

REPORT No. 84/13
CASE 12.482
MERITS
VALDEMIR QUISPEALAYA VILCAPOMA
PERÚ

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November 4, 2013

I. SUMMARY

1. On February 3, 2004, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," the "Commission" or "the IACHR") received a complaint filed by the Human Rights Commission (*Comisión de Derechos Humanos*, COMISEDH), (hereinafter "the petitioners"), in which it was claimed that the State of Peru (hereinafter "Peru," "the State" or "the Peruvian State") violated certain rights enshrined in the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") to the detriment of Valdemir Quispealaya Vilcapoma, (hereinafter "the victim"), when he was assaulted by his military instructor with a firearm in his right eye and in the head on January 23, 2001, at a time when he was serving in the Communications Company No. 31 of the December 9th Battalion in the Peruvian army in the city of Huancayo, department of Junin. It is alleged that as a result of this assault, the victim lost the vision in his right eye and that the criminal proceeding was transferred to the jurisdiction of the military courts, which acquitted the alleged perpetrator.

2. On February 25, 2001, the Commission adopted Admissibility Report No. 19/05, in which it concluded that the petition was admissible with respect to the alleged violations of the right to personal integrity, the right to judicial guarantees and the right to judicial protection, enshrined respectively in Articles 5, 8, and 25, in relation to Article 1(1) of the American Convention, as well as in Article 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Valdemir Quispealaya Vilcapoma.

3. At the merits stage, the petitioners alleged that Mr. Quispealaya was the victim of physical and psychological abuse by his military instructor and that that abuse was intended to discipline and punish the alleged victim, and as such, they considered that the acts constituted torture. They stated that these events were not investigated, despite the fact that at the time they took place, there was a context in the voluntary military service of tolerating the practice of torture, as the United Nations Committee Against Torture and the Ombudsman of Peru observed. They state that although the criminal proceeding was initiated in the civil courts by virtue of the complaint presented by the alleged victim's mother, the Supreme Court decided that the criminal military jurisdiction had competence over the matter because it was a crime committed during the performance of duties (*delito de función*). This proceeding resulted in the acquittal of the party who was allegedly responsible. They indicate that following the approval of the Admissibility Report in 2007, the process was reopened in the civil courts, which proceeded to close the case in spite of the presence of medical-legal reports that documented Mr. Quispealaya's injury. They indicate that as a result, there was no effective judicial remedy available and that the State no provided the alleged victim with reparations that were proportionate to the serious nature of the torture suffered. The petitioners indicate that in the 11 years since the events took place, the torture that Mr. Quispealaya suffered has caused an irreversible visual disability that has had an impact on his personal and family life, as it has been an obstacle to his finding steady work in

order to satisfy the basic needs of his family and himself. They indicate that Mr. Quispealaya has been able to survive due to the support of his elderly mother.

4. For its part, the State alleged that although a proceeding was taking place before the criminal military jurisdiction when the IACHR published Admissibility Report No. 19/05, at the present time the military-police jurisdiction in Peru has been reformed in order to be consistent with the Constitution and the American Convention. It indicated that the proceeding was reopened before the civil courts in 2007 and closed in 2008, given that Mr. Quispealaya could not be located and as a result, the pertinent medical-legal reports could not be realized in order to establish the length of his disability and the medical attention that he required. It indicated that the mere presence of a State official was not a sufficient element to characterize the alleged events as torture, because it is necessary that the intent to cause the victim pain or serious suffering be concurrent with some of the objectives of the act established in Peruvian law. It alleged that it was the place of the Attorney General, as the prosecutor of the criminal proceeding, to evaluate and characterize the acts that constitute the claim and to determine the criminal responsibility of an individual in relation to the alleged commission of a crime, a situation that could not materialize in the presumed case. It stated that the IACHR cannot intervene in this proceeding as a court of fourth instance, nor can it determine the criminal responsibility of an individual in relation to the alleged commission of a crime, because the criminal responsibility of the instructor was not proven in this case.

5. After analyzing the position of the parties, the Inter-American Commission concludes that the Peruvian State is responsible for the violation of the rights to personal integrity, enshrined in Articles 5(1) and 5(2) of the American Convention in relation to Article 1(1) of the same and in Article 8 of the Inter-American Convention to Prevent and Punish Torture to the detriment of Mr. Quispealaya Vilcapoma; the right to judicial guarantees and protection enshrined in Articles 8(1) and 25 of the American Convention in relation to Article 1(1) of the same instrument, to the detriment of Mr. Quispealaya Vilcapoma, and the right to personal integrity according to Article 5(1) of the American Convention in relation to Article 1(1) of that instrument, to the detriment of Ms. Victoria Vilcapoma Taquia, mother of Valdemir Quispealaya Vilcapoma.

II. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION

A. Processing of the case

6. The Commission examined the petition during its 122nd period of sessions and approved Admissibility Report No. 19/05 of February 25, 2005 and transmitted it to the parties on March 14, 2005, putting itself at the parties' disposition in order to reach a friendly settlement of the matter according to Article 48(1)(f) of the American Convention. Additionally, the Commission requested that the petitioners, in accordance with Article 38(1) of the Rules of Procedure in place at the time, present their additional observations regarding the merits. On May 17, 2005, the Commission received a communication from the petitioners which expressed their disposition to reach a friendly settlement of the matter. The IACHR sent this communication to the State on June 1, 2005 and provided a period of one month to present observations. The State requested an extension by means of a communication dated July 1, 2005, and the IACHR granted an extension of 20 days in a communication of July 15, 2005.

7. On November 10, 2005, the Commission received a letter from the State indicating that at that time, it was unable to offer its availability to initiate a friendly settlement proceeding with regard

to the present case. The IACHR sent this communication to the petitioners on January 31, 2006 with a period of one month in which to present observations, which were received on March 15, 2006 and sent to the State in a communication of the IACHR dated March 23, 2006. The petitioners sent a communication on March 28, 2006 in which they requested an extension to present their observations on the merits. The IACHR granted an extension of 30 days to the petitioners on March 29, 2006.

8. The State requested an extension on April 27, 2006, and the IACHR granted a period of 15 days in a communication dated May 22, 2006. The petitioners requested an extension of two months in a communication of April 28, 2006.

9. The Commission received the State's observations on July 19, 2006 and it sent them to the petitioners on August 10, 2006. The Commission also reiterated its request that the petitioners present their additional observations regarding the merits in order to continue processing the matter.

10. On February 12, 2007, the IACHR received the petitioners' additional observations regarding the merits and sent them to the State by means of a Communications of April 9, 2007, with a period of two months to present observations. On June 15, 2007, the Commission received a request from the State that an additional extension to present observations be granted, and this request was denied by the IACHR in accordance with Article 38(2) of the Rules of Procedure in place at the time, by means of a communication dated August 3, 2007.

11. The State presented additional observations regarding the merits in a communication of July 25, 2008, and these were sent to the petitioners with a period of one month to present observations on August 6, 2008. The petitioners sent their observations on September 16, 2008, and these were sent to the State on September 26, 2008 with the period of a month to present observations. The State requested that an extension be granted to present its observations in a communication of November 3, 2008, and the Commission granted this request for a period of 20 days on December 22, 2008.

12. On February 26, 2009, the IACHR received the State's observations, which were sent to the petitioners on March 25, 2009 with the period of a month to present observations. The petitioners presented their observations in a communication of May 5, 2009, and these were sent to the State in a communication of the IACHR of May 5, 2009 with the period of one month. The State presented its observations in a communication of June 26, 2009.

13. On September 1, 2009, the IACHR sent these observations to the petitioners with a period of one month to present their own observations, and they did so on October 6, 2009. On October 7, 2009, the IACHR sent the petitioners' observations to the State. Subsequently, on May 23, 2011, the IACHR received a communication from the petitioners and acknowledged receipt on July 15, 2011.

14. In a communication of May 2, 2013, the IACHR requested that both parties send a copy of the main procedural documents contained in the military and judicial case files that were relevant to the present case. The petitioners sent the information requested on May 20, 2013, and it was sent to the State on May 21, 2013 with a period of 30 days in which to present observations. The State presented the information requested by the Commission in a communication dated June 3, 2013, and this was sent to the petitioners on June 10, 2013.

III. POSITION OF THE PARTIES

A. The petitioners

15. The petitioners state that on November 14, 2000, Mr. Quispealaya, aged 23 at the time, went of his own will to the “December 9” Peruvian Army base in the city of Huancayo in order to enroll in the voluntary military service. They indicate that Mr. Quispealaya, having had a medical exam that demonstrated that he was in a good state of health, was assigned to the CID No. 31 in the city of Juaja for basic training. He purportedly stayed there until the end of December of 2000, and he was subsequently assigned to No. 31 Communications Company in the city of Huancayo.

16. They state that on the morning of January 23, 2001, members of his company went to the firing range at Azapampa for shooting practice. They indicate that noncommissioned officer Juan Hilaquita Quispe was in charge of the recruits’ practice, and that Mr. Quispealaya was included in that group. They claim that because Mr. Quispealaya committed many errors during the practice, noncommissioned officer Juan Hilaquita Quispe repeatedly insulted him and at one point grabbed the firearm (FAL) that he carried and hit him in the forehead and the right eye with the butt of the weapon. They affirm that other soldiers who were taking part in the shooting practice observed these events. They state that after this assault, Mr. Quispealaya went to the military unit’s medical center, where he was prescribed eye drops to treat the watering in his right eye.

17. They claim that because Mr. Quispealaya felt threatened and intimidated by his aggressor and feared possible reprisals, he waited until June of 2001, when he could no longer handle the strong headaches and pain in his right eye that he had been suffering, as well as the loss of his eyesight. He went to the clinic of the 31st Infantry Brigade to be examined by the surgeon, who recommended that he be transferred to the Central Military Hospital in Lima, where he received surgery on his right eye. The petitioners state that due to the advanced state of the injury, he lost vision in this eye.

18. In relation to the threats that the alleged victim received, they maintain that on February 4, 2002, after Mr. Quispealaya reported the alleged torture that he suffered to a public notary (*noticiero*), and as he was returning to his home, he found members of the Army waiting for him at the door of his house who rebuked for having reported his aggressor. They state that these events were reported to the Ombudsman [*Defensoría del Pueblo*] of Huancayo. Furthermore, the petitioners indicate that on November 29, 2002, Mr. Quispealaya’s mother requested a restraining order in her son’s name against the alleged aggressor in light of the constant threats received. They state that similarly, several witnesses of the purported assault on the alleged victim were also threatened: specifically, they report that on November 14, 2002, Edson Huayra Arancibia, a former soldier and witness of the events who had testified against the alleged aggressor during the criminal proceedings, was beaten by four unidentified individuals who appeared to be in the military, and that on December 4, 2002, the presumed aggressor, noncommissioned officer Juan Hilaquita Quispe, shot at him. They claim that these events were also reported to the Ombudsman of Huancayo.

Criminal proceedings before the civil courts and proceeding before the military courts

19. The petitioners indicate that on February 28, 2002, the alleged victim’s mother, Victoria Vilcapoma Taquia, presented a complaint before the National Prosecutor’s Office which was assigned to the Tenth Provincial Prosecutor’s Office of the judicial district of Junín, province of Huancayo, and the

preliminary investigation was assigned to the Second Provincial Prosecutor's Office for Criminal Matters of the province of Huancayo. They state that on June 11, 2002, at the request of the Second Prosecutor's Office of Huancayo, Mr. Quispealaya was given a medical examination by the Institute of Legal Medicine of the Medical-legal Division of Huancayo. It issued Medical-legal Certificate No. 006502-L, which concluded that "At the current date, the subject presents total and permanent loss of vision in the right eye, caused by advanced, post-traumatic cataracts and glaucoma, which are related to the data."

20. They indicate that once the preliminary investigation concluded, the Second Provincial Prosecutor of Huancayo initiated a criminal action for serious injuries but considered that there were insufficient grounds to initiate an action for torture. The petitioners state that on October 18, 2002, they presented a motion for appeal (*recurso de queja de derecho*), but this was declared inadmissible by the Prosecutor of Huancayo, although it did modify the action to include abuse of authority. They indicate that the Fifth Criminal Court of Huancayo opened an investigation for the offense of serious injuries and abuse of authority, and it issued a warrant for the arrest of the defendant, although he was never detained. The petitioners claim that the military officers protected the defendant, a fact that became clear during the judicial inspection of the firing range of Azapampa, when the criminal judge recognized the defendant and ordered his arrest but was prevented by members of the Army.

21. The petitioners indicate that on November 19, 2002, the judge of the Fifth Military Court of Huancayo asked the judge of the Fifth Criminal Court of Huancayo to cede jurisdiction. They state that the Criminal Chamber of the Supreme Court settled the controversy over jurisdiction in favor of the military courts, concluding that the allegations constituted an offense in the course of duty [*delito de funcion*]. The petitioners state that on August 19, 2005, the Permanent War Council of the Second Judicial Area of the Army acquitted noncommissioned officer Juan Hilaquita Quispe for the offense of abuse of authority to the detriment of the alleged victim, and on November 17, 2005, the Supreme Council of Military Justice reversed the sentence of acquittal and ordered more detailed investigations.

22. The petitioners subsequently reported that on November 9, 2007, the military proceedings were transferred to the civil courts in order that S01 Juan Hilaquita Quispe be investigated and punished for crimes against life, body and health – specifically causing serious injury – and that on October 17, 2008, the First Criminal Provincial Prosecutor of Huancayo definitively closed the case.

Allegations regarding the merits of the case

23. The petitioners claim that the State incurred international responsibility in this case at the moment that a state agent, S01 Juan Hilaquita Quispe, tortured Valdemir Quispealaya Vilcapoma, when he was performing voluntary military service in the Army, thus violating the alleged victim's right to personal integrity protected in the American Convention and the Inter-American Convention to Prevent and Punish Torture. They allege that the State incurred international responsibility for the failure to investigate effectively and to sanction the responsible parties. They indicate that the proceedings carried out in the domestic courts were for serious injuries and did not refer to the crime of torture, despite the fact that the seriousness of the acts committed against Mr. Quispealaya caused him to lose vision in his right eye, a fact proven by the Medical Report prepared by the Department of Ophthalmology of the Central Military Hospital of January 25, 2002, the Medical-legal Expert Report of March 2, 2002, Medical-legal Certificate 006502-L of June 11, 2002, and the psychological examination of June 11, 2002.

24. The petitioners allege that the practice of torture in Peru in the context of voluntary military service has been subject to extensive documentation and has not been contested, as reflected in the Observations of the UN Committee Against Torture to the Fourth Periodic Report of the State of Peru and in the Ombudsman's Report No. 42, which refers to the case of Valdemir Quispealaya.

25. The petitioners state that the transfer of the proceeding from the military to the civil courts took place after COMISEDH presented the petition to the IACHR, but the case was later closed, based on the argument that for crimes of torture, a medical-legal certificate is indispensable in order to establish the victim's period of disability and the medical attention that he required, or a document demonstrating that a major organ of the human body has been harmed, and that in the present case, there was no medical-legal certificate issued at the time when the events occurred. In this sense, they highlight that in the case file that was opened in the civil courts before it was transferred to the military courts, there were several medical certificates that recorded the injury, as well as witness statements about the events. Consequently, the petitioners maintain that the second investigation in the ordinary jurisdiction had the sole end of covering up the events that form the basis for this case.

26. The petitioners indicate that 11 years after the events took place, the torture suffered by Mr. Quispealaya has caused him an irreversible visual disability that has impacted his personal and family life, as it has constituted an obstacle to his finding a stable job in order to provide for himself and his family. They indicate that the alleged victim has been able to survive due to the support of his elderly mother.

27. In relation to the alleged violation of Article 5 of the American Convention and Article 8 of the Inter-American Convention to Prevent and Punish Torture, the petitioners allege that given that Mr. Valdemir Quispealaya was performing voluntary military service at an Army base and was mistreated, the State is responsible in its role of guarantor of the rights enshrined in the Convention, because it is responsible for the torture in that the alleged victim was tortured when he was in state custody, and that the State bears the burden of proving the contrary. They state that during the period of investigation, Mr. Valdemir Quispealaya was the victim of physical and psychological mistreatment committed by a State agent, first noncommissioned officer of the Peruvian Army Juan Hilaquita Quispe, who was responsible for his training, and who assaulted the alleged victim in a disproportionate and unnecessary manner as punishment for the mistakes he made during shooting practice, which constitutes a form of torture, as the Ombudsman determined in its Report No. 42. They claim that furthermore, the State is responsible for the violation of Mr. Quispealaya's right to personal integrity, based on its failure to carry out a proper investigation of the case and to punish noncommissioned officer Hilaquita.

28. The petitioners consider that the facts of this case characterize the crime of torture in accordance with Article 321 of the Criminal Code of Peru and with the definition contained in Article 2 of the Inter-American Convention to Prevent and Punish Torture, since the aim of the physical assault suffered by the alleged victim was to impose discipline by a public official, the first noncommissioned officer of the Armed Forces of Peru. They claim that the crime of torture not only seeks to protect the physical and moral integrity of the human being, but that it also especially protects the dignity of the person as a universal value. In relation to the gravity of the suffering or physical and mental pain inflicted, the petitioners state that as a consequence of the harm caused to Valdemir Quispealaya, he lost the vision in his right eye, leaving him disabled for life.

29. The petitioners claim that the State violated Articles 8 and 25 of the American Convention in relation with Article 1(1) of this treaty and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Valdemir Quispealaya Vilcapoma, since the Supreme Court of the Republic settled the dispute over jurisdiction in favor of the military courts. In this sense, they indicate that the jurisprudence of the Inter-American Court establishes that in a democratic State governed by law, military jurisdiction should have a restrictive and exceptional application and be directed toward protecting the special legal interests related to the aspects of law assigned to the military forces. They claim that in the present case, the State has violated the standard set by the Inter-American Court in the *Case of Palamara Iribarne v. Chile* with respect to the right to be tried by a competent, independent and impartial judge or court.

30. The petitioners state that the Ombudsman has already pronounced on the legal interests affected in the case of Valdemir Quispealaya, concluding that the assault on a soldier and the harm to his physical integrity have no relation to the institutional goals that correspond to the Armed Forces according to Article 165, and that the Code of Military Justice does not include the crime of serious injuries.

31. The petitioners indicate that the State did not initiate an investigation *ex officio* for the torture committed against the alleged victim, but that the claim instead originated in a complaint filed by the party. They add that it was not carried out with due diligence and was inefficient, since the party responsible for the crime was neither investigated nor punished. They state that furthermore, the State did not provide the victim with reparations that were proportionate to the seriousness of the lasting effects of the torture that he suffered.

32. The petitioners claim that the investigations were not carried out with due diligence because the judicial authorities did not apply the "Protocol of Medical-legal Recognition for the Detection of Injuries or Death as the Result of Torture," which was in force at the moment of the events. This includes physical and mental examinations, auxiliary examinations, and several sessions of treatment, concluding with a detailed and in depth report on the injuries that the victim presents. They claim that the Protocol of Istanbul was similarly not applied.

33. Finally, the petitioners request that in the present case the IACHR grant the following measures of reparation: a) training for members of the Peruvian Armed Forces that are in charge of training recruits who perform voluntary military service, particularly regarding the use of force and the application of disciplinary measures that respect human rights; b) design of a "Manual of disciplinary measures of the Armed Forces" which stipulates the disciplinary measures that are permitted; c) training for prosecutors and judges regarding the crime of torture and its difference from the crime of injuries; d) implementation of the Protocol of Istanbul; and e) measures of full reparation commensurate to the serious physical and psychological effects of the torture committed against Valdemir Quispealaya Vilcapoma, as well as that suffered by his family, who have supported him during the domestic proceedings; f) a judicial investigation of those responsible for the torture committed against Mr. Quispealaya.

B. The State

34. The State alleged that when the IACHR issued its Admissibility Report, there was a proceeding before the military courts for the alleged facts, and that reparations have been made in this

regard, meaning that the acts for which the Commission declared the petition admissible are no longer relevant and that the State's international responsibility cannot be required.

35. The State claimed that the Constitutional Tribunal issued a judgment on December 15, 2006 establishing that Military-Police Justice lacks jurisdiction over common crimes contained in the Criminal Code. Specifically in relation to the crime of abuse of authority, it held that "Article 179 of the Code of Military Police Justice, dealing with the crime of abuse of authority, is contained in the new Code of Military Police Justice under the title Excess in the Exercise of Command, described in the first section of Article 139, having been declared unconstitutional by the Plenary of the Constitutional Tribunal in its judgment of December 15, 2006, for which these acts no longer constitute crimes in the course of duty, and they can be subject to investigation by the civil courts." They indicate that the Constitutional Tribunal specified that in relation to the military offense of excesses in the exercise of command that "these criminal norms seek to sanction the conduct of an (active-duty) soldier or policeman who, in the exercise of his function . . . exceeds the scope of his authority . . . causing PHYSICAL INJURIES or DEATH, affecting the legal interests of PHYSICAL INTEGRITY AND LIFE (which are not institutional legal interests that are unique and particular to the Armed Forces or National Police). Consequently, taking into consideration that the aforementioned criminal norms do not include the basic characteristics of crimes in the course of duty, as required by Article 173 of the Constitution, the Constitutional Tribunal considers that they are unconstitutional."

36. Concretely, the State claims that it is adopting all efforts in order to adapt the offenses committed during the exercise of military activities, and specifically those that do not affect the unique legal interests of military institutions, to the principles contained in the Constitution and in the American Convention. It states that in the year 2008 a Special Commission of the Congress of the Republic was charged with preparing and promulgating a new Code of Military-Police Justice.

37. The State reports that in the present case, by means of communication No. 161 S-CSJIM of May 30, 2007, the Secretary General of the Supreme Council of Military Justice related that by resolution of March 24, 2007, the Permanent Military Court of Huancayo resolved to elevate the proceedings to the War Council of the Second Judicial Zone of the Army in order to close the case and notify the facts of the case to the Attorney General of Huancayo for it to take action. The State indicated that on August 16, 2007, the Permanent War Council of the Second Judicial Area of the Army issued a resolution overturning the previous decision and ordering that a certified copy of the pertinent procedural elements of the case be sent to the Attorney General's Office so that it could proceed in accordance with its jurisdiction.

38. The State claims that the Attorney General's Office issued a notice on November 29, 2007 in which it reported the National Human Rights Council that the instant case originated in the civilian courts and that the First Prosecutor of the Criminal Province of Huancayo resolved to open a preliminary investigation for the alleged commission of an offense against life, body and health, characterized as serious injuries, and that it had ordered the realization of various procedural steps.

39. Subsequently, the State reported that on October 17, 2008, the criminal complaint was finally closed, given that it was not possible to notify Mr. Valdemir Quispealaya to give a statement as his whereabouts were unknown. Furthermore, it was necessary to establish the period of disability and the medical attention that he required, for which the medical-legal certificate was needed, and none existed at the moment when the events occurred. The State alleges that if the alleged victim had not agreed with this resolution, he could have filed a motion for appeal [*recurso de queja*] to the Provincial

Prosecutor or the Supervising Prosecutor [*Fiscal Superior*], in which case, if it was considered admissible [*procedente*], the Provincial Prosecutor would have been instructed to present it before the Investigating Judge with jurisdiction. It indicates that if the Prosecutor before whom a motion for appeal was presented did not consider it admissible, the complainant would have been notified in writing and could appeal this decision before the Supervising Prosecutor within a period of 3 days of the notification.

40. With regard to the alleged torture suffered by Mr. Quispealaya, the State alleges that the alleged violation of Article 5 of the Convention admitted by the IACHR in its Admissibility Report is tied to the purported lack of investigation into the injuries suffered by Mr. Quispealaya Vilcapoma by the competent jurisdiction, a matter to which it has already referred. It states that the petitioners insist that the acts constitute the crime of torture and do not accept that the complaint was filed for the crime of serious injuries, despite the fact that the Office of Public Prosecutions, in its role as prosecutor of the criminal action, has the faculty to evaluate and define the acts that form the basis of the complaint and/or the *ex officio* investigation, in order to file a formal accusation before the Judicial Branch. The State claims that the Commission cannot intervene in this proceeding as a fourth instance, nor can it determine the criminal responsibility of an individual in relation to the alleged commission of an offense.

41. The State claims that in order to constitute the crime of torture, it is necessary that the perpetrator be a public official or person who acts with the consent or acquiescence of a public official, a fact which has not been established in the present case, as the criminal responsibility of noncommissioned officer Instructor Juan Hilaquita Quispe was never proven. It claims that the mere presence of a State agent does not constitute a sufficient element to characterize the allegations as torture, because it is necessary that the intent to cause the victim harm or serious suffering be concurrent and that the aim of the act be one of those established by Peruvian law. The State alleges that according to Article 5 of the American Convention, there is a difference between the concept of torture and cruel, inhuman and degrading treatment, and that according to the Peruvian legal regime, the criminal offense that is most similar to cruel, inhuman or degrading treatment is that of serious injuries.

42. In summary, the State concludes that in the present case, Articles 5, 8 and 25 of the American Convention have not been violated, nor has Article 8 of the Inter-American Convention to Prevent and Punish Torture.

IV. PROVEN FACTS

43. In application of Article 43(1) of its Rules of Procedure,¹ the Commission will examine the allegations submitted by the parties and the elements of proof submitted in processing the present case. Similarly, it will take into account publicly available information, including resolutions of committees of the universal system of human rights, the IACHR's own reports on petitions and cases and regarding the general situation of human rights in Peru, publications of non-governmental

¹ Article 43(1) of the Rules of Procedure of the IACHR establishes the following:

The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge.

organizations, laws, decrees and other norms that were in force at the date of the allegations of the parties.

44. In the following section, the IACHR will pronounce on A) the general context in which the events of the present case took place; B) the facts that have been proven; and C) the resulting responsibility of the State of Peru.

A. Context

45. In December of 2002, the Peruvian Ombudsman published Report No. 42 on “The right to life and personal integrity in the context of military service in Peru,” which covers the period between April 1998 and August 2002 and is based on the study of 174 reports or *ex officio* interventions for deaths and alleged acts of torture or cruel, inhuman and degrading treatment related to the performance of military service.² The Report states that the cases brought to the attention of the Ombudsman primarily occurred in units of the Peruvian Army at the national level,³ and that the circumstances in which they some cases occurred were not directly related to military service, and that others occurred during military service.⁴ When the torture or cruel, inhuman or degrading treatment was linked with the key activities of military service, the Report indicates that the acts manifested themselves in physical aggressions, excessive physical exercises and psychological abuse, because they were considered part of the disciplinary power.

46. The Report states that this practice was deeply rooted and corresponded to the way in which military service was performed,⁵ because it was based on an erroneous interpretation of military discipline. In this sense, the Report sustains that Article 2(a) of the Rules of the Interior Service of the Army No. 34-5 states that “every superior officer has the right to punish a lower-ranking officer in any circumstance of time and place,” and that in the event that the latter “protests or asks the superior for explanations as a result of acts of service or punishment that have been imposed,” this can be considered as the offense of insulting a superior officer, in accordance with Article 147 of the Code of Military Justice.⁶ Similarly, the Ombudsman’s Report indicates that from the testimonies collected, one can deduce that “during the performance of military service, the conscripts are placed in a situation of extreme discipline that could be likened to psychological abuse.”⁷

47. In the year 2000, Ombudsman Resolution No. 58-2000-DP stated that “This situation of rigorous discipline, unlimited obedience, inflexible hierarchy and lack of communication with the

² Annex 34. Ombudsman’s Report No. 42, “The right to life and personal integrity in the context of the performance of military service in Peru,” p. 8.

³ Annex 34. Ombudsman’s Report No. 42, “The right to life and personal integrity in the context of the performance of military service in Peru,” pp. 14-15.

⁴ Annex 34. Ombudsman’s Report No. 42, “The right to life and personal integrity in the context of the performance of military service in Peru,” pp. 44-45.

⁵ Annex 34. Ombudsman’s Report No. 42, “The right to life and personal integrity in the context of the performance of military service in Peru,” p. 45.

⁶ Annex 34. Ombudsman’s Report No. 42, “The right to life and personal integrity in the context of the performance of military service in Peru,” p. 49.

⁷ Annex 34. Ombudsman’s Report No. 42, “The right to life and personal integrity in the context of the performance of military service in Peru,” p. 136.

outside world has caused some young conscripts to develop symptoms of mental illness that are generally genetic, such as psychosis, schizophrenia or depression, which they have never before manifested.”⁸

48. Although the Ombudsman’s Report recognized that the institutional policy of the Armed Forces was attempting to diminish the problems that resulted from an erroneous interpretation of the concept of military discipline,⁹ it also indicated that according to Notice No. 12009 MINDEF-K of January 25, 1999, the current Minister of Defense sent a communication to the General Commanders of the Army, the Marines and the Air Force indicating that despite the measures issued to avoid disciplinary infractions, instances of abuse of authority, etc., these events had increased significantly.¹⁰

49. For its part, the UN Committee Against Torture indicated as a cause of concern with regard to Peru in a report of 2006 that there continued to be “complaints from recruits who were performing military service related to torture and cruel treatment.”¹¹

1. Facts of the case

50. Valdemir Quispealaya Vilcapoma was born on August 13, 1978 in the district of Santa Rosa de Sacco, Yauli province, in the region of Junin.¹² On November 14, 2000, Valdemir Quispealaya, who was then 22 years old, entered voluntarily and in optimal physical condition in the military base “December 9th” in the city of Huancayo to perform his military service, where after having passed the medical examination, he was sent first to the B Battalion (Buitres) in the city of Jauja to receive military training. Subsequently, he was sent to the “December 9th” military base, where he was assigned to the communications battalion No. 31 of Huancayo.¹³ According to Articles 48¹⁴ and 49¹⁵ of the Regulations

⁸ Annex 34. Ombudsman’s Report No. 42, “The right to life and personal integrity in the context of the performance of military service in Peru,” pp. 136-137.

⁹ Annex 34. Ombudsman’s Report No. 42, “The right to life and personal integrity in the context of the performance of military service in Peru,” p. 51.

¹⁰ Annex 34. Ombudsman’s Report No. 42, “The right to life and personal integrity in the context of the performance of military service in Peru,” pp. 52-53.

¹¹ United Nations, Committee Against Torture, CAT/C/PER/CO/4 of July 25, 2006, para. 12.

¹² Annex 3. RENIEC, Online consultation, details about citizen Valdemir Vilcapoma Quispealaya. Annex 1 from the petitioners’ communication of February 5, 2006.

¹³ Annex 1. Investigation 101(2)-2002, document signed by Angel R. Carpio Aquisé, Provincial Criminal Prosecutor of the 2nd Criminal Prosecutor’s Office of Huancayo of September 20, 2002, to the Criminal Court on Duty of Huancayo. Annex to the State’s Report of November 4, 2005; Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties’ Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners’ Communications of February 5, 2006.

¹⁴ Article 48. –Procedure of Qualification and Selection

The Qualification and Selection of the recruits will take place at the time and place that they enlist, taking into account the following aspects:

- a. Physical and psychosomatic aptitude.
- b. Level of training.
- c. Criminal, judicial and/or police record.

¹⁵ Article 49. – The Selected Recruit.

of Law No. 271278, "Law of Voluntary Service," the corresponding medical exam was practiced on Mr. Quispealaya to determine his physical and psychosomatic aptitude.

51. The petitioners complained to the Attorney General on February 28, 2002 that during the period of military training, S01 EP Juan Hilaquita Quispe, who was in charge of directing the military training, beat Valdemir Quispealaya and his companions with sticks in the back and in the legs and abused them psychologically in a way that affected their dignity.¹⁶

52. On January 23, 2001, Mr. Quispealaya was together with members of his company (officials, noncommissioned officers and troopers), specifically with Second Sergeants José Lazo Medina and Delfín Alcántara Durán, carrying out shooting practice in the firing range of Azapampa¹⁷ when S01 EP Juan Hilaquita Quispe, after insulting Mr. Quispealaya for making mistakes in his shooting, dealt him a blow with the butt of his regulation firearm (an FAL gun) in the forehead and the right eye.¹⁸

53. The petitioners complained to the Attorney General on February 28, 2002 that Mr. Quispealaya lost consciousness as a result of the blow and fell to the floor, where he was attended by Technician EP Calderón, who after helping him regain consciousness, put a patch on his right eye and ordered him to continue practicing.¹⁹ Similarly, they reported that when the practice had finished, Mr. Quispealaya went to the base infirmary, where they gave him eye drops to help the watering of his eye. They stated that noncommissioned officer Juan Hilaquita Quispe threatened that Mr. Quispealaya would disappear if he reported these events and identified the former as the aggressor.²⁰

54. The petitioners indicated that the swelling went away with time, but Mr. Quispealaya began to suffer from strong, prolonged headaches and pain in his right eye, as well as loss of vision. As a

The recruit who meets ideal conditions for active service in accordance with the preceding article will be qualified as SELECTED.

Those selected individuals who do not enlist voluntarily in active service will be part of the reserves.

¹⁶ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

¹⁷ Annex 4. Decision on final closing of the case file before the military courts of March 24, 2007, signed by Permanent Military Judge of Huancayo, Julio César Enciso Quilla. Annex to the State's communication of 10 July 2008.

¹⁸ Annex 1. Investigation 101(2)-2002, document signed by Angel R. Carpio Aquisé, Provincial Public Prosecutor of the Second Criminal District of Huancayo of September 20, 2002, sent to the Criminal Trial Court on Duty of Huancayo. Annex to the State's Report of November 4, 2005; Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

¹⁹ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

²⁰ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

result, Mr. Quispealaya went to the base infirmary where Dr. Chang treated him.²¹ They report that when Dr. Chang established the seriousness of the injury, she ordered him to tell her the circumstances under which they had occurred and who had caused them, to which Mr. Quispealaya replied that it had been an accident, as he feared that if he told the truth, noncommissioned officer Hilaquita would take reprisals against him.²² They state that Mr. Quispealaya also gave the same version of the events to the psychologist at the base.²³

55. The petitioners also reported that because the medical examinations practiced on Mr. Quispealaya confirmed the seriousness of his state of health, he was transferred from the Communications Battalion to the mess-hall (*ranchería*) and ordered not to strain himself physically.²⁴ They indicated that while he performed his duties at the mess-hall (*ranchería*), Mr. Quispealaya fainted one day due to a high fever and had to be transferred to the infirmary, where he was admitted in critical condition.²⁵ Furthermore, they reported to the Attorney General on February 28, 2002 that while he was admitted, Major EP Mendoza decided to grant him medical leave and ordered noncommissioned officer Technician Muquiyata to ask Mr. Quispealaya's mother, Victoria Vilcapoma Taquia, to pay a fee for a medical certificate in order to proceed with the medical leave for physical incapacity.²⁶ They indicate that in response to this request, Ms. Victoria Vilcapoma tried to speak to the military officials to find out more about her son's state of health, but noncommissioned officer Juan Hilaquita Quispe prevented her from entering, and she could only meet with Commander Torres, whom she told what had happened.

56. They stated that Mr. Quispealaya, when he discovered that the noncommissioned officers were preparing a file to grant him medical leave, he went to the infirmary after completing his guard duty on June 29, 2001 and spoke with Dr. Chang, telling her that it had been noncommissioned

²¹ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

²² Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

²³ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

²⁴ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the commission of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

²⁵ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the commission of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

²⁶ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the commission of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

officer Juan Hilaquita Quispe who had assaulted him on January 23, 2001 and had caused the injury to his head and right eye. He told her that the former had threatened him if he reported this, which is why he had not told the truth the first time that he went to the infirmary.²⁷ He indicated that when Dr. Chang reported these details to Commander Torres, he called Mr. Quispealaya and later noncommissioned officer Hilaquita, who denied all of the allegations. They stated that Commander Torres asked the officials in the Inspector's Office to begin the pertinent administrative investigations.²⁸ However, the IACHR has not been Reportd about the result of these investigations.

57. On July 6, 2001, Dr. Chang sent the Brigade General of Huancayo Mr. Quispealaya Vilcapoma's medical report, which indicated that he had received attention on June 27, 2001 as an outpatient "because he had pain in the left front ocular region produced by the blow from an FAL dealt by soldier Hilaquita Quispe in February of 2001," and that the pain had increased to become unbearable and that the sharpness of vision had diminished.²⁹ Similarly, the medical report stated that Mr. Quispealaya had gone to the Hospital Daniel A. Carrión on July 3, 2001, where the Specialist diagnosed "ptisis bulbi in the right eye, ametropia in the right eye," for which the patient was hospitalized while arrangements were made for his evacuation to the Central Military Hospital in Lima.³⁰

58. The petitioners complained to the Attorney General that given the serious state of Mr. Quispealaya's health, he was transferred to the Central Military Hospital in Lima, where despite receiving surgery in his right eye, he lost vision in that eye. They stated that after the operation, Mr. Quispealaya was assigned to the recovery ward of the Military Hospital.³¹ Mr. Quispealaya was admitted to the Central Military Hospital in Lima on July 14, 2001 and was released on September 5, 2002.³² With regard to the treatment he received, it was indicated that this included "extraction of the cataract, implantation of an intra-ocular lens and trabeculectomia in the right eye."³³

²⁷ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the commission of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

²⁸ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the commission of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

²⁹ Annex 7. Report signed by Patricia R. Chanjan Pino, Medical Surgeon, Huancayo, July 6, 2001. Annex 6 of the petitioners' communication of February 5, 2006.

³⁰ Annex 7. Report signed by Patricia R. Chanjan Pino, Medical Surgeon, Huancayo, July 6, 2001. Annex 6 of the petitioners' communication of February 5, 2006.

³¹ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the commission of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties' Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners' Communications of February 5, 2006.

³² Annex 11. Medical Report signed by Felix Zapana on September 28, 2002. Annex 9 to the petitioners' communication of February 5, 2006.

³³ Annex 11. Medical Report signed by Felix Zapana on September 28, 2002. Annex 9 to the petitioners' communication of February 5, 2006.

Medical reports

59. On January 16, 2002, Ms. Victoria Vilcapoma Taquia asked the Central Military Hospital Luis Arias Schreiber for the medical report of her son, Corporal Quispealaya Vilcapoma, which had been prepared by the Department of Ophthalmology of the Military Hospital.³⁴ The Medical Report that was sent on January 25, 2002 indicated that on July 14, 2001, the soldier Valdemir Quispeayala Vilcapoma was admitted to the Central Military Hospital and it concluded that the patient had “effects of a severe traumatic injury that was very advanced, and in light of the time that has passed, it has prevented him from recovering his vision . . .”³⁵ By way of background, the medical report stated that “On December 5, 2000, he suffered a casual blow with the handle of an FAL in the right eye, producing a diminishment of sharpness of vision. On January 26, 2001 he received another blow with the butt of a FAL in his forehead and around the right eye, and the diminishment of sharpness of vision and pain in the right eye was accentuated.”³⁶

60. On June 11, 2002, the Medical-legal Institute of Huancayo issued a medical certificate at the request of the Second Provincial Attorney General of Huancayo for injuries, in which it was concluded that at that date, Mr. Quispealaya “presented total and permanent loss of vision in his right eye, caused by advanced, post-traumatic cataracts and glaucoma, which is related to the data.”³⁷ In relation to this data, the aforementioned certificate indicated specifically: “[The patient] indicates that on December 5, 2000 he injured himself accidentally with the barrel of an FAL in his right eye, that it caused the sharpness of his vision to diminish, not having medical treatment. And on January 26, 2001, he suffered a physical assault by an acquaintance with the butt of an FAL in the right region of his face, causing greater diminishment of his vision.”³⁸

61. Similarly, on June 11, 2002, a forensic psychological evaluation was performed on Valdemir Quispealaya Vilcapoma by the Medical-legal Institute of the Medical Legal Division of Huancayo of the Office of Public Prosecutions.³⁹ The report states that Mr. Quispealaya indicated that on January 26, 2001, a noncommissioned officer physically assaulted him with the butt of an FAL, “this person was always abusing him and on other occasions had beat him with a stick, he did not tell anyone because this person had threatened him. He claims that he currently feels worried for his mother, because he thinks that something could happen to her because at this moment, he cannot take care of her.”⁴⁰ Regarding the analysis and interpretation of the results, the psychological report indicates that

³⁴ Annex 6. Memorandum No. 389-09/15.07 signed by Ruperto Vizcarra Curz, General Brigade Medical Director of the HMC. Annex 7 of the petitioners’ communication of February 5, 2006.

³⁵ Annex 8. Medical Report signed by Felix P. Zapana Calisaya, Chief of the Department of Ophthalmology of the HMC, of January 25, 2002. Annex 7 of the petitioners’ communication of February 5, 2006.

³⁶ Annex 8. Medical Report signed by Felix P. Zapana Calisaya, Chief of the Department of Ophthalmology of the HMC, of January 25, 2002. Annex 7 of the petitioners’ communication of February 5, 2006.

³⁷ Annex 9. Medical-legal Certificate No. 006502-L of the Office of Public Prosecutions, Institute of Legal Medicine, Medical-legal Division of Huancayo. Annex 10 of the petitioners’ communication of February 5, 2006.

³⁸ Annex 9. Medical-legal Certificate No. 006502-L of the Office of Public Prosecutions, Institute of Legal Medicine, Medical-legal Division of Huancayo. Annex 10 of the petitioners’ communication of February 5, 2006.

³⁹ Annex 10. Forensic Psychological Examination No. 006503-02-MP-FN-IML of June 11, 2002. Annex 11 of the petitioners’ communication of February 5, 2006.

⁴⁰ Annex 10. Forensic Psychological Examination No. 006503-02-MP-FN-IML of June 11, 2002. Annex 11 of the petitioners’ communication of February 5, 2006.

“upon evaluation, this person exhibits conduct of insecurity, fear, the need for emotional support, in light of stressful situations related to anxiety. Socially, he displays little spontaneity for managing his interpersonal contact.”⁴¹

62. On September 28, 2002, a medical report was issued by the Chief of the Department of Ophthalmology of the Central Military Hospital, in which it was concluded that “patient with alter effects of a severe traumatic injury that is very advanced, which is why he was unable to recover vision in spite of treatment. His healthy left eye has good vision corrected by ametropia (shortsightedness) is of a congenital nature.”⁴²

Criminal proceedings

63. On September 20, 2002, the Provincial Prosecutor of Huancayo filed a criminal indictment against Juan Hilaquita Quispe for the commission of a crime against the body, health and life in the manner of serious injuries to the detriment of Valdemir Quispealaya Vilcapoma.⁴³

64. On October 21, 2002, the 5th Criminal Court of Huancayo ordered the opening of an investigation of Juan Hilaquita Quispe for serious injuries to the detriment of Valdemir Quispealaya Vilcapoma and issued a warrant for the defendant’s arrest, among other reasons, because there were “sufficient elements of proof that the accused is trying to elude justice or interfere with the collection of proof.”⁴⁴ Furthermore, the 5th Criminal Court of Huancayo ordered, among other procedural steps: 1) that the testimony of the defendant be taken; 2) that the preventive testimony of the victim be taken; 3) that the medical experts Carlos Paz Cabrera, Walter Maíca Jaureguía and Norka Yupanqui Bonilla be notified so that they could ratify their conclusions in the proceedings in an immediate hearing; 4) that Luis Ordaya Melendez be named as a medical expert in order to carry out a new medical forensic report; 5) that November 13, 2002 be set aside to perform the judicial inspection and reconstruction of the events; 6) that the medical testimony of Drs. Chang and Granados be received; 7) that the affidavit (*declaración testimonial*) of Technician Calderon of November 13, 2002 be received; and 8) that notice be given to the medical department of the December 9 Battalion to send the medical examinations performed on the victim when he enlisted into the military service.⁴⁵

Proceedings before the military jurisdiction

65. In a notice of November 4, 2002, the General Commander of the 31st DI Huancayo Reportd the Permanent War Council of the Second Judicial Zone “about the circumstances involving the alleged beating that SO1 OC Hilaquita Quispe, Juan, may have dealt to Soldier SM QUISPEALAYA

⁴¹ Annex 10. Forensic Psychological Examination No. 006503-02-MP-FN-IML of June 11, 2002. Annex 11 of the petitioners’ communication of February 5, 2006.

⁴² Annex 11. Medical Report signed by Felix Zapana of September 28, 2002. Annex 9 of the petitioners’ communication of February 5, 2006.

⁴³ Annex 12. Criminal indictment presented by the Provincial Prosecutor’s Office of Huancayo on September 20, 2002. Annex 17 of the petitioners’ communication of February 5, 2006.

⁴⁴ Annex 5. Order opening the investigation of October 21, 2002. Investigation 2002-0783-150101JP05. 5th Criminal Court of Huancayo. Annex to the State’s communication of July 8, 2009.

⁴⁵ Annex 5. Order opening the investigation of October 21, 2002. Investigation 2002-0783-150101JP05. 5th Criminal Court of Huancayo. Annex to the State’s communication of July 8, 2009.

VILCAPOMA Valdemir, with the butt of an FAL, in the right eye, on January 26, 2001, in circumstances in which he was engaged in shooting practice at the firing range at Azapampa, which purportedly caused him to lose vision in his that eye.”⁴⁶

66. On November 6, 2002, the Military Prosecutor of First Instance formalized the complaint against soldier Hilaquita Quispe for abuse of authority against soldier Valdemir Quispealaya Vilcapoma before the President of the Permanent War Council of the Second Zone of the Army.⁴⁷ The complaint was based, among other alleged facts, on the Ophthalmological medical report of the Hospital El Carmen Huancayo, which indicated that Mr. Quispealaya suffered “diminished sharpness of his vision and palpebral ptosis (drooping eyelid) of his right eye due to alteration of the facial nerve” and “image of a cyst in the middle of his forehead,” as well as the psychological report of the Military Medical Center of Division No. 31 Manrique Mauricio Hilaria, who diagnosed that Mr. Quispealaya had “moderate depression,” and in a diagnosis of October 16, 2001 of Colonel San Zapana Calizaya, Chief of the Ophthalmology of HMC-Lima which stated that Mr. Quispealaya had “traumatic cataracts and chronic, advanced glaucoma in his right eye.”⁴⁸ The complaint similarly indicated that “because the aforementioned Soldier was recruited physically healthy, it should be presumed that his health has deteriorated during the performance of his service, having to consider this fact as A CONSEQUENCE OF THE SERVICE for legal and administrative effects.”⁴⁹

67. On November 12, 2002, the soldier Juan Hilaquita Quispe was deprived of liberty by order of the Permanent Military Judge of Huancayo, and he was held in the Cia PM No. 31 of Huancayo until August 26, 2003, in compliance with this security measure.⁵⁰

68. On November 19, 2002, the Permanent Military Judge of Huancayo initiated a jurisdictional contest and requested that the 5th Criminal Court of Huancayo be relieved of jurisdiction.⁵¹

Reports of threats

69. On February 28, 2002, the petitioners reported to the Public Prosecutor that on January 15, 2002, Mr. Quispealaya traveled from Lima to Huancayo to visit his mother, and that when he returned on January 26, 2002 in the bus to Lima he was beaten by five unknown individuals who stole

⁴⁶ Annex 19. Final Report No. 005-2003/5to. JMPH-2da ZJE of December 23, 2003. Annex to the State’s communication of October 18, 2004.

⁴⁷ Annex 30. Complaint No. 317-02, Public Prosecutor of First Instance, Abuse of authority, signed by Walter G. Buleje Vez, Military Prosecutor of First Instance, November 6, Annex to the State’s communication June 26, 2009.

⁴⁸ Annex 30. Complaint No. 317-02, Public Prosecutor of First Instance, Abuse of authority, signed by Walter G. Buleje Vez, Military Prosecutor of First Instance, November 6, Annex to the State’s communication June 26, 2009.

⁴⁹ Annex 30. Complaint No. 317-02, Public Prosecutor of First Instance, Abuse of authority, signed by Walter G. Buleje Vez, Military Prosecutor of First Instance, November 6, Annex to the State’s communication June 26, 2009.

⁵⁰ Annex 19. Final Report No. 005-2003/5to. JMPH-2da ZJE of December 23, 2003. Annex to the State’s communication of October 18, 2004; and Annex 20. El Peruano, p. 275124, Lima, Tuesday, August 24, 2004, *Declaran fundada parte de la acción de inconstitucionalidad interpuesta contra diversos Artículos de la Ley No. 24150, modificada por el D. Leg. No. 749*. Annex to the State’s communication October 18, 2004.

⁵¹ Annex 17. Judicial Branch. Resolution of January 23, 2003, signed by Jorge Mendoza Ariste, Secretary of the First Criminal Chamber. Annex 23 of the petitioners’ communication of February 5, 2006.

his belongings and left him in the street.⁵² They indicated that subsequently, Mr. Quispealaya went to the December 9 base of Huancayo, and when he spoke to his ex military comrades, he determined that they had changed their version of the events under threats from noncommissioned officer Hilaquita, and that even Technician Calderon had changed his version, denying the facts. They denounced that noncommissioned officer Hilaquita against contacted Mr. Quispealaya and threatened him so that he would change his version of the events, suggesting the possibility of reaching an agreement with him.⁵³

70. On November 25, 2002, Ms. Victoria Vilcapoma Taquia requested a restraining order from the Sub-prefect of the Province of Huancayo (the police authority of that jurisdiction) against noncommissioned Army officer Juan Hilaquita Quispe “because he hangs around my house and I assume that he could assault us, even kill me and my family, since I currently have a trial for torture” that he caused her son.⁵⁴

71. On December 10, 2002, Mr. Edson Huayra Arancibia presented a complaint against the Ombudsman’s Office for intimidation and coercion against soldier Juan Hilaquita Quispe, against whom he had testified before the Private Military Court regarding the abuse that the latter had been subjecting him to during his time as a recruit at the December 9 Battalion of Huancayo, as well as the injuries caused to Corporal Quispealaya.⁵⁵

72. On February 4, 2003, Mr. Valdemir Quispealaya Vilcapoma complained to the Ombudsman’s Office that he had received threats and coercion that very same day by members of the Peruvian Army.⁵⁶ According to the complaint, on February 4, 2003, after Mr. Quispealaya was interviewed on Channel 5 “Panamerica Television” at 7:15 am, and during which time he denounced the acts of torture to which soldier Juan Hilaquita Quispe subjected him, he arrived at the door to his home and found members of the Peruvian Army, who rebuked him for having made this complaint at a national level.⁵⁷ In the complaint, Mr. Quispealaya indicated that although he had requested a restraining order from the Prefect of Huancayo in November of 2002, at that time he had still received no response.⁵⁸

⁵² Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties’ Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners’ Communications of February 5, 2006.

⁵³ Annex 2. Complaint presented by the Human Rights Commission (COMISEDH) for the comisión of the crime against the person-physical and psychological torture before the Office of Public Prosecutions, received by the Parties’ Roundtable of the Office of Public Prosecutions (*Mesa de Partes de la Fiscalía de la Nación*) on February 28, 2002. Annex 15 to the petitioners’ Communications of February 5, 2006.

⁵⁴ Annex 13. Request for a restraining order [*Solicitud de garantías personales y/o posesorias*] of November 25, 2002, Annex 14 of the petitioners’ communication of February 5, 2006.

⁵⁵ Annex 4. Complaint presented to the Archbishop of Huancayo, Ombudsman of the Archdiocese of the Family, the Child and the Adolescent, signed by Edson Huayra Arancibia on December 10, 2002. Annex 12 of the petitioners’ communication of February 5, 2006.

⁵⁶ Annex 16. Complaint of February 4, 2003 for threats and coercion by a member of the Peruvian Army presented before the Ombudsman’s Office, Archbishop of Huancayo. Annex 22 of the petitioners’ communication of February 5, 2006.

⁵⁷ Annex 16. Complaint of February 4, 2003 for threats and coercion by a member of the Peruvian Army presented before the Ombudsman’s Office, Archbishop of Huancayo. Annex 22 of the petitioners’ communication of February 5, 2006.

⁵⁸ Annex 16. Complaint of February 4, 2003 for threats and coercion by a member of the Peruvian Army presented before the Ombudsman’s Office, Archbishop of Huancayo. Annex 22 of the petitioners’ communication of February 5, 2006.

Proceedings before the civilian courts

73. On December 23, 2002, the 5th Criminal Court of Huancayo expanded the scope of the summary investigation against noncommissioned officer Juan Hilaquita Quispe for the offense against public administration in the manner of abuse of authority to the prejudice of the Peruvian State and of Valdemir Quispealaya Vilcapoma, issuing a restricted warrant to appear and fixing, among others, a bond of 500 *nuevos soles*.⁵⁹

74. On March 12, 2003, the Judge of the 5th Criminal Court of Huancayo recorded in the case file that the military courts had resisted putting the defendant Juan Hilaquita Quispe at the disposition of the civilian courts, and his detention in an ordinary penal establishment, as the order to open the investigation had instructed, which had been confirmed by the Superior Criminal Chamber.⁶⁰ The 5th Criminal Judge of Huancayo similarly recorded that when the procedural step of judicial inspection was carried out, the Judicial Police had been present to carry out the detention, but they were physically and violently prevented by members of the military and by the defendant's lawyer, which constituted the criminal offense of resisting arrest and disobedience.⁶¹

Contest for jurisdiction

75. On April 14, 2003, the Second Supreme Prosecutor in Criminal Matters submitted his opinion regarding the contest for jurisdiction presented by the Permanent Military Judge of Huancayo on November 19, 2002, indicating that although it might be true that the perpetrator and the victim belonged to the Peruvian Army and the acts occurred in a military installation, the events described were of such a seriousness, according to the Medical-legal Report prepared by the Central Military Hospital and the Medical-legal Certificate, which indicated that the victim presented total and permanent loss of vision in his right eye, as well as the forensic psychological examination, that they fell beyond the scope of a proceeding for abuse of authority in the military courts.⁶² In summary, the prosecutor's opinion concluded that the events were defined by Article 121(2) of the Criminal Code, for which reason they should be dealt with in the Civil Jurisdiction.⁶³

76. On May 12, 2003, the Permanent Criminal Court of the Supreme Court resolved the conflict of jurisdiction in favor of the military courts, based on the reasoning that the events that were

⁵⁹ Annex 14. Instruction No. 2002-0783, Resolution of December 23, 2002. Annex 18 of the petitioners' communication of February 5, 2006.

⁶⁰ Annex 15. Instruction No. 2002-783. Resolution of March 12, 2003, signed by José Guzmán Tasayco, 5th Criminal Judge of the Criminal Court of Huancayo and the Learned Secretary of the former court. Annex 20 of the petitioners' communication of February 5, 2006.

⁶¹ Annex 15. Instruction No. 2002-783. Resolution of March 12, 2003, signed by José Guzmán Tasayco, 5th Criminal Judge of the Criminal Court of Huancayo and the Learned Secretary of the former court. Annex 20 of the petitioners' communication of February 5, 2006.

⁶² Annex 38. Office of the Attorney General, Second Supreme Public Prosecutor in Criminal Matters. Opinion No. 605-03-FN-MP-2º FSP of April 14, 2003. Signed by Dr. Miguel Ángel Sánchez Arteaga, Supreme Public Prosecutor of the Second Supreme Public Prosecutor for Criminal Matters. Annex 23 of the petitioners' communication of February 5, 2006.

⁶³ Annex 38. Office of the Attorney General, Second Supreme Public Prosecutor in Criminal Matters. Opinion No. 605-03-FN-MP-2º FSP of April 14, 2003. Signed by Dr. Miguel Ángel Sánchez Arteaga, Supreme Public Prosecutor of the Second Supreme Public Prosecutor for Criminal Matters. Annex 23 of the petitioners' communication of February 5, 2006.

the subject of the investigation were committed during military service, as they occurred during shooting practice in the Military Base facilities, had been approved by the Army Command, and the defendant, noncommissioned officer Hilaquita, was employed as an instructor of the same and thus carrying out his functions.⁶⁴

Criminal proceeding before the military jurisdiction

77. On August 18, 2003, the Permanent Military Judge of Huancayo declared admissible the motion for provisional release of noncommissioned officer Hilaquita, who was freed on August 26, 2003 after spending 9 months and 15 days in preventive detention.⁶⁵

78. On December 23, 2003, the President of the Permanent War Council of the Second Judicial Zone of the Army presented the Final Report based on the action against soldier Hilaquita Quispe for the crime of abuse of authority against soldier Quispealaya Vilcapoma, which was issued by the Permanent Military Judge of Huancayo.⁶⁶ According to this opinion, the Fifth Permanent Military Judge of Huancayo stated that he believed that the soldier Hilaquita Quispe was neither the perpetrator nor responsible for the crime of Abuse of Authority established in Article 180(2) of the Code of Military Justice, according to the justification that the direct imputation of the victim had only been corroborated by the testimony of former Corporal SM Edson Huayra Arancibia, while there were 15 other witness testimonies from military personnel that were present during the shooting practice that indicated that they did not see the defendant strike the victim. The report similarly indicated that the victim enlisted in the military service with problems with his vision, just as the testimony of the director of the Superior Institute Juan Enrique Pestalozzi corroborated, where the victim had studied before enlisting in the military service.⁶⁷

79. On May 17, 2004, the Superior Prosecutor of the Permanent War Council of the Second Military Zone presented an indictment against soldier Hilaquita Quispe as the perpetrator of the crime of abuse of authority⁶⁸ to the detriment of Mr. Quispealaya and requested that a sentence of 18 months of prison and a fine of 3,000 *soles* be imposed on him as a civil reparation.⁶⁹ The accusation was based, among other things: 1) on the fact that Technician Calderon, who covered Mr. Quispealaya's eye during the second exercise, indicated that when he covered his eye, the latter had "a red eye and a bump on the center of his forehead"; 2) that when the Recruitment Office performed the customary psychosomatic examinations prior to enlisting Mr. Quispealaya in the Army, as well as the Unit where he was assigned gave him a Medical Examination for Incorporation and, according to these examinations

⁶⁴ Annex 18. Criminal Chamber. Competency No. 08-2003. 5th Permanent JM of Huancayo II ZJE-5º JP of Huancayo of May 12, 2003. Annex 23 of the petitioners' communication of February 5, 2006.

⁶⁵ Annex 19. Final Report No. 005-2003/5to. JMPH-2da ZJE of December 23, 2003. Annex to the State's communication October 18, 2004.

⁶⁶ Annex 19. Final Report No. 005-2003/5to. JMPH-2da ZJE of December 23, 2003. Annex to the State's communication October 18, 2004.

⁶⁷ Annex 19. Final Report No. 005-2003/5to. JMPH-2da ZJE of December 23, 2003. Annex to the State's communication October 18, 2004.

⁶⁸ According to the indictment, the crime of abuse of authority is defined in Article 179 of the Code of Military Justice as "Exceeding the performance of one's duties to the detriment of an inferior officer or any other person."

⁶⁹ Annex 37. Prosecutorial Indictment No. 004 of May 17, 2004, addressed to Mr. CRL President of the CGP of the 2nd ZJE. Annex to the State's communication June 3, 2013.

he was declared apt without physical or psychological limitations; 3) the Medical Report prepared by Mr. Zapana indicated that there were remnants of an old hemorrhage, which appeared as a cyst in the X-rays presented by the defendant in his submissions of evidence, and in the affirmation of Dr. Carlos Paz it was stated that the loss of vision in the right eye was produced by a contusion in the area of the ocular region of the right eye resulting from a blunt force; and 4) the testimony of soldier Edson Wilfredo Huayra, who was at Mr. Quispealaya's side during the incident, and who told "lucidly the details about the way in which the defendant beat soldier Quispealaya Vilcapoma Valdemir."⁷⁰

80. On August 19, 2004, the Permanent War Council of the Second Judicial Zone of the Army issued a judgment acquitting soldier Juan Hilaquita Quispe for the crime of abuse of authority to the detriment of soldier Valdemir Quispealaya Vilcapoma, considering that it was not proven.⁷¹ This judgment was appealed by the War Council Prosecutor and by the Public Prosecutor of the Ministry of Defense.⁷²

81. On November 30, 2004, Mr. Valdemir Quispealaya Vilcapoma presented a jurisdictional challenge in which he requested that the military courts be relieved of jurisdiction in favor of the 5th Criminal Court of Huancayo,⁷³ which was resolved in May 12, 2005 by the Permanent Criminal Chamber of the Supreme Court of Justice in favor of the private military jurisdiction.⁷⁴

82. On January 19, 2005, the Prosecutor of the Military Council issued an opinion in relation to the appeal of the judgment of August 19, 2004, indicating that the judgment should be confirmed in all aspects and that it should furthermore declare inadmissible the payment of civil reparations.⁷⁵

83. On November 17, 2005, the Supreme Council of Military Justice overturned the judgment issued at first instance of August 19, 2004, for not having taken evidence into account, and it sent the proceedings to the Zone of Origin for a new pronouncement, in order that the evidence that had not been considered be examined in a new hearing.⁷⁶ In its resolution, the Supreme Council of Military Justice considered that a study of the file revealed that certain evidence demonstrated the responsibility of noncommissioned officer Hilaquita Quispe for the crime of abuse of authority, such as: the affidavit of Technician Valeriano Calderon before the civil courts when he indicated that by taking care of the victim during the shooting practice and placing a patch over his right eye so that he could continue shooting he noticed that the latter had a "bump" on his forehead; nor had it been considered

⁷⁰ Annex 37. Prosecutorial Indictment No. 004 of May 17, 2004, addressed to Mr. CRL President of the CGP of the 2nd ZJE. Annex to the State's communication June 3, 2013.

⁷¹ Annex 21. Judgment No. 008-2004 of August 19, 2004, Permanent War Council, 2nd Judicial Zone of the Army. Annex to the State's communication January 27, 2005.

⁷² Annex 22. Notice No. 813-S-CSJM/AG.2 of the Supreme Council of Military Justice, General Secretariat, August 11, 2005 signed by Luis O. Ramírez Arcaya. Annex to the State's communication of November 4, 2005.

⁷³ Annex 23. "Vista" No. 1511, Case No. 12000-2002-0007, Order of the Alternate General Public Prosecutor of the SCMJ, Demetrio Rojas Talla, October 12, 2005. Annex to the State's communication of July 26, 2006.

⁷⁴ Annex 25. Supreme Council of Military Justice – 2nd Judicial Area of the Army. Supreme Order of November 17, 2005. Annex to the State's communication of July 26, 2006.

⁷⁵ Annex 24. "Vista" No. 152, Case No. 12000-2002-2007, Opinion No. 2004-1293-00073 Appeal, signed January 19, 2005. Annex to the State's communication of July 26, 2006.

⁷⁶ Annex 25. Supreme Council of Military Justice – 2nd Judicial Area of the Army. Supreme Order of November 17, 2005. Annex to the State's communication of July 26, 2006.

that the Office of Recruitment had declared Mr. Quispealaya to be apt for service and without physical and psychological limitations prior to enlisting in the military service; nor had the medical report of Dr. Zapana, ophthalmologist of the Military Hospital been taken into account; nor the evaluation of Dr. Paz; nor the declaration of the soldier Edwin Wilfredo Huayra Arancibia, who was at the victim's side at the moment of the events, nor the reconstruction of the events which established that the but of the weapon impacted part of the victim's right eyebrow and forehead; as well as the continuous threats and abuse that the victim had suffered.⁷⁷

84. On March 24, 2007, the Permanent Military Judge of Huancayo resolved to close the case file against noncommissioned officer Juan Hilaquita Quispe for the alleged crime of authority, based on the Constitutional Tribunal's judgment of December 15, 2006, which established that Military Justice would have no jurisdiction over common crimes sanctioned by the Criminal Code and declared unconstitutional certain articles of the Code of Military Justice, including those which referred to "abuse of authority" since they did not involve offenses in the course of duty.⁷⁸ Similarly, the sentence of March 24, 2007 ordered that the allegations be communicated to the Public Prosecutor of Huancayo so that it could act in accordance with its constitutional attributions.⁷⁹ On August 16, 2007, the Permanent War Council of the Second Judicial Zone of the Army affirmed the former judgment,⁸⁰ and on August 17, 2007 the certified copies of the case file were sent to the Public Prosecutor of Huancayo.⁸¹

2. Criminal proceedings before the civil courts after 2007

85. On November 9, 2007, the First Provincial Prosecutor for Criminal Matters of Huancayo resolved to begin a preliminary investigation at the police level for a thirty-day period for the alleged commission of crimes against life, body and health in the manner of serious injuries presumably committed by Juan Hilaquita Quispe to the detriment of Valdemir Quispealaya Vilcapoma, after receiving the parts of the case file sent by the Second Judicial Zone of the Army of Huancayo.⁸²

86. On June 23, 2008, the National Police issued a police citation for Valdemir Quispealaya Vilcapoma to appear at the police station to give his testimony in relation to the police investigation that had been carried out for the alleged crime against (his) life, body and health.⁸³ Similarly, the case file indicates that on the same date, the Police issued a notice "regarding the actions taken to notify

⁷⁷ Annex 25. Supreme Council of Military Justice – 2nd Judicial Area of the Army. Supreme Order of November 17, 2005. Annex to the State's communication of July 26, 2006.

⁷⁸ Annex 4. Decision on final closing of the case file before the military courts of March 24, 2007, signed by Permanent Military Judge of Huancayo, Julio César Enciso Quilla. Annex to the State's communication of 10 July 2008

⁷⁹ Annex 4. Decision on final closing of the case file before the military courts of March 24, 2007, signed by Permanent Military Judge of Huancayo, Julio César Enciso Quilla. Annex to the State's communication of 10 July 2008.

⁸⁰ Annex 29. Case No. 12000-2002-2007, Lima, August 16, 2007. Annex to the State's communication of June 26, 2009.

⁸¹ Annex 31. Notice No. 0186/2da ZJE/ REL. Addressed to the Provincial Public Prosecutor of Huancayo, Case No. 12000-2002-0007. Annex to the State's communication of June 26, 2009.

⁸² Annex 26. Register No. 707-2007, Huancayo, November 9, 2007, Office of the Attorney General, First Criminal Public Prosecutor of Huancayo. Annex to the State's communication of July 10, 2008.

⁸³ Annex 34. Police Citation VIII-DIRTEPOL-RJ-DIVICAJ-DEINCRI-HYO of June 23, 2008. Annex to the State's communication of May 2, 2013.

Valdemir Quispealaya Vilcapoma,” which indicated that the address that appeared in the database RENIEC of Mr. Quispealaya did not exist, and that he could not be located.⁸⁴

87. On June 27, 2008, the National Police of Peru presented a report to the Provincial Prosecutor of Huancayo that concluded that it had not been possible to establish the alleged commission of an offense “since it was not possible to locate the pertinent parties to the present investigation as it is detailed in the present document,”⁸⁵ it was impossible to locate the property that appeared in the RENIEC database for Mr. Quispealaya, and the number did not exist, and the neighbors claimed not to know that person.⁸⁶ Similarly, the police record indicated that “it has not been possible to determine the injuries suffered by the victim in the year 2001 because according to information sent by the Medical-legal Division of Huancayo, Valdemir Quispealaya was not submitted to evaluation by medical-legal specialists in that year.⁸⁷

88. On October 17, 2008, the First Provincial Criminal Prosecutor of Huancayo resolved that there were no grounds for formalizing a criminal complaint in the preliminary investigation against Juan Hilaquita Quispe, because it had not been possible to locate Mr. Valdemir Quispealaya since the address indicated in the database RENIEC did not belong to him. Furthermore, because the crime was that of injuries, a medical-legal certificate was necessary to establish the period of disability and the medical attention or that a principal organ of the body had been damaged.⁸⁸ This resolution was notified on October 28, 2008 to the procedural residence of Mr. Quispealaya and was received by Haydee Quispealaya Vilcapoma, sister of Valdemir Quispealaya Vilcapoma.⁸⁹ In March of 2009, the case file was definitively closed.⁹⁰

89. On August 19, 2009, the Permanent War Council of the Second Judicial Zone of the Army resolved to close definitively the case file against noncommissioned officer of the Army Juan Hilaquita Quispe for the crime of abuse of authority, and it ordered that the corresponding notices be made in the respective books and registers.⁹¹

⁸⁴ Annex 35. Part No. S/N-VIII-DIRTEPOL-RPJ-DIVICAJ-DEINCRI-HYO, June 23, 2008, signed by Instructor. Annex to the State’s communication of May 2, 2013.

⁸⁵ Annex 32. Part No. 262-VIII-DIRTEPOL-RPNPJ-DIVIC-DEINCRI-HYO of June 27, 2008. Annex to the State’s communication of June 26, 2009.

⁸⁶ Annex 32. Part No. 262-VIII-DIRTEPOL-RPNPJ-DIVIC-DEINCRI-HYO of June 27, 2008. Annex to the State’s communication of June 26, 2009.

⁸⁷ Annex 32. Part No. 262-VIII-DIRTEPOL-RPNPJ-DIVIC-DEINCRI-HYO of June 27, 2008. Annex to the State’s communication of June 26, 2009.

⁸⁸ Annex 27. Resolution No. 284-2008, Investigation No. 2007-707, of October 27, 2008, Office of the Attorney General, First Criminal Public Prosecutor of Huancayo. Annex to the State’s communication of February 25, 2009.

⁸⁹ Annex 28. Proof of Notification, First Criminal Public Prosecutor of Huancayo, Resolution 284. Annex to the State’s communication of February 25, 2009.

⁹⁰ Annex 33. Office of the Attorney General, First Criminal Public Prosecutor of Huancayo, Notice No. 449-2009-MP-1ra.FPP-HYO. Annex to the State’s communication of February 25, 2009.

⁹¹ Annex 36. Case No. 12000-2002-0007, Resolution of August 18, 2009, signed by President of the War Council of the Second Judicial Area of the Army, Gabriel Hebert Idme Dávila, CrI SJE, among others. Annex to the State’s communication of June 3, 2013.

C. Considerations of law

1. Right to personal integrity (Article 5 of the American Convention) in relation to the obligations contained in the Inter-American Convention to Prevent and Punish Torture (article 8), the right to judicial guarantees and judicial protection (Articles 8 and 25 of the American Convention), and the obligations to respect and guarantee Rights (Article 1 of the American Convention)

90. Articles 5(1) and 5(2) of the American Convention establish that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

91. Article 8 of the Inter-American Convention to Prevent and Punish Torture establishes that:

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

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

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

92. Article 8(1) of the American Convention establishes that:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

93. According to Article 25 of the American Convention:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

94. The right to personal integrity is of such importance that the American Convention establishes specific protection for it by establishing, *inter alia*, the prohibition of torture, cruel, inhuman or degrading treatment, and the impossibility that these be suspended during a state of emergency.⁹²

95. The Inter-American Court has stated that the absolute prohibition of torture, both physical and psychological, today belongs to the International dominion of *jus cogens* and that this prohibition subsists even in the most difficult circumstances, such as war, threats of war, the battle against terrorism and any other crime, stages of siege or emergency, uproar or internal conflict, suspension of constitutional guarantees, political instability, or other emergencies or public calamities.⁹³ The same court has indicated that universal and regional treaties enshrine this prohibition and the non-derogable right not to be tortured. Similarly, new international instruments contain this right and repeat the same prohibition, even under international humanitarian law.⁹⁴

96. The Court has similarly established that “[the] infringement of the right to physical and psychological integrity of the human person is a type of violation which has a varying connotation and which encompasses torture and other types of mistreatment or cruel, inhuman, or degrading treatment whose physical and psychological consequences may have different degrees of intensity according to the extrinsic and intrinsic factors which should be proved in each specific situation.”⁹⁵ That is to say, the personal characteristics of an alleged victim when people are submitted to certain treatments.

97. With regard to the scope of the State’s obligations and its responsibility, the UN Committee Against Torture has indicated that

[E]ach State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care

⁹² I/A Ct. H.R. *Case of the Juvenile Reeducation Institute V. Paraguay*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, para. 157.

⁹³ I/A Ct. H.R., *Case of Bueno Alves*. Judgment of 11 May 2007. Series C. No. 164, para. 76; I/A Ct. H.R., *Case of the Miguel Castro Prison*. Judgment of 25 November 2006. Series C No. 160, para. 271 y I/A Ct. H.R., *Case of Baldeón García*. Judgment of 6 April 2006. Series C No. 147, para. 117.

⁹⁴ I/A Ct. H.R., *Case of Bueno Alves*. Judgment of 11 May 2007. Series C. No. 164, para. 77, citing: International Covenant on Civil and Political Rights, Art. 7; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2; Convention on the Rights of the Child, Art. 37, International Convention on the Protection of the Rights of Migrant Workers and their Families, Art. 10; Inter-American Convention to Prevent and Punish Torture, art. 2; African Charter on Human and Peoples’ Rights, Art. 5; African Charter on the Rights and Welfare of the Child, Art. 16; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará), Art. 4, and European Convention for the Protection of Human Rights and Fundamental Liberties, Art. 3; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 6; Code of conduct for public officials with responsibility for executing the law, Art. 5; UN Rules for the Protection of Juveniles Deprived of Liberty, Rule 87(a); Declaration on the rights of individuals who are not nationals of the country in which they live, Art. 6; UN Standard Minimum Rules for the administration of juvenile justice (Beijing Rules), Rule 17.3; Declaration on the protection of women and children in emergency and armed conflict, Art. 4, and Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, Guideline IV; and Common Article 3 of the Four Geneva Conventions; Convention relative to the Treatment of Prisoners of War (Third Convention), Arts. 49, 52, 87 y 89, 97; Convention relative to the Protection of Civilians in time of War (Fourth Convention), Arts. 40, 51, 95, 96, 100 y 119; Additional Protocol to the Geneva Conventions of August 12, 1949 related to the Protection of Victims from Armed International Conflicts (Protocol I), Art. 75.2.ii, y Additional Protocol to the Geneva Conventions of August 12, 1949 related to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 4.2.a.

⁹⁵ I/A Ct. H.R., *Case of Ximenes López v. Brasil*, Series C. No. 149, Judgment of 4 July 2006, para. 127; *Case of Loayza Tamayo*. Judgment of 17 September 1997. Series C No. 33, para. 57.

of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.⁹⁶

98. For its part, the UN Human Rights Committee has stated that the prohibition contained in Article 7 of the International Covenant on Civil and Political Rights⁹⁷ includes “corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.”⁹⁸ Similarly, the Human Rights Committee has indicated that Article 7 (Prohibition of torture of cruel, inhuman or degrading treatment) should be interpreted in conjunction with Article 2(3) of the Covenant.⁹⁹

99. In its jurisprudence, the Inter-American Court has stated that in every situation in which there are signs that torture has taken place, the State should immediately initiate an *ex officio* investigation that is impartial, independent and thorough, permitting it to determine the nature and origin of the injuries that occurred, identify the responsible parties, and prosecute them.¹⁰⁰ To this end, the State has the obligation to guarantee the independence of the medical and health professionals in charge of examining and providing care to prisoners so that they can freely perform the necessary medical examinations, respecting the norms that their profession establishes.¹⁰¹

100. In the present case, the petitioners allege that according to the medical examination performed on Mr. Quispealaya when he enlisted in the voluntary military service on November 14, 2000, he was in good health. He purportedly lost vision in his right eye as a result of the blow that he received from noncommissioned Army officer Juan Hilaquita Quispe when he was engaged in shooting practice on January 23, 2001, as a punishment for committing many errors. They allege that because Mr. Quispealaya was subjected to abuse and threats by this noncommissioned officer from the time that he enlisted in the Army, he waited until June 31, 2001 to go to the 31st Infantry Brigade clinic to see a

⁹⁶ Committee Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, Implementation of Article 2 by States Parties, UN. Doc., CAT/C/GC/2 of January 24, 2008, para. 15.

⁹⁷ Article 7 of the International Covenant on Civil and Political Rights: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

⁹⁸ UN Human Rights Committee, General Comment No. 20, UN. Doc., U.N. Doc. HRI/GEN/1/Rev.7 at 173 (1992), para. 5.

⁹⁹ Article 2.3 of the International Covenant on Civil and Political Rights: “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

¹⁰⁰ I/A Ct. H.R. *Case of Cabrera García and Montiel Flores V. México*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 26 November 2010. Series C No. 220, para. 135; *Case of Gutiérrez Soler v. Colombia. Merits, Reparations and Costs*. Judgment of 12 September 2005. Series C No. 132, para. 54; *Case of Bayarri V. Argentina*. Judgment of 30 October 2008. Series C No. 187, para. 92; *Case of Bueno Alves V. Argentina. Merits, Reparations and Costs*. Judgment of 11 May 2007. Series C No. 164, para. 88.

¹⁰¹ I/A Ct. H.R.. *Case of Cabrera García and Montiel Flores V. México*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 26 November 2010. Series C No. 220, para. 135; UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman and Degrading Treatment and Punishment, Doc E/ST/CSDHA/.12 (1991) (Protocol of Istanbul), paras. 56, 60, 65 y 66.

doctor, who recommended that he undergo a surgical procedure which was not able to prevent the loss of vision in his eye, given the time that had transpired since the injury occurred.

101. The State, for its part, claims that the admissibility of Article 5 of the American Convention in Admissibility Report No. 19/05 is linked to the purported lack of investigation of the injuries suffered by the alleged victim. It indicates that on October 17, 2008, the complaint was definitively closed because Mr. Quispealaya's statement could not be taken because his whereabouts were unknown, and because the period of his disability and the medical attention that he required could not be established by forensic-legal report and none was prepared when the events occurred. It sustains that in order for an act to be torture, the perpetrator must be a public official or someone who acts with a public official's consent or acquiescence, an element that has not been established in the present case, as the criminal responsibility of noncommissioned officer Hilaquita Quispe was never determined. It alleges that the mere presence of a State agent is not a sufficient element to characterize the acts as the crime of torture, given that other elements must also be present, such as the intent to cause the victim pain or grave suffering, as well as one of the objectives that Peruvian law establishes.

102. The Commission observes that the Inter-American Convention to Prevent and Punish Torture is part of the Inter-American *corpus juris* that should help this Commission to determine the content and scope of the general disposition contained in Article 5(2) of the American Convention.¹⁰² Specifically, Article 2 of that Convention defines torture as:

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

103. According to the jurisprudence of the Inter-American system, in order for an act to be characterized as torture, the following elements must concur: i) the act must have been committed by a public official or by a private individual at the instigation or with the acquiescence of a public official,¹⁰³ ii) the act must have been intentional, iii) the act must have caused intense physical or mental suffering, and iv) it must have been committed with a certain aim or purpose.¹⁰⁴ The Inter-American Court has established that "the threats and real danger of submitting a person to physical injuries produces, in certain circumstances, a moral anguish of such degree that it may be considered psychological torture."¹⁰⁵

104. The Commission observes that, according to the proven facts, the complaints presented by Mr. Quispealaya about the manner in which the events that gave rise to the present case occurred

¹⁰² I/A Ct. H.R., *Case of Tibi V. Ecuador*. Judgment of 7 September 2004. Series C No. 114, para. 145.

¹⁰³ IACHR, Report No. 5/96, Case 10.970, Merits, Raquel Martin Mejía, Perú, 1 March 1996, 3. analysis.

¹⁰⁴ IACHR, Report No. 5/96, Case 10.970, Merits, Raquel Martin Mejía, Perú, 1 March 1996, section 3 (Analysis) and I/A Ct. H.R., *Case of Bueno Alves*. Judgment of 11 May 2007. Series C. No. 164, para. 79.

¹⁰⁵ I/A Ct. H.R. *Case of del Penal Miguel Castro Castro*. Merits, Reparations and Costs. Judgment of 25 November 2006. Series C No. 160, para. 272, *Case of Baldeón García*. Merits, Reparations and Costs. Judgment of 6 April 2006. Series C No. 147 para. 119; *Case of Tibi*. Judgment of 7 September 2004. Series C No. 114, para. 147; *Case of Maritza Urrutia*. Judgment of 27 November 2003. Series C No. 103, para. 92.

have been consistent throughout time. In this sense, the Commission notes that in February of 2002, the petitioners reported to the Public Prosecutor of the Province of Huancayo that Mr. Quispealaya lost consciousness and fainted on January 23, 2001 as the result of a blow received by noncommissioned officer Hilaquita, who after insulting him for making mistakes during shooting practice, hit him in the forehead and the right eye with the butt of his weapon. This version was confirmed in the military jurisdiction by the soldier Edson Huayra Arancibia, who witnessed the facts and who, after presenting his testimony, filed a complaint with the Ombudsman for threats and coercion against noncommissioned officer Hilaquita.

105. The Commission similarly notes that Mr. Quispealaya reported to Dr. Chang on June 29, 2001 that it had been noncommissioned officer Hilaquita Quispe who caused the injury that he suffered in his right eye, information which she conveyed to the Brigade General of Huancayo in a medical report of July 6, 2001. Despite this, no investigation was opened to clarify the events and no forensic report was prepared according to the minimum requirements of the Protocol of Istanbul, which consist of preparing a trustworthy report that contains the circumstances of the interview, medical history, physical and psychological examination, opinion and authorship,¹⁰⁶ which would have helped to determine what happened.

106. With regard to the requirement that “intense physical or mental suffering be caused,” the Commission notes that the case file contains several medical certificates that establish the severity of the injury. In this sense, and as the proven facts demonstrate, on July 6, 2001, the surgeon Patricia R. Chanjan Pino sent a medical report to the Brigade General of Huancayo which stated that on June 27, 2001 she treated soldier Quispealaya Vilcampoma, who presented pain as the result of a blow from an FAL caused by soldier Hilaquita Quispe, and that the pain had intensified until it became unbearable, in addition to the loss of vision and that, given the serious nature of the injury, he was hospitalized while arrangements were made to evacuate him to the Central Hospital in Lima. Similarly, the case file before this Commission reveals that the Medical Report of January 25, 2002 indicates that on July 14, 2001, soldier Valdemir Quispealaya Vilcapoma was admitted to the Central Military Hospital with “after effects of a severe, very advanced traumatic injury which prevented the recovery of vision,” and that in the medical certificate issued by the Medical-legal Institute of Huancayo on June 11, 2002, at the request of the Second Provincial Public Prosecutor of Huancayo, concluded that at that time he presented “total and permanent loss of vision in the right eye, caused by advanced, post-traumatic cataracts and glaucoma, which are related to the data.” Finally, the medical certificate issued on September 28, 2002 by the Chief of the Department of Ophthalmology of the Central Military Hospital indicates that Mr. Quispealaya suffers from the after effects of a severe and very advanced traumatic injury, for which reason he could not recover his vision despite the treatment received. According to this medical certificate, Mr. Quispealaya was admitted to the Central Military Hospital of Lima on July 14, 2001 and was released on September 5, 2002, that is, one year and almost two months later.

107. In relation to the forensic reports present in the case file that corroborate the seriousness and intensity of the injury suffered by Mr. Quispealaya, the Commission observes that although they were issued months after the pertinent events occurred, the Protocol of Istanbul establishes that a forensic report must be performed, regardless of the time that has transpired since the torture occurred.¹⁰⁷

¹⁰⁶ Istanbul Protocol, Doc E/ST/CSDHA/.12 (1991), para. 82.

¹⁰⁷ Istanbul Protocol, Doc E/ST/CSDHA/.12 (1991), para. 103.

108. The IACHR similarly notes that despite the fact that Mr. Quispealaya told the authorities on several occasions that he had been threatened and intimidated in the hopes that he would change his version of the facts, and that companions who had witnessed the events (with the exception of one) had also been intimidated so that they would also change their version (see the complaint filed before the Public Prosecutor on February 28, 2002 and the complaint filed before the Ombudsman's Office on February 4, 2004), the competent authorities did not adopt any protective measures in their favor, nor did they initiate an investigation into the events. In the same sense, the State has not provided any information that would indicate that it responded to Ms. Vilcapoma Taquia's request for a restraining order for herself and her family against Juan Hilaquita Quispe on November 25, 2002. Furthermore, the psychological evaluation that the Medical-legal Institute performed on Mr. Quispealaya on June 11, 2002 indicated that a noncommissioned officer physically assaulted him with the butt of an FAL in January of 2001 and that this person constantly abused him and had hit him with a stick previously.

109. The Commission observes that the allegations reflect a pattern of torture and cruel, inhuman and degrading treatment that occurred inside military structures, purportedly originating in a deeply rooted and erroneous interpretation of military discipline, as the Ombudsman of Peru identified in its Report No. 42. In this sense, as stated in the section of the present case devoted to context, the Ministry of Defense itself recognized in an internal Army communication of 1999 that, despite the measures taken to prevent disciplinary infractions, acts of abuse of authority had significantly increased.

110. Additionally, the Commission notes that in the resolution of the Supreme Council of Military Justice of November 17, 2005, which overturned the judgment issued in first instance of August 19, 2004 (which had declared that the crime of abuse of authority to the detriment of Valdemir Quispealaya had not been proven), it was considered that proof existed of noncommissioned officer Juan Hilaquita Quispe's responsibility, which had not been properly considered by the lower court during the oral hearing, such as: the affidavit of Technician Valeriano Calderon, who assisted Mr. Quispealaya at the firing range, before the civil courts; the medical report prepared by Dr. Zapana, ophthalmologist of the Military Hospital; the failure to evaluate the statement of Dr. Carlos Paz, who indicated that in the present case, the loss of vision in the right eye was due to a contusion in the region of the right eye; the declaration of soldier Edwin Wilfredo Huayra Aranciai, who was beside Mr. Quispealaya when he was beaten; and the continuous threats that Mr. Quispealaya had received.

111. The Commission observes that despite the fact that the Supreme Council of Military Justice decided in the resolution of 2005 to transfer the file to the lower court so that it could carry out more in-depth investigations, and the fact that the Ombudsman reported a general context of presumed torture and cruel, inhuman and degrading treatment in the context of performing military service in the year 2002, no additional steps were taken until the case file was transferred to the civil courts in 2007, and these similarly failed to take into account the aforementioned context.

112. The Commission similarly observes that as a result of the blow to Mr. Quispealaya's right eye, and as the medical report of September 28, 2002 reveals, Mr. Quispealaya was admitted to the Central Military Hospital of Lima on July 14, 2001, where he lost the vision in his right eye in spite of the operation he received, and he was released on September 5, 2002, almost 13 months later. In this sense, the Commission highlights that the medical reports that are included in the file suggest that Mr. Quispealaya could not recover his vision as a result of a severe and advanced traumatic injury given the time that had transpired, which the State could have avoided if it had guaranteed Mr. Quispealaya the opportunity to report the torture he had suffered without having to fear for his life.

113. Ultimately, the Commission considers that the given blow to Mr. Quispealaya Vilcapoma by Sub Officer Juan Hilaquita Quispe was intended to impose him a punishment for committing repeatedly mistakes in his shooting practice, and to impose at the same time to all the soldiers who were present in the firing range of Azapampa an unrestricted submission to a misinterpreted military discipline.

114. The Commission observes that the State has the particular duty to protect the life and integrity of military recruits, since their freedom of movement and the application of disciplinary rules to which they could be submitted directly depend on State agents, who exercise authority and command over the recruits. Thus, when a recruit enlists in the Army in a good state of health but becomes injured during his service, it is the State's duty to give a convincing explanation of the causes of these injuries, an element that has not occurred in the present case.

115. With respect to the obligation to guarantee the right contained in Article 5 of the American Convention, the Court has stated that this means that the State must investigate possible acts of torture or other cruel, inhuman or degrading treatment.¹⁰⁸

116. The obligation to investigate is strengthened by the contents of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, according to which the State must "take effective measures to prevent and punish torture within their jurisdiction," as well as "prevent and punish . . . other cruel, inhuman or degrading treatment or punishment."

117. Similarly, according to Article 8 of this Convention,

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

118. The Inter-American Court has stated previously that:

in the light of the general obligation to guarantee all persons under their jurisdiction the human rights enshrined in the Convention, established in Article 1(1) of the same, along with the right to humane treatment pursuant to Article 5 (Right to Humane Treatment) of said treaty, there is a state obligation to start ex officio and immediately an effective investigations that allows it to identify, prosecute, and punish the responsible parties, when there is an accusation or well-grounded reason to believe than an act of torture has been committed.¹⁰⁹

119. In summary, the duty to investigate constitutes an imperative State obligation that comes from international law and cannot be cast aside or conditioned on domestic normative acts or rules of any type. As the Court has already stated, in situations of serious violations of fundamental human rights, the absolute need to prevent the repetition of these acts depends in good measure on preventing impunity and satisfying the expectations of the victims and society as a whole to learn the

¹⁰⁸ I/A Ct. H.R. *Case of Bueno Alves V. Argentina*. Merits, Reparations and Costs. Judgment of 11 May 2007. Series C No. 164, para. 88; I/A Ct. H.R. *Case of Vargas Areco V. Paraguay*. Judgment of 26 September 2006. Series C No. 155, para. 78.

¹⁰⁹ I/A Ct. H.R.. *Case of the Miguel Castro Castro Prison V. Perú*. Merits, Reparations and Costs. Judgment of 25 November 2006. Series C No. 160, para. 345; I/A Ct. H.R.. *Case of Vargas Areco V. Paraguay*. Judgment of 26 September 2006. Series C No. 155, para. 79, *Case of Gutiérrez Soler*. Judgment of 12 September 2005. Series C No. 132, para. 54.

truth about what has happened. The duty to investigate is a means to achieving these ends, and the failure to comply with it implicates the international responsibility of the State.¹¹⁰

120. It is important to emphasize that where there are allegations of presumed torture or abuse, the time required to carry out the expert forensic reports is essential to demonstrate irrefutably the existence of harm, particularly when the only witnesses available are the perpetrators and the victims and the proof may be limited. It follows that in order for an investigation into acts of torture to be effective, it must be carried out promptly.¹¹¹

121. The Commission notes that in the present case, the military authorities were informed on July 6, 2001 by Dr. Chang of the possibility that a crime of torture had taken place in the military facilities, but they did not initiate an investigation, nor did they take any security measures to protect the alleged victim, despite the fact that the very same military establishment had recognized that it was following an erroneous interpretation of military discipline.

122. As a result, and based on the elements of fact and law analyzed previously, the IACHR considers that Mr. Quispealaya Vilcapoma, when he was engaged in shooting practice, received a deliberate and intentional blow from his military instructor that caused him intense physical and mental suffering, had the purpose of punishing him, and that the State did not initiate *ex officio* the pertinent investigations when it was informed that an act of torture may have occurred in its facilities, consistent with its responsibility. In this sense, the Commission concludes that the aforementioned acts of violence constitute violations of Articles 5(1) and 5(2) of the American Convention in relation to Article 1(1) of the same and Article 8 of the Inter-American Convention to Prevent and Punish Torture.

Articles 8 and 25 of the American Convention

123. The Inter-American Court has repeatedly stated that the right to access to justice should ensure that alleged victims or their families have the right to have all necessary measures taken to determine the truth of the events that occurred and to punish the responsible parties within a reasonable time period.¹¹² Although the duty to investigate is one of means and not results, it should be assumed by the State as a duty in itself and not as a mere formality that is destined in advance to be ineffective¹¹³, or as a mere realization of private parties that depends on the procedural initiative of the victims or their families or the private submission of evidence.¹¹⁴

¹¹⁰ I/A Ct. H.R., *Case of Bueno Alves V. Argentina*. Merits, Reparations and Costs. Judgment of 11 May 2007. Series C No. 164, para. 90; I/A Ct. H.R., *Case of Vargas Areco V. Paraguay*. Judgment of 26 September 2006. Series C No. 155, para. 81.

¹¹¹ I/A Ct. H.R., *Case of Bueno Alves V. Argentina*. Merits, Reparations and Costs. Judgment of 11 May 2007. Series C No. 164, para. 111.

¹¹² *Case of the Ituango Massacres V. Colombia*. Judgment of 1 July 2006 Series C No. 148, para. 289; y I/A Ct. H.R., *Case of Baldeón García V. Perú*. Merits, Reparations and Costs. Judgment of 6 April 2006. Series C No. 147, para. 166.

¹¹³ I/A Ct. H.R., *Case of Velásquez Rodríguez V. Honduras*. Judgment of 29 July 1988. Series C No. 4, para. 177; I/A Ct. H.R., *Case of Cantoral Huamaní y García Santa Cruz V. Perú*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 10 July 2007. Series C No. 167, para. 131; y I/A Ct. H.R., *Case of Zambrano Vélez y otros V. Ecuador*. Merits, Reparations and Costs. Judgment of 4 July 2007. Series C No. 166, para. 120.

¹¹⁴ I/A Ct. H.R., *Case of Velásquez Rodríguez Honduras*. Judgment of 29 July 1988. Series C No. 4, para. 177; I/A Ct. H.R., *Case of Zambrano Vélez y otros V. Ecuador*. Merits, Reparations and Costs. Judgment of 4 July 2007. Series C No. 166, para. 120.

124. In the present case, the petitioners allege that the State did not initiate an investigation *ex officio*, but that it carried one out upon the initiative of a private party. They add that the investigation did not take place with due diligence, which is why the events are still subject to impunity and the victim has not received reparations that are proportionate to the seriousness of the after effects of the torture that he has suffered. They state specifically that the authorities charged with investigating the facts did not apply the Protocol of Medical-legal Recognition for the Detection of Injuries or Death as a result of Torture,” nor did they apply the Protocol of Istanbul.

125. For its part, the State reported that in the year 2007, it reformed its police-military jurisdiction to adapt it to the principles contained in the Constitution and the American Convention, and that the proceeding was sent from the military to the civil courts. It alleges that on October 17, 2008 it definitively closed the complaint because it was impossible to obtain the statement of Mr. Quispealaya, whose whereabouts were unknown, and that furthermore, it was necessary to establish the period of disability and the medical attention required, and no medical certificate to this effect was created. The State alleges that if Mr. Quispealaya had not agreed with the resolution to close the case, he could have presented an appeal, but he did not do so.

Reasonable time period

126. With regard to the reasonable time period contemplated in Article 8(1) of the American Convention, the Inter-American Court has established that three elements must be taken into account to determine the reasonability of the period in which the proceedings are carried out: 1) the complexity of the matter, b) the interested party’s procedural activities, and c) the conduct of the judicial authorities.¹¹⁵

127. The Commission considers that the matter in question was not complex, given that the allegations that Mr. Quispealaya consistently made occurred in plain daylight and before numerous witnesses, and because the case file contains several medical certificates that indicate that Mr. Quispealaya lost the vision in his right eye as a result of a traumatic injury. Additionally, the IACHR observes that at the moment when Mr. Quispealaya enlisted in the military service, a medical examination to determine his physical and psychological fitness demonstrated that he was fit for service.

128. With regard to the interested party’s procedural activities, the Commission observes that the petitioners had to report the events to the Public Prosecutor on February 28, 2002, that is, more than a year and a month after the events had occurred, and more than seven months after Dr. Chang informed the Brigade General of the events. This is despite the Peruvian State’s duty to initiate an investigation *ex officio*, without delay and in a serious, impartial and effective manner, once it becomes aware of the events. The Commission observes, similarly, that Mr. Quispealaya submitted to the medical examinations requested by the authorities and presented a motion for change of jurisdiction in which he requested that the case be removed from the military jurisdiction on November 30, 2004, which was resolved on May 12, 2005 by the Permanent Chamber of the Supreme Court of Justice in favor of the private military courts.

¹¹⁵ I/A Ct. H.R.. *Case of Vargas Areco V. Paraguay*. Judgment of 26 September 2006. Series C No. 155, para. 196; *Case of de las Masacres de Ituango V. Colombia*. Judgment of 1 July 2006 Series C No. 148, para. 289; y I/A Ct. H.R.. *Case of Baldeón García V. Perú*. Merits, Reparations and Costs. Judgment of 6 April 2006. Series C No. 147, para. 151.

129. With regard to the State's procedural activity, the proven facts before this Commission show that on June 29, 2001 – that is to say eight months after the petitioners presented the complaint – Mr. Quispealaya told Dr. Chang how the military instructor had beaten him in the right eye during training and had threatened him, and Dr. Chang informed the Brigade General of Huancayo of these events on July 6, 2001, yet there was no investigation into them, despite the State's obligation to initiate an investigation *ex officio* and immediately which allow in an immediately, independently and thoroughly manner to determine the nature and origin of the injuries, identify those responsible and start their processing.

The incompatibility of the military jurisdiction to try ordinary crimes

130. The Commission notes that after the 5th Criminal Court of Huancayo ordered the opening of an investigation on October 21, 2002, General Commander of the 31st DI Huancayo told the Permanent War Council of the Second Judicial Area about the circumstances in which Mr. Quispealaya had lost the vision in his right eye (November 4, 2002), and this communication led to the dispute over jurisdiction by the Permanent Military Judge of Huancayo on November 19, 2002 and in the accused's failure to appear before the 5th Criminal Court of Huancayo, as well as the resistance of the military courts and soldiers to carry out his arrest, just as the 5th Judge of the Criminal Court of Huancayo observed on March 12, 2003. As a result, the Commission considers that initiating proceedings in the military courts only had the effect of complicating the proceedings that had started in the civil courts.

131. The Commission further notes that on May 12, 2003, the Permanent Criminal Chamber of the Supreme Court resolved the conflict of jurisdiction in favor of the military courts, based on the consideration that the crime committed was one that occurred in the course of duty. Similarly, the Commission observes that on November 30, 2004, Mr. Quispealaya presented a motion to transfer the case to the civil courts, which was again resolved in favor of the military courts. In this sense, the Commission reiterates that the military courts should only be used to try active soldiers for the alleged commission of offenses in the course of duty in the strictest sense. Human rights violations must be investigated, tried and punished according to the law by ordinary criminal courts. The inversion of jurisdiction in this area should not be permitted, because this undermines judicial guarantees under the false pretense of effectiveness of military justice and implicates serious institutional consequences which question the civil courts and the rule of law.¹¹⁶ Specifically, the IACHR has determined that given its nature and structure, the criminal military jurisdiction does not satisfy the requirements of independence and impartiality that Article 8(1) of the American Convention requires in cases involving human rights violations.¹¹⁷

Civil jurisdiction

132. The Commission considers that although the proceedings were transferred from the military courts to the civil courts after the judgment of the Constitutional Tribunal of December 15,

¹¹⁶ IACHR, Application presented to the Inter-American Court of Human Rights, Valentina Rosendo Cantú and others vs. Mexico, August 2, 2009, para. 123; IACHR, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, doc. 59 rev. June 2, 2000, Chapter II, para. 214.

¹¹⁷ IACHR, Application presented to the Inter-American Court of Human Rights, Valentina Rosendo Cantú and others vs. Mexico, August 2, 2009, para. 126; IACHR, Report No. 53/01, Case 11.565, Ana Beatriz and Celia González Pérez (México), April 4, 2001, para. 81.

2006, it was not until November of 2007 that investigations before the competent jurisdiction reinitiated, that is, seven years later.

133. The Commission similarly notes that on October 17, 2008, the Public Prosecutor of the Province of Huancayo, 11 months after initiating the investigations, closed the case file because Mr. Quispealaya Vilcapoma could not be located, despite the fact that the closing of the file was notified to his sister, upon the reasoning that a medical-legal certificate was needed to establish Mr. Quispealaya's disability. In this respect, the Commission considers that the State has not explained why the Office of the Attorney General did not take into account the medical certificates that were in the file and that dated from January 25, June 11 and September 18, 2002, which were prepared by public entities (Department of Ophthalmology of the Military Hospital and the Medical-legal Institute of Huancayo), as well as the forensic psychological examination of June 11, 2002 performed by the Medical-legal Institute of the Medical-legal Division of the Office of the Attorney General of Huancayo. Furthermore, the Commission considers that the Public Prosecutor did not try to locate the witnesses to the events, such as Second Sergeants José Lazo Medina and Delfín Alcántara Durán, or the soldier Edson Huayra Arancibia, who corroborated the complaint filed by Mr. Quispealaya in the civil courts, in order to take their statement about the events.

134. Additionally, the IACHR considers that the competent authorities did not adopt the means at their disposal to locate Mr. Quispealaya in light of the fact that, as contained in the proven facts, it was his mother, Ms. Victoria Vilcapoma Taquia, along with the Human Rights Commission (COMISEDH), who presented the initial report before the Roundtable of the Office of the Attorney General on February 28, 2002, and included both the identification number of Ms. Vilcapoma and the designation of two lawyers of COMISEDH to represent Mr. Quispealaya, including their attorney registration numbers before the Lima Bar Association, as well as the address, telephone and email of COMISEDH.

135. The Commission reiterates that according to the jurisprudence of the Court, the right to access to justice requires that the facts be investigated and, if appropriate, criminal responsibility assigned, in an effective manner and in a reasonable time period, which is why owing to the necessity to guarantee the rights of victims, a prolonged delay can by itself constitute a violation of judicial guarantees.¹¹⁸

Investigation of the threats and the protection of the subject matter and purpose of the criminal proceedings

136. The Commission observes that Mr. Quispealaya informed the authorities of the threats and intimidation that he suffered at the hands of noncommissioned officer Hilaquita so that he would desist from the complaint of torture. In this sense, the case file shows that on June 29, 2001, Mr. Quispealaya told Dr. Chang that noncommissioned officer Hilaquita had threatened him if he reported the latter, which is why he had not told the truth the first time he went to the infirmary. Similarly, the file shows that Dr. Chang reported these facts to Commander Torres on July 6, 2001, but that the military authorities took no actions in response. It is also clear from the file before this Commission that on February 28, 2002, the petitioners reported to the Public Prosecutor that noncommissioned officer Hilaquita, who was in charge of directing the military training, had hit soldier Valdemir Quispealaya and

¹¹⁸ I/A Ct. H.R., *Case of Anzualdo Castro v. Perú*. Judgment of 22 September 2009, Series C No. 202, para. 124.

his companions with sticks in the back and legs and had psychologically abused them during their training, and this complaint was corroborated by Mr. Quispealaya during the psychological evaluation performed by the Medical-legal Institute of the Office of the Attorney General of Huancayo on June 11, 2002. The Commission notes that, similarly, the petitioners reported to the Public Prosecutor on the same date (February 28, 2002) that Mr. Quispealaya was beaten by five unknown subjects on January 15, 2002 when he returned from Huancayo to Lima after visiting his mother, and that when he returned to the military base he found out that his companions had changed their versions of the facts under threat of noncommissioned officer Hilaquita. Additionally, the petitioners reported to the Office of the Attorney General that noncommissioned officer Hilaquita had again contacted Mr. Quispealaya in order to threaten him if he did not change his version of the facts.

137. The file similarly shows that on December 10, 2002, soldier Edson Huayra Arancibia presented a complaint to the Ombudsman's Office of Huancayo for intimidation and coercion against soldier Juan Hilaquita Quispe, against whom he had testified before the Private Military Court regarding the abuse to which the latter had subjected him during his time in the Army, as well as regarding the injuries that he had caused to soldier Quispealaya.

138. In this regard, the Commission observes that the case file does not indicate that any investigation was begun or that the Office of the Attorney General had adopted any measure with respect to the threats reported in order to protect the subject matter and the purpose of the criminal proceedings, that is, the determination of the truth, the assignment of responsibilities. Similarly, the Commission observes that an order of arrest for noncommissioned officer Hilaquita Quispe was only issued on October 21, 2002, almost eight months after the victim's mother presented a complaint against him. This order was not carried out, due to the resistance of the military jurisdiction to turn the accused over to the civil courts, as the case file of the 5th Judge of the Criminal Court of Huancayo of March 12, 2003 demonstrates.

139. Based on the foregoing analysis, the Commission considers that in the present case, Mr. Quispealaya's right to access justice was violated, since proceedings were not initiated by the competent authorities, pertinent means were not adopted to protect the subject matter and purpose of the criminal proceedings. Despite the fact that Mr. Quispealaya repeatedly complained about threats against him and other witnesses to the facts, the proceedings were carried out in the military courts for nearly seven years in clear violations of the obligations assumed by the State of Peru by ratifying the American Convention. Similarly, the State did not adopt the means at its disposal to clarify the facts in a reasonable time period, which caused impunity to prevail more than 12 years after the events occurred. Consequently, the Commission concludes that in the present case, the rights of Mr. Quispealaya Vilcampoma enshrined in Articles 8(1) and 25 of the American Convention were violated, in relation to the obligation of the State to respect and guarantee the rights enshrined in that Convention.

2. Right to personal integrity (Articles 5 y 1(1) of the American Convention on Human Rights) of the victim's family

140. The right to personal integrity, enshrined in Article 5(1) of the American Convention, establishes that "[e]very person has the right to have his physical, mental, and moral integrity respected." In this sense, the Commission has recognized that:

Among the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of

their human personality. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect.¹¹⁹

141. The jurisprudence of the Inter-American Court has established that the victim's family members may themselves be affected by the violation of their right to psychological and moral integrity.¹²⁰ In this way, the Inter-American Court has considered that the right to psychological and moral integrity of the victim's family may be violated, due to the additional suffering that they have experienced as a result of the particular circumstances related to the violations committed against their loved ones¹²¹ and caused by acts and omissions of State authorities with regard to the events that occurred.¹²²

142. In the present case, the petitioners state that more than 11 years since the events occurred, the torture to which Mr. Quispealaya was subjected has caused him an irreversible visual disability that has impacted his personal and family life, and has constituted an obstacle for him to find a stable job in order to provide for his basic needs and those of his families, and that Mr. Quispealaya has been able to survive due to the support of his elderly mother.

143. The Commission notes that Mr. Quispealaya's mother, Victoria Vilcapoma Taquia, traed to meet with military officers to find out her son's state of health once noncommissioned officer Technician Muquiyita told her that the Army had granted him medical leave, and that it was Ms. Victoria Vilcapoma who presented the complaint to the Provincial Public Prosecutor of Huancayo on February 28, 2002 for the torture that her son had suffered. Similarly, the case file before the Commission indicates that on November 25, 2002, Ms. Vilcapoma Taquia requested a restraining order because she feared for her life and that of her family, given that the noncommissioned Army officer who had assaulted her son and against whom a complaint for torture had been filed was seen around her house. Nevertheless, no response was received, nor were any measures adopted to this end.

144. Additionally, the Commission has concluded in the present case that the State violated Mr. Quispealaya Vilcapoma's right to personal integrity, as well as his right to judicial guarantees and to an effective judicial remedy, based on the lack of an effective investigation of the facts within a reasonable time period.

¹¹⁹ IACHR. Report No. 38/00, Case 11.743, Merits, *Rudolph Baptiste*, Grenada, 13 April 2000, para. 89.

¹²⁰ I/A Ct. H.R., *Case of Juan Humberto Sánchez V. Honduras*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 7 June 2003. Series C No. 99, para. 101; *Case of the Massacre of Dos Erres V. Guatemala*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 24 November 2009. Series C No. 211, para. 206, *Case of Heliodoro Portugal V. Panamá*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 12 August 2008. Series C No. 186, para. 163.

¹²¹ I/A Ct. H.R., *Case of the Miguel Castro Castro Prison V. Perú*. Merits, Reparations and Costs. Judgment of 25 November 2006. Series C No. 160, para. 335; *Case of Vargas Areco V. Paraguay*. Merits, Reparations and Costs. Judgment of 26 September 2006. Series C No. 155., para. 96; *Case of Goiburú y otros V. Paraguay*. Merits, Reparations and Costs. Judgment of 22 September 2006. Series C No. 153, para. 96.

¹²² I/A Ct. H.R. *Case of Manuel Cepeda Vargas V. Colombia*. Preliminary Exceptions, Merits and Reparaciones. Judgment of 26 May 2010. Series C No. 213, para. 195.

145. Consequently, the Commission considers that these circumstances generate suffering, anguish, insecurity, frustration and impotence of family members before the State authorities,¹²³ and it concludes that the State has violated Article 5(1) of the American Convention in relation to Article 1(1) of the same to the detriment of Ms. Victoria Vilcapoma Taquia.

V. CONCLUSIONS

146. The Commission, based on the considerations of fact and law presented above, concludes that the Republic of Peru is responsible for failing to comply with the obligations to prevent and guarantee:

1. the right to personal integrity, in accordance with Articles 5(1) y 5(2) of the American Convention, in relation to Article 1(1) of the same instrument and Article 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr. Quispealaya Vilcapoma;
2. the right to judicial protection and guarantees enshrined in Articles 8 and 25 of the American Convention in relation to Article 1(1) of the same instrument, to the detriment of Mr. Quispealaya Vilcapoma;
3. the right to personal integrity, in accordance with Article 5(1) de la American Convention, in relation to Article 1(1) of that instrument, to the detriment of Ms. Victoria Vilcapoma Taquia.

VI. RECOMMENDATIONS

147. Based on the analysis and the conclusions contained in the present report, the Inter-American Commission on Human Rights recommends that the State of Peru:

1. Reopen the investigation for the violation of personal integrity suffered by Mr. Quispealaya Vilcapoma and carry it out in an impartial and effective manner within a reasonable time period, with the aim to clarify the facts in a complete manner, identify the responsible party or parties and punish them appropriately.
2. Provide adequate reparations for the human rights violations declared in the present report, both in the material and the moral sense, including just compensation.
3. Design and implement training materials and regular courses on human Rights, and specifically regarding the limits of military discipline in light of the obligations assumed by the State upon ratifying international human rights instruments.
4. Establish efficient mechanisms so that young people carrying out military service can report cases of abuse or mistreatment, mechanisms which guarantee respect for the rules of due process and eliminate the possibility of any type of reprisal by the aggressors.

¹²³ I/A Ct. H.R.. *Case of Bámaca Velásquez V. Guatemala*. Merits. Judgment of 25 November 2000. Series C No. 70, para. 160; I/A Ct. H.R.. *Case of Cantoral Benavides V. Perú*. Merits. Judgment of 18 August 2000. Series C No. 69, para. 105; y I/A Ct. H.R.. *Case of Durand y Ugarte V. Perú*. Merits. Judgment of 16 August 2000. Series C No. 68, para. 128.

5. Strengthen the capacity of the judicial branch to investigate reports of torture and violations of personal integrity that young people performing military service present in an adequate and efficient manner.

VIII. NOTIFICATION

148. The Commission agrees to transmit this report to the State of Peru and grant a period of two months for it to comply with the recommendations formulated. This period will be computed from the date of transmission of the present report to the State, and the State may not publish it. Similarly, the Commission agrees to notify the petitioners of the adoption of this report under Article 50 of the Convention.