regard to malice aforethought is the assurance of the execution of the act and the absence of risk in terms of any defense the victim might offer.

[. . .]

701. In these terms, it is indisputable that the crime was committed with malice aforethought. That is how it was planned, and that is how it was carried out. At the same time, its execution involved the military training of the perpetrators. The victims were caught by surprise in order to immobilize them, care was taken to ensure that they were unarmed, they were overpowered and, later, they were attacked with weapons of war, preventing any defensive maneuver on their part and ensuring their death. The victims were defenseless and the lethal results were ensured, without risk to those who carried out the act. All of the above, furthermore, was sought deliberately.

The use of special circumstances of time and place, the unexpected attack on the victims (rapid and by surprise in the Barrios Altos Case), the procedure used by the physical perpetrators of the crime, which left the victims without the ability to react and was meant to facilitate the execution of the crime, the helpless state of the victims—who were unarmed, and subject to the power of their attackers, which meant their total defenselessness—only confirm the malice aforethought of the conduct of their attackers.

There are no grounds, on the other hand, to consider that the homicide was motivated by extreme violence. Not only did the perpetrators act on the basis of a defined objective, but also the motive—in spite of its intrinsic unlawfulness and obvious ethical reproach, unjustifiable from any point of view—was not futile or insignificant. The antiterrorist consideration or alibi, besides being subject to repudiation given what is required of government employees in their conduct in dealing with persons understood to be terrorist criminals, does not express a disproportionate, despicable or base motive. The killing was done according to a previously devised plan, and the execution of the crime followed, at least externally, guidelines typical of the performance of military operations, albeit outside of and counter to military regulations. The notion that was assumed was based, undoubtedly, on disregard for human life and in open rebellion against the basic rules of a civilized society, and against the very essence of military honor and the guidelines that govern confrontations with and treatment of a defeated or unarmed enemy. The latter, in spite of its dramatic and shocking illegality, cannot be considered action based on a motive of extreme violence. Consequently, homicide with malice aforethought is admitted, and homicide with extreme violence is rejected.

§3.The crime of grievous bodily harm

[. . .]

705. The crime of *grievous bodily harm*—as a crime that has physical effects—requires, as set forth in the previously cited provision, that the perpetrator by improper act or omission cause, produce or bring about serious harm to the bodily integrity or health of the victim.

However, when Article 121 of the Criminal Code refers to the existence of a harm to body or health, it requires the performance of conduct—by act or omission—that, on one hand, causes any change, more or less lasting, to the victim's body (which is apparent in the body) or, on the other hand, causes or accentuates a pathological state of certain intensity, altering physiology (the functional equilibrium of the organism) or causing mental changes of a certain magnitude, whether lasting or relatively fleeting. The harm to the body—bodily integrity—or to psycho-physiological health, must be

serious. The legislature defines the seriousness of the injury, incorporating precise mandatory qualifying circumstances. Among them, and for purposes of this case, there are: a) injuries that present an imminent danger to life; b) those that cause permanent disability; and c) those that require thirty or more days of assistance or rest, according to a doctor's orders.

706. In the case of "imminent danger to life," the injury—by its characteristics and significance of the wound, as well as the conditions or constitution of the victim—must cause a specific, real, effective, active danger of seriously jeopardizing the life of the victim. That is, the injury inflicted must entail a certain likelihood of complications, which generally arise when mainly internal tissues and organs are damaged. The victim must actually have been at death's door.

707. In the case of "injuries that cause permanent disability," the normal physical means that the victim used to enjoy in his daily life, such as his ability to move, are seriously diminished as a result of the injury, in such a manner that, as a consequence, he will need the assistance of third parties or the assistance of some mechanical, electromechanical or other means in order to get by normally. Incidentally, there is no need for the disability to be incurable; rather, it must persist for a considerable length of time.

708. In the case of "causation of any other harm that requires thirty or more days of assistance or rest," the time periods are used with the understanding that the seriousness of harm is in part measurable by the period of time required for the victim's recovery [. . .]. It facilitates the inclusion of an entire range of injuries not provided for specifically, the only limitation being the requirement of disability lasting more than twenty-nine days that necessitates a doctor's care or leave from work.

709. SUBJECTIVE ELEMENTS OF THE OFFENSE. The perpetrator must act with *animus vulnerandi* or *laedendi* at the time of causing serious harm to his victim; that is, criminal intent to injure, to diminish the bodily integrity or the physical or mental health of the victim, with knowledge of the specific danger of the injury caused by his action. [. . .]

It should be noted that, as the Supreme Court has specified, *". . .from the external and purely objective perspective, the offense of*

causing bodily harm and an attempted murder are completely alike, the sole and only difference being the perpetrator's state of mind; one merely has the intent to injure, while the other has the intent to kill" [Final Judgment of September [24th, 1997], Motion for Nullity No. 2493–97/Amazonas].

§4. Crimes Against Humanity: Barrios Altos and La Cantuta.

[. . .]

712. Thus, according to the development or evolution of this internationally defined criminal offense, it is possible to define crimes against humanity, in general terms, as does GIL GIL, as any attack on fundamental individual legally protected interests (life, physical safety and health, freedom. . .) committed in times of peace as well as during wartime, as part of a widespread or systematic attack carried out with the participation or tolerance of the *de jure* or *de facto* political authority.[106]

713. Murder was always considered a type of crime against humanity [. . .].

An initial clarification, however, has to do with the term "murder." This clarification begins with two necessary considerations. *First*, the term "murder" cannot be identified under Article 108 of the Criminal Code, but rather with the act of killing or causing death; and, *second*, by virtue of the recognition of the principle of individual culpability, the conduct, whether by act or omission, must be intentional; the criminal intent—of any kind—must extend to all of the elements of the crime, basically to know that the death is part

106. Alicia Gil Gil, *Los crímenes contra la humanidad y el genocidio en el Estatuto de la Corte Penal Internacional a la luz de "Los elementos de los Crímenes," in La nueva justicia penal supranacional*, 94 (Kai Ambos Ed., 2002); Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 565-568 (Sept. 2, 1998) points in this same direction from a general perspective. The Court noted that the essential elements of crimes against humanity are those acts that are inhumane in nature and character that cause great suffering or serious harm to physical or mental health, in addition to being committed as part of a widespread and systematic attack against the civilian population. Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-A, Appeals Chamber Judgment (Oct. 7, 1997) (*"…serious acts of violence which harm human beings by striking what is most essential to them: their lives, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community…"*)

of a widespread or systematic attack directed against the civilian population.

714. If it is understood, in accordance with international jurisprudence, that a crime against humanity is of a special nature, with a higher degree of immorality in its commission as compared to common crimes, then the following must be verified:

> 1. From the *objective or substantive aspect*, certain elements must be present that have been shaped and recognized based on the positive or customary law of human rights protection. Specifically, the requirements imposed by the international instruments and courts have referred always to (i) the status of the perpetrator (as part of a government entity or a criminal organization that assumes *de facto* control of a territory);[107] (ii) the nature of the violation (organized, and widespread or systematic acts—the term "widespread," quantitatively, refers to the number of victims, while the adjective "systematic" encompasses the idea of a methodical plan);[108] (iii) the timing of the execution of the crime
>
> (situation of internal or external armed conflict),[109] and (iv) the qualities and status of the victims (civilian population, state of defenselessness).[110]

107. Prosecutor v. Zoran Kupesckic, Case No. IT-95-16-T, Judgment, ¶¶ 654-55 (June 14, 2000). In the same vein, see Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 659 (May 7, 1997).

108. Mireille Delmas-Marty, *¿pueden los crímenes internacionales contribuir al debate entre universalismo y relativismo de los valores?*, Gil Gil, *supra* note 106 at 83. Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment (May 7, 1997) (the attack must be widespread or systematic, that is, it is not necessary for both criteria to be met. In both cases it is required that the act be perpetrated in accordance with a policy, which excludes situations in which inhumane acts are committed on the perpetrator's own initiative or in furtherance of his own criminal plan, without the encouragement or direction of a government or organized group). *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sep. 2, 1998). Prosecutor v. Kunarac, Case No. IT-96-23-T, Judgement, ¶ 428 (Feb. 22, 2001) (the "widespread" nature of the attack shall be determined, principally, based on the number of victims); Prosecutor v. Kunarac, Case No. IT-96-23-T, Appeals Court Judgement, ¶ 94 (June 12, 2002) (the classification of the attack as "systematic" referred to the organized nature of the acts of violence and the unlikelihood of their occurring by mere coincidence).

109. Prosecutor v. Tadic, Case No. IT-94-1, Appeals Chamber Decision, ¶ 141 (Oct. 2, 1995) (customary international law no longer required a nexus between crimes against humanity and an international armed conflict; therefore, such

> 2. From the subjective perspective, it is required that the agent or perpetrator have knowledge of the broad and general context in which the act occurs, and that the conduct is or will be part of a widespread or systematized attack—organized violence—against the civilian population in furtherance of a plan or policy. It is clear that customary international law has never recognized any commission of an isolated inhumane act as a crime against humanity; the act has to be part of a greater campaign of atrocities committed against civilians. Accordingly, murder has been characterized as a crime against humanity,[111] with the specification that it be the consequence or expression of a systematic assault, coming from the State or its institutions of power, which is promoted or supported by official or quasi-official policies and directives, and brought to bear on the civilian population in a situation of social or military conflict. There is likewise no impediment to including grievous bodily harm in these considerations.

715. Based on this established standard, the writings of legal scholars have underscored the structured, political and systematic level of the acts of aggression that constitute crimes against humanity. On this point, AMBOS has stated: "*The common denominator of a systematic attack is that it is carried out according to a preconceived plan or policy, emphasizing the organized nature of the attack. The attack is systematic if it is based on a policy or a plan that provides guidance to the individual perpetrators with regard to the target of the attack, i.e., the specific victims. . . This is, in fact, the international element of crimes against humanity, since it is what makes criminal acts that would be common crimes under*

crimes could be committed in times of peace). Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), art. 1(b), U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7218 (1968) (refers to crimes against humanity "whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg [...].")

110. [...]Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 644 (May 7, 1997) (civilian population means those persons that are not part of the organized power that is the source of the violence [...]).

111. [...].Prosecutor v. Erdemovic, Case No. IT-96-22-T, Judgment, (Nov. 29, 1996) (the Tribunal states that, unlike under ordinary law, the attack is no longer directed at the physical welfare of the victim alone but at humanity as a whole. Those crimes also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated).

other circumstances acquire the character of crimes against humanity. In essence, the political factor only requires the exclusion of the casual acts of individuals acting on their own, in an isolated manner and without anyone coordinating them. . . Such common criminal acts, even if committed on a widespread scale, are not crimes against humanity if they are not tolerated, at least by some State or organization. . . Thus, in order to be crimes against humanity, crimes committed on a widespread scale must be linked to some form or another of state or organized authority: they must at least be tolerated by such authority."[112]

716. For its part, the International Criminal Tribunal for the former Yugoslavia in the case of PROSECUTOR V. BLASKIC recognized an attack as systematic based on the following indicators, which can always be inferred from the context: *"a) the existence of a political objective, a plan pursuant to which the attack is perpetrated, or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; b) the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; c) the preparation and use of significant public or private resources, whether military or other; d) the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan."*[113] [. . .] Only the attack—not the specific acts of which the defendant is accused—must be widespread or systematic. In addition, as held by the IACtHR in the Case of ALMONACID ARELLANO V. CHILE (Judgment September 26, 2006, para. 96), even a single act, committed in the context of a widespread or systematic attack, is sufficient to give rise to a crime against humanity.

717. Based on the foregoing, it is clear that the acts of murder and grievous bodily harm at issue in this case go beyond a strictly common or individual scope and are fully consistent with the identifying criteria of crimes against humanity. The murders and grievous bodily harm committed in the cases of Barrios Altos and La

112. KAI AMBOS, ESTUDIOS DE DERECHO PENAL INTERNACIONAL 133-35 (IDEMSA 2007).

113. Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, Judgment, ¶ 94 (Mar. 3, 2000) *cited in* Scilingo, SAN, Apr. 19, 2005 (No. 16/2005) "Caso Scilingo" [Scilingo Case] [...].

Cantuta are also crimes against humanity, fundamentally, because they were committed within the framework of a state policy of selective but systematic elimination of alleged members of subversive groups. This policy, on one hand, was designed, planned and controlled at the highest levels of State power, and carried out by state agents—members of military intelligence—who used the military apparatus to do so; in addition, in accordance with their objectives, it affected a significant number of defenseless members of the civilian population.

This conclusion is absolutely compatible with what was set forth in Part II of this Judgment. It has been proven that it was either a state ordered decision, or approved by the head of state, that it was carried out by the military intelligence bodies (the Colina Special Intelligence Detachment and the DINTE), directed ultimately by the SIN, that it had all of the official support imaginable, and that its final objective was the forced disappearance and/or arbitrary or extrajudicial execution of alleged subversives, of which two important events—but not the only ones—were specifically Barrios Altos and La Cantuta.

The foregoing coincides absolutely, based on the totality of the evidence examined, with the decisions of the IACtHR and the Constitutional Court, which also classified these acts as crimes against humanity under international criminal law.

Chapter II: Perpetration by means of control over an organized apparatus of power

§3. Perpetration by means of control over an organized apparatus of power

¶1. Background and evolution of the criminal doctrine.

724. The emergence of this approach began with the analysis of the Eichmann and Staschynski cases. The assessment of those cases demonstrated that it was not possible to link the defendants to the classic options of perpetration by means. However, ROXIN proved that both of the accused were part of an organized apparatus of power and that the crimes attributed to them in fact reflected plans and orders from the central bodies of those structures, which controlled and directed their execution. Accordingly, it was possible

to conclude that the immediate perpetrator of the crime, the mid-level commanders and the central body of the power structure that ordered its execution all had different ways of controlling the act, but were not mutually exclusive.

Thus, while the first had *control over the action*—that is, the physical execution of the punishable act—the second and third had *control over the organization,* meaning the ability to influence and control the realization of the criminal event, from their respective functional level, through the power structure that was at their disposal. This made the latter true indirect perpetrators, since "*the control over the event exercised by the 'person in the background' is based on the fact that he can, through the apparatus at his disposal, bring about the effect with greater certainty than even in the case of control through coercion and error, which are recognized almost unanimously as cases of perpetration by means."*

Therefore, it is a question of specific control that the principal exercises over the organization, and not one of a person to person relationship or direct control over the immediate perpetrator. As such, the basis of this form of perpetration by means cannot rest on control or dominance over the "*intervening person*," since that person ultimately "*is a free and responsible person in the performance of his own actions*." The control exercised by the perpetrator by means is exercised over the apparatus and its structure, into which the person who carries out the act is included and incorporated.

725. THE COURT'S ACCEPTANCE OF ROXIN'S THEORY. ROXIN's concept was invoked judicially for the first time in 1985 and 1986, in the judgments handed down by the Argentine Tribunals tasked with trying and reviewing the conviction of the Military Juntas that ruled Argentina from 1976 to 1983 (Judgment of December 9, 1985 issued by the National Court of Appeals for Federal Criminal and Correctional Matters of the Federal Capital, and the December 30, 1986 Judgment of the Supreme Court, respectively). The judges in the court of first instance arrived at the conclusion that the senior members of the military were criminally responsible as perpetrators by means. Thus, in point VII.6 of their decision, under the subtitle "*The path to be followed*," they emphasized that the defendants had at all times maintained control

over the people who carried out the acts and, therefore, had to be held responsible as indirect perpetrators of the crimes committed. That decision was later reviewed by the Supreme Court, and in a split decision the majority also applied the theory of perpetration by means of control over the organization.

Subsequently, it was the German Federal Supreme Court, in its Judgment of July 26, 1994(BGHSt, Vol. 40, pp. 218-240) that turned to the concept of perpetration by means of control over an organized apparatus of power to hold the members of the National Defense Council of the former German Democratic Republic criminally liable for the murders committed by shootings or through the placement of deadly landmines in the vicinity of the Berlin Wall. In that case, the three members of the National Defense Council were found to be indirect perpetrators of those deaths. In this manner, the Court modified the lower court's decision, which had only considered them instigators of those crimes. In our case law, this type of perpetration by means has also been attributed to the leader of the terrorist group Shining Path, Abimael Guzmán Reynoso. The judgment of the National Criminal Court of October 13, 2006, as well as the Final Judgment of the Second Temporary Criminal Chamber of the Supreme Court (the majority opinion) of December 14, 2007, held him responsible for the homicides and attacks carried out by the operational levels of that outlaw organization. In these national court decisions, the individuals who physically executed the crimes were considered direct perpetrators of those abominable acts, while those crimes were attributed to Guzmán Reynoso by virtue of the fact that he controlled the organization, by exercising political and military control over Shining Path from his position and rank in the Central Committee.

[. . .]

¶2. The General Assumption: The existence of the organization.

726. STRUCTURED ORGANIZATION. CHARACTERISTICS. The theory of perpetration by means of control over organized apparatuses of power is based fundamentally on the "prior existence of a structured organization." Such organization has a solid hierarchical line that will make its highest strategic level responsible for the criminal decisions and plans made therein, which, will be

later assigned to the immediate perpetrator through the vertical channel provided by its structural design.

Accordingly, an important characteristic of this type of hierarchically organized structure that highlights its strict verticality, is (i) the "assignment of roles." This phrase is more ideographic than those commonly used in contemporary penal doctrine to explain the relationship between the strategic level and the physical perpetrator of the act, and that refer to a division of labor or distribution of duties. Furthermore, such references could confuse 'perpetration by means' with cases of co-perpetration. In this respect, ROXIN has specified that, *"it is also not possible to speak of a 'division of labor' –which currently is considered generally to be a central element of co-perpetration—when the holder of power leaves it completely to the executing bodies to carry out his order."*

It is important also to stress, as another characteristic of these power apparatuses with organized hierarchical structures, that (ii) they develop a functional life that is independent of their members. They are grounded not in a special state of mind of the highest strategic level, but rather in the "*functional machinery of the apparatus*," that is, their "*automatism*" or development of a self-propelled process or operation. Consequently, the "person in the background" can always be confident that his criminal order or plan will be followed without the need to know the immediate perpetrator. It is, then, the "*automatic operation of the apparatus*" that actually guarantees compliance with the order. Therefore, it is not essential for there to be an express order, contained in a document, whereby the strategic superior directly orders the immediate executor to carry out a specific function. However, that does not mean that the superior is completely removed from the specific action of the organization; rather, his presence is noted in the configuration or operating capacity of a series of mechanisms that interact from inside and outside the power structure and which enable the apparatus to remain active and carry out its criminal plans.

¶3. The Specific Elements and their Requirements.

727. ELEMENTS AND FUNCTIONAL REQUIREMENTS. The identification of the hierarchical organizations that constitute organized apparatuses of power, which are the basis of the form of perpetration by means under examination, also requires proof of the

presence of what the German Federal Supreme Court has called the "*framework conditions.*" That is, the functional requirements and elements. They are as follows: 1) command authority; 2) the deviation of the organization from the legal system; 3) the fungibility of the immediate perpetrator; and 4) the elevated willingness of the executor to commit the act.

[. . .]

¶4. Objective Elements and Requirements.

4.1. Command authority.

729. CONCEPT. As indicated, *command authority* is a fundamental condition to charge perpetration by means in the context of an organized power structure. Command authority is the capacity of the strategic superior—of the "person in the background"—to give orders or assign roles to the part of the organization that is subordinate to him. He acquires this capacity, or it may be conferred upon him, by virtue of a position of authority, leadership or influence derived from political, ideological, social, religious, cultural, economic, or other similar factors.

[. . .]

730. FORMS OF COMMAND AUTHORITY. In this context, a distinction can be made between command authority, which is exercised at the superior strategic level and that which is realized at the intermediate levels. It is important to distinguish that command authority can be expressed in two ways: first, from the superior strategic level down to the intermediate tactical or operational levels; and second, from the intermediate levels to the direct executors. In both cases, such command authority will always be manifested vertically. The latter will be decisive for the attribution of perpetration by means to all of the commanders in the chain of the power structure, as it is not possible to equate the manner and scope with which the superior strategic level gives or transmits its decisions with those given by the mid-level commanders to the direct executors, precisely because of the different position that each level occupies inside the criminal organization. The control over the organization that is exercised from the superior strategic level will be different from that held by the intermediate commander, since whomever is at the apex of the hierarchical structure has total domination of the apparatus, while whomever is in the intermediate

position only has the potential to give orders in the sector of the organization in which he is authorized to do so.

This view of the organization and its functional hierarchies has been applied in the national courts to interpret the design of the Shining Path. Indeed, the National Criminal Court specified that the so-called *Central Leadership* exercised the *"real power of control over the entire organization,"* since it was in charge of presiding over and directing meetings held with the *intermediate bodies*, and at the same time controlled the proper operation of the criminal apparatus. For their part, those "*intermediary bodies*" were made up of the so-called *Regional Committees* and *Zone Committees*. Then, on a lower rung, there were *Sub-Zone Committees* and *Cell Committees*. The National Criminal Court found that when this terrorist group became militarized, all of the structures worked in terms of conducting armed operations. In that sense, when they formed the so-called *People's Army*, those individuals who had been the *Political Secretary* and *Undersecretary* of a *Committee* became the *Political Commander* and the *Military Commander*, respectively.

[. . .]

732. COMMAND AUTHORITY AND ORDERS. CLASSIFICATION.

> 1. As stated previously, the most typical manifestation of command authority is an order. This must be understood as an order that provides for the performance of an act or mission that the subordinate must carry out in view of the functional position and hierarchy of the one issuing the order. It can be verbal or written. However, it can also be expressed through signs or gestures. As such, two levels can be differentiated with respect to orders.
>
> At the first level, there are the formal orders that acquire such status according to mandates, directives and orders. On the other hand, at the second level there are orders given for their substantive effectiveness, that is, the signals, expressions, gesticulations, specific actions or similar expressions of another kind.
>
> [. . .]

> 2. The first-level orders are frequent in those organizations that, removing themselves from the formal and legitimate system that governs their structure, deviate toward the fulfillment of criminal objectives.
>
> 3. The case of the Military Juntas of the Argentine government evidenced this type of conduct.
>
> [. . .]
>
> 4. The orders at the second level are used, generally, by organized apparatuses of power that have been structured from their inception completely outside of the legal order. Such is the case of terrorist organizations that pursue the violent takeover of political power.
>
> 5. According to national case law, this occurred within the Shining Path organization through the decision-making power held by its Central Leadership. Indeed, as established by the National Criminal Court, many of the orders that were issued consisted of a series of codified gestures and practices that only the members of the organization, especially its leaders, would use and interpret. Thus, it was a procedure regulated by the top leaders that prior to committing an assassination, it was necessary to "unmask the victim," whether that person was a public servant or a businessman. This was done by putting up posters, distributing flyers, publishing in newspapers or other media, or through specific criticism that the Leadership would make against a specific public figure during Central Committee sessions or other events in which the murder of certain individuals was proposed. Those individuals would be eliminated shortly thereafter, and later, the Central Leadership would hold up the event expressly as a success of the organization. According to the judgment of the National Criminal Court, said procedure was adopted by Abimael Guzmán Reynoso against retired Vice Admiral Gerónimo Cafferata Marazzi, during the so-called IV National Conference held in 1986.

4.2. Deviation from the Law. Types and Characteristics.

733. DEFINITION. Another objective element of perpetration by means of control over an organized apparatus of power is "*detachment*" from or "*deviation"* from the law. "The law" is identified as a legal system or order represented by a *coordinated set*

of general and positive norms that regulate social life. The State, as a community, defines its normative order. This normative order can only be a legal order, meaning that which is commonly referred to as the "law of the State" or "national law." Nevertheless, this national law is closely linked and integrated with international law, forming a single unit. As such, international law forms part of the national legal system, insofar as the standards created in the international context are incorporated into the national law of the State. Consequently, the detachment or deviation from the law means that the organization is structured, operated and remains outside the national and international legal order.

734. SCOPE OF DEVIATION FROM THE LAW. PRESUMPTIONS. As ROXIN notes, in these cases, *"the apparatus functions as a whole outside the legal order."* That is, it causes its illegal effects as a complete whole that acts totally outside the law. In his analysis of the Eichmann and Staschynski cases, he found that state power was operating outside the law since the very guarantees that it regulated were ineffective. However, that did not mean, necessarily, that those holding such power were not ultimately governed by that same legal order, especially in its international aspect. In ROXIN's opinion, deviation from the law refers not only to disregard for the national legal system of each State but also, and very specifically, to disregard for international law: *"only because all peoples of the world are tied to certain values is it possible for us to consider criminal and punishable the conduct of superior State entities that clearly violate human rights."*

Another presumption of perpetration by means of control over an organized apparatus of power, recognized by ROXIN, arises in the case of crimes committed by clandestine movements, secret organizations and similar associations that clash with the domestic laws of the State. That is, they operate as *"a kind of State within the State that has freed itself from the community order in general, or in specific dealings with the community."* In short, in ROXIN's opinion, deviation from the law would arise not only in crimes committed by State entities or apparatuses of state power but also would be applicable to cases of *"non-state organized crime"* and in many *"forms of the emergence of terrorism."* Only cases of corporate criminality should be excluded. Consequently, all conceptualization and understanding of detachment or deviation

from the law must begin by identifying whether the issue deals with state criminality or nonstate criminality. That will be fundamental in being able to observe, in each criminal structure and expression, the presence of perpetration by means of control over organized apparatuses of power.

735. PERPETRATION BY MEANS AND STATE CRIMINALITY. Given the characteristics and content of the accusation in the case at hand, it is relevant to evaluate the specific expressions and manifestations of perpetration by means that are shaped and operate as state criminality.

[. . .]

2. It is important to note that an important peculiarity of this type of crime lies in the fact that the strategic superior level of the State, that is, its central authority, uses the structures of the state apparatus in the exercise of its position for the systematic commission of crimes that acquire international relevance due to their seriousness and the risk of impunity. This form of criminality attacks the legal order in force, marginalizing the legally enacted laws in their national as well as supranational aspects. Therefore, a State regime that from its superior strategic level orders the commission of these serious crimes cannot be considered a State of laws; indeed, it is completely outside the law.

[. . .]

736. *DE FACTO* GOVERNMENTS AND DEVIATION FROM THE LAW. In this context, it is relevant, particularly to the case at hand, to evaluate the status of so-called *de facto* governments that become *de facto* by reasons of the manner in which power is exercised. That is, those that are originally instituted pursuant to the legal procedures stipulated in the Constitution, but later begin to express, manifest and conduct themselves outside or in violation of the law.

¶5. Subjective Elements and Requirements.

1. Fungibility. Types.

737. CONCEPT. Fungibility is the first subjective element on which a charge of perpetration by means of control over an organized apparatus of power is based. It has been understood, generally, as the direct executor's capacity to be exchanged or

substituted by the strategic superior in making his criminal plan operational and in executing it. In that regard, FERNÁNDEZ IBÁÑEZ, paraphrasing the position of JOECKS, indicates that the *power of substitution* held by the person in the background is a central element of this form of imposing his dominant will.

[. . .]

738. TYPES OF FUNGIBILITY. Based on the foregoing, two types of fungibility can be identified: *negative and positive.*

> 1. Negative fungibility. This corresponds to the traditional concept conferred upon it by ROXIN, which means, above all, that: "The perpetrator does not represent a free and responsible individual, but an anonymous, interchangeable figure."
>
> [. . .]
>
> 2. In order to illustrate this fungible mode, ROXIN referred to the arguments asserted by Eichmann's defense counsel before the Jerusalem Tribunal. In his opinion, it was irrelevant if the Nazi officer failed to carry out the order to execute the Jews, since the order, even in such case, would have been carried out. In this manner it was clear that the crime was not the work of an individual person, but rather of the State itself. National case law has also referred to this position of negative fungibility. Indeed, the National Criminal Court in its judgment against Shining Path leader Abimael Guzmán Reynoso, held: "The person in the background did not control the will of the executor directly, but rather only indirectly through the criminal apparatus." This was due to the coincidence of two independent factors: first, because of the decisive nature of the management of the apparatus; and second, due to the link, membership and subordination of the executor to the hierarchy of this apparatus.
>
> 3. Positive fungibility. This arises and is seen, precisely, where there is a plurality of potential executors in the structure of the apparatus of power.

[. . .]

739. FUNGIBILITY AND THEORETICAL DISCUSSION. A minority sector of legal scholars have questioned the condition that

fungibility be an essential element of the offense of perpetration by means of control over an organized apparatus of power.

[. . .]

> **2.** In the national jurisprudence and legal scholarship, SCHROEDER's theory has been echoed by MEINI MÉNDEZ and by the National Criminal Court in the Guzmán Reynoso Judgment. In the opinion of the former, the possibility of substitution is an expectation of criminal conduct and it becomes a simple piece of statistical information on the likelihood of the success of the criminal plan, and therefore it is unnecessary to mention the possibility of substituting the executor as a decisive element of control over the organization. For the latter, control lies in the *"use of the predisposition of the executor"* to carry out the order. The possibility of substituting the direct perpetrators represents solely a greater likelihood that the criminal conduct will materialize, but it does not support any control.

[. . .]

2. Predisposition to commit the unlawful act.

740. NECESSITY OF ITS INCLUSION. The three criteria examined up to this point: command authority, deviation from the law and fungibility, were for a long time the three basic pillars of ROXIN's theory of perpetration by means of control over organized apparatuses of power. Nevertheless, as mentioned previously, in his latest studies this author has considered the inclusion and integration of a fourth element called the *considerably high willingness of the executor to perform the act.*

[. . .]

Its jurisprudential usefulness in deciding cases of perpetration by means in cases of State crimes was made clear in the mid-[1990s] by the German Federal Supreme Court in its judgment against the members of National Defense Council of the German Democratic Republic. In that judgment, the responsibility of the perpetrator by means was based on showing that the "person in the background" had taken advantage of the *"unconditional willingness of the immediate perpetrator to execute the crime."*

[. . .]

§4. Perpetration by means and superior responsibility in international criminal law

742. BACKGROUND. It is important to distinguish between perpetration by means of control over an organized apparatus of power and other means of accusation developed in international criminal law to attribute criminal responsibility to strategic levels of State or State-based power structures. Specifically, we refer here to the theory of superior responsibility. This is a criterion of accusation that arose and was developed at the end of WWII and which was implemented at the Nüremberg and Tokyo trials.[114] According to those who have studied these cases, *"In those trials, the idea was made clear that the commanders not only had the duty to respect the laws of war but also the obligation to make their subordinates respected them."*[115] Later, around the mid-[1990s], the International Criminal Tribunal for the former Yugoslavia also used this theory to convict the military commanders of the Army of the Serbian Republic of Bosnia and Herzegovina who failed to prevent their subordinate troops from perpetrating crimes against humanity, and those who omitted to investigate or punish the direct perpetrators of those criminal acts.[116]

743. CHARACTERISTIC ELEMENTS OF SUPERIOR RESPONSIBILITY.

Superior responsibility, as interpreted in scholarly opinions and regulated under international criminal law, establishes the liability by omission of the person who exercises command over the direct

114. Eduardo Bertoni, *Autoría mediata por aparatos organizados de poder: Antecedentes y Aplicación Práctica in* LOS CAMINOS DE LA JUSTICIA PENAL Y LOS DERECHOS HUMANOS 4 (IDEHPUCP 2007).

115. *Id.* at 29.

116. MIREILLE DELMAS-MARTY, ¿PUEDEN LOS CRÍMENES INTERNACIONALES CONTRIBUIR AL DEBATE ENTRE UNIVERSALISMO Y RELATIVISMO DE LOS VALORES? CRÍMENES INTERNACIONALES Y JURISDICCIONES INTERNACIONALES 83 (Editorial Norma 2004) provides important clarification with regard to the fact that although the Statute of the International Criminal Tribunal for the former Yugoslavia [unlike the Statute of the International Criminal Tribunal for Rwanda] seemed to require the existence of an armed conflict for the commission of crimes against humanity, *"in practice, however, the autonomy of the ICTY was strengthened with the Tadic judgment, in which the Appeals Chamber held that customary international law no longer required a link between crimes against humanity and an international armed conflict. In other words, it is clear that a crime against humanity can be committed in peace time."*

perpetrator of the crime.[117] In such cases, it is generally stated that the superior fails to comply with his duty of prevention, supervision and punishment of all crimes that are, or may be, committed by his subordinates. This means, then, that there is a legal obligation on the part of the superior, which he omits. According to AMBOS, "*The concept of command, or better, superior responsibility, makes the superior liable for a failure to act to prevent criminal misconduct of his or her subordinates. The superior is punished for a lack of control and supervision of his or her subordinates who commit crimes. Thus, the superior is punished both for his or her own failure to intervene and for the crimes of others. As a result, the concept seems to create, on the one hand, direct liability for the lack of supervision, and, on the other, indirect liability for the criminal acts of others. [. . .] Superior responsibility has a double character: it is a genuine offence of omission [. . .] and an offence which creates danger. . .*"[118]

744. DEFINITION. It is clear, then, that in view of its characteristics and assumptions this mode of assigning responsibility is different from perpetration by means of control over an organized apparatus of power. The latter, essentially, will always be an act of commission, but one that travels from the issuance of the order by the strategic superior to its specific execution by the intervening

117. KAI AMBOS, LA PARTE GENERAL DEL DERECHO PENAL INTERNACIONAL 79 (Temis 2005) (this doctrine presupposes that the perpetrator holds a specific position of military or political power. It is, furthermore, intimately related to a punishable act of omission. The perpetrator's position as a commander places him in a position of guarantor, which results in the emergence of specific duties of control, protection or oversight (duties of the guarantor), noncompliance with which makes him guilty by omission).

118. KAI AMBOS, EL NUEVO DERECHO PENAL INTERNACIONAL 375 (ARA Editores 2004). The concept of "superior responsibility" has a dual aspect: it is a crime of omission and a crime that creates danger. The superior is punished, from the objective perspective, for failing to supervise the subordinates and for not "preventing" or "suppressing" the commission of their atrocities. The crimes committed by the subordinates are neither an element of the crime nor a simple objective condition for the liability of the superior; they are only the point of reference of the superior's failure to supervise. From the subjective perspective, the criminal intent of the superior is not limited solely to the failure to supervise, which creates the risk or the danger that the subordinates will commit crimes, but also to those derivative crimes themselves. Kai Ambos, *La responsabilidad del superior en el derecho penal internacional in AA.VV.: La nueva justicia penal supranacional* 159, 197, 198 (Editorial Tirant lo Blanch 2002).

person.[119] The difference is also developed normatively in the Rome Statute, which regulates precisely both types as two distinct levels of involvement and punishability of the strategic bodies linked to the commission of crimes that violate human rights. Indeed, Article 25(3)(a) of the Statute identifies perpetration by means fairly clearly ("Commits such a crime, whether as an individual, *jointly with another or through another person, regardless of whether that other person is criminally responsible*").[120] On the other hand, Article 28 defines in detail the conditions of omission that constitute superior responsibility ("*. . .as a result of his or her failure to exercise control properly. . .*").[121]

119. For a discussion of the differences, *see* GERHARD WERLE, TRATADO DE DERECHO PENAL INTERNACIONAL 217-18, 225-25 (Editorial Tirant lo Blanch 2005). The author indicates (1) that perpetration by means is recognized in the major legal systems of the world; however, prior to the entry into force of the Rome Statute it was neither regulated in international law nor had it been implemented in its case law; (2) that in international criminal law perpetration by means is relevant, above all, in the form of control over an organization; (3) that the regulation by the Rome Statute, in terms of the punishability of the perpetrator by means is independent of whether the immediate perpetrator is himself criminally liable. Article 25(3)(a) has an explanatory effect in two regards [one is underscored], by virtue of which the concept of the "perpetrator behind the perpetrator" acquires a basis in international criminal law, as the responsibility of the person who acts as the direct or immediate perpetrator is not excluded expressly. On the other hand, regarding the concept of *superior responsibility*, he notes (4) that is a legal creation of international criminal law, under the aegis of which the military leader or civilian superior can be held responsible for crimes against international law committed by the subordinates, when they are to blame for the violation of their duties of control; and, (5) that from the theoretical point of view, this concept can be placed between responsibility by omission and the theory of criminal participation, which presents complicated issues of definition and of concurrence with the general principles of the theory of participation.

120. Dino Carlos Caro Coria, *La tipificación de los crímenes consagrados en el Estatuto de la Corte Penal Internacional in* AAVV LA CORTE PENAL INTERNACIONAL Y LAS MEDIDAS DE SU IMPLEMENTACIÓN EN EL PERU 145 (Elizabeth Salmón ed. 2001) (this formulation, as DINO CARLOS CARO CORIA emphasizes, incorporates ROXIN's theory of perpetration by means through "organized power structures").

121. In this respect, *see also* Brief for Allard K. Lowenstein International Human Rights Clinic of Yale Law School as Amicus Curiae, at 27. It states as follows:

> In this way, unlike perpetration by means or co-perpetration, superior responsibility attributes responsibility to superiors for their omissions—that is, their inaction when it comes to taking the necessary and reasonable measures to prevent the criminal act or to punish the crimes committed by their subordinates. In comparison, perpetration by means and co-perpetration

§5. Defendant Fujimori Fujimori as perpetrator by means

745. The defendant's indirect perpetration of the acts of which he is accused, in accordance with Chapter II of Part III and what has been set out in the previous paragraphs of this Chapter, is sufficiently proven. The legal and factual elements, which as presumptions and requirements support such level and method of assigning criminal responsibility, have been satisfied conclusively. In that respect, the following information is relevant:

> 1. The defendant occupied the highest position at the strategic level of State power in general and of the National Defense System in particular. From that position he exercised clear command authority for the direct political and military leadership of strategies for confronting the subversive terrorist organizations that had been active in the country since the beginning of the [1980s].
>
> 2. In his formal role as central entity, that is, as shaper and developer of government policies, and as Commander in Chief of the Armed Forces and the National Police, the defendant abused his position of authority and perverted the legitimate use of his power; as of [1990] (together with his advisor Vladimiro Montesinos Torres and with the direct support of Army General Hermoza Ríos, who held the highest positions in the military hierarchy), he began to set up an organized apparatus of power based on the central and derivative units of the SINA, which were co-opted at their highest levels of command.
>
> 3. In this context, defendant Fujimori Fujimori started to devise, and simultaneously to define, special objectives and strategies to confront terrorist subversion, particularly the core groups that had begun to operate in the country's urban areas, most notably in the capital and surrounding areas. He did this with his advisory milieu and the support of the State, using the secret intelligence services, which because of their function were characterized by the compartmentalization of their bodies or units, the hierarchical subordination if their structures, and the secrecy and complete clandestinity of their agents and actions.

generally presume that the perpetrators perform some positive act to set in motion the events that lead to the crime.

4. In this control, with the central government objective as the defined policy, the general strategies and the execution orders were issued or transmitted by the defendant and retransmitted by the other levels of the organized power structure in very diverse ways, fully consistent with the informal or quasi-formal systems that characterize the codes of communication and action manuals typical of the strategic or operational intelligence system.

5. In that context and practice, the underlying theme was the elimination of alleged terrorists and their organizations or bases of support. The specific strategy accorded to it was the identification, location, capture and physical elimination of members and sympathizers of the terrorist groups. At the tactical level, the operational pattern for the application of this strategy began with the gathering of information on the subversive core groups and their members, in order to later eliminate them with special intelligence operations under the responsibility of specialized SIE units that would be assigned and supervised by the SIN, with the logistical support and coordination of the Peruvian Army Headquarters.

6. The crimes of murder and grievous bodily harm that occurred in Barrios Altos and La Cantuta were acts committed in the execution of those objectives. They involved the strategy and tactical patterns of special intelligence operations against terrorist subversion, clearly illegal and clandestine in nature, that cannot be supported by the national and international legal systems that they subordinated systematically or from which they deviated completely.

7. The crimes of kidnapping against the victims Gorriti and Dyer also were in response to orders given and/or supported directly by the defendant for the unlawful control of political dissidence or criticism of his de facto regime, in a situation of democratic instability where fundamental rights and guarantees were disregarded by force.

8. Furthermore, in all of the crimes at issue in this case, the fungible status of the direct perpetrators as well as their willingness to execute the act and their lack of any direct or horizontal relationship to the defendant, confirm his status as a perpetrator by means, as the central entity with hierarchical control over the power structure, whose "automatism" he was

> familiar with and could control through his mid-level commanders.

746. The criminal activity and operations of Barrios Altos and La Cantuta, and in the basement of the SIE, carried out by the organized apparatus of power built and energized by the defendant from the SINA—whose basic executing core with regard to the control of subversive terrorist organizations was the Colina Special Intelligence Detachment—were an expression of State criminality against human rights in clear deviation from and continuous violation of national and international law. As stated by FARALDO CABANA: "The objectives of these state organizations that begin to act criminally coincide with those of the State, but the means used remain autonomous and differentiated from those provided in the legal system, as they are criminal in nature. Therefore, it can be asserted that the organized apparatus of power, which is no longer the State as a whole but rather a specific State organization (i.e., the State security forces and agencies, the Armed Forces, the intelligence services), acts outside the framework of the legal system; this is a necessary requirement, as we know, for the application of the theory of control over the organization.["]

747. Furthermore, in the field of criminology there is no current substantive inconsistency between the categories of Criminal State and Dirty War waged by state organizations as the defense asserted in its oral argument. Moreover, the defense has attempted to construct a fallacy surrounding the options set forth by FARALDO CABANA, whose classification with respect to the matter is a mere criminological option that is neither the sole nor the predominant one among contemporary approaches to the subject. It is even possible to observe a distortion of the author's opinion by the defense counsel, since in no section of her monograph does the jurist affirm that Criminal States use the entire State apparatus for acts involving the extermination of persons.

On the contrary, there is consensus in recognizing that both demonstrations of criminality and criminological categories stem from the same etiological source: State Criminality. That is, criminal behavior created, executed, supported, tolerated or justified at the highest spheres of state power. They are part of forms of criminality that, as understood by HASSEMER, materialize only with the

support of the State. Their features of criminality and neutralization or impunity, in a macro or micro sense, are the same, and have been summarized precisely by ZAFFARONI. This author underscores as such the denial of responsibility, the denial of the harm and the denial of the victims, the latter being ". . .the most common neutralization technique in State crimes. The victims were terrorists, traitors to the nation, they were the real aggressors, the crime of state was not a crime but rather legitimate and necessary defense, and so on.["]

Not in the most notable legal scholarship in the field of criminal law, nor in international criminal policy on the protection of human rights, are there qualitative differences between one or another criminal manifestation of the institutions of state power, as the defense has also asserted. On the contrary, the same concepts, characterizations and strategies of prevention and oversight are applied to them all.

At the most, it has been maintained, in a strictly academic and not in a substantive or functional sense, that there are some variations of degree, whereby both expressions—Criminal State and Dirty War—carried out by state organizations, can be considered quantitative modes of the same model of action or *modus operandi* for the realization of like objectives and policies that violate human rights through the murder, kidnapping or disappearance of groups of the defenseless civilian population. Thus, in the first, the spread of the criminal acts covers distinct spheres of the State. In the second, on the other hand, the selective and sector-based criminal activity of strategic bodies and special operations predominates. Nevertheless, the clandestine and illegal nature of the plans, the secrecy of the executors, the undercover control of the operations, the cruelty of the procedures, the tolerance of the supervisors, the justification of the means and the official use of mechanisms of impunity in the shaping of policies and for the communication or execution of the criminal decisions and orders, are shared and are common to both forms of state criminality. Accordingly, criminal responsibility is assigned to them under both national and international criminal law. FARALDO CABANA, in this respect, notes that ". . .these actions of State bodies that entail the perverse use of the state apparatus in the service of the systematic and organized violation of human rights are also the subject of international law and international criminal law when

they are consistent with crimes against humanity. This occurs when the commission of crimes against basic legally protected individual rights such as life, liberty, dignity or physical safety, is combined with the objective of destroying in an organized and systematic fashion an identifiable group within the population, with the tolerance or participation of the *de jure* or *de facto* political authority.["]

748. Therefore, if the murders of Barrios Altos and La Cantuta, as well as the kidnappings in the SIE basement, were carried out with the imposition of the defendant's dominant will upon the organized power structure, and with a *modus operandi* that is typical, at least, of the second of those previously described expressions of state criminality, the indirect perpetration of those acts is entirely attributable to defendant Fujimori Fujimori. This is recognized in the very same theoretical option invoked by the defense, that is, FARALDO CABANA: "Also admissible is perpetration by means of control of the organization in cases in which certain state organizations, following instructions that come from the highest institutions of the State, begin to use criminal means to achieve political objectives pursued by the State as a whole or by the group (political, military) that dominates it at the time, such as the elimination of terrorist guerrilla movements or political dissidence." Furthermore, according to the same theoretical source, international experience, particularly in Latin America, demonstrates that: "it is characteristic of the operations of the state organizations that undertake a dirty war to cover up and conceal their criminal methods from third parties. We have seen how the Argentine tribunals highlighted the schizophrenic behavior of the State during the Argentine military dictatorship; while part of their organizations had begun to act criminally, carrying out a dirty war against political dissidence, the rest continued to conduct themselves normally and with respect for the law. The same occurred in Chile during the military dictatorship.["]

Chapter IV: Civil Reparations. Determination.

[. . .]

§2. Court decisions and payments made to the victims in the Barrios Altos and La Cantuta cases.

774. On March [14th, 2001], the IACtHR issued its judgment on the merits in the *Case of Barrios Altos v. Peru*. It held, pursuant to the terms of recognition of international responsibility made by the State, that the State had violated the right to life, the right to humane treatment, and the right to a fair trial and judicial protection. It also ordered, in pertinent part, that the reparations would be determined by mutual agreement among the respondent State, the Inter-American Commission and the victims, their next of kin or their legal representatives.

On November [30th, 2001], the IACtHR rendered its judgment on reparations, approving the agreement on reparations of August [22nd, 2001], entered into between the Peruvian State and the victims, their next of kin and their legal representatives. The agreement included the payment of one hundred and seventy-five thousand U.S. dollars (US $175,000.00) to each one of the surviving victims and for each one of the deceased victims (with the exception of Máximo León León, in which case the amount was two hundred and fifty thousand U.S. dollars (US $250,000.00)), as well as the payment of healthcare expenses. It also included the non-pecuniary reparations of publication of the judgment, a public expression of apology and the erection of a memorial monument.

775. On November [29th, 2006], the IACtHR issued its judgment on the merits, costs and reparations in the *Case of La Cantuta v. Peru*. It should be noted that the judgment of November [30th, 2007], which interpreted the judgment on the merits, reparations and costs, did not in essence modify the prior judgment.

> A. The IACtHR declared, in accordance with the admission of the Peruvian State, the international responsibility of the State for violations of the right to life, the right to humane treatment and individual liberty, and the right to a fair trial and judicial protection in relation to its obligation to respect the rights of the victims.

> B. The decision also ordered the State to: i) take the necessary actions to effectively conduct and complete, within a reasonable time, the ongoing investigations and the criminal proceedings pending in the domestic courts; ii) search for and locate the mortal remains of specific victims; iii) publicly acknowledge its liability; iv) include the victims in the memorial monument named "El Ojo que Llora" (The Crying Eye); v) publish the partial acknowledgement; provide health care services and specialized treatment to the relatives of the victims; and vi) implement permanent human rights-oriented programs for the members of the security forces and judges.
>
> C. The Court further ordered [. . .].[122]

[. . .]

777. Consequent to the decisions of the IACtHR, the Peruvian State complied in paying the compensation to the victims in the Barrios Altos Case, as reflected in the information forwarded by the executive secretary of the National Human Rights Council at pages twenty-three thousand seventy-five to twenty-three thousand three hundred and twenty-eight and at page sixty-one thousand seven hundred and seventy-one

With respect to the La Cantuta Case, the information on the record, contained in official letter No. 2007–2007–JUS/CNDH–SE of November [15th, 2007], does not reflect the State's compliance with payment of the monetary sums, although it must be taken into account that pursuant to the IACtHR's judgment in that case the Peruvian State stated that it had paid three million *soles* (S/3,000,000.00) between [1996 and 1998] [paragraph 197]. The last report of the executive secretary of the National Human Rights Council, contained in official letter No. 2096–2008–JUS/CNDH–SE, of last September twenty-second, stated that compliance with the monetary reparations was still pending. As far as the military criminal court judgment regarding the case of La Cantuta, the information in question confirms the payment of the civil reparations.

122. Refers to the payments to be made to the relatives of the victims. (Publisher's note).

§3. Civil reparations at the national level and the decision of the international court—Inter-American Court of Human Rights.

778. The Court must decide whether it is proper to issue a judgment ordering civil reparations to the victims and their next of kin for the acts perpetrated against them when there is already an international judgment addressing this same issue [. . .].

779. [. . .] The international responsibility of the State is direct and principal in nature, just as it arises in terms of the violation of the Convention rights attributed to the State, while in this case the direct civil liability for the commission of a crime is assigned to the perpetrator or participant in the crime, to the extent that he caused harm.[123] In the first case, it is the State that is obligated to provide reparations; in the second case it is the direct responsibility of the perpetrator of the crime, as the person who committed it. In principle, the person who is criminally responsible is also civilly liable.

780. The victims of the harm to be redressed are the same, the damages arose from a single unlawful event, and the judgments of the IACtHR have identified the victims and their relatives and also determined specific reparations for all of them. Bearing this in mind, it is not possible for them to receive additional, or double, compensation. For them to do so would give rise to the unjust enrichment of the victim, and the IACtHR maintains, with respect to this matter, that the enrichment or the impoverishment of the victim or his heirs is unacceptable[124] [. . .].

781. The principle that this case law doctrine conveys is clear. A double payment for damages arising from the commission of a single act, or rather, an unlawful result that gave rise to compensable damages, is not possible. Accordingly, it will only be possible to set monetary damages for those purposes not considered in a prior judgment, or with respect to individuals not included therein who deserve compensation. The only exception would be where, for those items already established—always or exclusively before the international court, which is at a higher level than the domestic

123. Final Judgment of March 29, 2001, Motion for Nullity No. 412-2001/Lima.

124. Case of La Cantuta v. Peru, Merits, Reparations and Costs, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 202 (Nov. 29, 2006) (with precedent in the Goiburú, Montero Aranguren and Ximenes López judgments).

court—a lack of reasonableness and/or proportionality is noted in light of the facts proven.

[. . .]

786. In addition, and in accordance with the doctrine assumed in paragraph 781, it must be determined whether the civil parties, who represent twenty-one of the twenty-nine victims of the Barrios Altos and La Cantuta cases, are entitled to compensation for their activities conducted in this trial. This would be an issue that was, of course, not addressed in the international case.

The doctrine established in the case law of the IACtHR (paragraph 243 of the La Cantuta Case) has established—updating, according to CHIOVENDA, the idea derived from Roman Law—that what is called "costs and expenses" (which in the new Code of Criminal Procedure takes on its own importance, and which it is proper to determine independently) is included within the concept of reparation. This is because the activity undertaken by the victims for purposes of obtaining justice entails expenditures that must be compensated when responsibility is established by means of a conviction.

[. . .] It is proper to assume this doctrine and therefore to determine, as part of the civil reparations, a sum of money for the expenditures that the civil parties have paid out in dealing with this case.

787. [. . .] Therefore, as it must be established at a reasonable amount, the total estimated sum—divided proportionately among the number of victims included in the civil party—shall be twenty thousand U.S. dollars (US $20,000.00).

788. It should be made clear that these payments must be made by defendant Fujimori Fujimori as the direct perpetrator of the crimes.[125] The State cannot be included because it has neither been served notice of summons nor been considered expressly as a liable civil party [Article 100 *in fine* of the Code of Criminal Procedure].[126] It is

125. Final Judgment No. 834-2000/San Martín, of June 9, 2000.

126. It is consistent doctrine, accepted by the Supreme Court, that the civil third party or liable civil party that has not been summonsed cannot exercise its right of defense and, consequently, the judgment ordering that it pay civil reparations is non-binding. *See*DOMINGO GARCÍA RADA, MANUAL DE DERECHO PROCESAL PENAL, OCTAVA EDICIÓN 106 (EDDILI 1984).

likewise necessary to bear in mind that the sums paid by the State at the international level, completely or partially, may be subject to repetition with respect to the defendant in an independent case, insofar as he is found to be the indirect perpetrator of the criminal attacks that were the basis for finding the international responsibility of the State.

§4. Other reparations claims. The position of the civil party.

789. The civil party [. . .] requested, in addition to the financial requests already made by the Office of the Attorney General, specific measures of satisfaction based on the Resolution adopted by the General Assembly of the United Nations on March [21st, 2006] in its Sixtieth Period of Sessions, "*Basic Principles* and Guidelines on the *Right* to a Remedy and *Reparation* for *Victims* of Gross *Violations of International Human Rights* Law and *Serious Violations of International Humanitarian Law*." On this legal basis, it requested as a measure of satisfaction that an official statement or court decision be issued to restore the dignity, reputation and rights of the victims and those persons closely related to them.

790 and **791**[127]

§5. Admissibility of the measures of satisfaction requested.

[. . .]

793. It is possible to assert, from a general perspective, that civil liability imposes upon the liable party the obligation to restore the wealth of the affected party to its state prior to the commission of the punishable offense. The purpose is always to make the most comprehensive reparation of the harm and to neutralize the effects of the criminal action, whether potential or actual. From this perspective, the national legislature has provided three options: restitution (which is preferred, and is a kind of assertion of the recovery claim in the criminal case), reparation and compensation.

[. . .]

The Criminal Code links *restitution*—as a form of restoring the legal status altered by the criminal act—to *reparation* when the latter

127. The civil party also requested other measures of satisfaction. (Publisher's note).

is connected to the deprivation of an asset as a result of the criminal conduct and restitution is not possible. It includes, obviously, the payment of the damage and deterioration of the asset, which nevertheless typically constitute compensation; restitution is made in the payment of the value of the asset in question, and reflects the magnitude of the harm caused [. . .]

Compensation, on the other hand, is established as a suitable means of financial compensation for harm to an individual's rights regardless of whether the damaged good is a physical thing or another interest—restitution, in any case, does not prevent compensation if some detriment has arisen from the crime. Such damages must be derived directly from the punishable act (cause/effect relationship), and they must be compensated, except, clearly, harm to an individual's rights and pain and suffering, insofar as they stem unequivocally from the events. There is reasonable discretion in the court's decision, but, pursuant to Article 1984 of the Civil Code, it must correspond to its magnitude and to the harm caused to the victim or his family. Nevertheless, there is no evidence on which to establish suitable grounds for compensation in order to quantify the appropriate compensation with financial criteria, and therefore the description itself of the crime itself must be borne in mind. In that case, it is set reasonably based on criteria of equity [See: Civil Cassation No. 47–1–1998]; Article 1984 of the Civil Code stipulates that the assessment of non-pecuniary damages—understood as harm to an individual's rights and pain and suffering—is according to their magnitude and the harm caused to the victim or his family. For this the court must take into account the nature of the interest harmed in terms of the non-pecuniary nature of the legally protected interest. Its determination will depend on each case and the personal conditions that warrant compensation; it should not be limited to purely mathematical calculations.

Recoverable damages are pecuniary or property damages, and non-pecuniary damages: harm to an individual's rights and pain and suffering. Pecuniary or property damages include damage to things and physical injuries, that is, the harm caused to economic rights, which must be redressed [the crime of bodily harm, for example, includes healthcare expenses, disability from employment, the discomfort, pain and inconveniences of the injury and curative treatment, and the consequences of the injuries]. Non-pecuniary

damages, subdivided into: i) harm to an individual's rights, understood as the harm caused to the basic or non-monetary rights of persons—harm or damage to a right, a benefit or interest of the person as such; and ii) pain and suffering, understood as the mental grief and suffering—which includes anxiety, distress and physical suffering—experienced by the victim and which is short-lived and not lasting, as defined by the Italian Constitutional Court in its Judgment No. 148 of July [14th, 1986].

[. . .]

Furthermore, *indirect or consequential damages* and *lost wages* must be included within pecuniary damages; strictly speaking, they are two categories of pecuniary damages. Consequential damages are understood as financial damage and physical or mental personal injury, with or without financial repercussions. Lost wages are understood as the absence of earnings that the victim reasonably would have produced; this, obviously, is hypothetical, that is, it assumes a probabilistic reading of how events would have unfolded but for the intervention of the crime at issue. With regard to the heirs (which is the case of most of the civil plaintiffs) the compensation can be broken down, following the Spanish case law, into three components: (1) healthcare and funeral costs, which provide a secure evidentiary base; (2) economic hardship, if they depended financially on the deceased, determined based on support allowances and the loss of financial care; and (3) pain and suffering, which is intrinsic and need not be proven.

794. In En Banc Decision No. 6–2006/CJ–116, of October [13th, 2006] (paragraph eight), the Supreme Court, in this same vein, established that civil damages must be understood as those negative effects derived from the harm caused to a protected interest, which can give rise to (1) *pecuniary damages*, consisting of a harm to rights of an economic nature, which must be redressed, based on the reduction of the net assets of the victim and on the non-increase of the victim's net assets or net worth of the earnings that he has stopped receiving (reduction of net assets); as well as to (2) *non-pecuniary damages*, limited to harm caused to the (non-monetary) rights or legitimate basic interests of individuals as well as entities; this is where intangible assets of the victim's, which do not have any financial implications, are affected.

795. The case law of the Criminal Chambers of the Supreme Court has consistently held that civil reparations have a scope of definition or extent that refers specifically to economic redress. The request put forward in the civil claim in the national criminal case, in the vast majority of cases, asserts that a conviction must entail, among other things, certain positive obligations. Article 93 of the Criminal Code establishes specifically that the purpose of civil reparations is the restoration of the asset or, if that is not possible, the payment of its value, and the compensation of damages. In cases of crimes such as those in the instant case, which are not crimes against property, neither restitution nor reparation is admissible, insofar as they correlate only to a person's net assets [the reparation of the harm consists of making a monetary payment in view of the asset that it is not possible to restore]; rather, it is compensation, which means to order the payment of an amount of money sufficient to cover all of the harm caused by the criminal offense.

796. The civil party, however, without denying the validity of the compensation measures included in our domestic law, considers that the scope of the reparation includes other measures in addition to compensation and restitution: measures of satisfaction, rehabilitation and non-repetition, contained in international human rights law. To this end, as specified in paragraphs 784 to 786, the assertion is based on the Resolution adopted by the General Assembly of the United Nations on March [21st, 2006] in its Sixtieth Period of Sessions, [128] "*Basic Principles* and Guidelines on the *Right* to a Remedy and *Reparation* for *Victims* of Gross *Violations of International Human Rights* Law and *Serious Violations of International Humanitarian Law*."

That Resolution, in its second whereas clause, recommends that the States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of, among others, the members of the judiciary. The Preamble of the Basic Principles and Guidelines recalls various provisions found in international instruments that recognize the right to a remedy for

128. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

victims of violations of international human rights law, including Article 2 of the International Covenant on Civil and Political Rights and Articles 68 and 75 of the Rome Statute of the International Criminal Court, as well as in regional international human rights provisions, such as Article 25 of the American Convention on Human Rights. In addition, the Preamble affirms that the Basic Principles and Guidelines apply to gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity. It also underscores that the clauses it contains specify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law.

Section IX of the Basic Principles and Guidelines addresses "reparation for harm suffered." Principle eighteen establishes that in accordance with domestic law and international law, victims shall be provided with full and effective reparation, as appropriate, in five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. **Restitution**, which has a broader meaning than that provided under domestic law, includes, as appropriate, restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property (principle nineteen). **Compensation**, which has an aspect that might be compared to our domestic law, includes any economically assessable damage (principle twenty). **Rehabilitation** includes medical and psychological care, as well as legal and social services (principle twenty-one). **Satisfaction**, not provided for under our national law, includes various measures such as verification of the facts and full and public disclosure of the truth, a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim, and a public apology (principle twenty-three). **Guarantees of non-repetition**—also not part of our national law—should include, among other measures, reviewing and reforming laws, educating and training public servants, and strengthening the independence of the judiciary (principle twenty-three).

[. . .]

798. The reparations measures ordered by the IACtHR are based on Article 63.1 of the American Convention on Human Rights and on the Court's interpretation of the theory of international responsibility, whereby it establishes reparations measures that tend to erase the effects of the violations committed. Within this framework provided by the Convention, specific reparations measures are developed for the regional protection system; they seek to overcome obstacles to the effective reparation of damages sustained by the victims, as well as to address the need to provide an answer that facilitates the decision of the case at hand.[129] The IACtHR, to the extent possible, orders full restitution to the situation that existed prior to the commission of the violation (*restitutio in integrum*);[130] and if that is not feasible in whole or in part, other measures are taken to guarantee rights, redress the consequences and compensate the damages, as well as to ensure the non-repetition of harmful acts similar to the ones that occurred in the case.[131]

799. In principle, the Court accepts the primacy of international human rights law as the basic support for its decision in this area. The standards found therein are binding, and are directly and immediately enforceable, insofar as they contain standards more favorable to the fundamental rights of the individual than those set forth in the Constitution.[132] As such, it is proper to integrate these provisions—based on their own terms—into the domestic system, as well as to apply the case law of the IACtHR to decide, in pertinent part, the conflicts of interest expressed at the national level.[133] The

129. Case of the 19 Tradesmen v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 221 (July 5, 2004).

130. Case of Myrna Mack-Chang v. Guatemala, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 236 (Nov. 25, 2003).

131. Case of Juan Humberto Sánchez v. Honduras, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 150 (June 7, 2003). Viviana Krsticevic, *Reflexiones sobre la ejecución de las decisiones del sistema interamericano de protección de derechos humanos in* CEJIL: IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS 24-25 (San Jose 2007).

132. César Landa *Implementación de las decisiones del sistema interamericano de derechos humanos en el ordenamiento constitucional peruano in* CEJIL: IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS 149 (San Jose 2007).

133. Case No. 25/26-2005/PI/TC, ¶ 26, 32, Tribunal Constitucional [Constitutional Court], Aug. 19, 2009

interpretive guidelines to the American Convention on Human Rights and the principles of jurisprudence that come from the IACtHR, in addition to being an inevitable guide for interpreting the rights recognized in the Convention, are binding upon this Court. This doctrine, furthermore, has been noted by the Constitutional Court in Judgment No. 0217–2002–HC/TC, of April [7th, 2002], and reaffirmed in Judgment No. 2730–2006– PA/ TC, of July [21st, 2006], paragraph twelve; it has also been emphasized in particular by the Supreme Court in Binding Final Judgment No. 18–2004, of November [17th, 2004].

[. . .]

800. Consequently, to the extent that the facts at issue in this case can be classified as ". . .gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law. . ." (principle four), the provisions contained in the Basic Principles and Guidelines shall be applicable in the national court, especially since they have been included consistently in the case law of the IACtHR.

§6. Ruling on the merit of the non-pecuniary measures requested by the civil party.

[. . .]

804. As noted from the comparative analysis of the judgments of the IACtHR and the previously cited requests for relief, three of those requests have already been admitted by the IACtHR: healthcare benefits, the search for the remains of the victims of La Cantuta and changes in the law—which in the case of the international decisions are specific, and therefore, controllable. Furthermore, every judgment that is issued on the scope and magnitude of the facts, declares them proven and specifies the

established that international human rights treaties not only form part of our legal system but also have the status of constitutional law. *See also* Luis Huerta, *La aplicación de jurisprudencia constitucional para el juzgamiento de violaciones de derechos humanos in* LOS CAMINOS DE LA JUSTICIA PENAL Y LOS DERECHOS HUMANOS, INSTITUTO DE DERECHOS HUMANOS DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DEL PERU 109 (Francisco Macedo ed. 2007) (it is up to legal practitioners to assert the prevalence of the Constitution and human rights treaties over any other provision of lower hierarchical ranking that is inconsistent with their meaning).

harmful result to the victims, in and of itself, is a measure of reparation. Consequently, the requests concerning the necessity of a statement that the victims were attacked as a result of the defendant's conduct and that there are other indirect victims, in accordance with the law of damages, are already included. The petition for relief at page twenty-three thousand four hundred and ninety-three, in general terms, requests a court decision to restore the dignity, reputation and rights of the victims and the people closely connected to them. However, it does not specify the measure and the sense of the corresponding court decision. It is sufficient, nevertheless, for those purposes, and as a consequence of the statement of facts proven, to affirm that there is no evidence whatsoever, beyond an insinuation made by one of the participants in the events—without any supporting circumstantial evidence to justify it—that can even remotely lead to the suspicion that the victims were linked to the PCP–SL and involved in specific attacks with terrorist objectives.[134]

134. There is no consistent information whatsoever from police agencies, intelligence agencies or the Office of the Attorney General—let alone court judgments—that in any way supports an assertion, even at the level of reasonable suspicion, that any of the victims of Barrios Altos or La Cantuta were involved in the two large attacks preceding the acts perpetrated against them, or that they were members or were linked to the PCP-SL. The statements of the student named Espinoza Ochoa (tenth session) [which link some of the murdered students to PCP-SL proselytizing activities at La Cantuta University, but do not clearly establish their membership in that terrorist organization] and Army Major Martin Rivas's very vague remarks against the victims (at pp. 139 and 165 of the book *Ojo por Ojo* by the journalist Jara Flores) to justify the response of the military intelligence forces to the attack against the Húsares de Junín and the Tarata attack—accusing them of being part of the PCP-SL apparatus, alleging that the tenement house on Jirón Huanta and the University Residence were refuges for the activists and perpetrators of the attacks, and of their modes of criminal operation—have no solid basis whatsoever. In the eighty-ninth session, PNP Colonel Jiménez Baca not only questioned the grounds for the reasoning of military intelligence to link the victims to the PCP-SL but also reported, with respect to the crime of La Cantuta, that a student from La Cantuta linked to the PCP-SL was arrested some time later and stated that the victims neither belonged to a Shining Path detachment, nor were they leaders of that organization. He added that the PCP-SL's organizational logic and manner of acting made it infeasible for there to be an open meeting of leaders and top officials, and also of politically active members of the bodies that were created, as they were all informed by compartmentalization.

§7. Civil reparations to the victims Gorriti Ellenbogen and Dyer Ampudia.

[. . .]

806. [. . .] As far as the non-pecuniary damages (harm to individual rights and pain and suffering) are concerned, every arbitrary deprivation of liberty—a legally protected right of the highest order and of maximum constitutional importance and protection—of course, caused suffering, anxiety, terror, uncertainty and helplessness of particular significance, especially in the context of the interruption of constitutional order or the abusive exercise of government authority, and carried out by military and intelligence forces (the victims having been confined at an SIE facility). Clearly, it is not necessary that the pain and suffering be materialized in specific pathological or psychological disturbances. That harm, in view of the proof of the facts, has been sufficiently established. It is not possible for it to be established through specific evidence, and therefore it must be inferred from the severity of the fact proven or from its mental and emotional connotations. The quantification of such damages, in sum, must be established in accordance with criteria of equity, bearing in mind the circumstances in which the facts occurred and unfolded and the personal charcteristics of the victims [. . .].

In conclusion, for non-pecuniary or non-monetary damages only, it is proper to set the amount at fifteen thousand U.S. dollars (US $15,000.00) for each victim.

§8. Specification of the amounts to be paid by the defendant for civil reparations.

807. [. . .] "Interest shall accrue on the amount of the compensation from the date on which the harm was caused." The interest in question shall accrue from the date of the commission of the crime (the acts that gave rise to the damage or harm) to the date of this judgment; it must not be confused with default interest that runs from the start of a lawsuit. Moreover, as this item is stipulated as a necessary consequence, the parties need not have referred to it expressly.

PART THREE: DECISION

821. Based on these legal grounds, administering justice on behalf of the Nation and in its best judgment as authorized by Law, having stated, argued and voted on the issues of fact in a separate section, the Special Division of the Supreme Court of the Republic

RULES:

822. That the evidentiary issues raised by the defense counsel of defendant Alberto Fujimori Fujimori under subheadings two (evidentiary issues), three (video and audio evidence) and four (other evidentiary arguments) of Chapter I of Part Two of this judgment, are **UNFOUNDED**, except for:

I. The objection to the statement of military expert José Luis García regarding Manual MFA–110–1–EMC, as established in paragraph 70, is partially admissible.

II. The assessment of the evidentiary issues pertaining to the pretrial statements specified in paragraphs 72 and 73, which are ruled inadmissible as evidence in this case; and the audio recording entitled "Fujimori–Montesinos Dialogue," consistent with paragraph 153, which is excluded form the evidence.

823. TO CONVICT ALBERTO FUJIMORI FUJIMORI or KENYA FUJIMORI, whose particulars were specified paragraph 4, as the indirect perpetrator of the offenses of:

I. *Aggravated murder*, with the aggravating circumstance of malice aforethought, against:

1. Luis Antonio León Borja.

2. Luis Alberto Díaz Ascovilca.

3. Alejandro Rosales Alejandro.

4. Máximo León León.

5. Placentina Marcela Chumbipuma Aguirre.

6. Octavio Benigno Huamanyauri Nolasco.

7. Filomeno León León.

8. Lucio Quispe Huanaco.

9. Tito Ricardo Ramírez Alberto.

10. Teobaldo Ríos Lira.

11. Manuel Isaías Ríos Pérez.

12. Nelly María Rubina Arquiñigo.

13. Odar Mender Sifuentes Núñez.

14. Benedicta Yanque Churo

15. Javier Manuel Ríos Rojas. **(BARRIOS ALTOS CASE)**

16. Juan Gabriel Mariño Figueroa.

17. Bertila Lozano Torres.

18. Dora Oyague Fierro.

19. Robert Teodoro Espinoza.

20. Marcelino Rosales Cárdenas.

21. Felipe Flores Chipana.

22. Luis Enrique Ortiz Perea.

23. Richard Armando Amaro Cóndor.

24. Heráclides Pablo Meza.

25. Hugo Muñoz Sánchez. **(LA CANTUTA CASE)**

II. *Grievous bodily harm*, against:

1. Natividad Condorcahuana Chicaña.

2. Felipe León León.

3. Tomás Livias Ortega.

4. Alfonso Rodas Alvitres. **(BARRIOS ALTOS CASE)**

The aforementioned offenses of aggravated murder and grievous bodily harm are crimes against humanity under international criminal law.

III. *Aggravated kidnapping*, with the aggravating circumstance of cruel treatment, against:

1. Gustavo Andrés Gorriti Ellenbogen.

2. Samuel Edward Dyer Ampudia. **(SIE BASEMENT CASE)**

824. Accordingly, **A TERM OF IMPRISONMENT OF TWENTY-FIVE YEARS IS IMPOSED**, to be calculated from November [7th, 2005], on which date the defendant was arrested in Chile with a view to extradition, to June [18th, 2006], on which date he was released on bond, and from September [22nd, 2007], on which date he was brought before this Court, to its expiration on February [10th, 2032].

825. The Court **ORDERED** the following measures in benefit of the victims, in accordance with the determination set forth in Part Three, Chapter IV, subheadings 3 to 8 of this judgment:

A. It **SET,** for purposes of non-pecuniary damages to be paid to Marcelino Marcos Pablo Meza and Carmen Juana Mariños Figueroa, siblings of deceased victims Heráclides Pablo Meza and Juan Gabriel Muñoz Figueroa, respectively, the amount of sixty-two thousand and four hundred *nuevos soles* (S/.62,400.00) each.

B. It **ESTABLISHED,** for purposes of compensatory payment the amount of twenty thousand dollars (US $20,000.00) to the legal heirs of: 1. Luis Antonio León Borja, 2. Alejandro Rosales Alejandro, 3. Máximo León León, 4. Placentina Marcela Chumbipuma Aguirre, 5. Octavio Benigno Huamanyauri Nolasco, 6. Manuel Isaías Ríos Pérez, 7. Benedicta Yanque Churo, 8. Javier Manuel Ríos Rojas, 9. Juan Gabriel Mariño Figueroa. 10. Bertila Lozano Torres, 11. Dora Oyague Fierro, 12. Robert Teodoro Espinoza, 13. Felipe Flores Chipana, 14. Luis Enrique Ortiz Perea. 15. Richard Armando Amaro Cóndor, 16. Heráclides Pablo Meza, and 17. Hugo Muñoz Sánchez. Likewise, to: 18. Natividad

Condorcahuana Chicaña, 19. Felipe León León, 20. Tomás Livias Ortega, and 21. Alfonso Rodas Alvitres. The amount of sixty-two thousand four hundred *nuevos soles* (S/.62,400.00) shall be divided proportionately among the victims; that is, two thousand nine hundred and seventy-one *nuevos soles* and forty-three *céntimos* (S/.2971.43) to each of them.

C. It **DETERMINED,** for purposes of compensation for non-pecuniary damages the amount of forty-six thousand and eight hundred *nuevos soles* (S/.46,800.00) to each of the victims Gustavo Andrés Gorriti Ellenbogen and Samuel Edward Dyer Ampudia.

D. It **SPECIFIED** that the three monetary sums shall be paid by defendant Alberto Fujimori Fujimori personally. Interest shall accrue on these sums from the date on which the harm occurred.

826. THE COURT RESOLVED that it is not proper:

1. TO GRANT the twenty-nine victims from the Barrios Altos and La Cantuta cases—with the exception set forth in clause (a) of the previous paragraph—compensation for pecuniary and non-pecuniary damages, because the issue was already decided at the international level, and must be enforced in the legally provided manner and venue.

2. TO ORDER compliance with measures of satisfaction, rehabilitation and non-repetition requested by the civil party, because they have already been ordered by the international court (the IACtHR ordered seven measures in each case in the Barrios Altos and La Cantuta cases).

827. Bearing in mind what was established in paragraph 764 of this judgment, the Court **STATES ON RECORD**, categorically, that the twenty-nine victims identified in the Barrios Altos and La Cantuta cases—whose names are listed in paragraph 783, I and II, of the judgment—were neither linked to the terrorist actions of the PCP–SL, nor were they members of that criminal organization.

828. It is **ORDERED** that charges be brought: (i) against Alberto Augusto Pinto Cárdenas, Vladimiro Montesinos Torres and Nicolás de Bari Hermoza Ríos for the offense of aggravated kidnapping committed against Gustavo Andrés Gorriti Ellenbogen; (ii) against

Nicolás de Bari Hermoza Ríos for the offense of rebellion against the State; and (iii) against Willy Chirinos Chirinos for the offense of perjury against the State. Consequently, **IT IS ORDERED** that the respective case file be opened with copies of this judgment and the case records cited in Part Three, Chapter V, subheadings 2 and 3, and that they be sent to the Office of the Provincial Prosecutor with proper jurisdiction for the appropriate legal purposes.

829. The Court has **ISSUED** the respective investigation request to the Office of the Attorney General in order for it to take the appropriate steps to follow up on the DNA analysis sent to London to determine the identity of the victims in the La Cantuta case.

830. It is **ORDERED** that once this judgment has become final, it shall be recorded in the respective Registry; the notarial certified copies and notices of conviction shall be forwarded, and, thereafter, the case record shall be sent back to the original court for the appropriate legal purposes. Notice shall be given at a public hearing and entered into the record where appropriate.

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