

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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HUGO MUÑOZ SÁNCHEZ, BERTILA LOZANO TORRES, :
ET AL (LA CANTUTA) :
:
v. :
:
PERU :
:
Case 11,045 :
..... X

**BRIEF OF ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS IN
THE CASE OF LA CANTUTA**

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INTRODUCTION

On July 18, 1992, members of the Peruvian military detained, tortured, and executed a professor and nine students in La Cantuta. Under the American Convention on Human Rights and other international treaties to which Peru is a party, the state has an obligation to conduct an adequate and impartial investigation into the massacre to determine the identities of those responsible for the conception, planning, aiding, and/or commission of the crime. Once evidence of such responsibility has been identified, Peru has an obligation to prosecute the alleged perpetrators to the full extent of the law, to ensure that those found guilty receive sentences that adequately punish their crimes, and to enforce the sentences.

Peru has attempted to circumvent its duty to investigate and punish the people responsible for the La Cantuta massacre. It has done so by belatedly conducting investigations into the murders; by allowing the military justice system to assert authority and jurisdiction over the investigations; by allowing the military justice system to ignore evidence of high-ranking officers' complicity in masterminding the massacre; by sentencing only eight men to prison though evidence indicates many more were involved; and by passing amnesty laws that ensure that all those implicated in the crimes would enjoy impunity from punishment.

The Commission is thus urged to consider Peru's failure in the La Cantuta case to comply with its obligations under the American Convention and international law generally, and to take steps to ensure that this contravention of the Convention and other binding sources of international law does not continue.

STATEMENT OF INTEREST

The Allard K. Lowenstein International Human Rights Law Clinic (the "Clinic") is a Yale Law School program that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. The Clinic has prepared legal briefs and other documents for submission to regional and international human rights organizations, including the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, various bodies of the United

Nations, and the Foundation for the Medical Treatment of Torture Commission. The Clinic has also acted as counsel for victims from a number of countries seeking to hold individuals responsible for human rights abuses liable in United States courts. It has also assisted non-governmental organizations in preparing reports, legal memoranda, and briefs about human rights violations in the Americas and other regions of the world.

The questions presented here, regarding Peru's obligations to investigate, prosecute and punish those responsible for a massacre at La Cantuta in 1992, concern violations of the American Convention on Human Rights and fundamental principles of international law and are, therefore, of great interest to the Clinic, its students, and its professors.

STATEMENT OF FACTS

In the early morning hours of July 18, 1992, approximately thirty members of a Peruvian army special operations group known as "Colina" forcibly removed a professor and nine students of the Enrique Guzmán y Valle National University (located in La Cantuta, Lima) from their residences. The "Colina" members dragged approximately fifty students from their rooms, made them lie face down, and took away nine of them. While military troops prevented anyone at the university from assisting the captives, the nine students and professor were taken in vans bearing military license plates to an area outside of the city, where they were tortured and then shot execution style in the back of their heads. The soldiers buried the bodies under quicklime in an area known as Cerro Santa Rosa. The abduction and murders were undertaken pursuant to a military operation called "Secuestro," which targeted alleged Shining Path Supporters. Those killed in the massacre were professor Hugo Muñoz Sánchez, and students Bertila Lozano Torres, Dora Oyague Fierro, Luis Enrique Ortiz Perea, Armando Richard Amaro Condor, Robert Edgar Teodoro Espinoza, Heráclides Pablo Meza, Felipe Flores Chipana, Marcelino Rosales Cárdenas, and Juan Gabriel Mariños Figueroa.

Relatives of the dead attempted to bring habeas corpus proceedings on August 20, 1992, but the Peruvian Department of Public Prosecutions conducted no investigation. Judicial authorities claimed that the "pre-existence" of the students and professor could not be proven. However, evidence of the torture and murder by numerous members of the Peruvian army (including the involvement of high-ranking officials, who had conceived of the raid) subsequently

came from within the army itself. On April 2, 1993, Congressman Henry Pease García announced that he had received detailed reports from a group of mid-level officers using the name “Sleeping Lion,” describing what had happened at La Cantuta and implicating army and intelligence service officials. Specifically, those named in the reports were:

- General Commander Nicolas de Bari Hermoza Ríos, commander general of the Peruvian Army;
- Vladimiro Montesinos Torres, presidential advisor and reputed head of the National Intelligence Service (SIN);
- Major General Juan Rivero Lazo, head of intelligence of the Peruvian army;
- Major General Luis Pérez Documet, head of the special forces division (mentioned for coordinating the details of the operation with Rivero Lazo);
- Major Luis Martín Rivas Santiago Enrique, operations chief of the “Colina Group;”
- Colonel Federico Navarro Pérez, head of special operations of army intelligence (DINTE), in charge of carrying out operation with Martín Rivas;
- Infantry Commander Carlos Miranda Balarezo, head of the battalion that had control over the campus; and
- Lieutenant Colonel Manuel Guzmán Calderón, head of Battalion Commandos 19, which was involved in the actual massacre.

These reports finally forced the Democratic Constituent Congress to set up a commission to investigate the allegations. Peru’s Army Commander, General Hermoza Ríos denounced the investigation twelve days later and vowed that he would “not permit this move under any circumstances.” More than fifty tanks took to the streets of Lima a day later, and representatives of President Alberto Fujimori’s political coalition in Congress subsequently passed a measure allowing only the top commanders of the Peruvian armed forces to testify before the investigative commission.

The involvement of high-ranking members of the military in the massacre was confirmed a month later. On May 6, 1993, shortly after seeking asylum in the United States Embassy in Lima, the Peruvian Army’s third-highest-ranking officer, Lieutenant General Rodolfo Robles Espinoza, published a document detailing the planning, ordering, and commission of the murders. General

Robles Espinoza stated that responsibility for planning and conducting the raid and controlling the killers “lay with the upper echelons,” and specifically named General Hermoza Ríos and presidential advisor Montesinos Torres. Robles Espinoza also said that Rivero Lazo or Navarro Pérez, or both, had to have participated in planning, ordering, or coordinating the crime, and that they received assistance from Martín Rivas, Pérez Documet, and Infantry Lieutenant Portella Núñez Aquilino. The statement further explained that the massacre itself was carried out by Guzmán Calderón, Intelligence Operative Technician 3rd Class Sosa Dávila, and others.

The same month (May 1993), the military justice system asserted authority over the matter, opening a separate investigation. The Congressional Commission presented its majority opinion to the full Congress on June 24, 1993, finding evidence of criminal wrongdoing by Hermoza, Montesinos, Pérez Documet, Rivero Lazo, Martín Rivas, Navarro Pérez, and Guzmán Calderón, as well as General Luis Salazar Monroe, commander of the Second Military Region, and General Julio Salazar Monroe, official head of the SIN. The following month, the charred remains of the professor and some of the students were found in the Chavilca gully in Cieneguilla.

A civilian special prosecutor brought criminal charges against several members of the military on December 18, 1993, but the Peruvian military justice system subsequently usurped control of the process. The examining military judge challenged the jurisdiction of the civilian criminal court, and the case was referred to the Supreme Court of the Republic to resolve the jurisdictional issue. Although the prosecutor and the criminal judge agreed that the accused should be tried in civilian courts, the Supreme Court’s five-member Criminal Division announced on February 3, 1994, that it could not reach the four-judge concurrence required for a decision. The night of February 7, a ruling-party congressman submitted a bill that allowed the court to resolve the jurisdictional challenge with only three, instead of four, judges concurring on the matter. The bill was passed by the ruling-party bloc in Congress before dawn, and President Fujimori signed it into law the following day. Three days later, without waiting for a ruling on the constitutionality of the new law, three judges of the Supreme Court decided that the military courts should have exclusive jurisdiction over the La Cantuta case.

The military investigation and subsequent trials in Case No. 157-V-93 proceeded in secret—families of the victims were not allowed to participate until the investigation had ended, at which time they were called upon to testify. Neither the victims’ families nor their attorneys were allowed to witness the trials. The accused, their attorneys, and the magistrates of the military

court were the only participants during these two- or three-day proceedings. The military court rendered its decision on February 21, 1994, convicting ten officers for crimes related to the disappearances and massacre at La Cantuta. The decision then proceeded for review to the War Division of the Supreme Council of Military Justice (“CSJM”).

On May 3, 1994, the CSJM upheld eight of the convictions from the military court’s February 21 judgment in the La Cantuta prosecution. Martín Rivas and Captain Carlos Eliseo Pichilingue Guevara, the administrative chief of “Colina,” were convicted of abuse of authority, kidnapping, forced disappearance, and murder. Each was sentenced to incarceration for twenty years and ordered to pay 1.5 million nuevo soles in civil damages to the families of the La Cantuta victims. Three others accused of the same crimes, Technician 3rd Class Julio Chuqui Aguirre, Technician 3rd Class Nelson Rogelio Carbajal García, and Technician 3rd Class Jesús Antonio Sosa Saavedra, were sentenced to incarceration for fifteen years. Rivero Lazo and Navarro Pérez were charged with and convicted of negligence only and given sentences of five and four years, respectively. Infantry captain Velarde Astete was convicted of negligence and sentenced to one year of military confinement. Gúzman Calderón was acquitted of negligence and freed. Both the trial and appellate courts stated that they “acquitted” Rivero Lazo, Navarro Pérez, Velarde Astete, and Gúzman Calderón of the crimes of murder, kidnapping, forced disappearance, abuse of authority, and crimes against the administration of justice, even though the military prosecutor had neither charged them with these crimes nor argued their guilt before the courts. The military courts also acquitted Technician 2nd Class Pedro Guillermo Suppo Sánchez, closed any further investigation of Sosa Dávila and Coral Sánchez, and reserved judgment on Portella Nuñez because he did not show up for the trial.

Despite the CSJM’s May 3 decision closing the La Cantuta investigation, and the military prosecutor’s declarations concerning the innocence of the high command of the military and personnel of the intelligence service, shortly thereafter the military court opened a case against General Hermoza Ríos, presidential advisor Montesinos, and Major General Pérez Documet for participation in the La Cantuta massacre. This new case, No. 227-V-94-A, did not proceed to trial. The “*auditor*” (preliminary judge) of the military court issued a recommendation to stay the proceedings, which was executed by the CSJM. Thus, charges against the three high-level officials for murder, kidnapping, forced disappearance, abuse of authority, and negligence in relation to the La Cantuta massacre were permanently suspended on August 15, 1994. In its resolution, the

military court dismissed the accusations made by Robles Espinoza concerning the guilt of these high-ranking officials, and concluded that they and all other military and civil authorities lacked knowledge or authorship of, or participation in, the disappearances and massacre of July 18, 1992. Three days following the August 15 suspension, the *Sala Revisora* of the CSJM confirmed the stay and definitively closed Case No. 227-V-94-A.

The guilty verdicts against the lower-ranking officers in Case No. 157-V-93 were rendered moot a year later, in June 1995, by the enactment of two amnesty laws. Law No. 26,479 granted amnesty to military, police, and civilian personnel involved in human rights abuses committed since 1980. A second bill, Law No. 26,492 declared Law No. 26,479 valid and consistent with Peru's obligation to respect human rights and prohibited its judicial review, guaranteeing that state officials who had committed human rights violations since 1980 would enjoy full impunity. On July 15, 1995, the CSJM ordered the release of everyone previously convicted for the La Cantuta massacre. As a result, no one involved in the abduction, torture, and murder of the nine students and professor of Enrique Guzmán y Valle National University served more than fifteen months in prison for the La Cantuta convictions;¹ and the victims' families were left without judicial recourse. Following the release of the convicted officers, Peru experienced an increase in abductions, death threats, and harassment of opposition leaders, lawyers, and independent journalists, many of whom had advocated for or participated in the investigation and prosecution of those involved in the massacre.

Petitioners submitted this case (Case 11,045) to the Inter-American Commission of Human Rights on July 30, 1992, claiming the State of Peru violated the victims' rights enshrined in Articles 4, 5, 7, 8, and 25 of the American Convention on Human Rights. After exchanging communications with both parties, the Commission issued a report on admissibility (Report No. 42/99) on March 11, 1999. In this preliminary decision, the Commission found the petition admissible pursuant to Articles 46 and 47 of the Convention. It further determined that it was competent to hear the case on the question of the compatibility of Amnesty Laws Nos. 26,479 and 26,492 with the American Convention, but postponed until its review of the merits of the case a

¹ The convicted were imprisoned in the Cuartel Simón Bolívar, where it was reported that, unlike other prisoners, they had access to cellular telephones and personal color televisions, the use of tennis courts and mini-soccer fields, and daily visits from their families. See *La República*, Mar. 25, 1994. Because they were not in a military penitentiary, the convicted continued to receive their military salaries and other benefits. They also kept their ranks while in prison.

finding of its competence *ratione materiae* on the issue of the alleged failure to investigate and punish the masterminds of the massacre.

ARGUMENT

I. PERU HAS FAILED TO FULFILL ITS DUTY TO INVESTIGATE AND PUNISH ALL OF THE PERPETRATORS OF THE LA CANTUTA MASSACRE.

A. The American Convention on Human Rights and other binding treaties to which Peru is a party obligate it to adequately investigate and punish all those responsible for the La Cantuta massacre.

Peru's obligation to investigate and punish the perpetrators of the La Cantuta massacre is firmly established under binding international law. As a party to the American Convention on Human Rights ("Convention")², the Inter-American Convention to Prevent and Punish Torture ("IA Torture Convention")³ and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT")⁴, Peru has a duty to prevent, investigate, and punish violations of rights guaranteed in those respective treaties, including those violated here (right to life, right to personal liberty, right to humane treatment, right to a fair trial, right to judicial protection).⁵

Primarily, Peru is obligated to investigate and punish the human rights violations of the La Cantuta massacre under Article 1.1 of the Convention, which requires States to "ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms"

² American Convention on Human Rights, O.A.S. Official Records OEA/SER.K/XVI/1.1, doc. 65, rev. 1, corr. 1, January 7, 1970, 1144 U.N.T.S. 123 *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). Peru became a party to the Convention on July 28, 1978.

³ O.A.S. Treaty Series No. 67, *entered into force* Feb. 28, 1987, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992). Peru became a party to the IA Torture Convention on Mar. 28, 1991.

⁴ G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987. Peru became a party to the CAT on July 7, 1988.

⁵ "[E]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, adopted May 23, 1969, art. 26 U.N. Doc. A/C.39/27 at 289, 1155 U.N.T.S. 331 (*entered into force* January 27, 1980) *reprinted in* Basic Documents in International Law 349, 361 (Ian Brownlie ed., 3d. ed. 1983).

recognized by the Convention.⁶ In the Velásquez Rodríguez Case,⁷ in which Honduran military forces disappeared a student they considered dangerous to state security, the Inter-American Court of Human Rights (“Court”) established that “the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment. . . .”⁸ The Court further held that:

1. The State must investigate and punish every situation involving a violation of rights protected by the Convention.⁹ “If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights. . . . The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”¹⁰
2. To fulfill its duty to investigate, the State must conduct an “effective search for truth,” in which the investigation is “undertaken in a serious manner and not as a mere formality preordained to be ineffective.”¹¹
3. To fulfill its duty to prevent human rights violations, the State is required to investigate and punish those responsible. States must use “all those means of a legal, political, administrative and cultural nature that promote and ensure that the violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible”¹²

The Court has used the above principles to order a state to continue investigations into alleged violations and punish those responsible.¹³ In the case of El Amparo, military authorities acquitted suspected perpetrators for the murder of fourteen fishermen that police and military forces believed were guerrillas.¹⁴ Despite the acquittal of some of the suspects, the Inter-American Commission of Human Rights (“Commission”) urged the Court to require that the Venezuelan Government “identify and punish, on the basis of investigations made, the intellectual and

⁶ Velásquez Rodríguez Case, Inter-Am. Ct. H.R. ¶166 (1989). Official English language translations of the Court and Commission decisions have been used whenever available. Where they and other official source translations are unavailable, citations remain in the original Spanish.

⁷ Id.

⁸ Id. at ¶174.

⁹ Id. at ¶176.

¹⁰ Id.

¹¹ Id. at ¶177.

¹² Id. at ¶175.

¹³ El Amparo Case, Judgment on the Reparations, Inter-Am. Ct. H.R. ¶61 (1996).

¹⁴ Id.

accessory violators, thereby preventing the consummation of acts of grave impunity that damage the foundations of legal order.”¹⁵ The Court accepted the Commission’s request, finding that the Government’s duty to investigate and punish had not been fulfilled and instructing the State to follow through with this duty “seriously and not as a mere formality.”¹⁶

The Convention also effectively obliges states to investigate and punish violations of the Convention under Articles 8.1 and 25, which guarantee victims and/or their families the right to a fair hearing before a competent tribunal and to judicial protections, respectively. As the Court in Durand y Ugarte emphasized,

[E]l artículo 8.1 de la Convención Americana, en conexión con el artículo 25.1 de la misma, confiere a los familiares de las víctimas el derecho a que la desaparición y muerte de estas últimas sean efectivamente investigadas por las autoridades del Estado; se siga un proceso contra los responsables de estos ilícitos; en su caso se les impongan las sanciones pertinentes, y se reparen los daños y perjuicios que dichos familiares han sufrido. Ninguno de estos derechos fue garantizado en el presente caso a los familiares de los señores Durand Ugarte y Ugarte Rivera.¹⁷

The Court in Barrios Altos elaborated on the rights found in Articles 8.1 and 25, explaining that these protections are “instrumental” in guaranteeing the victim’s right to the truth.¹⁸ Thus, the Barrios Altos Court held that states must make available the necessary information to establish the facts and circumstances surrounding a violation of a fundamental right.¹⁹ This obligation is an affirmative duty, which requires the state to fully investigate all perpetrators, both direct perpetrators and masterminds, of human rights abuses such as those in La Cantuta.

The IA Torture Convention and the CAT additionally oblige Peru to prevent and punish torture and other cruel, inhuman, and degrading treatment. Specifically, these treaties bind State Parties to “take effective measures” to prevent and punish these crimes.²⁰ To fulfill their duty, States must ensure that such acts are offenses under their criminal law and make them “punishable

¹⁵ El Amparo Case, Judgment of January 18, 1995, Inter-Am. Ct. H.R. ¶4.

¹⁶ El Amparo Case, Judgment on the Reparations, Inter-Am. Ct. H.R. ¶61.

¹⁷ Durand y Ugarte, Judgment of Aug. 16, 2000, Inter-Am. Ct. H.R., Ser. C No. 68, ¶130.

¹⁸ The right to truth is further rooted in Article 13.1 of the Convention, which recognizes the victim’s right to look for and receive information. Caso Barrios Altos, Judgment of March 14, 2001, ¶45. Art. 13.1 states: “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”

¹⁹ Caso Barrios Altos, at ¶45.

²⁰ See IA Torture Convention, Articles 1, 6; CAT, Art. 4. This obligation also applies to an “attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.” Art. 4.

by severe penalties that take into account their serious nature.”²¹ Thus, Article 7 of the CAT explains that State Parties are bound to submit torture offenders found in their jurisdiction to the competent authorities for the purpose of prosecution or extradition.²²

B. Peru inadequately investigated the “intellectual authors”²³ of the La Cantuta massacre and, therefore, failed to fulfill its duty to prevent, investigate, and punish human rights violations.

Peru has failed to comply with its obligations to prevent, investigate, and punish human rights violations, because it has inadequately investigated, prosecuted, and punished the intellectual authors of the La Cantuta massacre. Much evidence indicates that Operation Secuestro was planned and ordered prior to its execution and covered up subsequently; yet Peru failed to fully investigate and prosecute the officers implicated. Early on, the military prosecutor summarily decided not to investigate intellectual authorship because he believed that Secuestro was an operation that was “neither clandestine, nor ordered or approved or authorized by the Army High Command.”²⁴ For that reason, officers higher up in the chain of command, such as Rivero Lazo, Navarro Perez, Velarde Astete, and Portella Nuñez, were charged only for negligent supervision of troops under their command.²⁵ The CSJM adopted the prosecutor’s position at the trials of the five low-ranking direct perpetrators, finding that the authors had been identified, and thereby “definitively closing” the file.²⁶

Notwithstanding the attempts to halt investigation into the masterminds behind La Cantuta, the military court issued a judgment staying an action against Hermoza, Montesinos and Pérez Documet for involvement in the events at La Cantuta. In that resolution, the CSJM merely reiterated the earlier position of the May 1994 court, finding that the massacre was conducted without command from *any* higher civil or military authority whatsoever.²⁷ The court supported

²¹ IA Torture Convention, Art. 6.

²² Id., Art. 7.

²³ This term refers to those who planned, coordinated, and ordered the crimes. *See El Amparo Case*, Judgment of January 18, 1995, ¶4.

²⁴ “Acusación del Fiscal Militar,” Sala de Guerra, Fiscalía, A.F. N° 02-93, Exp. N° 157-V-93, *reprinted in* Gral. (R) Rodolfo Robles E., Crimen e Impunidad, El “Grupo Colina” y el Poder, apéndice 20, p. 194.

²⁵ Id. at 196.

²⁶ “Transcripción de la Sentencia de 3 de mayo de 1994, Caso No. 157-V-93, por la Presidencia del Consejo Supremo de Justicia Militar,” *reprinted in* General Rodolfo Robles, Crimen e Impunidad: “El grupo Colina y el Poder,” apéndice 23, at 209 (1996).

²⁷ “Resolución de la Sala de Guerra del CSJM,” Caso No. 227-V-94-A, 15 de agosto de 1994, p. 1 (provided by the Peruvian government to the Commission during this proceeding).

its all-embracing holding by pointing to the earlier trials against the low-ranking direct perpetrators. These trials, the court held, had “duly identified and punished” all of the authors and those responsible for the disappearances and massacre.²⁸ The court further based its decision on testimonies of the accused and of military officials subordinate to General Hermoza Ríos, finding these adequate to negate the accusations of General Robles, which had clearly implicated the three accused and other high-ranking officials for masterminding the crimes.²⁹ Aside from a quick dismissal of Robles’ testimony, the Court’s opinion contained no consideration of evidence³⁰ that the events of La Cantuta were pre-planned, ordered, and covered up.

The August 1994 opinion of the military court demonstrates how the trials against the direct perpetrators were used to impede further investigation of the masterminds of the disappearances and massacre. The Court excused itself from any serious intent to discover the identities of the masterminds of the events by conveniently pointing to the findings of the earlier trials, using the convictions of the lower-ranking officers as a shield for the prosecution of the high command: “que el precitado proceso (causa ciento cincuentisiete guión V guión noventitres) [the trials of the direct perpetrators] permite establecer fehacientemente y de manera indubitable, conjuntamente con los presentes actuados, que los inculpados . . . no han tenidos participación alguna en los eventos delictuosos. . . .”³¹ The Court’s approach is made all the more clear by its finding that no military or civil authority could have ordered or approved the disappearances and murders. It made this finding even though no such authorities were before the court in the proceeding and even though it went beyond the issue of the guilt or innocence of the three defendants.³²

1. Substantial evidence in this case indicates that someone planned, ordered, and covered-up the La Cantuta Massacre.

Substantial evidence—including the facts of the crime itself and attempts by high-ranking military officials and politicians to thwart the investigation of the crime—strongly suggests that the killings of the university students and professor were not the actions of rogue elements of the military. Rather, the acts were pre-planned and ordered. First, the students and professors who

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ For examples of such evidence, *see infra* II.B.1.

³¹ “Resolución de la Sala de Guerra del CSJM,” Caso No. 227-V-94-A, 15 de agosto de 1994, p. 2 (provided by the Peruvian Government to the Commission during this proceeding).

³² *Id.* at 1.

were disappeared were not chosen at random. In fact, witnesses attest that the men who entered their dormitory halls held lists of specific students to be apprehended.³³ Whoever drew up such lists likely relied on intelligence operations in order to determine which students were possible Shining Path supporters. This suggests that persons with access to military intelligence contributed to the planning of the massacre by deciding to act on this information.³⁴

Second, the Army's Civic Action Base collaborated with the military intelligence unit that invaded the university campus; this implies that the Civic Action Base's commanders were aware of the operation beforehand and/or were instructed to let a cadre of hooded men onto the campus. At the time of the La Cantuta massacre, the Enrique Guzmán y Valle National University was under military command and heavily guarded. Nonetheless, the unit that invaded the campus—a separate unit from that permanently stationed there—was allowed to enter the students' and professor's residences in the middle of the night, seize nine students and a professor, tie the remaining students to their beds with guards to watch them, and leave with prisoners in vans recognized as belonging to military intelligence forces.³⁵ This invading unit was approximately thirty men strong and dressed in civilian clothes.³⁶ Presumably, the invading unit would have needed permission of superiors in command of the different occupying unit, if not the commander himself, to carry out such activities within the occupied zone.

In addition, efforts by officials of the military and the ruling party to thwart investigation into the massacre demonstrate that the power elite was concerned about efforts to determine responsibility for the incursion. This further suggests that Operation Secuestro was planned and ordered by someone at a higher level of command than the direct perpetrators. Following the release of press accounts of the crime and information leaked by Sleeping Lion, the military took a strong stance against the activities of the newly formed congressional investigative commission.

³³ "Transcripción de los puntos V, VI, y VII del dictamen de la mayoría de la Comisión Investigadora del Congreso Constituyente Democrático sobre el caso de La Cantuta," *reprinted in* Gal. (R) Rodolfo Robles E., Crimen e Impunidad, El "Grupo Colina" y el Poder, apéndice 6, p. 137.

³⁴ This hypothesis was corroborated by the account in *Sí* magazine, which asserted that the university was infiltrated by military intelligence who played a direct role in informing on student activists. *See* Revista Sí, 5/31/93, *reprinted in* Gal. (R) Rodolfo Robles E., Crimen e Impunidad, El "Grupo Colina" y el Poder, apéndice 1, p. 113.

³⁵ The license plates bore the initials KQ, used exclusively by military intelligence. *See* Anatomy of a Cover-Up: The Disappearances at La Cantuta ("Americas Watch Report"), Americas Watch, Vol. V, No. 8., Sept. 27, 1993, p. 5, *citing* "La Cantuta: Como fue," *Sí* (Lima: May 31, 1993), p. 16.

³⁶ Americas Watch Report, p. 5, *citing* Report of the Special Investigative Commission of the Democratic Constituent Congress, (Lima: June 24, 1993), p. 35; and Mónica Vecco, "Sí, Hermoza Ríos conocía secuestro de 10 estudiantes," La República, April 11, 1993.

Following General Hermoza's threat not to allow the commission to go forward,³⁷ the military began frequent and massive tank movements in Lima aimed at intimidating commission members.³⁸ Moreover, the commission was barred from seeking the testimony of lower-ranking soldiers who were at La Cantuta on the night of the incursion, and from receiving the evidence already in the hands of the military judge investigating the case.³⁹ The eleventh-hour passage of a legislative bill allowing three judges, rather than the four normally required, to resolve a jurisdictional challenge in the Supreme Court also raises suspicion of a cover-up by the military elite. This bill immediately followed the declaration by the Criminal Division of the Supreme Court that it was unable to reach a decision on jurisdiction.⁴⁰ Subsequent to the law's passage, and without waiting for constitutional challenges to be made, three members of the Criminal Division of the Supreme Court ordered that the trial be referred to the military justice system.⁴¹ In sum, interference by high-ranking members of the military and President Alberto Fujimori's political party in the events following the massacre suggests that these officials sought to prevent a full investigation of the case. This strongly supports the conclusion that there was involvement in the massacre at a level higher than that of the relatively low-ranking direct perpetrators so far convicted of mere negligence.

Recent events in Peru provide strong confirmation that the La Cantuta massacre was planned at the highest level of government; even ex-president Fujimori and his personal advisor Vladimiro Montesinos were likely involved. On June 11, 2001, in an eleven-to-seven vote, Peru's Comisión Permanente del Congreso passed a constitutional order accusing Fujimori of crimes against humanity arising from the Barrios Altos and La Cantuta massacres. The Commission accused Fujimori of responsibility for the crimes of assassination, homicide, grave injury, and forced disappearance. Among the evidence submitted to establish Fujimori's presumed responsibility were statements of two former army commanders, Hermoza Ríos and Robles

³⁷ Americas Watch Report, p. 9, *citing* Lima Global de Televisión, April 21, 1993, *as transcribed in the* FBIS Latin America Daily Report, April 22, 1993, p. 37.

³⁸ Id.

³⁹ "Transcripción de los puntos V, VI, y VII del dictamen de la mayoría de la Comisión Investigadora del Congreso Constituyente Democrático sobre el caso de La Cantuta," *reprinted in* Gral. (R) Rodolfo Robles E., Crimen e Impunidad, El "Grupo Colina" y el Poder, apéndice 6, p. 142; and Americas Watch Report, p. 11. Note that the military tribunal only began its investigation after the investigating commission was established.

⁴⁰ Case 11,045 (La Cantuta). Report N° 42/99, Inter-Am. C.H.R. (March 11, 1999), ¶21.

⁴¹ Id. at ¶22.

Espinoza, and of the current Commander General of the army.⁴² Since his arrest, Montesinos has stated that all his activities were undertaken with Fujimori's full knowledge and that the former president participated directly in the Barrios Altos and La Cantuta cases.⁴³

2. Despite the strong evidence, Peru has not adequately investigated who planned and ordered the La Cantuta massacre.

In its formal accusation of the direct perpetrators, the military prosecutor maintained that the La Cantuta massacre was not planned, ordered, or authorized at higher levels of the Peruvian military and, thus, there would be no prosecutions against alleged intellectual authors. In light of the foregoing evidence, however, the military prosecutor's statement is not credible and should serve as evidence that he did not fully investigate the crime and punish those responsible. Furthermore, the conclusions by the military prosecutor and the CSJM (May 1994 decision) that the events were not planned, ordered, or authorized, call into question the seriousness of the subsequent legal actions taken against Hermoza, Montesinos, and Pérez Documet. If the prosecutor and the military courts were already convinced that the La Cantuta massacre was not planned, ordered, or authorized, they could not have fully and impartially investigated Hermoza, Montesinos, and Pérez Documet for intellectual authorship. In fact, in the August 1994 decision dismissing the charges against these three men, the court only cited one piece of evidence—Robles's testimony—implicating the accused. However, each of the high-ranking officials were additionally implicated by the following sources:

- Capt. (R) Vladimiro Montesinos—accused of planning and approving the crimes by the document that Sleeping Lion gave to Congressperson Henry Pease García (Sleeping Lion document),⁴⁴ Gen. Robles Espinoza's testimony,⁴⁵ the majority

⁴² El Comercio, "Aprueban acusación constitucional contra Fujimori," 11 de junio 2001; "¡Sí hay indicios para investigar!," 12 de junio 2001; "Tres agentes de inteligencia responsabilizaron a Fujimori por Caso Barrios Altos y La Cantuta, revela procurador," 13 de junio 2001, <www.elcomerciope.com.pe>.

⁴³ El Comercio, "Montesinos no podrá acogerse al beneficio de colaboración eficaz, sostiene Vargas Valdivia," 2 de julio 2001, <www.elcomerciope.com.pe>. Montesinos is presently in a maximum security prison at the La Punta naval base. EFE News Services (U.S.), "Peruvian Justice Minister: Montesinos Received Illegal Visits," Oct. 12, 2001.

⁴⁴ Americas Watch Report, p. 7.

⁴⁵ Fragmentos de artículo en Caretas, (Lima: 20 de mayo de 1993) que reseña la exposición realizada por el autor ante la comisión investigadora, el 18 de mayo de 1993, *reprinted in* Gral. (R) Rodolfo Robles E., Crimen e Impunidad, El "Grupo Colina" y el Poder, apéndice 13, p. 178.

opinion of the congressional investigative committee (“Majority Opinion”),⁴⁶ and Sí Magazine.⁴⁷

- Gen. Nicolás Hermoza Ríos—accused of approving and covering up the crimes by the Sleeping Lion document, the Majority Opinion, and Sí Magazine.
- Gen. Luis Pérez Documet—accused of planning and/or ordering the crimes by the Sleeping Lion document, Gen. Robles Espinoza’s testimony, and the Majority Opinion.

In addition, the members of the high command of the Peruvian military who were credibly accused (but not charged) of planning, ordering, and covering up the La Cantuta disappearances and murders include:

- Gen. Julio Salazar Monroe—accused of planning and/or ordering the crimes by the Majority Opinion.
- Colonel Carlos Miranda Balarezo—accused of planning and/or ordering and/or coordinating by the Sleeping Lion document and the Majority Opinion.
- Major General Juan Rivero Lazo—accused of planning and coordinating by the Sleeping Lion document, the Majority Opinion, and Sí Magazine.
- Cavalry Colonel Federico Augusto Navarro Pérez—accused of planning and coordinating by the Majority Opinion, Sí magazine, and the civilian prosecutor’s declaration.⁴⁸
- Major Manuel Guzmán Calderón—accused of coordinating by the Sleeping Lion document; Gen. Robles Espinoza’s testimony, the Majority Opinion, and the civilian prosecutor’s accusation (and the military prosecutor’s accusation of negligence, for which he was found not guilty).
- Lt. Aquilino Portella Nuñez—accused of coordinating by Gen. Robles Espinoza’s testimony and Sí Magazine.⁴⁹

⁴⁶ “Transcripción de los puntos V, VI, y VII del dictamen de la mayoría de la Comisión Investigadora del Congreso Constituyente Democrático sobre el caso de La Cantuta,” *reprinted in* Gral. (R) Rodolfo Robles E., Crimen e Impunidad, El “Grupo Colina” y el Poder, apéndice 6, p. 137.

⁴⁷ Sí, (Lima: 31 de mayo de 1993), *reprinted in* Gral. (R) Rodolfo Robles E., Crimen e Impunidad, El “Grupo Colina” y el Poder, apéndice 1, p. 113.

⁴⁸ “Informe del Fiscal Cubas,” Señor Juez Del Décimo Juzgado Penal de Lima, *reprinted in* Gral. (R) Rodolfo Robles E., Crimen e Impunidad, El “Grupo Colina” y el Poder, apéndice 8, p. 157.

⁴⁹ Portella Nuñez was accused by the military prosecutor of murder, forced disappearance, kidnapping, crimes against the administration of justice, abuse of authority, and negligence, but did not appear at trial and was therefore not convicted or sentenced. The Peruvian Government is obligated to follow through on this prosecution as well as investigate him for intellectual authorship.

Without further investigation, it is impossible to determine definitively which of these men—or others—planned and ordered the massacre at La Cantuta. But the facts inherent in the crime itself, the interference by the military in the investigation, the sweeping statements by the military prosecutor and CSJM that there were no intellectual authors, and the specific accusations of planners strongly suggest that the crimes against the students and professor were planned, ordered, authorized, and covered up and that those responsible were never fully investigated and punished.

3. The Commission should recommend that the Peruvian Government adequately investigate, prosecute, and punish the intellectual authors of the La Cantuta massacre. Peru must also continue investigations into the remaining direct perpetrators.

Peru remains obligated under international law to investigate, prosecute, and punish those responsible for planning, coordinating, ordering, authorizing, covering up, and carrying out the La Cantuta massacre. As in the case of El Amparo, the Commission should recommend that the Government conduct serious investigations, particularly of those who planned and covered up the crimes.⁵⁰ Peru's investigation and prosecution of some of the direct perpetrators of the La Cantuta massacre does not release it from its obligation to investigate and punish the indirect perpetrators—the intellectual authors of the crime.⁵¹ In Velásquez Rodríguez, the Court stressed that the State must conduct “an effective search for truth,” which cannot shield certain individuals or groups from prosecution.⁵² By failing to seriously investigate and punish those who were indirectly responsible for the La Cantuta massacre, the Government directly violates the Court's ruling in Velásquez Rodríguez: it allows a certain powerful sector of the Peruvian military to commit crimes with impunity. Such impunity blatantly violates the State's obligation to prevent similar abuses, because it sends the implicit message that the State accepts human rights violations that are committed by a privileged class of society.

Finally, the prosecution and conviction of five of the direct perpetrators also does not absolve Peru of its obligation to continue investigations, prosecutions, and punishment of the additional soldiers who carried out the crimes. Witness testimony indicates that at least thirty

⁵⁰ El Amparo Case, Judgment of Jan. 18, 1995, Inter-Am. Ct. H.R. ¶4.

⁵¹ Article 4 of the Torture Convention explains that the State's obligation to punish applies to any person who is complicit or participates in torture.

⁵² Velásquez Rodríguez Case at ¶176.

soldiers participated in carrying out the incursion.⁵³ The number of soldiers had to be numerous enough to force fifty students in the residences to evacuate their rooms and lie face down on the floor. Suspected individuals—such as members of the “Colina Group” and troops from the Special Forces Directorates BIG-19—have been credibly named as direct perpetrators.⁵⁴ They and others must be investigated, prosecuted, and punished for their crimes.

II. PERU’S AMNESTY LAWS DO NOT ABSOLVE IT OF THE OBLIGATION TO INVESTIGATE, PROSECUTE, AND PUNISH THOSE RESPONSIBLE FOR THE LA CANTUTA DISAPPEARANCES AND MASSACRE.

In 1995, Peru passed Law No. 26,479, granting “a general amnesty to the military, police or civilian personnel, whatever their military, police, or official status, who face a formal complaint, investigation, criminal charge, trial, or conviction for common or military crimes . . . in relation to all events derived or originated from, or a consequence of, the fight against terrorism, and which may have been committed . . . between May 1980 and [June 14, 1995].”⁵⁵ The scope of this amnesty was broadened by Law No. 26,492, which was passed two weeks after the first amnesty law. The second law declared the first to be “of binding application by the Judicial Organs . . . independent of whether the military, police, or civilian personnel involved are or are not accused, investigated, subject to criminal proceedings, or convicted.”⁵⁶ Thus, Peruvian amnesty laws protect all those responsible for the events of La Cantuta from prosecution.

A. Peru’s amnesty laws violate the American Convention on Human Rights and cannot release Peru from its duty to investigate and punish the perpetrators of the La Cantuta massacre.

In the March 14, 2001, Barrios Altos decision, the Court unequivocally declared the Peruvian amnesty laws Nos. 26,479 and 26,492 invalid because they violate Articles 1.1, 2, 8.1,

⁵³ Americas Watch Report at p. 5, citing Report of the Special Investigative Commission of the Democratic Constituent Congress, (Lima: June 24, 1993), p. 35; and Mónica Vecco, “Sí, Hermoza Rfos conocía secuestro de 10 estudiantes,” La República, April 11, 1993.

⁵⁴ These sources include the document that Sleeping Lion gave to Congressperson Henry Pease García; Gen. Robles Espinoza’s testimony; the majority opinion of the congressional investigative committee; Sí Magazine; and the civilian prosecutor’s complaint.

⁵⁵ Law No. 26,479, Article 1, Normas Legales, Diario Oficial El Peruano, Lima, 15 June 1995.

⁵⁶ Law No. 26,492, Article 3, Normas Legales, Diario Oficial El Peruano, Lima, 2 July 1995.

and 25 of the American Convention.⁵⁷ The Court's holding in that case is applicable to La Cantuta, as foreseen by the Court itself: "las mencionadas leyes carecen de efectos jurídicos y no pueden seguir representando un obstáculo para la investigación de los hechos que constituyen este caso ni para la identificación y el castigo de los responsables, *ni pueden tener igual o similar impacto respecto de otros casos de violación de los derechos consagrados en la Convención Americana acontecidos en el Perú.*"⁵⁸ The Court was even more explicit in its September 3 interpretation of the March 14 decision, finding that because the promulgation of the Peruvian amnesties was a *per se* violation of the Convention, its holding in Barrios Altos was to have "efectos generales"—in other words, the invalidation of the Peruvian amnesties applies beyond Barrios Altos to other cases dealing with the amnesties, such as La Cantuta.⁵⁹ Given this clear precedent, and other Court and Commission precedents regarding the same law,⁶⁰ the Peruvian amnesties do not absolve the State of its duty to continue to investigate, prosecute, and punish all of the perpetrators of the La Cantuta massacre.

By acting pursuant to the two amnesty laws to release the convicted violators of the massacre and destroy the possibility of further investigations, prosecutions, and punishments, the Peruvian Government failed in its duties under Articles 1.1 and 2 of the Convention. Article 1.1 requires States to conduct a full and effective investigation of every violation of human rights and to follow up with prosecution and punishment;⁶¹ in turn, Article 2 obliges states to adapt domestic laws to ensure that they do not contravene state obligations under the Convention.⁶² The Peruvian amnesties, by contrast, represent a deliberate attempt to use domestic legislation to escape Peru's obligations under the Convention.

⁵⁷ Caso Barrios Altos (Chumbipuma Aguirre y Otros vs. El Perú), Sentencia de 14 de marzo de 2001, Inter-Am. Ct. H.R., ¶¶44-49.

⁵⁸ Id. at ¶44 (emphasis added).

⁵⁹ Caso Barrios Altos (Chumbipuma Aguirre y Otros vs. El Perú), Interpretación de la Sentencia de Fondo, Sentencia de 3 de septiembre de 2001, Inter-Am. Ct. H.R., ¶ 18.

⁶⁰ Castillo Paez Case, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R., ¶105 ("the Amnesty Law enacted by Peru . . . is one of the 'internal difficulties that might prevent the identification of the individuals responsible for crimes of this kind,' since it obstructs investigation and access to the courts and prevents the victims' next of kin from learning the truth and receiving the reparations to which they are entitled.")

⁶¹ Velásquez Rodríguez Case, at ¶176.

⁶² Art. 2 states: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

Peru is also responsible for ensuring family members of those massacred at La Cantuta the rights to be heard by a judge at a fair hearing (Art. 8.1) and to a prompt, simple recourse (Art. 25). The amnesties preempted the full investigation of the authors of the crimes, denying the victims' families these judicial protections. The testimonial opportunity given by the military court to the family members was inadequate—the latter were banned from participation in the investigations and allowed to testify only at the last hour. Such a process, concocted to cover up the full extent of the guilt of those who participated in the massacre, does not satisfy the requirements of Articles 8.1 and 25. These articles grant victims their right to know the truth about the facts behind the violations of their human rights, including *those responsible*.⁶³ As articulated by the Court in Barrios Altos, the right to truth—encapsulated in Articles 8.1, 25 and 13.1⁶⁴—is obstructed by amnesty laws: “Este tipo de leyes impide la identificación de los individuos responsables de violaciones a derechos humanos, ya que se obstaculiza la investigación y el acceso a la justicia e impide a las víctimas y a sus familiares conocer la verdad y recibir al reparación correspondiente.”⁶⁵

The events of La Cantuta parallel those in Barrios Altos in large part. In both cases, members of the La Colina death squad massacred suspected supporters of Shining Path. In both instances, civil prosecutors began criminal investigations and drafted complaints against several important military officers. Both attempts at criminal investigation were subsequently subverted by the military justice system and then nullified by the amnesty laws.⁶⁶ The Barrios Altos case differs from La Cantuta in that the amnesty laws cut off the process before any trials took place. This difference, however, does not make the Court's ruling in Barrios Altos any less applicable to the facts of La Cantuta. Although some trials took place in the case of La Cantuta, the amnesty laws also prohibited the investigation of the remainder of the direct and indirect authors, against

⁶³ Caso Barrios Altos at ¶48 (“el derecho a la verdad se encuentra subsumido en el derecho de la víctima o sus familiares a obtener de los órganos competentes del Estado el esclarecimiento de los hechos violatorios y las responsabilidades correspondientes . . .”).

⁶⁴ Id. at ¶45.

⁶⁵ Id. at ¶43 (emphasis added)

⁶⁶ Five military officials (Salazar Monroe, Martín Rivas, Carbajal García, Sosa Saavedra, and Coral Goycochea) were under formal investigation in the Barrios Altos case when the Peruvian amnesty laws were passed, terminating the investigations. Several of the five had already been serving time in prison for La Cantuta-related convictions when the amnesties took effect. Caso Barrios Altos, Sección II. Hechos, 2.(g)-(i). These officials were not investigated further for the Barrios Altos massacre until 2001, when the CSJM reopened the Barrios Altos investigation in response to the March 14, 2001 decision by the Inter-American Court. Subsequently, the CSJM transferred the reopened investigation to the civilian courts. El Comercio, “Anulan juicio que exime del caso Barrios Altos a ex asesor,” 5 de junio 2001, website <www.elcomerciope.com.pe>.

whom there is ample evidence.⁶⁷ Moreover, the amnesties prevented victims' families from obtaining a fair hearing and remedy—rights they were denied in the closed investigations and trials of the low-level direct perpetrators. Finally, the amnesties deprived the victims' families of their right to know the full extent of responsibility for the massacres, because they let the decisions of the CSJM stand as the “official truth” and eliminated any possibility of additional fact-finding. Given the remarkable similarities of the effects of the Peruvian amnesties in the two cases, the Commission should deliver recommendations analogous to those it made to the Court in Barrios Altos: “Declarar que el Estado del Perú debe investigar los hechos para determinar las personas responsables de las violaciones de los derechos humanos . . . así como divulgar públicamente los resultados de dicha investigación y sancionar a los responsables.”⁶⁸

The Barrios Altos decision is not unique in its repudiation of Peru's resort to amnesty for human rights violations. The Court in Castillo Paez affirmed that the Peruvian amnesty Laws 26,479 and 26,492 were incompatible with the Convention, rebutting Peru's argument that the laws were necessary for the Peruvian state to “change to save itself as a nation and as a state.”⁶⁹ Relying on Articles 1.1, 8.1 and 25, the Court reiterated the greater weight given to the rights of the victims' family members:

*Moreover, on the assumption that internal difficulties might prevent the identification of the individuals responsible for crimes of this kind, the victim's family still has the right to know what happened to him and, if appropriate, where his remains are located. It is therefore incumbent on the State to use all the means at its disposal to satisfy these reasonable expectations. In addition to this duty to investigate, there is also the duty to prevent the commission of forced disappearances and to sanction those responsible for them. These obligations on Peru shall remain in force until such time as they have been fully performed.*⁷⁰

Moreover, the Court emphasized that amnesty laws promote impunity for human rights violations and are thus incompatible with the State's obligation to “to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.”⁷¹

⁶⁷ See *supra*, Section II.A.

⁶⁸ Caso Barrios Altos, Section X, ¶5.

⁶⁹ Caso Castillo Paez, Judgment on the Reparations, Nov. 27, 1998, Inter-Am. Ct. H.R., ¶99.

⁷⁰ *Id.* at ¶103, *citing* Caso Castillo Páez, Judgment of November 1997, Inter-Am. Ct. H.R., ¶90 (emphasis added by Court in the Reparations proceeding).

⁷¹ *Id.* at ¶107, *citing* Caso Paniagua Morales y otros, Inter-Am. Ct. H.R., ¶173.

The amnesties at issue in Castillo Páez violated the Convention and cannot relieve Peru of its duty to investigate, prosecute, and punish those responsible for the alleged violations. The Court unanimously held that, notwithstanding the amnesties, the state had to conduct further investigations, identify and punish the perpetrators, and adopt the necessary domestic legal measures to ensure the fulfillment of its obligations.⁷² The Court's holding that Peru must "adopt the necessary domestic legal measures to ensure that this obligation is fulfilled,"⁷³ coupled with its previous statement that the amnesty laws constituted "internal difficulties that might prevent the identification of the individuals responsible for crimes of this kind,"⁷⁴ implies that, under this ruling, Peru was obligated to repeal or amend Law No. 26,479 and Law No. 26,492 so as to allow for the prosecution and punishment of the offenders. Judges Cançado Trindade and Burelli made this obligation clear in their joint concurrence:

[D]ichas medidas [las leyes peruanas de amnistía] son incompatibles con el deber de los Estados de investigar aquellas violaciones, imposibilitando la vindicación de los derechos a la verdad y a la realización de la justicia, así como, en consecuencia, del derecho a obtener reparación . . . [S]on, además, incompatibles con la obligación general de los Estados de respetar y garantizar el respeto de los derechos humanos protegidos, asegurando el libre y pleno ejercicio de los mismos (citation omitted). Los Estados tienen el deber de eliminar aquellas medidas (que constituyen obstáculos para la realización de los derechos humanos), de conformidad con la otra obligación general de adecuar a su derecho interno a la normativa internacional de protección (citation omitted).⁷⁵

The factual similarity of the La Cantuta case requires application of the Court's holding in Castillo Paez that Peru's amnesty laws do not absolve it of the duty to adequately investigate and punish. Both cases concern the crime of forced disappearance and the question of whether amnesty laws No. 26,479 and No. 26,492 violate the Convention. In both cases, members of the Peruvian security forces disappeared the victims because they were suspected of being supporters of Shining Path.⁷⁶ The Commission should follow the Court in Castillo Páez by finding the Peruvian amnesty laws invalid and recommending that Peru "investigate the facts..., identify and punish those

⁷² Id. at Conclusion, ¶2.

⁷³ Id.

⁷⁴ Id. at ¶105.

⁷⁵ Id., joint concurring opinion of Judges Cançado Trindade and Burelli, ¶¶2-3 (concurrence not available in english).

⁷⁶ Id. at ¶¶43d & 43e.

responsible and adopt the necessary domestic legal measures to ensure that this obligation is fulfilled.”⁷⁷

The Commission has already articulated a strong position against amnesties, repeatedly finding these measures in violation of the Convention and insisting that they do not absolve states from their duties to investigate and punish human rights violations.⁷⁸ As the Commission stated in its Second Report on the Situation of Human Rights in Peru:

Over the years, this Commission has had the opportunity in several key cases to state its views and crystallize its doctrine on the subject of amnesties. These decisions have uniformly found that *amnesty laws and comparative legal measures that preclude or terminate the investigation and prosecution of State agents who may be responsible for serious violations of the American Convention or Declaration violate multiple provisions of these instruments.*⁷⁹

In the same report, the Commission specifically repudiated the amnesty laws covering the La Cantuta crimes, asserting:

[S]tates parties to the American Convention cannot invoke the application of their domestic law, in this case amnesty laws, in order to disregard their obligation to ensure the full and proper functioning of justice for the victims.⁸⁰

According to the Commission, and in line with the Court’s jurisprudence, the aforementioned “obligation to ensure the full and proper functioning of justice for the victims” includes both the duty to investigate violations of the Convention and punish those responsible and the obligation to amend domestic legislation that prohibits the State from fulfilling its duties under the Convention. Thus, in the Garay Hermosilla Case, the Commission recommended

that [the State of Chile] amend its domestic legislation to reflect the provisions of the American Convention on Human Rights, so that violations of human rights by the ‘*de facto*’ military government may be investigated, with a view to identifying the guilty parties, establishing their responsibilities and effectively prosecuting

⁷⁷ *Id.* at Conclusion, ¶2.

⁷⁸ *See, e.g.*, Report No. 1/99, Case 10.480 (El Salvador), Inter-Am. C.H.R., Annual Report 1998; Report No. 36/96, Case No. 10.843 (Chile), Inter-Am. C.H.R., Annual Report 1996; Reports No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311 (Argentina), and No. 29/96, Cases 10.029, 10.036, 10.372, 10.373, 10.374, and 10.375 (Uruguay), Inter-Am. C.H.R., Annual Report 1992-1993.

⁷⁹ Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2000, para. 221 (emphasis added), *citing* Inter-Am. C.H.R., Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, doc. 9 rev. 1, February 26, 1999, ¶345. The Commission further noted here that its views on amnesties “have been confirmed by the Inter-American Court on Human Rights.” *Id.*

⁸⁰ Second Report on Peru at ¶221.

them, thereby guaranteeing to the victims and their families the right to justice that pertains to them.⁸¹

Following its recommendations in Garay Herмосilla, the Commission should, in this case, request that Peru repeal or amend the two amnesty laws in question, in order to facilitate the investigation and punishment of all of the perpetrators of the La Cantuta massacre.

B. Peru’s amnesty laws violate international human rights norms and cannot release Peru from its duty to investigate and punish the perpetrators of the La Cantuta massacre.

There is growing international agreement that amnesty laws violate international human rights norms. International human rights bodies have held that amnesties interfere with states’ obligations to investigate human rights violations, to ensure they are not repeated in the future, and to combat impunity. These bodies have acknowledged a *per se* prohibition on all amnesties for grave violations of human rights and have specifically denounced the amnesties at issue in the La Cantuta case.⁸²

Intergovernmental bodies have increasingly recognized that such amnesties violate international human rights principles and States’ obligations to protect and ensure human rights

⁸¹ Report No. 36/96, Case No. 10,843 (Chile), Inter-Am. C.H.R., Annual Report 1996, ¶111.

⁸² International human rights bodies have also widely prohibited the use of so-called “self-amnesties”—those granted by the same government that is responsible for the crimes at issue. UN Human Rights Committee, General Comment No. 20 regarding Art. 7 of the International Covenant on Civil and Political Rights, ¶15, UN Doc./CCPR/C/21/Rev.1/Add.3 (Apr. 7, 1992) (“the practice of granting self-amnesties violate[s] the prohibition against privileging a particular group of people, as well as the principle of equality”); Allied Control Council Law No. 10, Art. II(5), Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 Dec. 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946 (“In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 July 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.”)

While denouncing amnesties for all “serious violations of the Convention and Declaration,” the Commission has expressed particular disapproval of self-amnesties. In its recent report on Peru, the Commission stated that the concept of ‘amnesty’ was historically conceived of as a political measure by which the victorious sovereign would grant a pardon for the crimes of his enemies, so as to foster reconciliation after an armed conflict. This concept has been distorted in modern times, marked by ‘self-amnesties’ by which the sovereign grants itself a pardon for its own crimes, thereby creating a state of impunity and illegality, flagrantly contradicting the original purposes of the institution of amnesty. Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2000, ¶220.

Similarly, in its report on Garay Herмосilla et al. v. Chile, the Commission stated with respect to Chile’s amnesty law that a “government that is accused of the systematic violation of the fundamental rights of its subjects and that tries to excuse itself through an amnesty thereby commits a serious abuse of power.” Inter-Am. C.H.R., Case 10,843, Report No. 36/96, OEA/Ser.L/V/II.95, Doc. 7 rev. at 156 (1997), October 15, 1996, ¶33.

within their jurisdictions. As explained by the U.N. Human Rights Committee, “[a]mnesties are generally incompatible with the duty of States to investigate such acts [as torture], to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future.”⁸³ This being so, numerous organs of the United Nations have articulated a *per se* rule prohibiting amnesties for grave human rights abuses. The General Assembly declared in the U.N. Declaration on the Protection of All Persons from Enforced Disappearances, for instance, that “[n]o privileges and immunities or special exemptions shall be admitted”⁸⁴ in trials of those charged with having committed enforced disappearance and that “[p]ersons who have or are alleged to have committed [enforced disappearance] . . . shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.”⁸⁵ The General Assembly, explaining the principles underlying the U.N. Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, recognized the danger of amnesties, calling upon member states to “ensure that public and military officials and agents receive no immunity from prosecution or disciplinary proceedings *for victimization that was caused willfully . . .*”⁸⁶

Furthermore, several U.N. bodies have specifically denounced the Peruvian amnesty laws that cover the La Cantuta massacre. The U.N. Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions, on Torture, and on the Independence of Judges and Lawyers, as well as the Chair of the U.N. Working Group on Enforced or Involuntary Disappearances, jointly wrote to the Government of Peru, stating that the two amnesty laws “favor impunity [and] are contrary to the

⁸³ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992).

⁸⁴ U.N. Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, 47 U.N. GAOR Supp. No. 49, at 207, U.N. Doc. A/47/49 (1992), Art. 16.3.

⁸⁵ Id. at Art. 18.1. *See also* Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Theo Van Boven, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1992/8 (interim report); E/CN.4/Sub.2/1993/8 (final report); E/CN.4/2000/62, Final Report of Special Rapporteur M. Cherif Bassiouni; E/CN.4/sub.2/1996/17 (amended principles) (a state’s duty includes ensuring “that no person who may be responsible for gross violations of human rights shall have immunity from liability for their actions”); U.N. Commission on Human Rights, 49th Sess., Report of the Working Group on Enforced or Involuntary Disappearances, 1992 (recommending that “no laws or decrees should be enacted or maintained that, in effect, afford the perpetrators of disappearances immunity from accountability”); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989) (“In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.”).

⁸⁶ Implementation Principles of the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985).

spirit enshrined in human rights instruments, including the Vienna Declaration approved by the World Conference on Human Rights on 25 June 1993.”⁸⁷ The Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, Mr. Bacre Waly Ndiaye, reported on the La Cantuta case in his 1995 global report, further stating that the promulgation of the amnesty laws

. . . den[y] the right to an effective remedy for victims of human rights violations . . . [and are] contrary to the spirit of general international law, according to which States are obliged to investigate allegations of human rights violations, ensure that perpetrators are brought to justice and provide means of redress, including compensation to victims. . . . Furthermore, . . . it is axiomatic that a State’s national law may not be invoked to avoid its obligations under international law. Article 27 of the Vienna Convention on the Law of Treaties sets forth in this regard that “a party may not invoke the provision of its internal law as justification for its failure to perform a treaty”.⁸⁸

The Chair of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities also expressed concern at the promulgation of the two laws. At the Sub-Commission's 47th Session, in August 1995, he endorsed the communication sent by the U.N. experts to the Government of Peru and pledged to examine a draft resolution on the amnesty laws at the Sub-Commission's next session in August 1996.⁸⁹

The vast majority of the world’s States have declared that States are under an obligation not only to refrain from granting amnesties for serious human rights violations, but also to repeal or amend such amnesty laws if they have already been passed. As stated in the World Conference on Human Rights’ Declaration and Programme of Action, “States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.”⁹⁰

⁸⁷ Amnesty International, Peru: Amnesty Laws Consolidate Impunity for Human Rights Violations, February 1996, AI Index: AMR 46/03/96, pp. 2-3. The experts’ urgent appeal was sent on August 2, 1995. Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories, Extrajudicial, summary or arbitrary executions Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolution 1995/73, U.N. Doc. E/CN.4/1996/4 (25 January 1996), para. 384.

⁸⁸ *Id.*, U.N. Doc. E/CN.4/1996/4, para 397.

⁸⁹ Amnesty International, Peru: Amnesty Laws Consolidate Impunity for Human Rights Violations, February 1996, AI Index: AMR 46/03/96, p. 3.

⁹⁰ World Conference on Human Rights, Declaration and Programme of Action, Vienna, June 3 1993, U.N. Doc A/Conf./57/23, second part.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has also denounced the use of amnesty laws to prevent prosecution for violations of *jus cogens* human rights norms. In its judgment in the case of Prosecutor v. Anto Furundzija, the Tribunal held:

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimize any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a state say, taking national measures authorizing or condoning torture or *absolving its perpetrators through an amnesty law*. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would . . . not be accorded international recognition.⁹¹

Thus, according to the ICTY, the prohibition on amnesties for violating *jus cogens* human rights norms must itself be considered a *jus cogens* norm.

The principle that amnesties for grave human rights violations are impermissible has similarly been followed at the national level. The ICTY's statement in the Furundzija case that amnesties for perpetrators of torture would not be accorded international recognition, for example, was echoed in the United Kingdom by the House of Lords' refusal to recognize the Chilean amnesty in its decision to rule on the Pinochet case. Individual States' amnesty laws have themselves reflected the principle that gross human rights offenses should never be pardoned. Colombia, for instance, excluded persons guilty of torture, forced disappearances and executions from its 1982 amnesty law.⁹² Similarly, a Romanian amnesty law excluded crimes against peace and humanity; and former Nazis were excluded from a 1979 amnesty law in the former German Democratic Republic.⁹³

International human rights bodies have denounced amnesties for violations of human rights, particularly where they involve abuses such as enforced disappearance, torture, and extrajudicial execution—all at issue in the La Cantuta case. The Peruvian amnesty laws violate the international human rights norms that require states to investigate and prosecute such human

⁹¹ Prosecutor v. Anto Furundzija, Judgment of 10 December 1998, IT-95-17/1, ¶ 155 (emphasis added).

⁹² Colombian Amnesty Law (No. 35), Nov. 19, 1982.

⁹³ Study on Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights, Preliminary Report by Louis Joinet, Special Rapporteur, U.N. Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/1985/16 (1985), ¶ 51.

rights violations, to guarantee victims' right to justice, and to combat impunity. Therefore, despite Laws No. 26,479 and 26,492, Peru must still fulfill its duty to investigate, prosecute, and punish those responsible for such incidents as the La Cantuta massacre.

III. ANY AND ALL FURTHER INVESTIGATIONS AND PROSECUTIONS OF THOSE RESPONSIBLE FOR THE MASSACRE AT LA CANTUTA SHOULD BE CONDUCTED BY CIVILIAN AUTHORITIES.

As this Commission and the Court have repeatedly emphasized, Peru's military courts are not impartial and independent tribunals, because military judges and prosecutors are not insulated from the military hierarchy's chain of command. The Peruvian military justice system's consistent failure to bring to justice military personnel who commit human rights abuses has guaranteed impunity for these perpetrators and systematically denied victims of human rights abuses their right to pursue a remedy, to a fair hearing before a competent court, and to the truth. Finally, the Peruvian military courts simply lack jurisdiction over the disappearances and massacre in La Cantuta, because these are human rights violations, unrelated to the service functions of the military. Consequently, in order to ensure the rights protected by the Convention, Peru must guarantee that any and all further investigation and prosecution of those responsible for the massacre at La Cantuta be conducted by civilian authorities.

A. Peru's military justice system is not independent and impartial, because military prosecutors and judges are not insulated from the military hierarchy.

As this Commission and the Court consistently have held, Peru's military court system does not provide an independent and impartial forum, because military prosecutors and judges are not insulated from the chain of command of the military hierarchy. In Castillo Petruzzi, for example, the Court held that the exercise of military jurisdiction over civilians constitutes a violation of the Convention because military courts are not independent and impartial: "[T]he military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8.1 of the American Convention recognizes as essentials of due process of law."⁹⁴ The Court emphasized that military tribunals are not independent and impartial when the prosecutors and judges are not

⁹⁴ Castillo Petruzzi y Otros, Judgment of May 30, 1999, Inter-Am. Ct. H.R., Ser. C, No. 52, ¶132.

insulated from the command structure of the military hierarchy: “Members of the Supreme Court of Military Justice also decide who among their subordinates will be promoted and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question.”⁹⁵ Because military courts lacked independence, civilians tried before these courts were denied their rights to an independent tribunal as guaranteed by Article 8.1 of the Convention.⁹⁶

The European Court of Human Rights, like the Inter-American Court, has strongly condemned the lack of independence of military judges and prosecutors who are not insulated from the military hierarchy. In the case of Gerger v. Turkey, for example, a Turkish civilian challenged his conviction, for disseminating unlawful propaganda, by the Ankara National Security Council. The applicant maintained that the Security Council did not constitute an “independent and impartial tribunal” as required by Article 6.1 of the European Convention on Human Rights, because one of the three members of the court was a military judge. The European Court found that Turkey had violated Article 6.1’s guarantee of an independent and impartial tribunal, explaining that while “the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality, certain aspects of these judges’ status made their independence and impartiality questionable.”⁹⁷ Military judges, explained the European Court, “are servicemen who still belong to the army, which in turn takes its orders from the executive; . . . they remain subject to military discipline; and . . . decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army.”⁹⁸ Because the structure of the National Security Courts did not adequately insulate the military judge from the army hierarchy, the Court found that the applicant “could legitimately fear that the Ankara National Security Court might allow itself to be unduly influenced by considerations which had

⁹⁵ Id. ¶130.

⁹⁶ *See also Cantoral Benavides*, Judgment of Aug. 18, 2000, Inter-Am. Ct. H.R., Ser. C, No. 69, ¶114 (holding that Peru’s military justice system was not impartial and independent because the judges’ careers were determined by the Consejo Supremo Militar). In the case of Cesti Hurtado, the Court similarly emphasized that a retired military officer could not be tried before a military court. The Court observed that at the time of the process, Mr. Hurtado “status was that of a retired member of the armed forces and, therefore, he could not be judged by the military courts. Consequently, the proceeding to which Gustavo Cesti Hurtado was submitted violated the right to be heard by a competent tribunal, according to Article 8.1 of the Convention.” Cesti Hurtado, Judgment of Sept. 29, 1999, Inter-Am. Ct. H.R., Ser. C., No. 56, ¶151.

⁹⁷ Gerger v. Turkey, Judgment of July 8, 1999, Eur. Ct. H.R., No. 24919/94, ¶60.

⁹⁸ Id.

nothing to do with the nature of the case. . . . [T]he applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified."⁹⁹

When military judges and prosecutors occupy positions within the command hierarchy, they may be subject to "pressure by commanders on the courts martial or outright orders designed to obtain a verdict absolving soldiers of all responsibility for any acts they allegedly committed in violation of human rights."¹⁰⁰ In particular, a prosecutor who is not guaranteed independence from the chain of command may be either unwilling or unable to adequately investigate and proceed against other military personnel, and the prosecutor's investigation "may be conducted so as to impede [the case] from reaching the final decision-making stage."¹⁰¹ Given the military prosecutor's vulnerability to pressure, "the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage."¹⁰²

Substantial evidence in the case of La Cantuta, for example, indicates that those assigned to the La Cantuta case were not independent and impartial, because they were not insulated from the military hierarchy. The majority in the Special Human Rights Commission on La Cantuta expressed the fear that members of the military court system had impeded the development of the

⁹⁹ Id. at ¶61; *see also Sener v. Turkey*, Judgment of July 18, 2000, Eur. Ct. H.R., No. 26680/95; Sürek and Özdemir v. Turkey, Judgment of July 8, 1999, Eur. Ct. H.R., Nos. 23927/94 and 24277/94; Karatas v. Turkey, Judgment of July 8, 1999, Eur. Ct. H.R., No. 23168/94; Ciraklar v. Turkey, Judgment of Oct. 28, 1998, Eur. Ct. H.R.; Incal v. Turkey, Judgment of June 9, 1998, Eur. Ct. H.R., at 1547. Similar concerns informed the European Court's decision in Hood v. United Kingdom. The applicant, a soldier in the British army, claimed that his court martial was invalid because it did not meet the requirements of independence and impartiality required by Article 6.1 of the European Convention of Human Rights. The Court agreed, finding that the British courts martial, convened pursuant to the Army Act of 1955, did not meet the requirements of Article 6.1 because of the lack of independence of the convening officer. According to the Court, tribunals convened under the 1955 Act were inadequate because "of the central part played in the prosecution by the convening officer, who was closely linked to the prosecuting authorities, was superior in rank to the members of the court martial and had the power, albeit in prescribed circumstances, to dissolve the court martial and to refuse to confirm its decision." Hood v. United Kingdom, Judgment of Feb. 18, 1999, Eur. Ct. H.R., No. 27267/95, ¶76.

¹⁰⁰ Inter-Am. C.H.R., Third Report on the Situation of Human Rights in Colombia, February 26, 1999, OAS Doc. No. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, ch. 5, ¶25. Problems with partiality may be endemic to military justice systems. Because soldiers and police officers "are bound to follow the orders of their superiors or face severe consequences," it is nearly impossible for these individuals to make decisions and carry out prosecution independent of influence; "[m]embers of the military often feel bound to protect their colleagues who fight by their side in a difficult and dangerous context," and may be reluctant to prosecute or punish fellow officers. Id. ¶26.

¹⁰¹ Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2, 2000, OAS Doc. No. OEA/Ser.L/V/II.106 Doc. 59, ch. 2, ¶210. As the Commission noted in a report on the situation of human rights in Colombia, "Investigations into the conduct of members of the State's security forces carried out by other members of those same security forces generally serve to conceal the truth rather than to reveal it." Inter-Am. C.H.R., Third Report on the Situation of Human Rights in Colombia, February 26, 1999, OAS Doc. No. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, ch. 5, ¶19.

¹⁰² Id.

Commission's investigation.¹⁰³ In particular, the majority emphasized the fact that Judge José Picón Alcalde, the President of the War Room investigating the La Cantuta case, was subordinate to the President of the Joint Command of the Armed Forces and Commander General of the Military (Hermoza).¹⁰⁴ General Picón's lack of independence was evident, for example, from his condemnation of Robles for testifying against the military hierarchy. General Picón claimed that Robles's testimony was a lie, dishonorable, and cowardly. General Picón maintained that if he were Robles, he would commit suicide.¹⁰⁵ As the majority of the Peruvian Commission noted, "The conduct of [Picón] lacks impartiality to administer justice as the President of the War Room of the Supreme Council of Military Justice. An official of lower rank finds himself inhibited from conducting the pertinent investigations, because of his hierarchical dependence."¹⁰⁶

Problems with partiality are aggravated when military prosecutors and judges are active-duty personnel. In Durand y Ugarte, for example, the Court emphasized that the military justice system in Peru did not meet the criteria for an independent and impartial tribunal; not only was the tribunal an organ of the military, but the members of the tribunal were in active service: "[L]os militares que integraban dichos tribunales eran, a su vez, miembros de las fuerzas armadas en servicio activo, requisito para formar parte de los tribunales militares. Por tanto, estaban incapacitados para rendir un dictamen independiente e imparcial."¹⁰⁷ As this Commission emphasized in its report on Peru, military courts cannot be independent when the judges are "active-duty members of the Army, which means that they are in the position of sitting in judgment of their comrades-in-arms, rendering illusory the requirement of impartiality, since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context."¹⁰⁸ Active-duty military judges and prosecutors are incapable of independence, because they must judge excesses that were committed during operations, and they themselves—

¹⁰³ See General Rodolfo Robles, Crimen e Impunidad: "El grupo Colina y el Poder", apéndice 6, at 143, 148 (1996).

¹⁰⁴ Id. at 148.

¹⁰⁵ Id. at apéndice 11, 172.

¹⁰⁶ Id. at apéndice 6, 148.

¹⁰⁷ Durand y Ugarte, Judgment of Aug. 16, 2000, Inter-Am. Ct. H.R., Ser. C No. 68, ¶126.

¹⁰⁸ Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2, 2000, OAS Doc. No. OEA/Ser.L/V/II.106 Doc. 59, ch. 2, ¶211.

or those with whom they work closely—may have participated in or assisted with the planning and executing of those very same operations.¹⁰⁹

B. Because military court systems that are not independent and impartial promote impunity for military personnel who commit human rights abuses, such abuses should only be tried in civilian courts.

Peru's military courts are not independent and impartial and should not be allowed to try military personnel for human rights abuses, because these courts have proven themselves incapable of prosecuting and trying military personnel. Massive and systematic human rights violations often go unpunished because, as the Commission found to be the case in Peru, "State organs that lack the necessary independence and impartiality are in charge of determining the responsibilities of their own members, as is the case of the military courts."¹¹⁰ The exercise of military jurisdiction over human rights cases that involve punishing members of the military "does not offer the guarantees of independence and impartiality needed for the trial of [such] cases . . . , thereby guaranteeing impunity."¹¹¹

The connection between military courts' lack of independence and their role in promoting impunity for military personnel, especially in Latin America, has long been recognized. One scholar has explained:

In Latin America, military courts have not generally shown themselves to be willing or able to provide competent, independent, and impartial justice. Rather they have stalled and then released the alleged perpetrators. The judges making up the military tribunals often have a strong spirit of solidarity with the military personnel whom they judge. Thus, they tend to justify violations, and even legitimize them in the superior interest of fulfilling the mission of the armed forces. In most cases, military tribunals do not appear capable of fulfilling the international requirement of an independent tribunal.¹¹²

¹⁰⁹ See Inter-Am. C.H.R., Third Report on the Situation of Human Rights in Colombia, February 26, 1999, OAS Doc. No. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, ch. 5, ¶21.

¹¹⁰ Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2, 2000, OAS Doc. No. OEA/Ser.L/V/II.106 Doc. 59, ch. 2, ¶206.

¹¹¹ *Id.* ¶209. In Paniagua Morales, the Inter-American Court defined impunity as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention." Paniagua Morales, Judgment of Mar. 8, 1998, Inter-Am. Ct. H.R., ¶173.

¹¹² Jo M. Pasqualucci, The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law, 2 U. Miami Inter-Am. L. Rev. 297, 326 n.150 (citations omitted) (1995); See also America's Watch, Truth and Partial Justice in Argentina, An Update (1991); Amnesty International, Mexico: Amnesty International's Concerns Regarding Torture and Ill-Treatment in Mexico (1997) ("Alarming, military jurisdiction

Another scholar places a similar emphasis on the link between the lack of independence and impartiality of military courts and the promotion of impunity for the military:

Military justice systems, well known in Latin American states, have generated impunity for fellow officers who were alleged to have committed violations in the name of state security. . . . Military proceedings, especially in Latin American states, have often been used to facilitate impunity sanctioned by the state and only rarely bring to trial and prosecution military officers accused of serious human rights deprivations.¹¹³

He further notes:

Direct links clearly exist between military justice and impunity. Military legislation is often crucial for granting impunity to perpetrators, since in many national circumstances, military tribunals hold extensive jurisdiction over human rights conditions in the country. Military courts are composed of military officers, many who may be sympathetic to accused offenders and may render judgments based on personal loyalties rather than evidence or considerations of justice.¹¹⁴

When military courts are not independent, the exercise of military jurisdiction over members of the military who commit human rights abuses—a practice prevalent in Peru and throughout Latin America—results in a systematic failure to bring these violators to justice. The failure of states to bring alleged human rights violators to justice not only denies the victims a right to a remedy, but ensures that such abuses will continue in the future.

The military court's exercise of jurisdiction over the case of La Cantuta guaranteed the impunity of all but a few of those who bear responsibility for the massacre. Before the case was transferred to the military justice system, the civilian authorities had indicated their intent to prosecute both those who carried out the orders and the material and intellectual authors of the attack.¹¹⁵ Although several lower-ranking perpetrators were ultimately prosecuted, convicted and sentenced by the Peruvian military justice system, most of the higher-level material and intellectual

has systematically blocked attempts by victims and their representatives to seek punishment for those responsible for human rights violations.”).

¹¹³ Christopher C. Joyner, Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability, 26 *Denver J. Int'l L. & Pol'y* 591, 611-12 (1998).

¹¹⁴ Id. at 612.

¹¹⁵ See “Informe del fiscal Cubas, Señor Juez del Decimo Juzgado Penal de Lima,” *reprinted in* General Rodolfo Robles, Crimen e Impunidad: “El grupo Colina y el Poder”, apéndice 8, at 157 (1996). In fact, the civilian prosecutor for the La Cantuta case himself emphasized that the case should not be tried by military courts, given that “Law 25592, which typifies the crime of forced disappearance, expressly indicates that it should be tried by the common justice system.” Id. at 167.

authors were never even charged by the military prosecutor. When Hermoza Ríos, Rivero Lazo and Pérez Documet were tried, the Court -- apparently without a full investigation -- quickly dismissed the possibility that any military or civilian authorities knew or planned the crimes. The transfer of the case to military jurisdiction allowed the authorities to prosecute selectively and thus shield many of the higher-ranking officers from liability for their involvement in planning and carrying out the massacre at La Cantuta.

Peru's use of military jurisdiction to shield the perpetrators of the La Cantuta massacre is only one of many instances in which Peruvian military jurisdiction has been used to protect human rights violators. As Americas Watch (now Human Rights Watch/Americas) has explained, the transfer of the La Cantuta case from civilian to military jurisdiction "follows a long tradition in Peru whereby the military has used its own court jurisdiction—where soldiers and officers are effectively guaranteed friendly treatment by an institution determined to protect its own—to thwart investigations by the regular court system or by congress."¹¹⁶ The failure of the Peruvian military justice system to meet international standards of impartiality and independence has been

a key element in protecting human rights violators from punishment in Peru. Despite thousands of cases of disappearances and extrajudicial executions over the past decade, Americas Watch is aware of only three cases in which members of the military have been convicted for violating human rights. Meanwhile, military courts have sentenced 200 alleged terrorists to life imprisonment in the past year alone.¹¹⁷

Experience has shown that Peruvian military courts' exercise of jurisdiction over personnel who commit human rights abuses often guarantees that these violators will not be held responsible for their crimes. This Commission need not be reminded of the extensive history of its efforts and those of the Court to end repeated attempts by the Peruvian military justice system to undermine the Convention by shielding human rights violators from prosecution—most recently in Barrios

¹¹⁶ Americas Watch, Peru: Anatomy of a Cover-Up: The Disappearances at La Cantuta 11 (1993).

¹¹⁷ Id. at 13 n.38; *See also* Inter-Am. C.H.R., Third Report on the Situation of Human Rights in Colombia, February 26, 1999, OAS Doc. No. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, ch. 5, ¶17 (emphasizing that the exercise of military jurisdiction over cases involving human rights violations helped guarantee the impunity of perpetrators because in Colombia, "the military courts have consistently failed to sanction members of the public security forces accused of committing human rights violations").

Altos,¹¹⁸ but also in Durand y Ugarte,¹¹⁹ Cantoral Benavides,¹²⁰ Castillo Petruzzi,¹²¹ Loayza Tamayo,¹²² García v. Perú,¹²³ and Cayara.¹²⁴ Because Peruvian military courts have proved themselves incapable of impartially adjudicating the liability of military personnel for human rights abuses, civilian authorities must try such alleged violators.

C. **The Peruvian military courts lack jurisdiction over the La Cantuta disappearances and massacre, because military courts have a “restrictive and exceptional” jurisdiction that does not include the prosecution of human rights violations.**

The Inter-American Court has consistently held that the jurisdiction of military courts—in particular, Peruvian military courts—must be limited to cases involving military personnel and arising under narrow circumstances of a breach of domestic military law. Such narrow circumstances do not include violations of international human rights, specifically those enshrined in the Convention, for these crimes fall outside the proper scope of the “special legal interests” of the military law. This position is articulated in Cantoral Benavides, where the Court found that military jurisdiction is designed to protect only the legal interests related to the functions that are assigned to the military by law: “[L]a jurisdicción penal militar ha de tener un alcance restrictivo y excepcional y estar encaminada a la protección de intereses jurídicos especiales, vinculados con las funciones que la ley asigna a las fuerzas militares.”¹²⁵ Conversely, conduct that does not violate domestic military duties must be excluded from military jurisdiction: “Así, debe estar excluido del ámbito de la jurisdicción militar el juzgamiento de civiles y *sólo debe juzgar a militares por la*

¹¹⁸ Caso Barrios Altos, (Chumbipuma Aguirre y Otros vs. Perú), Judgment of March 14, 2001, Inter-Am. Ct. H.R..

¹¹⁹ Durand y Ugarte Case, Judgment of Aug. 16, 2000, Inter-Am. Ct. H.R., Ser. C, No. 68.

¹²⁰ Cantoral Benavides Case, Judgment of Aug. 18, 2000, Inter-Am. Ct. H.R., Ser. C, No. 69.

¹²¹ Caso Castillo Petruzzi y Otros, Judgment of May, 30, 1999, Inter-Am. Ct. H.R., Ser. C, No. 52.

¹²² Caso Loayza Tamayo, Judgment of Sept. 17, 1997, Inter-Am. Ct. H. R., Ser. C, No. 33.

¹²³ Case No. 11,006 (García v. Peru), Inter-Am. C.H.R., Report No. 1/95, Feb. 7, 1995.

¹²⁴ Cayara Case, Preliminary Objections, Judgment of February 3, 1993, Inter-Am.Ct.H.R., Ser. C, No.14. . Please note that this list is exemplary, not exhaustive.

¹²⁵ Cantoral Benavides Case, Judgment of Aug. 18, 2000, Inter-Am. Ct. H.R., Ser. C, No. 69, ¶113 (citation omitted). At the very least, the Court’s emphasis on the fact that military jurisdiction must be restrictive and exceptional indicates that when there is doubt about the impartiality of a military tribunal with regard to a particular case, that case should be tried by civilian authorities. The Commission has adopted a similar position with regard to the Colombian military system. The Commission has interpreted the Colombian Constitutional Court’s holding that “military jurisdiction should be treated as ‘exceptional,’” as indicating that “in situations causing doubt regarding the proper criminal jurisdiction, cases should be processed by the civilian justice system.” Inter-Am. C.H.R., Third Report on the Situation of Human Rights in Colombia, February 26, 1999, OAS Doc. No. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, ch. 5, ¶30

*comisión de delitos o faltas que por su propia naturaleza atenten contra bienes jurídicos propios del orden militar.”*¹²⁶

In Castillo Petruzzi and Durand y Ugarte, the Court elaborated on the crimes included under Peru’s military jurisdiction. Looking to the Peruvian Constitution, the Court pointed out that the military courts’ jurisdiction is intended to maintain order and discipline, but is limited to military personnel “who have committed some crime or were derelict in performing their duties, and then only under certain circumstances.”¹²⁷ The Court underscored that crimes subject to the jurisdiction of military court must be committed within the exercise of military functions; because civilians do not engage in military duties, they could never engage in behavior that violated military duties or laws.¹²⁸

In the case of defendants who are military personnel, the acts in question must be committed within the scope of their legitimate military function. For example, in Durand y Ugarte the Court found that the use of military force beyond that necessary to maintain order was beyond the scope of military jurisdiction.¹²⁹ In that case, military officers demolished a prison (which held alleged Shining Path supporters) in order to quell a prisoners’ revolt. The Court found that the bombing and its disregard for the lives of the prisoners fell outside the scope of the military function: “En el presente caso, los militares encargados de la debelación del motín ocurrido en el penal El Frontón hicieron un uso desproporcionado de la fuerza que excedió en mucho los límites de su función, lo que provocó la muerte de un gran número de reclusos.”¹³⁰ While the Court did recognize a legitimate State interest in guaranteeing the security of the prison, it held that this interest is limited by fundamental human rights, such that no State action “puede fundarse sobre el desprecio a la dignidad humana.”¹³¹ Because the indiscriminate killing of prisoners exceeded any legitimate military function, the acts of the naval officers were not military crimes, but rather

¹²⁶ Id. (citation omitted; emphasis added). The Court first enunciated this holding in Caso Durand y Ugarte, Judgment of Aug. 16, 2000, Inter-Am. Ct. H.R. The Court explained: “En un Estado democrático de Derecho la jurisdicción penal militar ha de tener un alcance restrictivo y excepcional y estar encaminada a la protección de intereses jurídicos especiales, vinculados con las funciones que la ley asigna a las fuerzas militares. Así, debe estar excluido del ámbito de la jurisdicción militar el juzgamiento de civiles y sólo debe juzgar a militares por la comisión de delitos o faltas que por su propia naturaleza atenten contra bienes jurídicos propios del orden militar.” Id. ¶117.

¹²⁷ Castillo Petruzzi y Otros Case, Judgment of May 30, 1999, Inter-Am. Ct. H.R., Ser. C, No. 52, ¶128.

¹²⁸ Id. “[M]ilitary tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties.”

¹²⁹ Durand y Ugarte Case, Judgment of Aug. 16, 2000, Inter-Am. Ct. H.R., Ser. C, No. 68, ¶118.

¹³⁰ Id.

¹³¹ Id. at ¶69

“ordinary, common offenses.”¹³² As such, the officers should have been investigated and punished “en la justicia ordinaria, independientemente de que los supuestos autores hubieran sido militares o no.”¹³³

Human rights violations fall within the group of crimes excluded from military jurisdiction because they are not, by their very nature, service-related offenses. In Durand y Ugarte, the Court explained that it is not a legitimate military function to commit crimes against human life and dignity.¹³⁴ Rather, when military personnel commit gross violations of human rights such as disappearance, torture, and extrajudicial executions, they are viewed as acting in a non-military function, and thereby become subject to civilian justice. In such a case, the perpetrator’s official defense is illegitimate and should not shield the officers from civilian investigation and prosecution.¹³⁵

For the above reasons, the disappearances, torture, and massacre in La Cantuta should not fall within the military’s jurisdiction. As in Durand y Ugarte, the Peruvian military forces disappeared and killed the La Cantuta victims not as part of their “legitimate military function,” but out of political contempt because the latter were allegedly “subversives.” The students and professor were treated without respect for human life or dignity—rounded up in the middle of the night, disappeared (their very existence denied), tortured, and summarily executed. The perpetrators’ actions were clearly disproportionate to the “threat” these students posed to military order or to national security. Unlike the prisoners in Durand y Ugarte, the students and professor were not even armed or engaged in revolts. In fact, the military never proved that they were at all involved in terrorist activities. Therefore, because the perpetrators targeted the victims with lethal force merely because they were suspected political opponents—a reason that clearly does not constitute a legitimate military function—they must be held accountable in civilian courts.

¹³² Id. The Colombian Constitutional Court applied similar reasoning in concluding that crimes committed “in relation to service” specifically excluded from military court jurisdiction “particularly serious crimes, including crimes against humanity.” The Colombian Court held that acts constituting crimes against humanity “stand in complete contradiction to the duties and responsibilities of the public security forces and thus could not be committed in relation to military service.” Inter-Am. C.H.R., Third Report on the Situation of Human Rights in Colombia, February 26, 1999, OAS Doc. No. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, ch. 5, ¶30. Acts such as desertion or disobedience of orders, on the other hand, are crimes that arise directly under military law.

¹³³ Durand y Ugarte, Judgment of Aug. 16, 2000, Inter-Am. Ct. H.R., Ser. C, No. 68, ¶118.

¹³⁴ Id., ¶69.

¹³⁵ This argument mirrors the rationale for not allowing a defense of “obedience to superior orders” for violations of human rights in cases in which those orders are manifestly illegal. When military personnel commit gross violations of human rights, they have exceeded the requirements of their official capacity and can be held personally accountable for those crimes.

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

This Commission has also recognized the importance of excluding violations of human rights from the jurisdiction of military courts. In its June 2000 report on Peru, the Commission emphasized that “military justice can only be applied to *members of the military who have committed service-related offenses. . . .*”¹³⁶ Invoking the Court’s holding in Castillo Petruzzi, the Commission emphasized:

The Inter-American Court has confirmed that the purpose of the military jurisdiction is to maintain order and discipline in the Armed Forces; in this regard, it is a functional jurisdiction whose application should be reserved to those members of the military who have committed offenses or violations in the performance of their duties, under certain circumstances.¹³⁷

According to the Commission, those circumstances should be strictly construed; the exercise of jurisdiction should be limited to “active-duty military officers for the alleged commission of service-related offenses, strictly speaking. *Human rights violations must be investigated, tried, and punished in keeping with the law, by the regular criminal courts.*”¹³⁸ As the Commission has noted, allowing the military courts to adjudicate human rights cases “undercuts judicial guarantees, under an illusory image of the effectiveness of military justice, with grave institutional consequences, which in fact call into question the civilian courts and the rule of law.”¹³⁹

The position of the Court and Commission has international support beyond the Inter-American system. The Joint Report¹⁴⁰ to the U.N. Economic and Social Council, for example, recommended limiting the jurisdiction of military courts to exclude cases involving human rights abuses, in order to combat impunity for these crimes: “Because military courts do not have enough statutory independence, their jurisdiction must be limited to specifically military infractions committed by members of the military, excluding serious crimes under international law which

¹³⁶ Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2, 2000, OAS Doc. No. OEA/Ser.L/V/II.106 Doc. 59, ch. 2, at 94 (emphasis added).

¹³⁷ Id. at ¶¶ 94-95.

¹³⁸ Id. at ¶ 214 (emphasis added).

¹³⁹ Id.

¹⁴⁰ Question of Impunity of Perpetrators of Violations of Human Rights (Civil and Political): Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, Economic and Social Council, U.N. Doc. E/CN.4/SUB.2/1997/20 (June 16, 1997).

must come within the jurisdiction of the ordinary courts.”¹⁴¹ Principle 34 of the “Joinet Principles” thus provides:

In order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity by virtue of a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be limited solely to specifically military offences committed by military personnel, excluding human rights violations constituting serious crimes under international law, which come under the jurisdiction of the ordinary domestic courts or, where necessary, an international court.¹⁴²

As this Commission has noted, limiting the ability of military courts to adjudicate cases involving human rights violations does not deprive the military of the ability to discipline its own. Military courts will continue to have jurisdiction over those offenses traditionally adjudicated by military justice systems—those “offenses that are either service-related or have to do with military discipline.”¹⁴³

This international standard is, in fact, already present *de jure* (but not *de facto*) in Peruvian domestic law. The Peruvian Constitution limits the subject-matter jurisdiction of military courts “to judging acts performed by active-duty members of the military and committed while on duty, and matters that affect military discipline, thus they have no jurisdiction over matters referring to the fundamental civilian guarantees such as habeas corpus and *amparo*.”¹⁴⁴ Peruvian law contemplates only one instance where military courts have jurisdiction over “common crimes”—i.e., when the military court is “competent”—that is, if both the aggrieved and the accused are military personnel.¹⁴⁵ More telling for the present case, Peruvian law has singled out the crime of forced disappearance as one that must be tried by civilian courts in all circumstances. The 1992

¹⁴¹ *Id.*, ¶38, at 257. In fact, certain international documents expressly provide for civil, rather than military, court jurisdiction to adjudicate cases involving human rights abuses. *See, e.g.*, Declaration on the Protection of All Persons From Enforced Disappearances, G.A. Res. 47/133, 47 U.N. GAOR Supp. No. 49, art. 14, at 207, U.N. Doc. A/47/49 (1992) (“Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State . . .”).

¹⁴² Question of Impunity of Perpetrators of Violations of Human Rights (Civil and Political): Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, Economic and Social Council, U.N. Doc. E/CN.4/SUB.2/1997/20, at 276 (June 16, 1997) (emphasis added).

¹⁴³ Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2, 2000, OAS Doc. No. OEA/Ser.L/V/II.106 Doc. 59, ch. 2, ¶212.

¹⁴⁴ *Id.*, ¶199.

¹⁴⁵ Código de Justicia Militar, Art. 324, *cited in* Informe del Fiscal Cubas, *reprinted in* General Rodolfo Robles, Crimen e Impunidad: “El grupo Colina y el Poder”, apéndice 8, at 167 (1996).

law that established forced disappearance as a crime in the Peruvian Criminal Code, calls for civilian prosecutors to investigate disappearances and proceed accordingly.¹⁴⁶ Furthermore, Peru modified its Criminal Code in 1998 to include “crimes against humanity”—defined as forced disappearance, torture, and genocide. Article 5 of that law specifically states that all crimes against humanity will be investigated and prosecuted “en la vía ordinaria y ante el fuero común.”¹⁴⁷ Peru’s own legal norms, require the investigation and prosecution by civilian courts of (1) common crimes committed by military officers against civilians and (2) crimes against humanity, particularly forced disappearance. Thus, the Peruvian military justice system lacks jurisdiction to investigate and try those responsible for the crimes in the La Cantuta case.

Peru’s military court system has proven itself incapable of adequately investigating and prosecuting allegations of human rights abuse by members of the military. Because Peru has a duty under Articles 1.1, 8.1 and 25.1 of the Convention to ensure that such allegations are investigated and prosecuted and that victims and their families are guaranteed their right to judicial process, investigations and prosecutions of human rights abuses committed by military personnel must be conducted by civilian authorities. Because the massacre at La Cantuta involved human rights violations, which fall outside the jurisdiction of the Peruvian military courts, the Commission should recommend that Peru guarantee that all further investigations and prosecutions of those responsible for the La Cantuta massacre be carried out by the civilian justice system.

IV. THE CONVENTION’S NON BIS IN IDEM PROVISION (ART. 8.4) DOES NOT PREVENT FURTHER INVESTIGATION AND PROSECUTION IN THE LA CANTUTA CASE.

The array of decisions and statements by the military prosecutor and judges so far in this case suggests a need to determine whether further investigation and prosecution by the Government of Peru of those involved in the massacre could violate Article 8.4 of the Convention, on *non bis in idem*.¹⁴⁸ Careful analysis shows that no conflict would arise. First, several of these decisions and statements do not deal with intellectual authorship, the specific conduct for which the individuals implicated might be prosecuted in the future.¹⁴⁹ Second, other decisions and

¹⁴⁶ Law No. 25,592, July 2, 1992, Art. 4.

¹⁴⁷ Law No. 26,926, (Art. 6 amending Art. 1 of Law No. 25,592).

¹⁴⁸ Article 8.4 states: “An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.”

¹⁴⁹ See *infra*, Section V.B.

statements relating to high-ranking persons do not constitute “acquitt[als] by a nonappealable judgment” within the meaning of Article 8.4.¹⁵⁰ Third, because the Peruvian military courts lacked jurisdiction over these violations of human rights,¹⁵¹ their decisions and statements do not constitute primary jeopardy; thus retrials would not invoke double jeopardy. Last and most important, all decisions and statements were made as part of a “sham” legal process—investigations and trials designed to shield all but a few lower-ranking officers from responsibility for violations of human rights. Compelling evidence indicates that the investigations and trials were deliberately manipulated to place all responsibility on a few low-ranking scapegoats and to justify the acquittals or non-investigations of the remainder of the direct and indirect perpetrators. Because sham investigations and trials deny the procedural and substantive protections of Articles 8.1 and 25.1 of the Convention, they should not constitute *res judicata* to bar subsequent prosecution under Article 8.4.

A brief review of the decisions and statements in question helps demonstrate their implications. In Case No. 157-V-93, the military prosecutor charged Major Guzmán Calderón, Major General Rivero Lazo, Colonel Navarro Pérez, and Captain Velarde Astete with negligence only. The first military court decision, on February 21, 1994, acquitted Major Guzmán Calderón and convicted the other three on this charge, and on May 3, 1994, the second military court confirmed this decision. The first court also stated on February 21, 1994, that it “acquitted” Maj. Guzmán Calderón, Maj. General Rivero Lazo, Col. Navarro Pérez, and Cap. Velarde Astete of responsibility for murder, kidnapping, forced disappearance, abuse of authority, and crimes against the administration of justice, even though the prosecutor had neither charged them with these crimes nor attempted to persuade the court of their guilt. In fact, the complaint makes clear that “se abstiene de formular acusación escrita” against these four men for crimes beyond negligence.¹⁵² At the time of the convictions and acquittals in the May 1994 decision, the CSJM ordered the definitive closing of the investigation against any future suspects in the La Cantuta crimes, because it believed the perpetrators had already been identified.¹⁵³

¹⁵⁰ See *infra*, Section V.C.

¹⁵¹ See *supra*, Section III.

¹⁵² “Acusación del Fiscal Military,” Case No. 157-V-93, reprinted in General Rodolfo Robles, Crimen e Impunidad: “El grupo Colina y el Poder”, apéndice 20, at 199 (1996). The military prosecutor likewise abstained from accusing Sosa Dávila and Coral Sanchez of any crimes, because they were not members of the Peruvian military at the time of the events, according to the head of military personnel. *Id.*

¹⁵³ “Transcripción de la Sentencia de 3 de mayo de 1994, Caso No. 157-V-93, por la Presidencia del Consejo Supremo de Justicia Militar,” reprinted in General Rodolfo Robles, Crimen e Impunidad: “El grupo Colina y el

In the subsequent case against Hermoza Ríos, Montesinos and Pérez Documet, No. 227-V-94-A, the CSJM resolved that these three high-level officers “no tuvieron ninguna participación directa ni indirecta en los hechos instruídos, se concluye que no son autores intelectuales ni materiales o partícipes de los delitos cometidos” at La Cantuta. Without proceeding to trial, the CSJM dismissed the action against the men for the crimes of murder, kidnapping, forced disappearance, abuse of authority, crimes against the administration of justice, and negligence. In addition, the Court made the following sweeping conclusions: (a) that the authors of the La Cantuta crimes “ya han sido plenamente identificados y debidamente sancionados judicialmente” in the previous case (No. 157-V-93);¹⁵⁴ (b) that the authors committed the crimes “de motu proprio y sin conocimiento ni autorización de su Comando ni del Servicio de Inteligencia Nacional ni de ninguna otra autoridad civil or militar.”¹⁵⁵

A. Under Art. 8.4 of the Convention, Amnesty Laws Nos. 26,479 and 26,492 do not bar further investigation and prosecution.

Amnesty Laws Nos. 26,479 and 26,492 purport, together, to absolve all members of the Peruvian military, police, and civil service, whether they have been investigated and prosecuted or not, of responsibility for specific crimes committed between 1980 and June 14, 1995.¹⁵⁶ However, as explained above, these laws violate the Convention.¹⁵⁷ Therefore, they cannot be invoked as *res judicata* in order to invoke the Convention’s *non bis in idem* provision (Art. 8.4) to evade Peru’s duties under the Convention to conduct additional investigations and trials in the La Cantuta case. The *non bis in idem* protection provided by Article 8.4 of the Convention does not validate domestic laws that violate the Convention and promote impunity for violators of human rights.¹⁵⁸

Poder”, apéndice 23, at 209 (1996) (ordenando el “archivamiento definitivo de la instrucción abierta contra los que resulten Responsables de los delitos materia de juzgamiento, por haber sido identificados los autores”).

¹⁵⁴ “Resolución de la Sala de Guerra del CSJM,” Caso No. 227-V-94-A, 15 de agosto de 1994, p. 3 (provided by the Peruvian government to the Commission during this proceeding).

¹⁵⁵ Id. at 1.

¹⁵⁶ See Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2, 2000, OAS Doc. No. OEA/Ser.L/V/II.106 Doc. 59, Chap. 2, ¶ 215-16, 219.

¹⁵⁷ See *supra*, Section III.A.

¹⁵⁸ Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, June 2, 2000, OAS Doc. No. OEA/Ser.L/V/II.106 Doc. 59, Chap. 2, at ¶221 (“States parties to the American Convention cannot invoke the application of their domestic law, in this case amnesty laws, in order to disregard their obligation to ensure the full and proper functioning of justice for the victims.” (*quoting* Inter-Am. C.H.R., Third Report on the Human Rights Situation in Colombia, Feb. 26, 1999, OAS Doc. No. OEA/Ser.L/V/II.102, doc. 9 rev. 1, ¶ 345) (internal quotation marks omitted)).

Using Art. 8.4 in that manner would turn it into a vehicle for impunity, violating the very purpose of the Convention.

B. Judicial decisions and statements concerning different causes do not bar future prosecution for intellectual authorship.

Gen. Rivero Lazo, Col. Navarro Pérez, Cap. Velarde Astete, and Maj. Guzmán Calderón could be prosecuted for intellectual authorship of the La Cantuta massacre because the acquittal of the first three and conviction of the last for negligence, as well as the purported “acquittal” of all for murder, kidnapping, forced disappearance, abuse of authority, and crimes against the administration of justice, concern different causes than intellectual authorship.¹⁵⁹

Article 8.4 bars prosecution only if the accused was earlier acquitted “for the same cause” (in the Spanish text, “*por los mismos hechos*”). In Loayza Tamayo, the Inter-American Court interpreted Article 8.4 as forbidding the retrial in civilian court on terrorism charges of a defendant acquitted in military court of treason.¹⁶⁰ Its evaluation of the terrorism and treason charges as constituting essentially the same “cause” rested, first, on the lack of a clear distinction in the definitions of these crimes under Peruvian law¹⁶¹ and, second, on the similarity between the acts cited by the prosecution in each case as constituting the crime charged.¹⁶² Therefore, the Court held, a second prosecution for the same acts for which the accused had already been acquitted violated Article 8.4 of the Convention.¹⁶³

The acquittal of Maj. Calderón and convictions¹⁶⁴ of Gen. Rivero Lazo, Col. Navarro Pérez, and Cap. Velarde Astete for negligent supervision of their subordinates in connection with

¹⁵⁹ Section V.C., *infra*, demonstrates that because the “acquittals” for crimes neither previously charged nor tried do not constitute “acquitt[als] by a nonappealable judgment,” they do not fulfill Art. 8.4’s requirements and should not bar subsequent prosecution for either intellectual or direct authorship of murder, kidnapping, forced disappearance, abuse of authority, or crimes against the administration of justice. This section lays out an additional reason that the “acquittal” does not prevent prosecution of these people for intellectual authorship in particular.

¹⁶⁰ Loayza Tamayo Case, Judgment of Sept. 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33, ¶¶ 66-77.

¹⁶¹ Id. at ¶ 68.

¹⁶² Id. at ¶¶ 74-76.

¹⁶³ “. . . [T]he Court finds that the Peruvian State violated Article 8.4 of the American Convention with Ms. María Elena Loayza Tamayo’s trial in the civil jurisdiction for the same facts of which she had been acquitted in the military jurisdiction.” Id. at ¶ 77.

¹⁶⁴ The language of Art. 8.4 bars retrial only after an acquittal, not a conviction. At the conference that drafted the Convention, no state proposed modifying the text of Art. 8.4 to include convictions. Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, Nov. 7-22, 1969, Actas y Documentos, OAS Doc. No. OEA/Ser.K/XVI/1.2 (1973), at 202-203 (Committee considering substantive rights separated *non bis in idem* provision from confession provision to create two separate paragraphs (eventual Art. 8.4 and 8.3, respectively), but

the massacre would not bar prosecution of them as intellectual authors of serious human rights abuses. Planning, ordering, and/or coordinating a massacre is a different “cause” from negligent supervision of military subordinates; it is a crime of commission rather than omission. Such charges would rest on different facts from those on which the negligence charges rested. Intellectual authorship would involve actively conceiving, preparing, coordinating, and/or directing, while negligent supervision involves failing to take reasonable steps to prevent or halt the commission of crimes by others.¹⁶⁵ The former can be more serious, necessarily involving specific intent to cause the death of the victims, while the latter can imply neutral or even benign motives, acted upon inadequately. Planning and ordering a crime therefore constitutes a “cause” different from negligently supervising subordinates who then commit criminal acts; under Article 8.4 of the Convention, conviction for the latter should not bar prosecution for the former.¹⁶⁶

In addition, the Supreme Council of Military Justice’s May 3, 1994’ statement that it “acquitted” Maj. Gen. Rivero Lazo, Col. Navarro Pérez, Capt. Velarde Astete, and Maj. Calderón of murder, kidnapping, forced disappearance, abuse of authority, and crimes against the administration of justice (material authorship) would not block their prosecution for planning, ordering, or coordinating the La Cantuta massacre (intellectual authorship), should further

approved *non bis in idem* text proposed to conference without discussion); *Id.* at 291ff. (committee reported its draft of substantive rights provisions to plenary session without highlighting *non bis in idem* provision, and conference likewise approved treaty text without discussing the provision).

¹⁶⁵ According to the military prosecutor, the Peruvian Military Justice Code (Arts. 238 and 257) defines the crime of negligence to be “al no haber exigido a sus subordinados el estricto cumplimiento de sus obligaciones, dejando de cumplir gravemente por omisión o descuido los deberes que corresponden a su cargo.” “Acusación del Fiscal Militar,” Case No. 157-V-93, *reprinted in* General Rodolfo Robles, *Crimen e Impunidad: “El grupo Colina y el Poder”*, apéndice 20, at 196 (1996).

¹⁶⁶ Furthermore, there is precedent in international law for finding that convictions for negligence would not bar prosecution for intellectual authorship, because the latter is a higher crime than the former. This view is based on the principle that a single criminal act may be split into multiple offenses. The European Court of Human Rights, for example, held that prosecution for a greater offense, after an individual had been convicted of a lesser offense, did not violate *non bis in idem*. In *Oliveira v. Switzerland*, the complainant had been convicted of and fined for “failing to control her vehicle.” The Swiss district attorney’s office later fined the petitioner again for “negligently causing physical injury.” The European Court of Human Rights held that the second prosecution for a greater charge did not violate the *non bis in idem* principle articulated in Article 4 of Protocol No. 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, because that provision “prohibits people being tried twice for the same offence, whereas, in cases concerning a single act constituting various offences . . . one criminal act constitutes two separate offences.” The Court in that case goes on to explain that the provision “does not preclude separate offences, even if they are all part of a single criminal act, being tried by different courts, especially where, as in the present case, the penalties were not cumulative, the lesser being absorbed by the greater.” Following the principle articulated by the European Court, a second prosecution by Peru of the material authors who were previously prosecuted and convicted for negligence should not be barred by Article 8.4 of the Convention, so long as the subsequent trial is brought on the greater charge of intellectual authorship.

investigations find sufficient evidence to charge them.¹⁶⁷ Masterminding, or intellectual authorship of murder, kidnapping, and forced disappearance constitutes a different “cause” from direct perpetration of these crimes, within the meaning of Article 8.4. Unlike Loayza Tamayo, where both charges of treason and terrorism were found to stem from the same acts, the charges of masterminding and directly perpetrating the La Cantuta massacre are based on different acts by the defendants. To find the accused guilty of masterminding, the prosecution would have to investigate and prove planning and ordering of the crimes; on the other hand, to successfully convict for direct perpetration, the Court would focus on the defendant’s role in the execution and implementation of the crimes.

As recognized by the Court, it is not legitimate for the charges to have two distinct names but refer to basically the same cause. For that reason, the Convention’s double jeopardy prohibition purposely refers to “hechos” (cause) instead of “delitos” (crimes or offenses), to provide enhanced protections to defendants:

Unlike the formula used by other international human rights protection instruments (for example, the United Nations International Covenant on Civil and Political Rights, Article 14.7, which refers to the “*crime*”), the American Convention uses the expression “*the same cause*,” which is a much broader term in the victim’s favor.¹⁶⁸

The Court’s emphasis on the deliberate choice of language in Article 8.4 demonstrates its concern that States pay careful attention to the acts that are the subject of successive trials. In every case, it should be shown that the State is not merely rephrasing the charge in order to get a second chance at convicting the defendants, but rather bringing a charge conceptually distinct from the former, one that not only includes different elements, but will be proved with different facts.

Such danger is not present in the La Cantuta case. As the Commission stated in its decision on admissibility, the May 3, 1994’ judgment “made no statement either convicting or acquitting those accused of having masterminded the massacre.”¹⁶⁹ In fact, the prosecutor conducted the investigation in Case No. 157-V-93 under the assumption that the crimes were not planned or ordered; therefore, the prosecutor brought no charges of masterminding and did not attempt to

¹⁶⁷ The Commission may view this purported “acquittal” as failing to fulfill additional standards for triggering Art. 8.4 beyond those discussed in this brief.

¹⁶⁸ Loayza Tamayo Case, Judgment of Sept. 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33, ¶ 66, where “victim” refers to the defendant, victim of multiple prosecutions by the State for the same cause.

¹⁶⁹ Case No. 11,045, Inter-Am. C.H.R., Report No. 42/99, March 11, 1999, ¶ 43.

prove intellectual authorship.¹⁷⁰ In this way, La Cantuta is distinct from Loayza Tamayo. In that case, the military court had already fully deliberated on the same facts: the court “took cognizance of the facts, circumstances and evidence relating to the alleged acts, evaluated them, and ruled to acquit her.”¹⁷¹ In La Cantuta, by contrast, the CSJM did not resolve the intellectual authorship of Rivero Lazo, Navarro Pérez, Velarde Astete and Guzmán Calderón, because no issues of intellectual authorship were brought before the court. Accordingly, under Article 8.4, these four men are eligible for future prosecutions for intellectual authorship of the La Cantuta massacre.

C. **Statements seeking to acquit several of the accused for crimes with which they were never charged do not bar prosecution of those accused for intellectual authorship, because those statements do not fall within the meaning of “acquitt[al] by nonappealable judgment” in Art. 8.4.**

Several statements by the military prosecutor and court attempted to absolve the accused and others of La Cantuta-related crimes that were neither actually charged nor fully investigated. In García v. Peru, the Commission established that “[i]nitiation of a new criminal prosecution based on the same charges brought previously violates the principle prohibiting multiple criminal prosecutions, and accordingly subparagraph 4, Art. 8 of the American Convention.”¹⁷² García clearly states that “accused person acquitted” “implies ... someone who, having been charged with a crime, has been exonerated from all criminal responsibility, since he has been acquitted because his innocence has been demonstrated, because his guilt has not been proven, or because it had been determined that the acts of which he is accused are not defined as crimes.”¹⁷³ Thus, an “acquitt[al] by nonappealable judgment” can only follow from specific charges that were actually brought against a specific person and were subsequently investigated. The statements by the La Cantuta military prosecutor and court, accordingly, do not invoke double jeopardy against future prosecution for intellectual or direct authorship, because they do not qualify as “acquitt[als] by nonappealable judgment” under Article 8.4.

First, the blanket statements by the CSJM, attempting to limit further prosecutions and ordering the definitive closing of the investigation of any unknown suspects of the La Cantuta

¹⁷⁰ “Acusación del Fiscal Militar,” Case No. 157-V-93, *reprinted in* General Rodolfo Robles, Crimen e Impunidad: “El grupo Colina y el Poder”, apéndice 20, at 196 (1996).

¹⁷¹ Loayza Tamayo Case, Judgment of Sept. 17, 1997, Inter-Am. Ct. H.R. (Ser.C) No. 33, ¶ 76.

¹⁷² Case No. 11,006 (García v. Peru), Inter-Am. C.H.R., Report No. 1/95, Feb. 7, 1995 (emphasis added).

¹⁷³ Id.

crimes, do not have *res judicata* effect on subsequent prosecutions, because these statements do not satisfy the requirement, elucidated by the Commission in García, that the “accused must have been acquitted.”¹⁷⁴ The statements of the courts on May 3 and August 15, that all perpetrators had been identified, declared the general innocence of the Military Command, the National Intelligence Service, and all other civil and military authorities. These statements failed to designate specific individuals. Moreover, such a blanket statement cannot constitute an “acquittal,” even if the identity of the individuals in question is apparent, because they were never charged with specific crimes.

Second, the court statements of February 21 and May 3, 1994, which arbitrarily sought to “acquit” Gen. Rivero Lazo, Col. Navarro Pérez, Cap. Velarde Astete, and Maj. Guzmán Calderón of murder, kidnapping, forced disappearance, abuse of authority, and crimes against the administration of justice, do not fall under the Article 8.4 definition of “acquitt[al] by a nonappealable judgment.” These four men were never charged with the crimes for which the court declared they were acquitted; clearly, their innocence had not been fully demonstrated before the court. The Commission should not accept this type of empty pronouncement as an “acquittal.” Doing so would amount to an amnesty that denies the victims their right to judicial remedies, including the right to the truth. Moreover, allowing courts to acquit individuals for crimes for which they have never been charged would promote judicial abuse of discretion, particularly where the court system—like the Peruvian military justice system—has a history of bias.¹⁷⁵

Finally, the prosecutor’s decision not to pursue legal action against several officers for direct authorship or masterminding the massacre is clearly insufficient to invoke *non bis in idem* and prevent future prosecution for those crimes. A decision not to prosecute is commonly considered to be an exercise of prosecutorial discretion. It is often made without any procedural guarantees of an adequate and impartial investigation and can depend heavily on political factors. It cannot be deemed to fall within the definition of an “acquitt[al] by a non-appealable judgment” that would bar subsequent proceedings.¹⁷⁶

¹⁷⁴ Id.

¹⁷⁵ A similar analysis should be made regarding the dismissal of the action against Hermoza Ríos, Montesinos, and Pérez Documet in Case No. 227-V-94-A, if the Commission finds that these men were never charged with the crimes for which they were granted the stay. Such information about the charges brought in the second case against the higher-ranking officers has not been released or revealed by the Government of Peru.

¹⁷⁶ Case No. 11.006 (García v. Peru) (An “accused person acquitted” “implies ... someone who, having been charged with a crime, has been exonerated from all criminal responsibility, since he has been acquitted because his innocence has been demonstrated, because his guilt has not been proven, or because it had been determined that the

D. Future investigations and prosecutions should not, under Art. 8.4, be barred by prior judicial decisions or statements that rest on proceedings that did not meet the Convention's standards.

In La Cantuta, the Commission confronts a set of judicial proceedings elaborately designed to shield many of the accused, especially those of higher rank, from full responsibility for their role in the massacre. In recommending to Peru that it further investigate the La Cantuta massacre, particularly who planned and ordered it, the Commission should explicitly reject this practice. It should state that the convictions, acquittals, and blanket statements of exoneration in Case No. 157-V-93 and Case No. 227-V-94-A failed to meet the Convention's standards of independence and impartiality under Article 8.1, violated the La Cantuta victims' right to judicial protection (Art. 25.1) and their right to truth (Arts. 8, 25 and 13.1), and, therefore, do not preclude future investigations and prosecutions. The Commission should not permit Peru to distort the meaning and purpose of Article 8.4, protecting individuals from state persecution, in order to validate and preserve the impunity for gross violations of human rights from which its officials have unlawfully benefitted.

1. A clearly specified "sham trial" exception to *non bis in idem* would further the protection of human rights and be consistent with the Commission's and the Inter-American Court's jurisprudence and the international law norm.

In high-profile cases, such as La Cantuta, a government reluctant to fulfill its duties under the Convention to prevent, investigate, prosecute, and punish human rights violations often will find it difficult politically to avoid taking measures that would, at least, give the appearance of seeking justice. Instead, the government may attempt to pacify critics through (1) scapegoating—punishing lower-level, direct perpetrators while ignoring those at higher levels who planned and ordered the violations; and (2) sham investigations and trials that make a show of justice before a fore-ordained verdict to exonerate some or all of those charged. These techniques confirm to human rights abusers that their state sponsors will protect them, thereby encouraging further human rights violations. The bias of such proceedings in favor of the accused violates Article 8.1's guarantee of an impartial tribunal. In denying effective recourse to the courts, they violate victims' rights under Article 25.1. As impunity-promoting mechanisms, they violate states'

acts of which he is accused are not defined as crimes.") In this case, the prosecutor's decision does not fulfill any of the elements of "acquitt[al] by non-appealable judgment."

obligations under Article 1.1 to ensure the free and full exercise of the rights and freedoms guaranteed by the Convention.

Article 8.4 should not be allowed to reinforce such corruption of judicial redress by further protecting from serious prosecution alleged human rights violators who have been acquitted under dubious circumstances. That protection would twist Article 8.4 into an accessory to serious violations of States' duties to prevent, investigate, prosecute, and punish human rights violations, perverting the Convention's purpose of promoting human rights. The Commission, therefore, should hold that subsequent prosecution of persons accused of human rights violations does not violate Article 8.4 if the prior trials shielded them from criminal responsibility or otherwise were conducted in a manner inconsistent with the pursuit of justice.

The Commission and the Court have recognized that the conduct of prior proceedings is relevant in determining whether they should have the effect of *res judicata* and bar subsequent proceedings under the doctrine of *non bis in idem*. In its decision of Feb. 6, 1992, in Case No. 10,235, the Commission rejected the Government of Colombia's contention that after charges had been dismissed, against police officers accused of murdering and disappearing eleven people, the doctrines of *res judicata* and *non bis in idem* in Colombian law prevented it from reopening proceedings against the officers.¹⁷⁷ The Commission recommended that the Government of Colombia reopen the investigation, "taking into consideration the principle whereby *res judicata* does not exist when there has been serious judicial error."¹⁷⁸ In its decision on the merits in Cantoral Benavides,¹⁷⁹ the Court declined to find a violation of Article 8.4 for a trial in civilian court, where the accused had previously been acquitted in a Peruvian military court proceeding that the Court found to have violated Article 8.1. It concluded that "la presunta infracción del artículo 8.4 de la Convención resulta subsumida en la violación del artículo 8.1 de la misma."¹⁸⁰ Cantoral Benavides involved the abuse of an individual by the state through multiple prosecutions, a situation in which *non bis in idem* protection should *not* be weakened, in contrast to proceedings like those in the La Cantuta case, which shielded individuals accused of human rights violations. Cantoral Benavides demonstrates that the Court has seen fit to evaluate the validity of the initial judicial proceedings in determining whether to apply Article 8.4.

¹⁷⁷ Case No. 10,235, Inter-Am. C.H.R., Report No. 1/92, Feb. 6, 1992.

¹⁷⁸ Id. at operative ¶3.

¹⁷⁹ Cantoral Benavides Case, Judgment of Aug. 18, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 69.

¹⁸⁰ Id. at ¶140.

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

The exception to *non bis in idem* for trials designed to shield the accused is widely recognized in international law. The statute of the International Criminal Court (ICC) stipulates:

No person who has been tried by another court for [genocide, crimes against humanity, or war crimes] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.¹⁸¹

The statute of the International Criminal Tribunal for the Former Yugoslavia similarly provides that *non bis in idem* protection does not apply when the prior “national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.”¹⁸² The statute for the International Criminal Tribunal for Rwanda contains an identical provision.¹⁸³ The European Convention on the Protection of Human Rights and Fundamental Freedoms provides a broader exception to its *non bis in idem* provision “if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.”¹⁸⁴

Non bis in idem provides an important protection for individuals against excessive state prosecution, and any exception made to prevent its abuse must be carefully tailored. Such care would be consistent with the Commission’s and the Inter-American Court’s broad interpretation of *non bis in idem* where the State has used the judicial system to violate individual rights.¹⁸⁵ The

¹⁸¹ Rome Statute of the International Criminal Court, art. 20.3, U.N. Doc. A/CONF.183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998) (emphasis added).

¹⁸² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory for the Former Yugoslavia Since 1991, Art. 10.

¹⁸³ Statute of the International Criminal Tribunal for Rwanda, Art. 9.

¹⁸⁴ Protocol No. 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 22, 1984, Art. 4.2, 24 I.L.M. 435, 436.

¹⁸⁵ See, e.g., Loayza Tamayo; Case No. 11,006 (García v. Peru).

Commission's and Court's detailed jurisprudence on protecting the rights of both victims and the accused under Articles 8 and 25 of the Convention should serve as precedent.¹⁸⁶

The Commission should hold that Article 8.4 does not bar subsequent prosecution for the same cause where the offense charged involves a violation of the Convention or other international treaty to which the state is signatory, and (a) there is evidence of new or newly discovered facts that could affect the outcome of the case; or (b) the first prosecution or proceeding either (i) was designed to shield the accused from criminal responsibility or (ii) was not conducted impartially or independently, or was otherwise conducted in a manner that is inconsistent with an intent to bring the person concerned to justice.

This narrowly tailored exception to *non bis in idem* would help avoid the distortion of Article 8.4 through sham trials that shield human rights violators from accountability, but would not erode the protection it provides against state persecution. It would be consistent with the purpose of the Convention, existing jurisprudence of the Commission and Court, and other international human rights law.

2. Because military court proceedings against members of the military accused of human rights violations fail to meet the standards of impartiality, independence, and competence required by Art. 8.1 of the Convention, they should not trigger *non bis in idem* protection under Art. 8.4.

As part of its efforts to keep Article 8.4 from becoming a tool of impunity, and to be consistent with the Inter-American Court's jurisprudence (see Section IV *supra*), the Commission should find that Article 8.4 does not come into play where members of the military are acquitted of human rights violations by military courts. Such a finding would simply apply to Article 8.4 the Commission's consistent conclusion that "the military jurisdiction does not offer the guarantees of independence and impartiality needed for the trial of cases [involving human rights violations] that involve punishing members of the Armed Forces"¹⁸⁷ As detailed earlier in this brief,¹⁸⁸ military courts lack the impartiality and independence required by Article 8.1 of the

¹⁸⁶ See, e.g., Cantoral Benavides, (rights of accused under Art. 8); Loayza Tamayo, (rights of accused under Art. 25).

¹⁸⁷ Second Report on the Situation of Human Rights in Peru, *supra* note 156, Chap. 2, at ¶ 209. Accord Inter-Am. C.H.R., Third Report on the Situation of Human Rights in Colombia, 1999, Chap. 5, ¶ 17 ("The Commission has repeatedly condemned the military jurisdiction in Colombia and in other countries for failing to provide an effective and impartial judicial remedy for violations of Convention-based rights, thereby ensuring impunity and a denial of justice in such cases.")

¹⁸⁸ See *supra*, Section IV.

Convention. This makes them unable to vindicate the rights of victims to judicial redress under Article 25.1.¹⁸⁹

Furthermore, “the military jurisdiction cannot be considered a real judicial system, as it is not part of the Judicial Branch, but is organized instead under the Executive.”¹⁹⁰ This distinction is manifest in the limited jurisdictional scope of military courts. As explained in Section IV, the military justice system is designed to maintain “order and discipline” within the ranks.¹⁹¹ The goals of military justice may be adverse to the values embodied in civilian trials (i.e., a search for truth and justice), for example, when military judges feel compelled to give priority to the interests of the military as a whole over the human rights of individual victims or defendants. Accordingly, in cases of human rights abuses, where judicial protections guaranteed in civilian courts cannot be compromised, the trials must take place in the civilian system.¹⁹² In turn, the competence of military courts must be limited to cases against military officers for acts committed in performing service-related functions, strictly construed.¹⁹³

Having already decided that human rights violations such as those in La Cantuta fall outside the scope of the competence of military courts,¹⁹⁴ and recognizing that Peruvian law itself would bar the assertion of military jurisdiction in this case,¹⁹⁵ the Commission should find that the

¹⁸⁹ The U.N. Human Rights Committee has also found that remedies offered by military courts are not “adequate and effective” for violations of human rights. In Bautista de Arellana v. Colombia, the Committee found that the disciplinary and administrative remedies ordered by the military court were insufficient to remedy the disappearance and assassination of a political activist. The Committee notes that anything short of criminal prosecution in cases of serious human rights violations would be insufficient. See Communication No. 563/1993, Views of the U.N. Human Rights Committee (Oct. 27, 1995).

¹⁹⁰ Second Report on the Situation of Human Rights in Peru, *supra* note 156, Chap. 2, at ¶ 211.

¹⁹¹ Castillo Petruzzi y Otros Case, Judgment of May 30, 1999, Inter-Am. Ct. H.R., Ser. C, No. 52 ¶128.

¹⁹² This argument finds support in a proposed “civil rights exception” to double jeopardy in the U.S. system. Paul Hoffman argues that although double jeopardy is violated, there is reason for federal reprosecution of state claims in exceptional cases of civil rights violations (e.g., Rodney King retrials). This sort of reprosecution serves constitutional interests of equality, over which Congress gave the federal government particular jurisdiction (i.e., civil rights laws). See The Rodney King Trials: Civil Rights Prosecutions and Double Jeopardy: Double Jeopardy Wars: The Case for a Civil Rights “Exception”, 41 UCLA L. Rev. 649 (Feb. 1994). Similarly, a “human rights exception” would allow civilian retrial of military officers acquitted of human rights abuses in military tribunals, because it is civilian, and not military, courts that protect the fundamental human rights at stake in these trials.

¹⁹³ Cantoral Benavides Case, Judgment of Aug. 18, 2000, Inter-Am. Ct. H.R., Ser. C, No. 69, ¶113; Durand y Ugarte Case, Judgment of Aug. 16, 2000, Inter-Am. Ct. H.R., Ser. C, No. 68, ¶118.

¹⁹⁴ Second Report on the Situation of Human Rights in Peru, *supra* note 2, Chap. 2 at ¶ 214 (“The Commission reiterates that military justice should be used only to judge active-duty military officers for the alleged commission of service-related offenses, strictly speaking. Human rights violations must be investigated, tried, and punished in keeping with the law, by the regular criminal courts.”).

¹⁹⁵ See *supra* Section IV.C.

military justice system was not competent under Article 8.1 to assert jurisdiction over the disappearances and massacre at La Cantuta.

Because of these deficiencies – lack of impartiality and independence, and a lack of judicial competence – judgments by military prosecutors and courts in cases involving military defendants accused of violations of Convention-based human rights do not acquire the force of *res judicata* and, thus, do not bar subsequent investigation and prosecution by civilian authorities. Allowing them to do so would pervert the purpose of the Convention and undermine the Commission’s efforts to stop the use of military jurisdiction to promote impunity.

3. In the La Cantuta case, statements and decisions of military courts and prosecutors that appear to have been designed to shield the accused rather than to impartially determine guilt or innocence should not be construed to trigger *non bis in idem* protection under Art. 8.

The Commission should determine, and inform the Government of Peru, that none of the pronouncements and decisions by the military prosecutor and courts prevent Peru’s civilian judicial institutions from prosecuting, on any La Cantuta-related charges, those purportedly acquitted or convicted in cases No. 157-V-93 and No.227-V-94-A.¹⁹⁶ The pronouncements and decisions in these cases all were made by military prosecutors and courts, which fail to fulfill the Convention’s requirements under Articles 8.1 and 25.1 and, therefore, should not trigger Article 8.4 protection.¹⁹⁷ Furthermore, an analysis of these particular proceedings indicates that they were designed to shield some of those responsible from full criminal responsibility for their acts, rather than to judge their guilt or innocence through an impartial investigation and weighing of evidence, as required by the Convention.

High-level political and military authorities made multiple and extreme efforts to prevent effective investigation of the La Cantuta massacre by the Peruvian Congress, the press, and the civilian judiciary. When called to testify before the congressional investigative committee on April 20, 1991, the commander of the armed forces, General Commander Hermoza Ríos (one of those against whom charges of all responsibility were dismissed by the military court), refused to answer important questions and denied the committee’s requests to interview other members of the armed

¹⁹⁶ As discussed above (*see supra*, note 161), Art. 8.4’s language does not bar subsequent trials after convictions.

¹⁹⁷ *See supra*, Section IV.C.2.

forces.¹⁹⁸ In the days immediately following his testimony, the army repeatedly maneuvered large numbers of tanks throughout Lima, apparently attempting to intimidate investigators.¹⁹⁹ The influence of these high-level officials over the military justice system is well established²⁰⁰ and may well have affected the decisions of the military prosecutor and judges. Ricardo Uceda, director of the magazine that discovered the graves of the La Cantuta disappeared, was accused by the Attorney General immediately afterwards of committing crimes against the administration of justice²⁰¹—notwithstanding the Attorney General’s own refusal to take measures, such as sealing the graves, to secure the evidence.²⁰²

The failure of the military prosecutor to indict *any* person for planning and/or ordering the massacre in Case No. 157-V-93, despite abundant evidence that planning and approval by authorities above the rank of the direct perpetrators would have been necessary,²⁰³ raises additional suspicions that the military proceedings were designed to shield, rather than reveal, some of those involved in the crimes. The prosecutor’s conclusory statement, early on in the case, that there was no such planning is so incredible²⁰⁴ as to constitute evidence of bad faith. The military court’s attempt to abruptly close the investigation upon the conviction of some of the direct perpetrators reinforces the strong impression of partiality.

Rather than allaying concerns about a sham process, the subsequent dismissal of Case No. 227-V-94-A against Hermoza, Montesinos, and Pérez Documet provokes additional suspicion. The strident position of the prosecutor and CSJM in the earlier case that there was no possibility that the crimes were planned and ordered, and that court’s “definitive closing” of all further investigations, suggest that the subsequent case against the higher-level officers was a mere

¹⁹⁸ See *id.* at 8-9.

¹⁹⁹ See *id.* at 9.

²⁰⁰ See *supra*, Section IV; Second Report on Situation of Human Rights in Peru, *supra* note 156, Chap. 2.

²⁰¹ See *id.* at 16.

²⁰² See *id.* at 14.

²⁰³ See *supra*, Section I.B.

²⁰⁴ One early piece of evidence available to the military prosecutor that warranted investigation for intellectual authorship was the letter from Gen. Rodolfo Robles Espinoza, which this Commission reviewed in Report No. 42/99. The letter alleged, “The La Cantuta crime, in which one professor and 9 students from that university were slain, was carried out by a special intelligence detachment operating under direct orders from Presidential Advisor and virtual head of the SIN Vladimiro Montesinos, the actions of which are coordinated with the Army Intelligence Service (SIE) and the General Staff’s Intelligence Directorate (DINTE) but always are approved of and known to the Commander General of the Army.” Case No. 11,045, at ¶ 24. The Commission noted that “the rank held by Gen. Robles Espinoza, the fact that his declarations were made in May 1993, before the victims’ bodies were found in July of that year, and the fact that several of the individuals he accused in 1993 as the perpetrators of the La Cantuta massacre were later convicted, in 1994, for committing those crimes” lent credibility to these accusations. *Id.*

formality. It is probable that the prosecutor never even formally charged, fully investigated, or attempted to prove the guilt of these men before the court.²⁰⁵ The text of the decision indicates, rather, that no thorough investigation took place. In granting a permanent stay in favor of Hermoza, Montesinos, and Pérez Documet, the court relied predominately on the previous admissions of the convicted direct perpetrators and merely regurgitated the findings of the previous case.²⁰⁶ Not surprisingly, the court's opinion refers to no other evidence aside from the testimony of the accused and their subordinates—lower-ranking officers who could easily have been pressured to lie to protect their superiors. This lack of extrinsic evidence calls into question the impartiality and adequacy of the investigation of the three high-level officers. Moreover, it implies that the second judicial proceedings were purposefully undertaken to evade further legal proceedings against the masterminds of the La Cantuta crimes. The judge not only dismissed the case against the three accused, but took it upon himself to exonerate “any civil or military authority” from all responsibility.²⁰⁷ This is indicative of the lack of any genuine intent to bring the case to justice.

4. Because the convictions by the military courts in the La Cantuta cases were part of a sham legal process, Peru must declare them null and void and conduct retrials that comply with the Convention's standards.

The fact that the military proceedings did convict and sentence five defendants to significant jail terms for their role in the massacre does not contradict the evidence that the proceedings were designed to shield, or had the effect of shielding, others. These defendants' convictions appear to have been intended to satisfy local and international demands for prosecution of the perpetrators of the massacre, while shielding those who planned and ordered it and, perhaps, other direct perpetrators.²⁰⁸ As scapegoats in politically manipulated “show” trials, the convicted were themselves denied their Convention-based rights to a fair trial. Assuming these men did carry out the La Cantuta crimes, they should be adequately punished; but the Convention requires that

²⁰⁵ In fact, the military justice system has withheld almost all information about the case against Hermoza Ríos, Montesinos and Pérez Documet, providing only the judgments in this action. Such secrecy furthers the growing impression that this action was a mere formality, without any real possibility that the accused would be subject to fair and impartial proceedings to determine guilt or innocence.

²⁰⁶ “Resolución de la Sala de Guerra del CSJM,” Caso No. 227-V-94-A, 15 de agosto de 1994, p. 2-3 (provided by the Peruvian government to the Commission during this proceeding).

²⁰⁷ *Id.*, at 1.

²⁰⁸ Eyewitnesses reported that the group of soldiers that kidnapped the male students from the dormitory numbered approximately 30. Americas Watch, Anatomy of a Cover-Up: The Disappearances at La Cantuta, Sept. 27, 1993, at 5.

their convictions be attained through a fair and impartial process where their guilt is not predetermined. Because these proceedings did not guarantee the most basic judicial protections required by the Convention, the Commission must not legitimize them. Rather, in its recommendations, it should find the military court judgments null and void²⁰⁹ and recommend that Peru conduct retrials before civilian courts that conform to the Convention's requirements.²¹⁰ Those who are convicted in retrials should be sentenced in compliance with international standards,²¹¹ taking into account time served.

²⁰⁹ The Court's order in Castillo Petruzzi, Judgment of May 30, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 53, Puntos Resolutivos ¶13, provides precedent for these recommendations.

²¹⁰ In the event the Commission is satisfied with the judicial protections offered to the accused in the first trials, the Court must reinstate the sentences of those released by the 1995 amnesty laws, as these laws do not absolve the State of its duty to punish human rights violators. *See supra*, Section II.

²¹¹ The sentences of the direct perpetrators (15 and 20-year prison terms) pronounced by the military court appear to be reasonable in length by international human rights standards. *See, e.g., Celebici Case* (Landzo), *Prosecutor v. Delalic et al.*, Case No. IT-96-21, International Criminal Tribunal for the Former Yugoslavia (ICTY), Judgment of Trial Chamber, ¶1285 (November 16, 1998) (15-year sentence for murder and torture; mitigating circumstances (youth) considered); Kupreskic Case (Josipovic), *Prosecutor v. Kupreskic, et al.*, Case No. IT-95-16-A, ICTY, Judgment of Trial Chamber, ¶869 (January 14, 2000) (15-year sentence for murder and inhumane acts); Erdemovic Case (Erdemovic), Case No. IT-96-22-Tbis, ICTY, Second Sentencing Judgment of the Trial Chamber (March 5, 1998) (five-year sentence for murder; mitigating circumstances (duress) considered). Nonetheless, reports of special treatment in the Simón Bolívar Cuartel prison remain disconcerting and would not conform to these standards of impartial justice. Moreover, the one-year, four-year and five-year sentences for negligence are lower than those given to commanding officers for "superior responsibility" by the ICTY. Because negligence is the domestic tort law equivalent of the international crime of "command or superior responsibility"—having known or should have known about the likely commission of human rights violations by subordinates and failing to prevent or punish such commission—it can be argued that these two crimes should receive comparable sentences. Typical sentences for command responsibility in international tribunals range from seven to forty-five years, depending on mitigating or aggravating circumstances. *See, e.g., Celebici Case* (Mucic), *Prosecutor v. Delalic et al.*, Case No. IT-96-21, ICTY, Judgment of Trial Chamber (November 16, 1998) (commander of detention facility sentenced to seven years for superior responsibility in murder, torture, and causing great suffering); Kupreskic Case (Santic), *Prosecutor v. Kupreskic, et al.*, Case No. IT-95-16-A, ICTY, Judgment of Trial Chamber, ¶869 (January 14, 2000) (commander of military police sentenced to 25 years for participation in and command of murder, persecution, and inhumane acts); Kordic Case (Kordic), *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-1412, ICTY, Judgment of Trial Chamber, ¶857 (February 26, 2001) (regional political leader sentenced to 25 years for superior responsibility in murder, inhumane treatment, unlawful attack on civilians); Blaskic Case (Blaskic), Case No. IT-95-14-A, ICTY, Judgment of Trial Chamber, ¶809 (March 3, 2000) (general in army sentenced to 45 years for personal and superior responsibility for murder, inhumane treatment, and persecution). The most common aggravating circumstances punished more harshly by the ICTY are leadership roles for higher-level officials, or particular brutality and sadism for low-level participants. Celebici Case (Delic), *Prosecutor v. Delalic et al.*, Case No. IT-96-21, ICTY, Judgment of Trial Chamber (November 16, 1998) (sentenced to 20 years; brutality and sadistic pleasure in torture found to be aggravating circumstances to increase sentence).

V. CONCLUSION

Peru has failed to fulfill its duty under international treaties, including the American Convention on Human Rights, to investigate and punish those responsible for the massacre that took place at La Cantuta on July 18, 1992. Because Peru did not adequately investigate the masterminds of the disappearances and massacre and improperly effectuated the early release of those few direct perpetrators who were prosecuted, Peru has yet to fulfill its international obligation. The 1995 amnesty laws cannot absolve Peru of this obligation; nor do the decisions of the Supreme Council of Military Justice in Cases No. 127-V-93 and No. 227-V-94-A, as a military judicial system is an improper forum to investigate and adjudicate human rights violations by members of that same military system. Therefore, Peru should bring itself into compliance with this critically important international obligation. To do so, the State must ensure that the intellectual authors of the massacre are thoroughly and impartially investigated and prosecuted to the full extent of the law. Peru must bring charges in civilian courts against those found to have contributed to the conception and/or commission of the massacre, whether or not such officers were previously charged with such crimes. Since Peru is not barred by Article 8.4 of the American Convention from bringing such charges, it must proceed with its duty to investigate and punish. Finally, recognizing that the trials of those convicted were part of a corrupt scheme of biased investigations and prosecutions, Peru must declare the past convictions null and void and conduct retrials in civilian courts that conform to the Convention's standards.