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Durand and Ugarte v. Peru

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Durand and Ugarte v. Peru

ABSTRACT¹

This is one of the many cases stemming from the Peruvian government's fight, during the 1980s and 1990s, against the guerilla organization Sendero Luminoso. In this case, Peruvian authorities arbitrarily arrested and incarcerated Mr. Nolberto Durand Ugarte and his uncle, Mr. Gabriel Pablo Ugarte Rivera in the El Frontón Island prison off the Peruvian coast. Mr. Durand Ugarte and Mr. Ugarte Rivera were both killed during a prison riot by use of excessive force by Peruvian armed forces. The remains of one of the two victims were found eighteen years later, after the Court issued its judgment, and those of the second victim are still missing.

I. FACTS

A. Chronology of Events

February 14, 1986: Peru's Department Against Terrorism (*Dirección Contra el Terrorismo*, "DIRCOTE") detains Mr. Nolberto Durand Ugarte under suspicion that he participated in terrorist acts.²

February 15, 1986: DIRCOTE detains Mr. Durand Ugarte's uncle, Mr. Gabriel Pablo Ugarte Rivera, for the same reason.³ DIRCOTE detains them without arrest warrants or finding them guilty of felonies.⁴ DIRCOTE forces Mr. Ugarte Rivera to relinquish his right to a defense attorney.⁵ Police investigate Mr. Ugarte Rivera and Mr. Durand Ugarte.⁶

February 25-26, 1986: Ms. Virginia Ugarte Rivera, mother of Mr. Durand Ugarte and sister of Mr. Ugarte Rivera, files *habeas corpus* petitions for each relative with the Forty-Sixth Instruction Judicial Court

1. Justine Schneeweis, Author; Monica Rodriguez, Editor; Elise Cossart-Daly, Chief IACHR Editor; Cesare Romano, Faculty Advisor.

2. Durand and Ugarte v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68, ¶ 59(a) (Aug. 16, 2000).

3. *Id.*

4. *Id.* ¶ 59(b).

5. *Id.* ¶ 59(c).

6. *Id.* ¶ 59(d).

of Lima.⁷ In the petition, Ms. Ugarte Rivera asks for access to defense attorneys for her detained relatives, the protection of their physical integrity, and their immediate release.⁸

March 4, 1986: Criminal proceedings commence against Mr. Ugarte Rivera and Mr. Durand Ugarte before the Thirty-Ninth Instruction Court of Lima.⁹ Mr. Durand Ugarte and Mr. Ugarte Rivera are sent to the El Frontón Island prison off the Peruvian coast.¹⁰

June 2, 1986: President of the Republic of Peru, Mr. Alan Gabriel Ludwig García Pérez, declares a State of Emergency in the Lima and Callao provinces.¹¹ The President's Order declares that the Armed Forces will take control over these provinces, including the prisons.¹²

June 18, 1986: Simultaneous prisoner uprisings take place at three separate prisons in Lima: Santa Bárbara, Lurigancho, and El Frontón, where Mr. Ugarte Rivera and Mr. Durand Ugarte are held.¹³ Prisoners take some of the members of the Republican Guard, the entity responsible for enforcing prison security, hostage and confiscate Republican Guard weapons.¹⁴ Prison authorities, judicial authorities, and the rioting prisoners enter negotiations.¹⁵

June 19, 1986: President García Pérez issues a Supreme Order declaring the Santa Bárbara, Lurigancho, and El Frontón prisons "restricted military zones."¹⁶ The Joint Command of the Armed Forces takes jurisdiction over El Frontón.¹⁷ This jurisdictional status prohibits civilian or judicial authorities from entering El Frontón.¹⁸ The Peruvian Navy and the Republican Guard, under Joint Command as the Special Operation Task Force (*Fuerza de Operaciones Especiales*, "FOES"), have control over El Frontón and suppress the prisoner riots.¹⁹

7. *Id.* ¶ 59(e).

8. *Id.*

9. *Id.* ¶ 59(d).

10. *Id.*

11. *Id.* ¶ 59(q).

12. *Id.*

13. *Id.* ¶ 59(f).

14. *Id.* ¶ 59(g).

15. *Id.*

16. *Id.* ¶ 59(i).

17. *Id.*

18. *Id.* ¶¶ 59(i)-62(b).

19. *Id.* ¶ 59(j).

FOES bombs the Blue Pavilion, an isolated section of El Frontón.²⁰ The riot suppression efforts exert force that clearly outweighs the force exerted by the rioters themselves.²¹ A significant number of prisoners are wounded or killed.²² Mr. Ugarte Rivera and Mr. Durand Ugarte go missing.²³

Because El Frontón is in a restricted military zone that prohibits civil judges from entering the prison, *habeas corpus* recourses are effectively impossible.²⁴ The Supreme Order stipulations prevent the investigation and thus determination of the whereabouts of *habeas corpus* beneficiaries.²⁵

June 20, 1986: The President's Supreme Order placing the Santa Bárbara, Lurigancho, and El Frontón prisons under military jurisdiction appears in a newspaper article.²⁶ The article states that the Order is in force as of June 19, 1986 despite the fact that the prison riots are under control, and states that military forces have discontinued their operation inside the prisons.²⁷

June 26, 1986: Ms. Ugarte Rivera files a *habeas corpus* petition with the First Instruction Judicial Court of Callao on behalf of Mr. Durand Ugarte and Mr. Ugarte Rivera.²⁸ She asks the Court to identify the location of her relatives, and asks the Court to respect her relatives' right to communicate with those outside the prison, as well as their rights to life and personal integrity.²⁹

June 27, 1986: The First Instruction Court of Callao declares that the *habeas corpus* recourse is unfounded.³⁰

July 15, 1986: The First Correctional Tribunal of the Supreme Court of Callao confirms the judgment of the First Instruction Court,³¹ which

20. *Id.* ¶¶ 59(j), 38(a).

21. *Id.* ¶ 59(j)

22. *Id.*

23. *Id.* ¶ 59(r).

24. *Id.* ¶ 59(i).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* ¶ 59(o).

29. *Id.*

30. *Id.* ¶ 59(p)(i).

31. *Id.* ¶ 59(p)(ii).

held that Ms. Virginia Ugarte's *habeas corpus* recourse was unfounded.³²

August 13, 1986: The First Penal Hall of the Supreme Court confirms the Correctional Tribunal's confirmation of the First Instruction Court's June 27, 1986 verdict.³³

August 27, 1986: The Supreme Court declares the military court is responsible for investigating the June 19, 1986 riot suppression efforts at El Frontón.³⁴ The Second Navy Permanent Instruction Court opens proceedings against the Navy Officers who suppressed the El Frontón riots.³⁵

October 28, 1986: The Constitutional Guarantees Tribunal affirms the Supreme Court's August 13, 1986 decision that Ms. Ugarte Rivera's *habeas corpus* recourse is unfounded, but decides that she may reinstate the action.³⁶

June 20, 1986 – March 31, 1987: The State removes debris that resulted from the June 19, 1986 El Frontón riot in order to investigate that event.³⁷

June 6, 1987: The Second Navy Permanent Instruction Court acquits the Navy Officers who suppressed the El Frontón riots.³⁸

June 16, 1987: The Permanent Council of the Navy confirms the Second Navy Permanent Instruction Court's acquittal.³⁹

July 31, 1987: *La Republica* newspaper publishes an article stating that the Tribunal for Military Justice declared Mr. Ugarte Rivera and Mr. Durand Ugarte free from imprisonment at El Frontón, though both men have been missing since the June 19, 1986 El Frontón riots.⁴⁰

32. *Id.* ¶ 59(p)(i).

33. *Id.* ¶ 59(p)(iii).

34. *Id.* ¶ 59(k).

35. *Id.* ¶ 59(l).

36. *Id.* ¶ 59(p)(iv).

37. *Id.* ¶ 59(l); *see id.* ¶ 59(l).

38. *Id.* ¶ 59(l).

39. *Id.*

40. *Id.* ¶ 59(r), n.33.

August 7, 1987: The National Congress of Peru establishes a commission to investigate the uprisings at the El Frontón, Lurigancho, and Santa Bárbara prisons.⁴¹

July 20, 1989: The Supreme Council of Military Justice, which had reopened the proceedings on the Navy Officers' liability in their riot suppressing efforts, holds that the officers who suppressed the El Frontón riots are not responsible for prisoner deaths that occurred during the riot suppression efforts.⁴²

The Council concludes that 111 prisoners died during the riot suppression efforts, based on the discovery of ninety-seven corpses and fourteen human skeletons.⁴³ As thirty-four prisoners surrendered and survived, the Council accounts for a total of 145 people.⁴⁴ An unofficial list of inmates before the riots had included 152 people.⁴⁵ Thus, the Council fails to account for seven inmates.⁴⁶

The Council finds that the State did not diligently identify corpses after the riots subdued.⁴⁷ Investigators never requested assistance from victims' families to identify corpses.⁴⁸ As a result, the corpses of ninety human beings went unidentified after autopsies were performed.⁴⁹

Mr. Durand Ugarte and Mr. Pablo Ugarte Rivera are not among the list of survivors, and their corpses are never identified.⁵⁰

B. Other Relevant Facts

Persistent economic and social inequality plagues the State during the 1980s.⁵¹ As a result, many segments of the population develop increased contempt for the government.⁵² The Maoist-inspired Shining Path ("*Sendero Luminoso*") guerilla group, which seeks to overthrow the State government, broadens its reach from the impoverished rural countryside to urban centers.⁵³ The group conducts armed attacks on

41. *Id.* ¶ 59(n).

42. *Id.* ¶ 59(l).

43. *Id.* ¶ 59(ll).

44. *Id.*

45. *Id.*

46. *See id.*

47. *Id.* ¶ 59(m).

48. *Id.*

49. *Id.* ¶ 59(m).

50. *Id.*

51. GORDON H. MCCORMICK, RAND CORPORATION, *THE SHINING PATH AND THE FUTURE OF PERU* 1 (1990).

52. *See id.* at v.

53. *See id.* at 1, 3.

polling places, public development projects, police stations, government offices, and public infrastructure, among other symbols of government power.⁵⁴ The State government faces an internal crisis with the Shining Path's expanding geographical reach and surge of supporters throughout the decade.⁵⁵ In efforts to quell the Shining Path's rising influence, the State military employs various counterinsurgency strategies, leaving scores of human rights abuses in its track.⁵⁶

II. PROCEDURAL HISTORY

A. *Before the Commission*

April 27, 1987: A petition is brought to the Inter-American Commission on Human Rights on behalf of Mr. Ugarte Rivera and Mr. Durand Ugarte.⁵⁷

May 19, 1987: The Commission sends to the State the petition's accusations, and requests that the State send to the Commission information as to the extent to which domestic legal recourses had been exhausted for those accusations.⁵⁸

January 19, 1988: The Commission again requests the State to send information on exhaustion of domestic legal recourses with regard to the petitions on behalf of Mr. Ugarte River and Mr. Durand Ugarte.⁵⁹

February 23, 1989: The Commission again requests the same information from the State.⁶⁰

September 29, 1989: The State submits a brief to the Commission stating that the petitioners have not exhausted all domestic legal remedies because there are two cases pending in the State's Military

54. *Id.* at 15-16.

55. *Id.* at 1, 17.

56. Although the State arrested Mr. Durand Ugarte and Mr. Ugarte Rivera under suspicion of terrorist acts during the Shining Path's period of rising power and the State's counterinsurgency policy phase, neither the Court nor the State implicates Mr. Durand Ugarte or Mr. Ugarte Rivera with the Shining Path. *Durand and Ugarte v. Peru*, Merits, ¶ 59(a); see MCCORMICK, *THE SHINING PATH AND THE FUTURE OF PERU* at 16; see generally *Durand and Ugarte v. Peru*, Merits. When requested to do so by the Court, the State failed to offer any specific terrorist allegations against the victims. *Id.* ¶ 87.

57. *Durand and Ugarte v. Peru*, Merits, ¶ 3.

58. *Id.*

59. *Id.* ¶ 4.

60. *Id.*

Exclusive Court that relate to the accusations contained within the Commission's petition.⁶¹

June 7, 1990: The Commission again asks the State for the status of domestic legal resources exhausted with regard to Mr. Ugarte Rivera and Mr. Durand Ugarte, the status of the related cases in the Military Exclusive Court, and the whereabouts of Mr. Ugarte River and Mr. Durand Ugarte.⁶² The State does not respond to this request.⁶³

March 5, 1996: The Commission adopts Report No. 15/96, declaring the petition admissible.⁶⁴

May 8, 1996: The Commission sends a copy of the approved petition to the State.⁶⁵

The Commission finds that the State violated Articles 1(1) (Obligation to Respect Rights), 2 (Obligation to Give Domestic Legal Effects to Rights), 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8(1) (Right to a Hearing Within a Reasonable Time Before a Competent and Independent Tribunal), 25(1) (Right of Recourse Before a Competent Court), 27(2) (Suspension of Guarantees) of the American Convention to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte.⁶⁶

The Commission recommends that the State pay sufficient compensation to the relatives of Mr. Ugarte Rivera and Mr. Durand Ugarte.⁶⁷

The Commission requires the State to notify the Commission of measures the State will take to adhere to the Commission's recommendations within sixty days of receiving the Commission's report.⁶⁸

July 5, 1996: The State sends a report to the Commission that demonstrates that the State did not comply with the Commission's recommendation.⁶⁹

61. *Id.* ¶ 5.

62. *Id.* ¶ 6.

63. *Id.*

64. *Id.* ¶ 7. The Commission did not publish Report No. 15/96.

65. *Id.*

66. *Id.* ¶ 1.

67. *Id.*

68. *Id.* ¶ 7.

69. *Id.* ¶ 8.

B. Before the Court

August 8, 1996: The Commission submits the case to the Court after the State fails to adopt its recommendations.⁷⁰

September 20, 1996: The State submits seven preliminary objections with the Court.⁷¹

The State first argues that the claimants have failed to exhaust domestic remedies pursuant to Article 46 of the American Convention and Articles 44 and 45 of the Commission's regulations.⁷² The State notes that the claimants did not seek a civil action pursuant to the State's Civil Code to declare Mr. Ugarte Rivera and Mr. Durand Ugarte deceased for inheritance purposes.⁷³ The State further notes that the claimants failed to exhaust possible recourse under *habeas corpus*.⁷⁴

Second, the State claims that the Commission already decided this case in its decision in *Neira Alegría et al. v. Peru*, which shared the same facts of the present case.⁷⁵ The Commission, however, failed to combine the two petitions as provided in Article 40.2 of the Commission Regulations.⁷⁶

Third, the State claims that this case is precluded by *res judicata* because the Court already delivered judgment in *Neira Alegría et al. v. Peru*.⁷⁷

Fourth, the State claims that claimants failed to indicate in their original petition which domestic remedies they pursued, and that the petition, which the Commission received on April 27, 1987 and concerned events that occurred on June 18, 1986, was not brought within the applicable time frame set forth in Article 38 of the Commission Regulations.⁷⁸

Fifth, the State claims that the Court lacks jurisdiction over the case.⁷⁹ The State argues that the purpose, competence, and jurisdiction of the Court are debased because the claimants seek compensatory damages without an intervening proceeding wherein the Court finds the

70. *Id.* ¶ 9.

71. Durand and Ugarte, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 50, ¶ 15 (May 28, 1999).

72. *Id.* ¶ 30.

73. *Id.* ¶ 31(b).

74. *Id.*

75. *Id.* ¶ 41.

76. *Id.*

77. *Id.* ¶¶ 45-46.

78. *Id.* ¶¶ 56(a)-(b).

79. *Id.* ¶¶ 51(a)-(b).

State's breach of its human rights commitment in a case with new facts that has not been adjudicated.⁸⁰ The State also claims that the Court is biased because it is unlikely to depart from its prior ruling on a case with nearly identical facts.⁸¹

Sixth, the State argues procedural error, lack of competence, and lack of standing by the Commission.⁸² The State contends that the Commission omitted the friendly settlement procedure and duplicated a previously examined petition.⁸³

Seventh, the State claims the Commission lacked standing to issue a report on the claimants' petition, arguing that the Commission cannot adopt a report on a matter in which it previously served as a party before the Court or decide a case that was already settled by the Court.⁸⁴

October 4, 1996: The State appoints Mr. Fernando Vidal Ramírez as judge *ad hoc*.⁸⁵

May 28, 1999: The Court issues a judgment on the State's preliminary objections.⁸⁶

The Court dismisses the State's first preliminary objection.⁸⁷ The Court finds that the claimants sufficiently exhausted domestic remedies pursuant to Article 46(1) of the American Convention where it exhausted the habeas corpus remedy.⁸⁸ Since *habeas corpus* is the appropriate remedy in cases of forced disappearances, it was the only remedy that the claimants were required to exhaust.⁸⁹

The Court notes that the *habeas corpus* remedy was pursued on two occasions: Ms. Ugarte Rivera's *habeas corpus* petitions on behalf of Mr. Ugarte Rivera and Mr. Durand Ugarte with Lima's Forty-sixth Examining Court on February 25 and 26, 1986, and Ms. Ugarte Rivera's second *habeas corpus* filing with Callao's First Examining Court on June 26, 1986.⁹⁰ The second petition was made subsequent to

80. *Id.* ¶ 51(a).

81. *Id.* ¶ 51(b).

82. *Id.* ¶¶ 62(a), 62(d).

83. *Id.* ¶ 62(a).

84. *Id.* ¶¶ 67-68.

85. Durand and Ugarte v. Peru, Merits, ¶ 12.

86. Durand and Ugarte v. Peru, Preliminary Objections, ¶ 29.

87. *Id.* ¶ 39.

88. *Id.* ¶ 32(a).

89. *Id.* ¶ 32(c).

90. *Id.* ¶ 36(a).

the June 18th prison rights,⁹¹ and was denied and affirmed denied on appeal.⁹² The Court notes that the *habeas corpus* remedy is considered exhausted when it is pursued and decided without satisfactory result to the claimant.⁹³ Thus, the Court concludes that the claimants exhausted domestic remedies pursuant to Article 46(1)(a) of the American Convention.⁹⁴ Regardless, however, the State did not fulfill the Commission's request to demonstrate that the claimants had not exhausted local remedies within the period requested by the Commission and the State did not properly argue domestic remedy exhaustion as a preliminary objection.⁹⁵ The Court thus dismisses the State's objection.⁹⁶

The Court dismisses the State's second preliminary objection,⁹⁷ noting that the Commission must only combine petitions when two petitions concern the same facts and persons.⁹⁸ Because *Neira Alegría et al. v. Peru* and the instant case involve petitions on behalf of separate individuals whose rights violations happen to arise from the same facts, the Commission was not required to merge the two.⁹⁹

The Court dismisses the State's third preliminary objection of *res judicata*.¹⁰⁰ Mr. Ugarte Rivera and Mr. Durand Ugarte are separate human beings from the *Neira Alegría et al. v. Peru* victims.¹⁰¹ Mr. Ugarte Rivera and Mr. Durand Ugarte received no remedy for their rights' violations in the *Neira Alegría* case, and accordingly, the claimants are not precluded from doing so on behalf of Mr. Ugarte Rivera and Mr. Durand Ugarte with this Court.¹⁰²

The Court dismisses the State's fourth objection.¹⁰³ Because the State was aware that Ms. Ugarte Rivera had filed a *habeas corpus* petition with Callao's First Examining Court,¹⁰⁴ it cannot claim that it was unaware of the domestic remedies being pursued.¹⁰⁵ The Court also

91. *Id.* ¶ 37.

92. *Id.*

93. *Id.* ¶ 32(c).

94. *Id.* ¶ 37.

95. *Id.* ¶ 38.

96. *Id.*

97. *Id.* ¶ 44.

98. *Id.* ¶ 43.

99. *Id.* ¶¶ 42-43.

100. *Id.* ¶ 49.

101. *Id.*

102. *Id.*

103. *Id.* ¶ 60.

104. *Id.* ¶ 57(a).

105. *Id.*

notes that Ms. Ugarte Rivera filed *habeas corpus* petitions that were denied initially and on appeal in higher courts, following proper procedures before bringing a petition to the Commission.¹⁰⁶ Ms. Ugarte Rivera thus exhausted domestic remedies on October 28, 1986 upon the Court of Last Resort's denial of the *habeas corpus* petition.¹⁰⁷

The Court dismisses the State's fifth preliminary objection, asserting that the filing of the present case, which seeks compensatory damages, does not undermine the Court's purpose, competence, or jurisdiction.¹⁰⁸ The Court also notes that while the present case contains similar facts to that of a case previously adjudicated by the Court, the Court's objectivity and discretion in the present case are not swayed by similar cases it previously adjudicated.¹⁰⁹

The Court dismisses the State's sixth objection, repeating its earlier emphasis that the present case is not identical to a prior proceeding with similar facts, and noting that the friendly settlement procedure is discretionary, not mandatory.¹¹⁰

The Court dismisses the State's seventh objection.¹¹¹ The Court refers to the same reasons the Court gave to the State's second, third, and sixth objections.¹¹²

1. Violations Alleged by Commission¹¹³

Article 4 (Right to Life)

Article 5 (Right to Humane Treatment)

Article 7(6) (Right to Recourse Before a Competent Court)

Article 8(1) (Right to a Hearing Within a Reasonable Time Before a Competent and Independent Tribunal)

Article 25(1) (Right of Recourse Before a Competent Court)

Article 27(2) (Suspension of Guarantees)

all in relation to:

Article 1(1) (Obligation to Respect Rights)

Article 2 (Obligation to Give Domestic Legal Effects to Rights) of the American Convention.

106. *Id.*

107. *Id.*

108. *Id.* ¶ 54.

109. *Id.* ¶ 52.

110. *Id.* ¶¶ 63-66.

111. *Id.* ¶ 71.

112. *Id.* ¶ 70.

113. Durand and Ugarte v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68, ¶ 1 (Aug. 16, 2000). The Commission did not indicate that these violations were in relation to Article 1(1) (Obligation to Respect Rights) of the Convention.

2. Violations Alleged by Representatives of the Victims¹¹⁴

Same Violations Alleged by the Commission.

III. MERITS

A. *Composition of the Court*

Antônio Augusto Cançado Trindade, President

Máximo Pacheco Gómez, Vice-President

Hernán Salgado Pesantes, Judge

Alirio Abreu Burelli, Judge

Sergio García Ramírez, Judge

Carlos Vicente de Roux Rengifo, Judge and

Fernando Vidal Ramírez, Judge *ad hoc*

Manuel E. Ventura Robles, Secretary

Renzo Porni, Deputy Secretary

B. *Decision on the Merits*

August 16, 2000: The Court issues its Judgment on Merits.

The Court found unanimously that Peru had violated:

Article 4(1) (Prohibition of Arbitrary Deprivation of Life), to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte,¹¹⁵ because:

The State arbitrarily ended the lives of Mr. Ugarte Rivera and Mr. Durand Ugarte.¹¹⁶ The Blue Pavilion detainees at El Frontón were convicted or suspected terrorists and used force against the State in the form of prisoner riots.¹¹⁷ While the State possesses the right and duty to take measures to preserve its own security, it may not abuse this right and duty by using force in limitless circumstances.¹¹⁸ The State, accordingly, may not arbitrarily deprive an individual of his right to life by exerting unjustified and disproportionate force.¹¹⁹

114. See generally *id.* The Court's Judgment on the Merits did not identify the victims' representatives or separate violations alleged by the victims.

115. *Id.* ¶ 72. The Court did not indicate that this violation was in relation to Article 1(1) (Obligation to Respect Rights) of the Convention.

116. *Id.* ¶ 71.

117. *Id.* ¶ 70.

118. *Id.* ¶ 69.

119. *Id.*

The Court found that the State did not comply with its obligations under Article 4(1) (Prohibition of Arbitrary Deprivation of Life) for several reasons.¹²⁰ First, the State's Navy forces, in its riot suppression efforts, used disproportionate force against the prisoner riots by demolishing the Blue Pavilion section of the El Frontón prison, where Mr. Ugarte Rivera and Mr. Durand Ugarte were detained.¹²¹ While these prisoners exerted force by rioting inside the prison, the Navy unjustifiably responded with disproportionate force by bombing the Blue Pavilion.¹²² Second, the State's Navy forces did not attempt to rescue detainees who survived the bombing.¹²³ Third, investigative authorities did not diligently identify remaining corpses.¹²⁴ Thus, the State failed to confer the protection of life as required by law for Mr. Ugarte Rivera and Mr. Durand Ugarte and arbitrarily deprived them of life in violation of Article 4(1) (Prohibition of Arbitrary Deprivation of Life).¹²⁵

Articles 7(1) (Right to Personal Liberty and Security) and Article 7(5) (Right to Be Promptly Brought Before a Judge and Right to a Trial Within Reasonable Time), to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte,¹²⁶ because:

The Court found that the State did not comply with its obligations under Articles 7(1) (Right to Personal Liberty and Security) and 7(5) (Right to Be Promptly Brought Before a Judge and Right to a Trial Within Reasonable Time) for several reasons.¹²⁷

Article 7(1) (Right to Personal Liberty and Security) guarantees the right to personal liberty and security.¹²⁸ This right may be undermined only when the law expressly permits, such as when an individual violates an enumerated law that allows the State to deprive an individual of his personal liberty and security.¹²⁹ State agents must find an individual guilty of a felony, and obtain a written arrest warrant to

120. *Id.* ¶¶ 67-68.

121. *Id.* ¶ 67.

122. *Id.* ¶ 68.

123. *Id.*

124. *Id.*

125. *Id.* ¶ 71.

126. *Id.* ¶ 92. The Court did not indicate that these violations were in relation to Article 1(1) (Obligation to Respect Rights) of the Convention.

127. *See id.* ¶¶ 81-92.

128. *Id.* ¶ 83.

129. *See id.* ¶ 85.

*detain any individual,*¹³⁰ *except where terrorist acts are alleged.*¹³¹ *DIRCOTE arrested Mr. Ugarte Rivera and Mr. Durand Ugarte without obtaining a warrant and without finding them guilty of felonies.*¹³² *The State claimed to arrest Mr. Ugarte Rivera and Mr. Durand Ugarte under suspicion of terrorism.*¹³³ *When the Court requested that the State provide it with detention warrants or other documents that would permit the State to detain the victims pursuant to specific allegations of terrorist acts, the State failed to specify any allegations.*¹³⁴ *Thus, the State deprived Mr. Ugarte Rivera and Mr. Durand Ugarte of their right to personal liberty and security beyond the scope of exceptions permitted by law.*¹³⁵

*Article 7(5) (Right to Be Promptly Brought Before a Judge and Right to a Trial Within Reasonable Time) guarantees that a detained individual be brought promptly before a judge and receive a trial within a reasonable time after his or her detention.*¹³⁶ *In instances of suspected terrorist acts, the State's Constitution permits the State to detain individuals for up to fifteen days before sending an individual to the appropriate judicial body.*¹³⁷ *The State did not refer Mr. Ugarte Rivera and Mr. Durand Ugarte to judicial agencies until eighteen and seventeen days, respectively, after they were detained.*¹³⁸ *Thus, the State violated Article 7(5) (Right to Be Promptly Brought Before a Judge and Right to a Trial Within Reasonable Time) to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte where it failed to bring either of them before a judge within the applicable time frame set forth in the State's Constitution.*¹³⁹

Articles 7(6) (Right to Recourse Before a Competent Court), 25(1) (Right of Recourse Before a Competent Court), and 27(2) (Suspension of Guarantees), to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte,¹⁴⁰ because:

130. *Id.* ¶ 90.

131. *Id.* ¶ 91.

132. *Id.* ¶ 85.

133. *Id.* ¶ 87.

134. *Id.*

135. *Id.* ¶ 89.

136. *Id.* ¶ 83.

137. *Id.* ¶ 90.

138. *Id.* ¶ 91.

139. *Id.*

140. *Id.* ¶¶ 106, 110. The Court did not indicate that these violations were in relation to

The Court found that habeas corpus recourse was the best means to determine the whereabouts of Mr. Ugarte Rivera and Mr. Durand Ugarte.¹⁴¹ The Court also found that while the State did not de jure prohibit access to habeas corpus recourse by El Frontón detainees' relatives, the State de facto prohibited habeas corpus recourse where it declared exclusive military jurisdiction over the province where the prison was located.¹⁴² By declaring military jurisdiction over El Frontón during the state of emergency, which prohibited the entrance of judges into the prison to investigate prisoners' whereabouts, the State thus prevented the exercise of the essential function of the habeas corpus recourse.¹⁴³

Article 7(6) (Right to Recourse Before a Competent Court) guarantees the individual the right to recourse before a court in order to determine the lawfulness of the individual's arrest or detention, and to require the individual's release when the individual's arrest or detention is unlawful.¹⁴⁴ For a court to determine whether Mr. Ugarte Rivera and Mr. Durand Ugarte's detention was lawful first requires a court to determine their whereabouts.¹⁴⁵ Contrary to the First Instruction Court of Callao's finding and subsequent courts' affirmations that Ms. Ugarte Rivera's lacked a basis for seeking habeas corpus recourse,¹⁴⁶ the Court found that habeas corpus was the appropriate recourse in this instance.¹⁴⁷ Thus, by both denying the habeas corpus petition as unfounded,¹⁴⁸ and by preventing the possibility for a habeas corpus investigation to take place,¹⁴⁹ the State violated Mr. Ugarte Rivera's and Mr. Durand Ugarte's rights to recourse before a court to determine the lawfulness of their detention in violation of Article 7(6) (Right to Have Recourse Before a Competent Court).¹⁵⁰

Article 25(1) (Right of Recourse Before a Competent Court) guarantees

Article 1(1) (Obligation to Respect Rights) of the Convention.

141. *Id.* ¶ 100.

142. *Id.* ¶ 93(d).

143. *Id.* ¶ 100.

144. *Id.* ¶ 96.

145. *See generally id.* ¶¶ 101-103.

146. *Id.* ¶ 104.

147. *Id.* ¶ 100.

148. *Id.*

149. *Id.* ¶ 100.

150. *Id.* ¶ 110.

*the individual's right to prompt and effective recourse when the individual's fundamental rights have been violated, even when the individual's rights are violated by those acting within the scope of their official duties.*¹⁵¹ *Habeas corpus was the ideal recourse to identify the whereabouts of Mr. Ugarte Rivera and Mr. Durand Ugarte.*¹⁵² *Because the State rendered the habeas corpus recourse effectively impossible through its declaration of exclusive military jurisdiction over El Frontón,*¹⁵³ *the State thus prevented prompt and effective recourse to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte after their fundamental rights had been violated, in violation of Article 25(1) (Right of Recourse Before a Competent Court).*¹⁵⁴

*The Court noted, furthermore, that the State is not immune from violating its obligations under the American Convention despite provisions set forth in Article 27(2) (Suspension of Guarantees).*¹⁵⁵ *Article 27(2) allows the State to take measures that run contrary to its obligations under the American Convention in cases of war, public danger, or other threatening situations that pose danger to the security of the State, with certain exceptions that do not include Articles 25(1) (Right of Recourse Before a Competent Court) and 7(6) (Right to Recourse Before a Competent Court).*¹⁵⁶ *This consent, however, is valid only for the duration and extent necessitated by the circumstances that threaten the State's security.*¹⁵⁷ *State actions beyond those limits are violations of law.*¹⁵⁸ *The Court has held that the nonexistence of an effective recourse against Convention violations surpasses the extent of necessary measures permitted during such emergency situations.*¹⁵⁹ *The State is thus not exempt under, but is instead in violation of, Article 27(2) (Suspension of Guarantees), by suspending the habeas corpus recourse.*¹⁶⁰

Articles 8(1) (Right to a Hearing Within a Reasonable Time by a Competent and Independent Tribunal) and 25(1) (Right of Recourse

151. *Id.* ¶ 95.

152. *Id.* ¶ 93(d).

153. *Id.* ¶ 100.

154. *Id.* ¶ 131.

155. *See id.* ¶¶ 99-100.

156. *Id.* ¶¶ 97(1)-(2).

157. *Id.* ¶ 97(1).

158. *Id.* ¶ 99.

159. *Id.* ¶ 102.

160. *Id.* ¶ 93(e).

Before a Competent Court), to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte and their relatives¹⁶¹ because:

The Court found that the military tribunals through which the habeas corpus petitions on behalf of Mr. Ugarte Rivera and Mr. Durand Ugarte were adjudicated did not constitute competent, independent tribunals for purposes of Articles 8(1) (Right to a Hearing Within a Reasonable Time by a Competent and Independent Tribunal) and 25(1) (Right of Recourse Before a Competent Court).¹⁶²

Article 8(1) (Right to a Hearing Within a Reasonable Time by a Competent and Independent Tribunal) guarantees the right to a hearing before a competent, independent, and impartial tribunal within a reasonable time.¹⁶³ Article 25(1) (Right of Recourse Before a Competent Court) guarantees the individual the right to prompt and effective recourse when the individual's fundamental rights have been violated, even when the individual's rights are violated by those acting within the scope of their official duties.¹⁶⁴ The State delegated the duty to investigate the riot suppression efforts at El Frontón to military courts.¹⁶⁵ Because military courts consist of active-duty members of the armed forces, however, and because the investigation for which the military court was charged with undertaking concerned potential misconduct by military members themselves,¹⁶⁶ the military court did not constitute an independent, impartial tribunal.¹⁶⁷ Furthermore, Article 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) must be read to include the victims' relatives as well as the victims themselves whose recourse is denied.¹⁶⁸ Thus, the State violated Articles 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal) and 25(1) (Right of Recourse Before a Competent Court) to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte as well as their relatives.¹⁶⁹

161. *Id.* ¶ 131. The Court did not indicate that these violations were in relation to Article 1(1) (Obligation to Respect Rights) of the Convention.

162. *Id.* ¶ 125.

163. *Id.* ¶ 113.

164. *Id.* ¶ 114.

165. *Id.* ¶ 119.

166. *Id.* ¶ 126.

167. *Id.*

168. *Id.* ¶ 128.

169. *Id.* ¶ 131.

The general obligations of Articles 1(1) (Obligation to Respect Rights) and 2 (Obligation to Give Domestic Legal Effect to Rights), to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte,¹⁷⁰ because:

The Court found that by violating American Convention Articles 4(1) (Prohibition of Arbitrary Deprivation of Life), 7(1) (Right to Personal Liberty and Security), 7(5) (Right to Be Promptly Brought Before a Judge and Right to a Trial Within Reasonable Time), 7(6) (Right to Recourse Before a Competent Court), 8(1) (Right to a Hearing Within a Reasonable Time by a Competent and Independent Tribunal) and 25(1) (Right of Recourse Before a Competent Court), the State impliedly violated the general rights and freedoms guaranteed by Article 1(1) (Obligation to Respect Rights).¹⁷¹ The Court also found that where the State failed to guarantee the rights stipulated in Article 1(1) and failed to adopt domestic legislative measures to attempt to give effect to those rights,¹⁷² the State also violated Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte.¹⁷³

The Court found by six votes against one that the State had not violated:

Article 5(2) (Prohibition of Torture, and Cruel, Inhumane or Degrading Treatment), to the detriment of Mr. Ugarte Rivera and Mr. Durand Ugarte,¹⁷⁴ because:

The Court did not have sufficient evidence to establish that Mr. Ugarte Rivera and Mr. Durand Ugarte suffered acts of torture, cruel, inhumane, or degrading treatment by the State while detained at El Frontón.¹⁷⁵ The Court may infer that because Mr. Durand Ugarte and Mr. Ugarte Rivera were detained at El Frontón the day of the riot suppression efforts, there was no possibility for their escape, and their whereabouts remain unknown, they are the victims of forced disappearances.¹⁷⁶ The State also used disproportionate force against

170. *Id.* ¶ 139.

171. *Id.* ¶ 138.

172. *Id.*

173. *Id.* ¶ 139.

174. *Id.* ¶ 80. The Court did not indicate that this violation was in relation to Article 1(1) (Obligation to Respect Rights) of the Convention.

175. *Id.* ¶ 79.

176. *Id.* ¶¶ 79(b), (d).

*the prisoners at El Frontón where Mr. Ugarte Rivera and Mr. Durand Ugarte were detained.*¹⁷⁷ *Forced disappearance and disproportionate and unjustified use of force alone, however, are insufficient to infer that victims necessarily suffer acts of torture, cruel, inhumane, or degrading treatment.*¹⁷⁸ *The Court thus cannot conclude that Mr. Ugarte Rivera and Mr. Durand Ugarte suffered such treatment in violation of Article 5(2) (Prohibition of Torture, and Cruel, Inhumane or Degrading Treatment) of the Convention.*¹⁷⁹

C. Dissenting and Concurring Opinions

1. Partially Dissenting Opinion of Judge De Roux Rengifo

Judge De Roux Rengifo opposed the majority Court's finding that it could not infer, from the victims' forced disappearances and subjection to disproportionate force alone, that the State subjected Mr. Ugarte Rivera and Mr. Durand Ugarte to the treatment prohibited by Article 5(2) (Prohibition of Torture, and Cruel, Inhumane or Degrading Treatment).¹⁸⁰

Judge De Roux Rengifo noted that the Court recently stated three criteria for evaluating evidence.¹⁸¹ First, the Court retains flexibility to assess evidence using logic and experience.¹⁸² Second, the Court may utilize circumstantial evidence to make findings as long as such evidence yields sound conclusions.¹⁸³ Third, with regard to human rights violations, a State may not base its defense on the grounds that plaintiffs failed to produce sufficient evidence, since the State is often the gatekeeper of the very evidence that plaintiffs seek to gather.¹⁸⁴ Judge De Roux Rengifo asserted that the Court did not follow these criteria in the present case.¹⁸⁵

Judge De Roux Rengifo agreed with the Court that the Court cannot infer that the State's disproportionate use of force alone constitutes cruel, inhumane or degrading treatment against the

177. *Id.* ¶ 79.

178. *Id.*

179. *Id.* ¶ 80.

180. Durand and Ugarte v. Peru, Judgment, Partially Dissenting Opinion of Judge De Roux Rengifo, Inter-Am. Ct. H.R. (ser. C) No. 68 (Aug. 16, 2000).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

victims.¹⁸⁶ Employing the Court's previously stated criteria, however, Judge De Roux Rengifo asserted that the State's disproportionate use of force, along with the *type* of disproportionate force it used, should allow the Court to infer how the victims were affected by such force.¹⁸⁷ Evidence demonstrates an ample time period between the demolition of the Blue Pavilion and most of the inmates' times of death.¹⁸⁸ This circumstantial evidence may lead to a judgment that inmates suffered severely during this time, considering the physical anguish from the type of force used, as well as the mental anguish that likely resulted from the inmates' knowledge that escaping was impossible.¹⁸⁹ Judge De Roux Rengifo thus asserted that it may be concluded with high probability that Mr. Ugarte Rivera and Mr. Durand Ugarte suffered severe mental and physical anguish between the time of the riot suppression efforts and the time of their deaths so as to amount to the cruel, inhumane, or degrading treatment prohibited by Article 5(2) (Prohibition of Torture, and Cruel, Inhumane or Degrading Treatment).¹⁹⁰

IV. REPARATIONS

The Court ruled unanimously that the State had the following obligations:

A. *Specific Performance (Measures of Satisfaction and Non-Repetition Guarantee)*

1. Publish the Court's Judgment

The Court indicated that the State shall issue an Executive Decree that the *El Peruano* newspaper, as well as other media outlets, publish the Court's August 16, 2000 Judgment.¹⁹¹

2. Publically Apologize

The Court indicated that the State's Executive Decree for publication of the Court's Judgment, in the *El Peruano* newspaper, must include a public apology to Mr. Ugarte Rivera and Mr. Durand Ugarte

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Durand and Ugarte v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 89, ¶ 39(a), (Dec. 3, 2001).*

for the “grievous injuries caused,” as well as the State’s confirmation that similar events will never recur.¹⁹²

3. Investigate and Punish

The Court indicated that the State must investigate and punish all persons responsible for the harm caused to the thirty murdered victims, including Mr. Ugarte Rivera and Mr. Durand Ugarte, in the *El Frontón* riot suppression efforts.¹⁹³

The Court also indicated that the State must undertake necessary measures to locate and identify the remains of Mr. Ugarte Rivera and Mr. Durand Ugarte.¹⁹⁴ The State must deliver the remains to the victims’ next of kin.¹⁹⁵

B. Compensation

The Court awarded the following amounts:

1. Pecuniary Damages

The Court awarded a compensatory payment of \$125,000 as a result of damages caused to Mr. Ugarte Rivera, Mr. Durand Ugarte, and their relatives.¹⁹⁶ The sum shall be divided equally¹⁹⁷ to victims’ beneficiaries, Ms. Virginia Bonifacia Ugarte Rivera de Durand, Mr. Durand, and Nolberto Durand Vargas, sister and brother-in-law, respectively, to Mr. Ugarte Rivera, and parents of Mr. Durand Ugarte.¹⁹⁸ The State must make partial payment of the sum within the current fiscal year and complete the payment during the second quarter of the next fiscal year.¹⁹⁹

The State must also pay for a portion of the construction costs of the beneficiaries’ residence.²⁰⁰

2. Non-Pecuniary Damages

The State must cover the lifetime health care costs, including

192. *Id.* ¶ 39(b).

193. *Id.* ¶ 39(c).

194. *Id.* ¶ 39(d).

195. *Id.*

196. *Id.* ¶ 32.

197. *Id.* “Decides” ¶ 2.

198. *Id.* ¶ 26.

199. *Id.* ¶ 29.

200. *Id.* ¶ 38.

medications, of the beneficiaries.²⁰¹

The State must cover all future costs associated with psychological health services as required by the beneficiaries.²⁰²

3. Costs and Expenses

[None]

4. Total Compensation (including Costs and Expenses ordered):

\$125,000²⁰³

C. Deadlines

The State must provide the Court with a report on its performance of reparations obligations within six months of the Court's Reparations and Costs Judgment issued December 3, 2001.²⁰⁴

V. INTERPRETATION AND REVISION OF JUDGMENT

[None]

VI. COMPLIANCE AND FOLLOW-UP

June 12, 2002: The State complied with its obligation to deliver partial payment of the \$125,000 Judgment ordered by the Court to the beneficiaries of Mr. Ugarte Rivera and Mr. Durand Ugarte.²⁰⁵ As of this date, the State has paid eighty percent of the judgment to the beneficiaries.²⁰⁶

November 14, 2002: The State partially complied with its obligation to publish the Court's August 16, 2000 judgment.²⁰⁷ The State published the judgment in the *El Peruano* newspaper, but did not publish the judgment in additional media outlets.²⁰⁸

201. *Id.* ¶ 36.

202. *Id.* ¶ 37.

203. The State must also pay all future costs for the beneficiaries' health and psychological expenses, and partial future costs for construction of the beneficiaries' residence. *See id.* ¶¶ 36-38.

204. *Id.* ¶ 45(5).

205. Durand and Ugarte v. Peru, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. "Having Seen" ¶ 3 (Nov. 27, 2002).

206. *Id.*

207. *Id.* ¶ 14.

208. *Id.* ¶ 15.

November 22, 2002: The State fulfilled its obligation to publish a public apology for “grievous damage caused” to the victims an Executive Decree in *El Peruano*.²⁰⁹

November 27, 2002: The Court reports that the State failed to comply with the Court’s judgment within the required time period for several of its obligations.²¹⁰ The State failed to cover all health care and psychological services costs for the beneficiaries, as well as to partially cover the beneficiaries’ home construction costs.²¹¹ The State also failed to publish and circulate of the Court’s August 16, 2000 judgment in the *El Peruano* newspaper and other media outlets, and failed, by extension, to publish a public apology to the victims.²¹² Further, the State failed to investigate and punish the individuals responsible for all injury to the victims and to and advance the investigation of the murder of thirty individuals, including Mr. Ugarte Rivera and Mr. Durand Ugarte.²¹³ Last, the State failed to undertake specific measures to identify the remains of Mr. Ugarte Rivera and Mr. Durand Ugarte.²¹⁴

May 28, 2003: The State made its final payment to fulfill its obligation to pay \$125,000 to victims’ beneficiaries.²¹⁵

June 24, 2004: The State complied with its obligation to identify and confer to his next of kin the remains of Mr. Durand Ugarte.²¹⁶ The Office of the Special Prosecutor for Forced Disappearances had conducted exhumations in several public cemeteries, where it was able to identify Mr. Durand Ugarte’s remains. After several exhumations in the same cemeteries, however, the remains of Mr. Ugarte Rivera had not been found.²¹⁷

April 18, 2006: The State had yet to comply with its obligation to identify the remains of Mr. Ugarte Rivera, but continued its

209. Durand and Ugarte v. Peru, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. “Considering” ¶ 19 (Aug. 5, 2008).

210. *Id.* “Having Seen” ¶ 3(4).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* “Considering” ¶ 5.

216. *Id.* ¶ 25.

217. *Id.* ¶¶ 25-26.

investigation to do so.²¹⁸

August 5, 2008: The State implemented various measures through which to investigate and punish the individuals responsible for victims' injuries.²¹⁹ Several investigative bodies, such as the Office of the Special Prosecutor for Forced Disappearances, the Supreme Council of Military Justice, the Attorney General, and the Third Criminal Chamber initiated investigations.²²⁰ The Court required, however, that the State collect and provide the Court with further information on the status of its obligation to investigate and punish those responsible for the grievances to Mr. Ugarte Rivera and Mr. Durand Ugarte.²²¹

The State had still not complied with its obligation to identify the remains of Mr. Ugarte Rivera.²²² The Court demanded that the State continue its investigation to locate Mr. Ugarte Rivera's remains and update the Court on measures it has taken in order for the Court to assess the State's compliance with this obligation.²²³

VII. LIST OF DOCUMENTS

A. *Inter-American Court*

1. Preliminary Objections

Durand and Ugarte v. Peru, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 50 (May 28, 1999).

2. Decisions on Merits, Reparations and Costs

Durand and Ugarte v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68 (Aug. 16, 2000).

Durand and Ugarte v. Peru, Judgment, Partially Dissenting Opinion of Judge De Roux Rengifo, Inter-Am. Ct. H.R. (ser. C) No. 68 (Aug. 16, 2000).

Durand and Ugarte v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 89 (Dec. 3, 2001).

218. *Id.*

219. *Id.* ¶ 24.

220. *Id.* ¶ 27.

221. *Id.* ¶ 24.

222. *See id.* "Declares" ¶ 4(d).

223. *Id.*

3. Provisional Measures

[None]

4. Compliance Monitoring

Durand and Ugarte v. Peru, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (Nov. 27, 2002).²²⁴

Durand and Ugarte v. Peru, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (Aug. 5, 2008).

5. Review and Interpretation of Judgment

[None]

B. Inter-American Commission

1. Petition to the Commission

Durand and Ugarte v. Peru, Report No. 15-96, Inter-Am. Comm'n H.R., (April 27, 1987).

2. Report on Admissibility

[None]

3. Provisional Measures

[None]

4. Report on Merits

[None]

5. Application to the Court

Durand and Ugarte v. Peru, Petition to the Court, Inter-Am. Comm'n H.R., Case No. 10.009 (Aug. 8, 1996).

²²⁴ Available only in Spanish.

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