ANNEX 2

C.2. Authority, in monitoring compliance with judgment, to rule on the alleged non-observance of the obligation to investigate, prosecute and punish owing to a "pardon on humanitarian grounds"

28. During the stage of monitoring of compliance with judgment in the *Barrios Altos*[60] and *La Cantuta*[61] cases, the Court noted that, as of 2001, Peru began adopting the necessary measures to prevent amnesty laws from having effect and to enforce the criminal prosecution of the violations found by the Court in those judgments. Similarly, it viewed favourably the domestic decisions of April and December 2009 that sentenced the former President Fujimori to prison as an indirect perpetrator of the acts committed in the referenced cases, and which were characterized as "[TRANSLATION] crimes against humanity under international criminal law" (recital 9 above).[62]

29. However, when Alberto Fujimori had served 10 years and 10 months (recital 22 above) of the 25-year prison sentence he had received, the representatives of victims informed the Court on 25 and 26 December 2017 that the President of the Republic of Peru had granted him a "pardon on humanitarian grounds" (recitals 23 and 24 above) on 24 December, which they and the Inter-American Commission considered to be in contravention of the obligations arising from the *Barrios Altos* and *La Cantuta* rulings, with regard to the obligation to investigate, prosecute and, where applicable, punish the serious human rights violations found in said cases (recitals 15 and 17 above). The State considers, on the contrary, that it "[TRANSLATION] met its obligation to prosecute and punish [the former] President Fujimori", giving him the "[TRANSLATION] maximum sentence applicable", and that granting him a humanitarian pardon after he had served "[TRANSLATION] nearly

[60] See *Barrios Altos v. Peru*. Monitoring of Compliance with Judgment. Order of the Inter-American Court of Human Rights of 22 November 2005, recital 9 and *Barrios Altos v. Peru*. Monitoring of Compliance with Judgment, footnote 30 above, recital 30.
[61] See *La Cantuta v. Peru,* footnote 2 above, paras. 178-187.
[62] See *La Cantuta v. Peru*, footnote 2 above, para. 188.

half of that sentence" does not imply impunity in those cases.[63] It maintained that, with the delivery of the judgment criminally convicting Alberto Fujimori, effect had been given to the victims' rights to truth, justice and reparation, and that "[TRANSLATION] when weighing [those] rights […] against [Alberto Fujimori's] rights to health, dignity and life, the latter set of rights prevails."[64]

30. Regarding the State's arguments, although the Court recognizes the progress made in discharging said obligation in the *Barrios Altos* and *La Cantuta* cases through the above-mentioned determinations of criminal responsibility (recital 9 above), it deems it necessary to recall that the execution of the sentence is also part of that obligation[65] and that, during the period of its execution, benefits must not be granted unduly, as that could lead to a form of impunity (recitals 31 and 47 below). Likewise, the enforcement of the judgments is an integral part of the victims' right of access to justice.[66]

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[63] In that respect, the State specified that the pardon, "[TRANSLATION] in order to be granted, presumes the individual's guilt, following a sentence, prior investigation and conduct of corresponding criminal proceedings"; the President thus exercised that "[TRANSLATION] prerogative […] subsequent to [the handing down of] the sentence". It also stated that, pursuant to the above, the "[TRANSLATION] pardon on humanitarian grounds" may not be equated with amnesty and that, therefore, the pardon in question has not been prohibited in the obligation to investigate, prosecute and punish, as ordered in the Judgments of the referenced cases. Similarly, it stressed that the "[TRANSLATION] pardon on humanitarian grounds" does not affect the *res judicata* of the conviction decision, given that the conviction decision is immutable. See Public Hearing of 2 February 2018 and State reports of 2, 14 and 28 February 2018.

[64] See Public Hearing and State report of 2 February 2018.

[65] See *Myrna Mack Chang v. Guatemala*. Monitoring Compliance with Judgment. Court Order of 26 November 2007, recitals 6-13 and first paragraph of operative part, and *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 14 November 2014. Series C No. 287, para. 460. In *Rodríguez Vera*, the Court stated that, even where "[t]he obligation to investigate […] is an obligation of means, this does not signify that the person convicted does not have to serve his sentence in the terms in which it was decreed."

[66] In *Baena Ricardo et al. v. Panama* the Court considered that "in order to comply with the right to access to justice, it is not sufficient that a final ruling be delivered during the respective proceeding or appeal, declaring rights and obligations, or providing protection to certain persons. It is also necessary that there are effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively. The execution of such decisions and judgments should be considered an integral part of the right to access to justice, understood in its broadest sense, as also encompassing full compliance with the respective decision. The contrary would imply the denial of this right." See *Baena Ricardo et al. v. Panama*. Jurisdiction. Judgment of 28 November 2003. Series C

31. Specifically regarding benefits as they relate to the execution of the sentence, in its Order on monitoring compliance issued in 2012 in the *Barrios Altos* case (recital 9 above), the Court expressed its view on how granting benefits unduly during the execution of a sentence could potentially lead to a form of impunity:

> [TRANSLATION] **Under the rule of proportionality,** in exercising their obligation to prosecute those serious violations**, States must ensure that the sentences imposed do not become factors that contribute to impunity**, taking into account aspects such as the characteristics of the crime, and the participation and guilt of the accused. **Likewise, the undue granting of benefits during the execution of a sentence can potentially lead to a form of impunity, in particular in cases where serious human rights violations have been perpetrated**, such as those which occurred in the instant case.
> […]
> **Although in cases of serious human rights violations international law acknowledges that certain circumstances or situations may lead to a lessening of punitive power or a reduction of the sentence**, such as effective collaboration with judicial authorities through information enabling the crime to be elucidated, **the Court considers that the State should assess whether to apply such measures in the instant case, as granting them unduly can potentially result in a form of impunity.** [Emphasis added].[67]

32. Accordingly, given that the *Barrios Altos* and *La Cantuta* cases are now at the stage of the monitoring of compliance with the obligation to investigate, prosecute and, where applicable, punish,[68] the Court may, in the exercise of its supervisory powers, rule on the alleged non-compliance with that obligation, owing to the "pardon on humanitarian grounds" granted to Alberto Fujimori while he was serving his prison sentence.

No. 104, paras. 73, 74, 79, 82 and 83. Similarly, in *Acevedo Jaramillo et al. v. Peru*, the Court considered that "in order to satisfy the right to an effective remedy it is not sufficient that final judgments be delivered in the appeal for legal protection proceedings, ordering protection of plaintiffs' rights. It is also necessary that there are effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively. As it is established […], one of the effects of the judgment is its binding character."

[67] See *Barrios Altos v. Peru.* Monitoring of Compliance with Judgment, footnote 30 above, recitals 55 and 57. See also, *inter alia, Furlan and Family v. Argentina,* footnote 66 above, paras. 209 and 210; *Constitutional Tribunal (Camba Campos et al.) v. Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 August 2013. Series C No. 268, para. 228; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia,* footnote 66 above, para. 405.

[68] See *Barrios Altos v. Peru.* Monitoring of Compliance with Judgment, footnote 30 above, point 1 of operative part and *La Cantuta v. Peru.* Monitoring of Compliance with Judgment, footnote 29 above, point 2.a. of operative part.

33. With regard to the State's argument that the representatives of victims have not exhausted domestic remedies and thus should be prohibited from having recourse to the Court in relation to the "pardon on humanitarian grounds" granted to Alberto Fujimori (recital 11 above), the Court recalls that any analysis it may make in the *Barrios Altos* and *La Cantuta* cases is not that which would correspond to cases at the merits stage, but rather to those at the stage of monitoring compliance with judgment. The requirement for the prior exhaustion of domestic remedies is not provided for in the American Convention with regard to monitoring compliance with judgments. Accordingly, in exercising its supervisory powers (recital 1 above), the Court may monitor the actions of any State body or authority involved in providing the reparations ordered in the judgments, bearing in mind that what it may order the State to perform is circumscribed by its supervisory powers and that it does not exercise its contentious jurisdiction to determine the State's responsibility. The stage of monitoring compliance with judgment entails the undertaking of a reasoned assessment as to whether or not the State has complied with the ordered reparations. Depending on the type of reparation concerned, the Court may – in certain cases and under certain circumstances – consider it advisable for State bodies and authorities with competence to oversee the provision of such reparation to do so before the Court assesses whether domestic actions are in compliance with the orders in the judgment.[69]

34. With regard to the State's argument (recital 11.b above) that the representatives of victims have taken contradictory stances in their submissions to the Court, contending, on the one hand, that a "pardon on humanitarian grounds" is in contravention of international law if it is granted to persons convicted of serious human rights violations, and, on the other, that if such a pardon were in conformity

[69] See *Barrios Altos v. Peru.* Monitoring of Compliance with Judgment, footnote 30 above, recitals 60 and 61.

with the relevant qualifying conditions under Peruvian law, it would be valid,[70] the Court considers that, regardless of whether the representatives have acted in the manner described by the State, the Court must make a determination as to whether the "pardon on humanitarian grounds" granted by the Executive for serious human rights violations could be incompatible with international law. Such a determination affects the manner in which other points submitted for its consideration are examined, including the State's request that the victims be granted recourse to Peruvian constitutional justice in order to ask that the aforementioned pardon be declared null and void (recital 11.b above).

[70] In that respect, the State has alleged that such conduct by the representatives of victims would give rise to estoppel and they opposed the acts of the representatives of the victims and their family members. The State indicated and demonstrated that the representatives of the victims requested the then President of the Republic and Minister of Justice that "[TRANSLATION] Supreme Decree No. 281-2017 be annulled" because it was not sufficiently reasoned, because the humanitarian grounds that gave rise to the pardon in question were not validated and because it was a result of "[TRANSLATION] a political negotiation". They also requested that a Prison Medical Board be appointed "with professional experts (national and/or foreign) and that within their clinical competencies they ensure the submission of an impartial report that is objective and truthful". Moreover, the State provided the report issued by the Ombudsman concerning the pardon for humanitarian reasons in question granted to Alberto Fujimori stressing that the report stated that "[TRANSLATION] […] the victims or their family members […] have publicly expressed […] that out of respect for human dignity, they would not object to a humanitarian pardon, in whose process it has been unequivocally demonstrated that the beneficiary suffers from serious illnesses that are worsened by his imprisonment." That notwithstanding, Peru stated that, in an international forum, the representatives argued that the humanitarian pardon should be granted to former President Fujimori only if the requirements of Peruvian regulations were met, and also that the pardon in question is incompatible with crimes against humanity in that this type of crime precludes pardon of the sentence. See *"Recurso de nulidad de indulto y derecho de gracia* [Appeal for annulment of pardon and executive clemency]" of 26 December 2017, submitted to the then President of the Republic and the Minister of Justice, signed by Raida Cóndor Saez, Carmen Amaro Cóndor and Gloria Cano Lengua; document in support of the aforementioned "*Recurso de nulidad de indulto y derecho de gracia* [Appeal for annulment of pardon and executive clemency]" signed on 27 December 2017 by Andrea Gisela Ortiz Perea, Antonia Pérez Velásquez, Carmen Mariños Figueroa, Pilar Sara Fierro Huamán, Bertila Bravo Trujillo and Carmen Oyague Velazco; "*Recurso de nulidad de indulto y derecho de gracia* [Appeal for annulment of pardon and executive clemency]" of 27 December 2017 submitted to the then President of the Republic and the Minister of Justice, signed by Gladys Sonia Rubina Arquiñego and David Licurgo Velazco Rondón; Report No. 177 of the Ombudsman entitled "*Indulto y derecho de gracia otorgados al expresidente Alberto Fujimori: evaluación normativa y jurisprudencial* [Pardon and executive clemency granted to the former President Alberto Fujimori: regulatory and jurisprudential assessment]" (annexes to the State report of 2 February 2018); State reports of 30 January; 6, 14, 20 and 28 February and 4 May 2018.

35. It should be noted that, while both pardon and executive clemency were granted on humanitarian grounds pursuant to the above-mentioned Supreme Decree (recital 23 above), for the purposes of the present Order, the Court will rule solely on the aforementioned "pardon on humanitarian grounds" in accordance with the terms of the relevant Peruvian legislation (recitals 25-28 above). This is because it is the institution of pardon – and not that of executive clemency – that is applicable to the *Barrios Altos* and *La Cantuta* cases in which a final judgment had already been handed down, convicting the former president Alberto Fujimori of what domestic criminal courts found to be crimes against humanity (recitals 9 and 20 above). Similarly, considering that the legal institution of pardon is not regulated uniformly in the countries of the region (recital 44 below) and that the institution of "pardon on humanitarian grounds" is specific to the Peruvian legal system, the Court's reasoning will focus solely on an analysis of whether this Peruvian legal institution, applied to Alberto Fujimori, could constitute an obstacle to compliance with the obligation to investigate, prosecute and punish, as ordered in the *Barrios Altos* and *La Cantuta* cases, in particular with respect to the execution of the sentence imposed on Alberto Fujimori in both cases (recital 20 above).

C.3. International standards on institutions that terminate, suspend, reduce or modify a sentence for serious human rights violations or crimes against humanity

36. In the case at bar, the representatives of victims and the Commission maintained that the granting of pardons in cases of serious human rights violations is incompatible with international law (recitals 15.b and 17 above). In substantiation of their argument, they construe certain previous rulings of the Court, including those in the *Barrios Altos* case, as implying its prohibition;[71] they also cite the rules of

[71] The representatives asserted that the Court's holding in the *Barrios Altos* Judgment "[TRANSLATION] does not apply solely to measures excluding responsibility before the issuance of a conviction, but to any measure that could become a factor of impunity with respect to serious human rights violations." See written submissions of the representatives of victims of 2 February 2018. The IACHR stated that

the Rome Statute and other international instruments, as well as decisions of the European Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, the International Criminal Court, the Human Rights Committee, the Committee against Torture and the Extraordinary Chambers in the Courts of Cambodia, and refer in addition to the comparative law of States in the region.[72] Peru has maintained that "[TRANSLATION] the institution of humanitarian pardon falls outside the scope of the restrictions of international law" and that the Court's previous rulings "[TRANSLATION] do not bar a person convicted of serious human rights violations from receiving a humanitarian pardon where his or her life or health is at risk" (recital 11 above). It also challenged the representatives' interpretation of the decisions of the Court and of other international courts and United Nations bodies, arguing that those decisions referred primarily to amnesty and to the prevention of impunity.[73]

37. As the State has alleged[74] and the Court has noted (recital 26 above), the "pardon on humanitarian grounds" granted by the President of the Republic of Peru to Alberto Fujimori is not a measure that discontinues criminal proceedings and prevents investigation and punishment but rather one that implies a "termination" of the sentence that was imposed after criminal proceedings were conducted against him. It is nevertheless a measure which allows the President of the Republic to pardon a criminal sentence imposed by the competent courts of the judicial branch for crimes against humanity, which affects the victims' right of access to justice (recital 56 below).

"[TRANSLATION] pardon – with no distinction as to its nature – is one of the legal institutions that States are prohibited from invoking, given that it represents a breach of its obligations with regard to truth and justice, which include the punishment of perpetrators in cases of serious human rights violations, and especially crimes against humanity." See IACHR submissions of 28 February 2018.

[72] See Public Hearing of 2 February 2018 and submissions of the legal representatives of victims of 2 February 2018.

[73] See State reports of 14 and 28 February 2018.

[74] See State reports de 2 and 14 February 2018.

38. Even though the Inter-American Court has not examined any case in which the alleged violation involved the application of the aforementioned Peruvian legal institution or another legal institution allowing the executive to terminate the sentence imposed in cases of serious human rights violations, it has however referred generally to the State's duty to abstain from applying measures that are "intended […] to suppress the effects of a conviction decision"[75] and from "[TRANSLATION] unduly granting benefits during the execution of the sentence" (recital 31 above), as well as to the importance of ensuring that the judgment is executed "in the terms in which it was decreed". [76]

39. The European Court of Human Rights considered in the case of *Yeter v. Turkey* that, "when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible".[77] The European Court considered that the light sentence imposed demonstrated a serious disproportion between the gravity of the crime and the punishment imposed. Similarly, in the case of *Enukidze and Girgvliani v. Georgia*, the European Court stated that

> the Court considers that when an agent of the State, in particular a law-enforcement officer, is convicted of a crime that violates Article 2 of the Convention, the granting of an amnesty or pardon can scarcely serve the purpose of an adequate punishment.[78]

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[75] See *19 Tradesmen v. Colombia*, Merits, Reparations, and Costs. Judgment of 5 July 2004. Series C No. 109, para. 263. See also, *inter alia*, *Molina Theissen v. Guatemala*. Reparations and Costs. Judgment of 3 July 2004. Series C No. 108, para. 83; *Gómez Paquiyauri Brothers v. Peru*, footnote 27 above, para. 232; *Gómez Palomino v. Peru*. Merits, Reparations, and Costs. Judgment of 22 November 2005. Series C No. 136, para. 140; *Huilca Tecse v. Peru*. Merits, Reparations, and Costs. Judgment of 3 March 2005. Series C No. 121, para. 108; *Plan de Sánchez Massacre v. Guatemala*. Reparations. Judgment of 19 November 2004. Series C No. 116, para. 99; *Tibi v. Ecuador.* Merits, Reparations, and Costs. Judgment of 7 September 2004. Series C No. 114, para. 259.

[76] See *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, footnote 65 above.

[77] In this case, a police officer who was sentenced to four years' and two months' imprisonment for culpable homicide of a person in custody served only 20 days, as he was granted conditional release. See ECtHR, *Yeter v. Turkey*, No. 33750/03, Judgment of 13 January 2009, para. 70. Similarly, see ECtHR, *Abdülsament Yaman v. Turkey*, No. 32446/96, Judgment of 2 November 2004, para. 55; ECtHR, *Eskí v. Turkey*, No. 8354/04, Judgment of 5 June 2012, para. 34; ECtHR, *Taylan v. Turkey*, No. 32051/09, Judgment of 3 July 2012, para. 45.

[78] See ECtHR, *Enukidze and Girgvliani v. Georgia*, No. 25091/07, Judgment of 26 April 2011, para. 274.

40. Moreover, with regard to international criminal law, no institution such as the "pardon on humanitarian grounds", as provided for in Peruvian law (recitals 25-27 above), has been incorporated into international constitutive treaties or instruments or those governing international criminal courts. Even though the statutes of the special international criminal tribunals established for the former Yugoslavia (1993),[79] Rwanda (1994),[80] Sierra Leona (2002)[81] and Lebanon (2009)[82] provide that convicted persons may be eligible for the application of institutions such as "pardon" or "commutation of sentence", the latter may be authorized only by the above-mentioned international criminal tribunals. The State in which a convicted person is serving a sentence of imprisonment is entitled only to identify the benefits which may be applicable in accordance with its laws and to communicate them to those tribunals. Essentially, the authorities of those States may not implement such benefits directly; the decision on whether or not to authorize them must be issued at

[79] The official English version of article 28 provides: "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law." See Statute of the International Criminal Tribunal for the former Yugoslavia, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

[80] The official English version of article 28 provides: "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law." See Statute of the International Criminal Tribunal for Rwanda, available at: http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf.

[81] The official English version of article 23 provides: "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law." See Statute of the Special Court for Sierra Leone, available at: http://www.rscsl.org/Documents/scsl-statute.pdf.

[82] The official English version of article 30 provides: "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Tribunal accordingly. There shall only be pardon or commutation of sentence if the President of the Tribunal, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law." See Statute of the Special Tribunal for Lebanon, available at: https://www.stl-tsl.org/en/documents/statute-of-the-tribunal/223-statute-of-the-special-tribunal-for-lebanon.

the seat of an international tribunal, in combination with other considerations, such as the gravity of the crime, the convicted person's rehabilitation and his or her substantial cooperation with the judicial system.

41. In addition, article 110[83] of the Statute of the International Criminal Court of 1998[84] provides for the possibility for that Court to authorize a "reduction of sentence" that it has imposed, thereby permitting an early release once the convicted person has served "two thirds of the sentence, or 25 years in the case of life imprisonment". That international instrument contains no reference whatsoever to a pardon or to the termination or pardon of sentence. Article 110(4) of the Statute and rule 223 of the Rules of Procedure and Evidence of the International Criminal Court set forth the "factors" that must be taken into account in deciding whether to reduce the sentence (recital 57 below).[85]

42. In summary, the statutes of the aforementioned international criminal tribunals (recitals 40 and 41 above) govern the granting of benefits only by those same tribunals during the execution of the sentence, with the Statute of the International Criminal Court providing, in addition, for the possibility of a

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[83] "Article 110. Review by the Court concerning reduction of sentence:
1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.
2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time. […]".
See Rome Statute of the International Criminal Court, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/RulesOfProcedureEvidence-SPA.pdf.

[84] On 10 November 2001, Peru deposited the instrument of ratification of the Rome Statute.

[85] The International Criminal Court has reviewed applications for reduction of sentence of two convicted persons, rejecting the application in the *Lubanga Dyilo* case and approving it in the *Katanga* case. See International Criminal Court, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*. "Second decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo", No. ICC-01/04/01/06, "Decision of 3 November 2017", para. 93; International Criminal Court, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga*. "Decision on the review concerning reduction of sentence of Mr Germain Katanga", No. ICC-01/04/01/07, "Decision of 13 November 2015", para. 116.

"reduction of sentence". This implies that sentences imposed for the type of crimes recognized by those international criminal tribunals may not be pardoned or reduced by discretionary decisions on the part of the respective States.

43. Various United Nations mechanisms for the protection of human rights have stated their views on the incompatibility of pardons or pardons of sentences imposed for international crimes or serious human rights violations. In its concluding observations on the report submitted by Algeria, of 2007, the Human Rights Committee recommended that the State

> [e]nsure that no pardon, commutation or remission of sentence or termination of public proceedings is granted in respect of any person, whether a State or official or member of an armed group, who has committed or commits serious human rights violations, such as massacres, torture, rapes and disappearances.[86]

The Committee against Torture in its concluding observations on the reports of Morocco and Lebanon, of 2011 and 2017, respectively, recommended that the laws of those States preclude the possibility of granting measures which pardon the sentence of persons convicted of the crime of torture.[87] Likewise, in the case of *Kepa Urra Guridi v. Spain*, the Committee took the opportunity to express its views on the pardon granted to Guardia Civil members convicted of torture, asserting that "the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment".[88] The Committee on Enforced Disappearances, in its concluding observations on the report submitted by Bosnia and Herzegovina, of 2016, expressed its concern over

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[86] See United Nations, Human Rights Committee, Concluding observations on Algeria, UN Doc. CCPR/C/DZA/CO/3, 12 December 2007, para. 7(c).

[87] See United Nations, Commission against Torture, Concluding observations on Morocco, UN Doc. CAT/C/MAR/CO/4, 21 December 2011, para. 6: "The Committee is concerned by some of the existing legal provisions on torture, particularly those providing for the possibility of granting an amnesty or pardon to perpetrators of acts of torture"; and, United Nations Committee against Torture, Concluding observations on the initial report of Lebanon, UN Doc. CAT/C/LBN/CO/1, 30 May 2017, para. 47: "The State party should repeal the amnesty laws of 1991 and 2005. It should also ensure that its laws preclude any possibility of granting amnesty to any person convicted of the crime of torture or any kind of pardon that violates the Convention."

[88] See United Nations, Commission against Torture, *Kepa Urra Guridi v. Spain*, Communication No. 212/2002, UN Doc. CAT/C/34/D/212/2002, 17 May 2005, para. 6.7.

"legislative proposals that would allow pardon for persons convicted of the crimes of genocide, war crimes and crimes against humanity after serving three-fifths of the sentence".[89]

44. Moreover, the laws of various States in the region, members of the Organization of American States, such as Argentina,[90] Colombia,[91] Ecuador,[92]

[89] See United Nations, Concluding observations on Bosnia and Herzegovina, UN Doc. CED/C/BIH/CO/1, 3 November 2016, para. 25.

[90] Article 1 of Law No. 27.156 of July 2015 entitled "*Prohibición de Indultos, Amnistías y Conmutación de Penas en Delitos de Lesa Humanidad* [Prohibition to grant pardon, amnesty or commutation of sentences for crimes against humanity]" provides that "[TRANSLATION] [s]entences or criminal proceedings for the crimes of genocide, crimes against humanity and war crimes referred to in articles 6, 7 and 8 of the Rome Statute of the International Court and in international human rights treaties with constitutional hierarchy may not be subject to amnesty, pardon or commutation of sentence, under penalty of which the act providing therefor shall become absolutely and irreparably null and void."

[91] Article 14 of Law 589 of 2000 "[TRANSLATION] providing for the definition of genocide, enforced disappearance and torture […] as offences under criminal law" establishes that "[TRANSLATION] [t]he crimes that [said] law defines as criminal offences shall not be eligible for amnesty or pardon". Therefore, in accordance with the provisions of the "[TRANSLATION] [p]aragraph" in article 23 of Law No. 1820 of December 2016 "[TRANSLATION] setting forth provisions on amnesty, pardon or special criminal law treatment and other provisions", and the automatic and final review of the constitutionality of said law, which was carried out by the Constitutional Court of Colombia in March 2018, "[TRANSLATION] [i]n no case will amnesty or pardon be granted in cases of" crimes corresponding to, *inter alia*, the following acts: crimes against humanity, genocide, serious war crimes, the taking of hostages or other serious deprivation of liberty, torture, extrajudicial executions, enforced disappearances, violent rape and other forms of sexual violence, child abduction, forced displacement, "[TRANSLATION] in addition to the recruitment of minors, in accordance with the provisions of the Rome Statute". In the event that a criminal judgment has used the terms "[TRANSLATION] ferocity, barbarity or other equivalent", no amnesty and pardon shall be granted exclusively for criminal conduct that corresponds to that established as ineligible for amnesty in the aforementioned law.

[92] Article 120 of the Constitution of Ecuador and Article 73 of the Comprehensive Organic Penal Code empowers the National Assembly to "[TRANSLATION] [g]rant amnesties and pardons for political crimes and pardons on humanitarian grounds" in accordance with the Constitution and the law, and provide that "[TRANSLATION] [t]hey shall not be granted for crimes committed against the public administration nor for genocide, torture, enforced disappearance, kidnapping and homicide for political reasons or reasons of conscience". Article 74 of the Code empowers the President of the Republic to "[TRANSLATION] grant pardons, commutations or reductions of sentences imposed in the final judgment" and the President, "[TRANSLATION] or the authority designated for the purpose" shall assess "[TRANSLATION] whether the request is appropriate". Moreover, Decree No. 861 of December 2015 entitled "*Reformas al Reglamento para la concesión de indulto, conmutación o rebaja de pena* [Reforms of the Regulations for granting pardon, commutation or reduction of sentence]", reiterates such prohibition in its article 2 for the granting of pardons to "[TRANSLATION] citizens convicted for perpetrating crimes of genocide, torture, enforced disappearance of persons, kidnapping and homicide for political reasons or reasons of conscience", although an exception is made for

Honduras,[93] Mexico,[94] Nicaragua,[95] Panama,[96] Paraguay,[97] Uruguay[98] and Venezuela,[99] are showing a regional trend towards the express prohibition of

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"[TRANSLATION] the latter", for whom it may be granted "[TRANSLATION] in the event of a duly confirmed catastrophic or terminal illness".

[93] Article 7 of the Law on Pardon of April 2013 provides that "[TRANSLATION] [e]ven in combination of the aforementioned requirements, the benefit of Pardon shall exclude persons convicted of the following crimes: (1) genocide, crimes against humanity and war crimes, as defined by domestic law and international law, in accordance with the Conventions and Treaties signed and ratified by the Honduras; (2) other serious human rights violations that caused social disruption or were perpetrated against children, adolescents, the elderly, women and groups or persons in a situation of vulnerability; and (3) organized crime involving crimes of unlawful assembly, money laundering, human trafficking, organ trafficking, arms trafficking, drug trafficking, extortion and kidnapping. And crimes of patricide, assassination in exchange for money or reward, infanticide, robbery followed by homicide, and those applicable to arsonists". Further, article 10 on "[TRANSLATION] [p]ardon on humanitarian grounds" provides that "[TRANSLATION] [a]ny convicted person may be eligible for a Pardon on humanitarian grounds, even where he or she has not served half of the sentence, except in the cases given in article 7(1) and (2) of this Law […]".

[94] Article 97 of the Federal Penal Code provides that "[TRANSLATION] [w]here it has been observed that the conduct of the convicted person reflects a high level of social reintegration and his or her release does not represent a risk for public order and safety, according to the opinion of the body implementing the punishment, and he or she was not convicted of treason against the State, espionage, terrorism, sabotage genocide, crimes against health, rape, intentional crimes against life and kidnapping, enforced disappearance torture and human trafficking, nor a repeat offence of intentional crimes, pardon may be granted by the federal executive authority by its discretionary powers, providing the reasons and the grounds […]". That notwithstanding, article 97 *bis* of this law provides that "[TRANSLATION] [e]xceptionally, *propio motu* or by request to the plenary session or one of the Chambers of Congress of the Union, the incumbent of the Federal Executive Power may grant the pardon for any federal or common crime in the Federal District, and pursuant to the opinion of the implementing body of the punishment in which it has been demonstrated that the convicted person does not represent a danger for public order and safety, explaining the reasons and grounds, where there are coherent indications of serious human rights violations by the convicted person". Further, article 17 of the "*Ley general para prevenir, investigar y sancionar la tortura y otros tratos o penas crueles, inhumanos o degrandantes* [General Law to prevent, investigation and punish torture and other cruel, inhumane or degrading treatment or punishment]" of April 2017 provides that "[TRANSLATION] [n]o persons prosecuted for or convicted of the crime of torture may be granted immunities, pardons, amnesties, or similar measures or measures having similar effects". Likewise, article 15 of the "*Ley general en materia de desaparición forzada de personas, desaparición cometida por particulares y del Sistema Nacional de Búsqueda de Personas* [General Law on the enforced disappearance of persons, disappearances committed by private persons and the National System for Missing Persons]" of November 2017 provides "[TRANSLATION] [t]he prohibition to apply amnesties, pardons and similar measures of impunity that prevent the investigation, prosecution or punishment and any other measures for determining the truth and obtaining full reparation for the crimes referred to in [said] Law."

[95] Article 130 of the Penal Code provides that "[TRANSLATION] the pardon, whose effect is limited to the total or partial termination of the sentence, shall be determined in each case by the National Assembly. Persons convicted of crimes against international peace shall be excluded from this benefit". Title XXII of the Code provides that these crimes are genocide, crimes against humanity and crimes against persons and property protected in armed conflict.

pardon – understood as the power of the executive or judicial branch to terminate, commute or pardon a sentence imposed by means of a final judgment – in respect of certain crimes that constitute serious human rights violations or international crimes referred to in the Rome Statute of the International Criminal Court (genocide, crimes against humanity, war crimes and crimes of aggression). Among them, Argentina, Paraguay and Uruguay[100] have adopted such a prohibition on the basis of the provisions of the above-mentioned Statute of the International Criminal Court; the laws in Paraguay and Uruguay even indicate, respectively, that they have been adopted with a view to "[TRANSLATE] implementing" said Statute and to "[TRANSLATE] cooperating […] with the International Criminal Court" to combat the crimes defined in the Statute. Furthermore, the laws of other States, such as

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[96] Article 116 of the Penal Code provides that "[TRANSLATION] neither pardon nor amnesty shall apply to crimes against humanity and to the crime of enforced disappearance of persons".

[97] Law No. 5.877 of September 2017 "[TRANSLATION] [i]mplementing the Rome Statute creating the International Criminal Court" provides in its article 10 that "[TRANSLATION] the definitions of offences and penalties established in the present Law shall not be declared terminated by pardon, commutation, amnesty or any other measure of leniency that prevents the prosecution of suspects or the effective implementation of the penalties imposed".

[98] Article 8 of Law No. 18.026 of September 2006 entitled "*Cooperación con la Corte Penal Internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad* [Cooperation with the International Criminal Court in combating genocide, war crimes and crimes against humanity]", provides that "[TRANSLATION] [t]he crimes and penalties established in Titles I to III of Part II of the present law [*viz*. genocide, crimes against humanity and war crimes] may not be declared terminated by pardon, amnesty, grace or any other institution of leniency, sovereign or similar, which in the facts prevents the prosecution of the suspects or the effective implementation of the penalties by the convicted persons".

[99] Article 29 of the Constitution provides that "[TRANSLATION] [t]he State shall be required to investigate and legally sanction human rights crimes perpetrated by its authorities. The actions to sanction crimes against humanity, serious human rights violations and war crimes are not time- barred. Human rights violations and crimes against humanity shall be investigated and prosecuted by ordinary courts. Such crimes shall be excluded from benefits that may be associated with their impunity, including pardon and amnesty".

[100] The above-mentioned special legislation has regard to Law No. 27.156 of July 2015 of Argentina ("*Prohibición de Indultos, Amnistías y Conmutación de Penas en Delitos de Lesa Humanidad* [Prohibition of Pardons, Amnesties and Commutation of Sentences in Crimes against Humanity]"), Law 5.877 of September 2017 of Paraguay (Law "[TRANSLATION] [i]mplementing the Rome Statute creating the International Criminal Court) and Law No. 18.026 of October 2016 of Uruguay ("*Cooperación con la corte penal internacional en materia de lucha contra el genocidio, los crímenes de guerra y de la lesa humanidad* [Cooperation with the International Criminal Court to combat genocide, war crimes and crimes against humanity]").

Bolivia,[101] Brazil,[102] Chile[103] and Peru[104] include rules that prohibit pardon or a pardon of the sentence for criminal acts considered to be the most serious under their

[101] Article 118.II of the Constitution provides that "[TRANSLATION] [t]he maximum punishment applicable shall be 30 years' imprisonment, excluded from executive clemency". The Penal Code of Bolivia expressly prohibits pardon for crimes of treason, espionage, assassination and patricide. Furthermore, in Presidential Decree No. 3030 of December 2016 entitled "*de amnistía, indulto total e indulto parcial*" [on amnesty, total pardon and partial pardon], article 7 (relating to exclusions from total pardon) provides that "[TRANSLATION] [m]ay not be eligible for the granting of [t]otal [p]ardon, persons deprived of liberty who: (a) [h]ave been convicted of crimes that may not be pardoned, assassination, homicide, femicide, infanticide, high treason, genocide, terrorism, crimes against the State's external and internal security, patricide, espionage, kidnapping, contraband, aggravated robbery, crimes of corruption, human trafficking and smuggling, crimes against sexual liberty, fraud or other fraud involving several victims and persons convicted with sentences greater than ten (10) years for crimes referred to in Law No. 10008 of 19 July 1988 on the *Regimen de la Coca y Sustancias Controladas* [Regime applicable to coca and controlled substances] [and] (b) [r]epeat offenders". Article 12 (relating to exclusions to the granting of partial pardon) provides that "[TRANSLATION] "[s]hall not be eligible to be granted [p]artial [p]ardon persons deprived of liberty who (a) [h]ave been rendered a final judgment for crimes which […]: i. […] may not be pardoned; assassination, homicide, femicide, infanticide, kidnapping, terrorism, contraband, corruption; ii. [a]ny crime against the State's external or internal security; iii. [c]rimes against sexual liberty; iv. [c]rimes of human trafficking and smuggling; v. [w]ith concurrence of crimes against life; vi. [f]raud or other fraud with several victims; vii. [a]ggravated robbery; (b) [r]epeat offenders; [and] (c) [h]ave received a final judgment with sentences longer than ten (10) years for crimes referred to in Law No. 1008. […]".

[102] Article 5 XLIII of the Constitution provides that "[TRANSLATION] according to the law, the practice of torture, illicit trafficking in narcotics and related drugs, terrorism and those crimes defined as heinous, whether those answerable are the criminals themselves, those who ordered the crime to be committed or those who failed to prevent the crime's commission by omission, are considered to be crimes that are not eligible for bail, clemency or amnesty". Furthermore, in section 1 of Law No. 8.072 of July 1990, "[TRANSLATION] [o]n heinous crimes, in the terms of art. 5 XLIII of the Federal Constitution, and other provisions", "heinous crimes" are defined as: homicide where perpetrated as an activity characteristic of extermination groups; aggravated homicide; grave bodily harm or bodily harm resulting in death, perpetrated by State agents who are members of the police or members of the prison system, or spouses or blood relatives to the third degree; robbery followed by grave bodily harm or death; extortion aggravated by death, extortion through kidnapping and in its aggravated form; statutory rape; epidemic resulting in death; falsification, corruption or alteration of products intended for therapeutic or medicinal purposes: facilitation of prostitution or sexual exploitation of minors, or of persons who because of illness or mental deficiency do not possess the necessary discernment to consent to sexual acts; genocide; [and] illegal carrying of restricted use firearms. Under section 2 of the same law these crimes, together with the practice of torture and illicit trafficking in narcotics or drugs, "[TRANSLATION] are not eligible for amnesty, clemency or pardon […]".

[103] Article 9 of the Constitution provides that "[TRANSLATION] [t]errorism, in whatever form, is essentially in contravention of human rights", and that, for "[TRANSLATION] [t]hose responsible for these crimes", "[TRANSLATION] no special pardon shall be granted, except to commute the death penalty to life imprisonment". Furthermore, Law No. 20588 of June 2012 "*Indulto General*" [General Pardon] provides in its article 6 that "[TRANSLATION] [p]ardons provided for in [said] law shall not be granted with respect to crimes perpetrated that are referred to in articles 141(3)(4)(5); 142; 361; 372 *bis*; 390 and 391(1) and (2) of the Penal Code; in paragraphs 5, 6, 7 and 8 of Title VII of Book II, where the victims are minors; and paragraph 5 *bis* of Title VIII of Book II, and in articles 433, 436 and 440 of the

domestic law or for crimes punishable by the maximum sentences in their courts, including certain serious human rights violations or crimes against humanity. The foregoing does not prevent the legal systems of the above-mentioned States from providing for other legal measures which, without implying a pardon of the sentence, allow for its modification in order to safeguard the life and well-being of convicted persons.

45. There is thus an emerging trend in international human rights law and international criminal law to place restrictions on sentences handed down by criminal courts for serious human rights violations which prevent them from being pardoned or terminated by discretionary decisions issued by the executive or the legislature. In that regard, the Court considers that, when analysing whether the application of the legal institution of "pardon on humanitarian grounds" constitutes an obstacle to compliance with the obligation to investigate, prosecute and, where applicable, punish such violations, it is necessary to consider whether it unnecessarily and disproportionately affects the right of access to justice of the victims of such violations and their family members, in terms of the proportional

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same Code [, defining kidnapping with aggravating circumstances, child abduction, rape, rape resulting in the death of the victim, homicide, rape of minors, statutory rape, migrant smuggling and human trafficking, and robbery with violence, intimidation or burglary with forced entry in a place of residence, or with regard to persons convicted of crimes or ordinary offences established in Law No. 19.913 creating the Financial Analysis Unit and amending several provisions in relation to money laundering and asset laundering. With the exception of the situation referred to in article 5 of said law, pardons shall not be granted to persons convicted of crimes or ordinary offences established in Law No. 20.000, Law No. 19.366 and Law No. 18.403, punishing the illicit trafficking of narcotics and psychotropic substances; nor shall pardons be granted to persons convicted of the crimes provided for in Law No. 18.314 determining terrorist conduct and setting the penalties pertaining thereto".

[104] Article 2 of Law No. 28704 of April 2006, "*Ley que modifica los artículos del Código Penal relativos a los delitos contra la libertad sexual y excluye a los sentenciados de los derechos de gracia, indulto y conmutación de pena* [Law amending the articles of the Penal Code relating to crimes against sexual liberty and excluding convicted persons from measures of leniency, pardon and commutation of sentence]", provides that "[TRANSLATION] "[n]o pardon, commutation of sentence or executive clemency shall be granted to persons convicted for the crimes referred to in articles 173 and 173-A" of the Penal Code relating to the rape of minors and the rape of persons resulting in death or bodily harm, and Legislative Decree No. 1181 of July 2015, "[TRANSLATION] incorporating the crime of contract killings into the Penal Code", provides that "[TRANSLATION] [e]xecutive clemency, amnesty, pardon and commutation of sentence shall be prohibited for the crimes referred to in articles 108-C and 108-D" of the Penal Code relating to contract killings and conspiracy and the offer of contract killings.

relationship between the sentence imposed in the judicial proceedings and its execution (recital 30 above and recital 46 below). The "pardon on humanitarian grounds" in Peru empowers the executive to grant the termination of a sentence ordered by a court for serious human rights violations, on the basis of the aforementioned humanitarian grounds (recital 27 above).

C.4. Criteria to be considered in granting a "pardon on humanitarian grounds" for serious human rights violations

46. The Court has referred to the importance of the principle of proportionality, both in the determination of the sentence and in its execution. It has maintained that the

> punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrated acted, which in turn should be established as a function of the nature and gravity of the events.[105]

Along the same lines, it has taken the view that

> [u]nder the rule of proportionality, in their exercise of their obligation to prosecute such serious violations, States must ensure that the sentences imposed and their execution do not constitute factors that contribute to impunity, taking into account aspects such as the characteristics of the crime, and the participation and guilt of the accused.[106]

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[105] See *Massacre of La Rochela v. Colombia,* Merits, Reparations and Costs. *Judgment of 11 May* 2007. Series C No. 163, para. 196. See also, *inter alia, Vargas Areco v. Paraguay.* Judgment of 26 September 2006. Series C No. 155, para. 108; *Raxcacó Reyes v. Guatemala.* Merits, Reparations and Costs. Judgment of 15 September 2005. Series C No. 133, paras. 70 and 133; *Heliodoro Portugal v. Panamá.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 12 August 2008. Series C No. 186, para. 203, and *García Ibarra et al. v. Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 17 November 2015. Series C No. 306, para. 167.

[106] See *Manuel Cepeda Vargas v. Colombia.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 26 May 2010. Series C No. 213, para. 150. Similarly, in para. 153 of this case, the Court stated that "proceedings followed through up until their conclusion and that fulfil their purpose are the clearest sign of zero tolerance for human rights violations, contribute to the reparation of the victims, and show society that justice has been done", stressing that "administrative or criminal sanctions play an important role in creating the type of institutional culture and competence required to deal with the factors that explain certain structural contexts of violence." See also, *inter alia*, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago.* Merits, Reparations and Costs. Judgment of 21 June 2002. Series C No. 94, paras. 103, 106 and 108; *Heliodoro Portugal v. Panama*, footnote 105 above; and *González et al. ("Campo Algodonero") v. Mexico.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 16 November 2009. Series C No. 205, para. 377. Also, in *Rodríguez Vera* the Court noted that "when exercising its punitive powers, the State's actions should be guided by

Further, it has maintained that "[t]he undue granting of […] benefits could eventually lead to a form of impunity, particularly in cases of the perpetration of serious human rights violations".[107]

47. Consequently, the international obligation to sanction persons responsible for serious human rights violations with sentences that are commensurate with the gravity of the criminal conduct[108] may not be affected unduly or become illusory during the enforcement of the judgment imposing the sanction, in accordance with the principle of proportionality. As discussed (recital 30 above), the enforcement of the judgment is an integral part of the right of access to justice of the victims of serious human rights violations and their family members.

C.4.a. Measures to safeguard the life and integrity of persons deprived of liberty

48. With regard to the State's argument that the pardon "on humanitarian grounds" is permitted even in cases of serious human rights violations, owing to the need to protect the rights of the convicted person and to avoid turning the deprivation of liberty into "[TRANSLATION] a death penalty in disguise" (recital 11.e above),[109] the Court will immediately turn to the standards and factors to be considered with respect to the State's obligation to protect not only the life and integrity of persons sentenced to imprisonment but also the right of access to justice of victims of serious human rights violations and their family members.

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rationality and proportionality, thus avoiding both the leniency characteristic of impunity, and also excesses and abuse in the determination of punishments". *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia,* footnote 65 above.

[107] See *Manuel Cepeda Vargas v. Colombia,* footnote 106 above, paras. 152 and 153.

[108] See Inter-American Convention on Forced Disappearance of Persons, article III; Inter-American Convention to Prevent and Punish Torture, article 6. See, *inter alia*, *Caso Velásquez Rodríguez v. Honduras.* Merits. Judgment of 29 July 1988. Series C No. 4, para. 174; *Osorio Rivera and Family Members v. Peru*, footnote 27 above, para. 114; *Comunidad Campesina de Santa Bárbara v. Peru.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 1 September 2015. Series C No. 299, para. 161, and *Tenorio Roca et al. v. Peru*, footnote 27, paras. 142 and 143.

[109] See Public Hearing of 2 February 2018.

49. The Court has previously held that "[t]he State has a special role to play as guarantor" vis-à-vis persons deprived of their liberty,[110] and therefore has "[TRANSLATION] the obligation […] to safeguard the health and well-being [of those persons] and to ensure that the manner and method of the deprivation of liberty do not exceed the unavoidable level of suffering inherent in their situation". It lies with the State to ensure the right of "[TRANSLATION] every person deprived of liberty […] to live in conditions of detention which are compatible with his or her personal dignity".[111] The Court has unequivocally stated that such rights must be protected with regard to "[TRANSLATION] every person deprived of liberty", without discrimination.[112]

50. The judgment in *Chinchilla v. Guatemala*[113] establishes various standards regarding adequate medical attention,[114] *inter alia*, a State's responsibility to provide persons deprived of liberty who suffer from serious, chronic or terminal illnesses with adequate, with specialized and continuous medical attention, whether inside or outside the prison facility.[115] If that cannot be assured, persons deprived of their liberty must not remain in detention centres. Where the State is unable to provide

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[110] See *Neira Alegría et al. v. Peru.* Merits. Judgment of 19 January 1995. Series C No. 20, para. 60 and *Chinchilla Sandoval et al. v. Guatemala.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 29 February 2016. Series C No. 312, para. 168.

[111] See *Chinchilla Sandoval et al. v. Guatemala,* footnote 110 above, para. 169. See also *"Juvenile Reeducation Institute" v. Paraguay.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, para. 159.

[112] See *Chinchilla Sandoval et al. v. Guatemala,* footnote 110 above, para. 171.

[113] In the case in question, the Court found Guatemala internationally responsible for, *inter alia*, non-compliance with the obligation to protect the right to personal integrity and life of María Inés Chinchilla Sandoval, who was serving a prison sentence in the *Centro de Orientación Femenino* ("COF") [rehabilitation centre for women], where she died on 25 May 2004 after falling from her wheelchair. The Court determined that the State failed to act diligently in providing the necessary urgent medical attention to Ms Chinchilla on the day of her death, either within the COF or by transferring her to a hospital, despite the precarious situation resulting from her afflictions and physical and sensory disabilities. Further, the conditions of her detention before her death did not allow for the practical means or suitable procedures needed to transfer her to medical appointments in hospitals, nor was she guaranteed regular, adequate and systematic medical supervision for the treatment of her afflictions and her disability, or to prevent them from worsening, for example. See *Chinchilla Sandoval et al. v. Guatemala,* footnote 110, paras. 99, 197, 223 and 224.

[114] See *Chinchilla Sandoval et al. v. Guatemala,* footnote 110 above, paras. 171-179 and 199.

[115] See *Chinchilla Sandoval et al. v. Guatemala,* footnote 110 above, paras. 184-185.

such attention in the prison facility, it is "[TRANSLATION] obliged to establish a mechanism or protocol for providing expedient and effective attention to ensure timely and systematic medical supervision, in particular in emergency situations". Procedures established for external hospital consultations "[TRANSLATION] must be flexible enough, in practice, to allow for the provision of prompt medical treatment".[116] It is therefore the State's responsibility to adopt measures to ensure that convicted persons serving a sentence in a prison facility are provided with adequate medical attention, and also to consider, where necessary, alternative measures or modifications to the sentence.

51. Moreover, the European Court of Human Rights ruled in the *Mouisel* case as follows:

> Although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.[117]

52. Accordingly, depending on factors such as state of health, risk to life, conditions of detention and proper treatment facilities (whether at the prison or by transfer to a medical establishment), it is the State's responsibility to determine the most proportionate administrative or legal measure necessary for protecting the life and integrity of the convicted person, provided that such a measure is duly granted and has a legitimate purpose, and is not merely to relinquish oversight of the execution of the sentence.

53. In cases of serious human rights violations, such administrative or legal measures must be those that least restrict the victims' right of access to justice (recitals 56 and 57 below) and must be applied in very extreme cases and only where absolutely necessary. This does not mean that the legal or other measure to be adopted by the State need be one that releases the convicted person, much less

[116] See *Chincilla Sandoval et al. v. Guatemala*, footnote 110 above, para. 199.
[117] See ECtHR, *Mouisel v. France*, No. 67263/01, Judgment of 14 November 2002, para. 40.

one that implies the termination of the sentence. It must first be determined, in accordance with other factors, whether there is a measure that might allow for the provision of effective medical attention (for example, by ensuring that the convicted person is able in practice and without delay to attend the necessary medical appointments or procedures and to have access to measures and protocols affording emergency medical attention) (recital 50 above) or whether it is necessary to apply a suitable legal measure that modifies the sentence or permits an early release (recitals 57 and 68 below).

C.4.b. Right of access to justice of victims of serious human rights violations

54. Even though the application of the legal institution of "pardon on humanitarian grounds" in Peru is for the legitimate purpose of protecting the life and integrity of the convicted person (recitals 27, 49 and 50 above), it should be recalled that this pardon is granted on the basis of a discretionary power of the President of the Republic (recital 25 above) since, in the case *sub judice*, it was applied to a case involving crimes against humanity, as found by domestic criminal courts (recitals 9, 20 and 21 above) and with regard to which the Court stated the following in its Judgment in the *La Cantuta* case:

> [TRANSLATION] they go far beyond what is tolerable for the international community and are an affront to humanity as a whole. The damage caused by such crimes is still taking its toll on national society and on the international community, which demand the investigation and punishment of those responsible.[118]

55. In this vein, it should be taken into account that when the President of the Republic adopts a discretionary measure that implies the pardon of a sentence, it has a direct impact on the principle of proportionality (recitals 46 and 47 above), the latter having been satisfied through the task entrusted to the judges and the courts of the judicial branch to issue a judgment determining a sentence – in an individualized and reasoned manner – that is commensurate with the gravity of the

[118] See *La Cantuta v. Peru.* Merits, Reparations and Costs, footnote 2, para. 225. See, in that sense, *Almonacid Arellano et al. v. Chile.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 26 September 2006. Series C No. 154, para. 105.

offence and taking into account other factors and circumstances noted in the course of the criminal proceedings.

56. Consequently, in criminal proceedings involving cases of serious human rights violations in which a sentence proportional to the infringed rights has been imposed, the subsequent pardon of that sentence by decision of the President of the Republic takes a heavier toll on the right of access to justice of victims of serious human rights violations and their family members[119] in terms of the execution of the sentence handed down in the criminal judgment (recitals 30, 46 and 47 above).

57. In addition, if a measure being contemplated will affect a sentence imposed for crimes constituting serious violations of human rights, in particular when it is a measure pursuant to which the executive may, by means of a discretionary decision, terminate that sentence, the possibility of requesting a judicial review of the measure must be afforded, so that an assessment can be made of the extent to which it might affect the rights of the victims and their family members, and to ensure that it has been duly granted, having regard to the international law standards mentioned previously (recitals 46-53 and 55-56 above). Given that serious human rights violations are involved and taking into account the development of international criminal law (recitals 40-42 above),[120] it is necessary to consider not

[119] Similarly, the Court has stated that "[TRANSLATION] [i]n order for the State to fulfil its duty to adequately safeguard various rights protected in the Convention, including the right of access to justice, it must fulfil its duty to investigate, prosecute and, where applicable, punish and remedy serious human rights violations", and that "[TRANSLATION] [t]o that end, the State must comply with due process and ensure, *inter alia*, the principle of reasonable time periods, the *inter partes* principle, the principle of the proportionality of the punishment, the effective resources and the implementation of the judgment. See *Massacre of La Rochela v. Colombia*, footnote 105 above, paras. 146 and 193, and *Workers of the Hacienda Brasil Verde v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 20 October 2016. Series C No. 318, para. 412.

[120] As regards the International Criminal Court, in addition to the requirements set forth in the Rome Statute relating to the serving of a determined period of the sentence by the convicted person with the investigations and execution of the judgments (recital 41 above), its Rules of Procedure and Evidence establish other factors or criteria to take into account in determining the reduction of sentence: (i) "[t]he conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime"; (ii) "[t]he prospect of the resocialization and successful resettlement of the sentenced person"; (iii) "[w]hether the early release of the sentenced person would give rise to

only the convicted person's state of health but also other factors or criteria, such as whether a significant portion of the prison sentence has been served and whether the civil reparations imposed in the sentence have been paid; the prisoner's conduct in the establishment of the truth; recognition of the gravity of the crimes perpetrated and the prisoner's rehabilitation; and the potential effects that the prisoner's early release would have on society and on the victims and their family members.

58. For the purposes of the foregoing, the Court will assess below the possibility of conducting a judicial review in Peru of the pardon granted "on humanitarian grounds", so as to enable a court to determine whether a measure granted by the Executive to safeguard the right to life and integrity of a person criminally convicted for serious human rights violations is proportional to the right of access to justice of the victims and their family members. In addition to carrying out the aforementioned assessment (recitals 52 and 53-57 above), a judicial review of the

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significant social instability"; (iv) "[a]ny significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release"; and (v) "[i]ndividual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age". See rule 223 of the Rules of Procedure and Evidence of the International Criminal Court, available at: https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceSpa.pdf. Likewise, in the cases of the International Criminal Tribunals for the former Yugoslavia and for Rwanda (recital 40 above), their respective rules of procedure set forth that "[i]n determining whether pardon or commutation is appropriate, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor." See rule 125 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, available at: http://www.icty.org/en/documents/rules-procedure-evidence; rule 126 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, available at: http://unictr.unmict.org/en/documents/rules-procedure-and-evidence. For example, in the case of *Biljana Plavšić*, before the Criminal Tribunal for the former Yugoslavia, the President granted her "early release" after considering that she had served two thirds of her sentence, had cooperated with the Prosecutor by providing testimony and interviews for the investigation of other cases and had demonstrated "substantial evidence of rehabilitation". To conclude the latter, it considered that she: (i) had "accepted responsibility for her crimes from an early stage of the proceedings"; (ii) expressed to the Tribunal "her remorse fully and unconditionally"; and (iii) the detention centre report indicated that she "exhibited good behaviour during the course of her incarceration". See "Decision of the President on the application for pardon or commutation of sentence of Mrs. Biljana Plavšić", 14 September 2009, paras. 8-12. Available at: http://www.icty.org/x/cases/plavsic/presdec/en/090914.pdf.

pardon must allow for a rigorous, strict and objective examination of the agreement between the factual aspects and the legal requisites laid down in Peruvian law concerning the "humanitarian grounds" of the pardon.