

**THE WAR ON TERRORISM: PERU'S PAST AND
PRESENT, A LEGAL ANALYSIS**

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**The John Marshall Law School
Chicago, Illinois
August, 2004**

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I.

INTRODUCTION

Due process of law embodies substantive rights and procedural guarantees that protect a person from the arbitrary and capricious acts of his or her government. These rights include life, liberty, and security of person; recognition before the law and equal protection of the law; freedom from arbitrary arrest and detention; freedom from torture and cruel inhumane, and degrading treatment or punishment; presumption of innocence; and fair trial. There are currently numerous international human rights instruments that afford every individual these rights, such as the American Convention on Human Rights, Inter-American Convention to Prevent and Punish Torture, International Covenant on Civil and Political Rights, and Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment. Peru's past is filled with horrific stories of violence involving terrorism and the violent reaction to terrorism by its government, especially after the April 5, 1992, *coup-d-état*. Peru is slowly coming out of its tragic past. Currently, in its war on terror, Peru is making substantial progress in improving its human rights record, but in some important respects she falls short of her obligations under international human rights norms.

During the reign of President Alberto Fujimori, core due process rights, which were previously protected by the Constitution, were obliterated in the arrest, prosecution and sentencing of alleged terrorists. Under the anti-terrorism laws and numerous presidential decrees, persons arrested for alleged terrorist activities were tortured, interrogated, forced to confess, and then tried in closed military trials presided by hooded or faceless judges and prosecutors. Since Fujimori's removal from office, the Peruvian Constitutional Court and the

Inter-American Court of Human Rights, have directed Peru to alter its judicial system and reform its anti-terrorism laws. Some legislative changes were eventually made in 2003.

This report analyzes the 1992 terrorism law which caused the detentions, arrests, interrogations, trials and the sentencing of many Peruvians and some foreigners and the disappearances and murder of many other individuals. This report also discusses the decision of the Peruvian Constitutional Court, which was prompted by the rulings of the Inter-American Court of Human Rights (IACHR), and the subsequent legislative changes Peru made to its anti-terrorism law in 2003. The report will also evaluate Peru's anti-terrorism laws and procedures against international human rights standards that bind Peru outside the Inter-American human rights system.

II.

PERU'S ANTI-TERRORISM LAWS

In a report concerning "Terrorism and Human Rights", the Inter-American Commission on Human Rights recognized that States have criminalized terrorism in one of two ways: some have chosen to prescribe a specific crime of terrorism based on commonly identifiable characteristics of terrorist violence, while others, instead of prescribing terrorism as a separate crime, have added to existing and well-defined common crimes, such as murder, a terrorist intent, and increased the punishment for the crime depending on the severity of the terrorist violence.¹

In Peru, as early as 1981, terrorism was criminalized in the following terms:

Those who, with the goal of provoking or maintaining an state of anxiety, alarm or fear among the population or part of it, committed acts that may endanger life, health or patrimony, or that are directed to destroy or damage public buildings, means of communication or transportation, using methods capable of

¹ Inter-American Commission on Human Rights, "Report on Terrorism and Human Rights", October 2002.

provoking major havoc, or seriously disturbing public peace, or affecting international relations or the security of the state, will be punished with imprisonment for no less than ten and no more than twenty years.²

Subsequent Peruvian laws eliminated reference to the actor's intent and punished the objective result instead. Terrorism was classified as an "offense of danger" that punishes an act for the likely harm that it will produce.

On April 5, 1992, then Peruvian President Alberto Fujimori restructured the Peruvian government.³ As a result, the 1979 Constitution of Peru was replaced by a new Constitution, which was ratified in 1993, giving the President power to issue decrees, having the force of law.⁴ In response to increased terrorist attacks, President Fujimori issued Decree Law 25475 (hereinafter DL 25475) to prosecute terrorism.⁵ The law included guidelines for the arrest, detention, investigation, trial and sentencing of persons accused of acts of terrorism.⁶

A. 1992 Decrees

1. Definition of Terrorism

a. Decree Law 25475, Article 2 – Definition of Terrorism

Article 2 of DL 25475 defined the crime of terrorism as an act that:

provokes, creates, or maintains a state of anxiety, alarm, or fear in the population or in a sector thereof, performs acts against life, the body, health, personal liberty and security, or against property, against the security of public buildings, roads, or means of communication or of transport of any type, energy or explosive materials or artifacts, or any other means capable of causing damage or grave disturbance of the public peace, or affect the international relations or the security of society and the State.⁷

² Peru Legislative Decree N° 46 (March, 1981)

³ *Second Report on the Situation of Human Rights in Peru*, Inter-Am. C.H.R. OEA/Ser.L/V/II/106, doc. 59 rev. (2000) [hereinafter Peru Report 2000].

⁴ Const. Peru, art. 118(8) available at <http://www.georgetown.edu/pdba/Constitutions/Peru/per93.htm> [hereinafter Const. Peru].

⁵ Decree Law No. 25475, art. 12, May 5, 1992, available at <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/25475.pdf>. [hereinafter DL 25475].

⁶ *Id.*

⁷ <http://www.cidh.org/countryrep/Peru2000en/chapter2a.htm>, para. 79.

The legislation also provided that acts of terrorism would be punished with incarceration for a period of not less than twenty years.⁸

This legislative definition of terrorism has been harshly criticized as too “abstract and vague.” It does not notify a person exactly what acts or omissions may trigger criminal liability.⁹ Because the crime did not include an element of intent to commit terrorist acts, negligible conduct such as petty theft could ultimately yield a conviction and sentence of 20 years to life in prison. The International Commission of Jurists stated that conduct in violation of Article 2 “need not be associated *at all* with terrorism.”¹⁰ There is no distinction between the common criminal and the work of a terrorist. “By not linking the proscribed conduct to the subjective element of terrorist intent, this decree law can be interpreted to permit law enforcement officials to regard almost any act of violence as a crime of terrorism.”¹¹

The Inter-American Commission’s 2000 Report found that Article 2 violated Article 7(2) of the American Convention in two ways: first, for failing to give a clear definition of terrorism and second, for disproportional punishment.¹² Under the Convention, no person may be deprived of his or her liberty without clear notice and a clear definition that his or her actions are criminal.¹³ Furthermore, Article 2 allowed the incarceration of one suspected of a terrorist act or collaborating in terrorist acts for long periods of time, regardless of whether this person actually committed the act. Article 2, the Commission concluded, “is a grave threat to the people’s juridical security...a body of law contrary to universally accepted principles of legality, due

⁸ *Peru Report*, at ¶79.

⁹ *Id.* at ¶80.

¹⁰ International Commission of Jurists, Report on the Administration of Justice in Peru (published in Spanish by *Instituto de Defensa Legal*, Lima, 1993, p. 45) (citing Decree Law No. 25475)

¹¹ *Id.*

¹² *Peru Report*, at ¶80.

¹³ *Id.* at ¶82.

process, judicial guarantees.”¹⁴ The right to liberty set forth in Article 7(2) of the Convention demands that no person may be subjected to arrest or imprisonment for an act that is disproportionate to the crime charged or is unforeseeable.¹⁵ Imprisonment for petty theft that equates the act as a crime of terrorism is both disproportionate and unforeseeable.

b. Decree Law 25475, Article 7 – Engaging in or Public Support of Terrorism

Article 7 consisted of two parts. The first part of Article 7 stated that an individual who is an accessory for the crime of terrorism or a leader of terrorism will receive 6-12 years in prison upon conviction.¹⁶ The second part of Article 7 stated that if the act was committed outside of Peru by a Peruvian national, the individual would be stripped of his or her citizenship and given a prison sentence of 6-12 years.¹⁷

2. Police Procedure

a. Decree Law 25475, Article 12 – Pre-Trial Detention

Article 12 of DL 25475 established authority for police investigations into crimes of terrorism.¹⁸ This authority was vested in DINCOTE, a division of the National Police of Peru. It decided whether there was sufficient evidence against an alleged terrorist to indict him or her.¹⁹ According to the Commission this authority violated Article 8 of the Convention by denying the accused due process of law. It allowed the DINCOTE to “impose incommunicado detention unilaterally, without consulting with a judge.”²⁰

¹⁴ *Id.* at ¶81.

¹⁵ *Id.* at ¶82.

¹⁶ DL 25475, at art. 7.

¹⁷ *Id.*

¹⁸ *Id.* at art.12.

¹⁹ *Id.* at ¶ 87. *Peru Report*, at ¶ 87.

²⁰ *Id.*

Article 12(d) of the 1992 law allowed the DINCOTE to detain an individual for 15 days incommunicado.²¹ During this period, under Article 12(c), DINCOTE's only responsibility was to notify a judge and the Public Ministry within 24 hours.²² The Commission Report found that these provisions violated Articles 7 and 8 of the Convention, which guarantee that a detainee must be presented promptly before a judge and that he or she has a right to communicate freely with counsel.²³ Under Article 8(2)(d) of the Convention, every detainee has the right to choose counsel freely, regardless of whether counsel also represents other detainees.²⁴

Moreover, the Commission observed that the 15 day detention period is conducive to torture and false confessions. This violates Article 5(2) of the Convention that prohibits torture or cruel, inhuman or degrading treatment. Article 8(3) of the Convention prohibits the use of statements obtained by torture as evidence at trial.²⁵

The International Commission of Jurists vividly described the environment of incommunicado detention in its own report on Peru:

...the detainee is completely controlled by the police and is not subject to any effective judicial supervision....the suspect when questioned normally is kept bound and blindfolded and never sees his interrogators....generally there are eight to ten police officers exerting tremendous pressures on the detainee....the suspect is questioned....as a rule....at night.²⁶

3. Right to Defense Counsel

a. Decree Law 25475, Article 12(f) – Access to Defense Counsel

Under Article 12(f) of DL 25475, a suspect could have counsel of his or her choice.²⁷

However, no contact was allowed with counsel before the accused had given a statement in the

²¹ *Id.* at ¶ 88. DL 25475 at art.12.

²² *Peru Report*, at ¶ 1188.

²³ *Id.* at ¶ 90.

²⁴ *Id.*

²⁵ *Id.* at ¶ 93 and 94.

²⁶ International Commission of Jurists, Report on the Administration of Justice in Peru, (published in Spanish by *Instituto de Defensa Legal*, Lima, 1993, p. 60).

presence of a representative from the Public Ministry.²⁸ Article 12 also limited each privately retained defense attorney to only one client accused of terrorism.²⁹ Public defenders were not given such a limitation.³⁰ However, only one year later, this limitation on private defense attorneys was lifted when Article 18 was derogated by Article 4 of Decree-Law 26248 (hereinafter DL 26248), a law which modified several of the 1992 anti-terrorist decrees.³¹

4. Investigatory and Trial Phases

a. Decree Law 25475, Article 13 – Investigatory and Trial Phases

Article 13 of DL 25475 established procedures for the trial of a person charged with terrorism.³² The judge, acting on a complaint issued by the prosecutor, should order the initiation of the investigating phase within twenty-four hours of the suspect's detention.³³ At this point the judge issued an arrest warrant. The suspect remained in detention during the investigation and trial.³⁴ The trial was limited to fifteen days of testimony and evidence after which the verdict and sentence were announced by the judge.³⁵ The trial itself was not open to the public.³⁶ Defense counsel was not allowed to seek substitution of judges.³⁷ Moreover, Article 13(h) of the 1992 law prevented judges from recusing themselves.³⁸ Finally, the anonymity of the judges allowed judges, who would otherwise disqualify themselves, to remain

²⁷ *Id.* at art. 12(f). DL 25475, at art.12(f).

²⁸ *Id.*

²⁹ *Id.* at art. 18.

³⁰ *Id.*

³¹ Decree Law No. 26248, art. 4, November 24, 1993, *available at* <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/26248.pdf> [hereinafter DL 26248].

³² DL 25475, at art. 13.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at art. 13(f).

³⁶ *Id.*

³⁷ *Id.* at art. 13(h).

³⁸ DL 25475, at art. 13(h).

on the bench.³⁹ These closed proceedings violated Article 8(5) of the Convention, which recognizes a right to a public trial.⁴⁰

b. Decree Law 25475, Article 13(c) – Witnesses

Article 13(c) of DL 25475 placed several restrictions on the use of witnesses at trial. Under this article, police or military officers who participated in the writing of the official report and preparing the file were prohibited from testifying as witnesses at the trial of the accused.⁴¹ Furthermore, defense counsel was prohibited from interviewing these individuals prior to trial.⁴²

c. Decree Law 25475, Article 15 – Faceless Judges

Article 15 of DL 25475 allowed for the use of faceless judges in terrorism trials.

It provided that the identity of the judges and members of the Public Ministry, and of the justice auxiliaries who intervene in the trial of crimes of terrorism, shall be secret, to which end measures will be adopted to guarantee that measure...the judicial rulings shall not bear signatures or seals of the judges participating, nor of the justice auxiliaries...for this purpose, codes and keys will be used, which shall also be kept secret.⁴³

Under this mandate, the identity of the judges, the members of the Public Ministry, as well as that of the Justice Auxiliaries who participated in terrorism trials, were kept secret. To maintain their identity secret, judges and Justice Auxiliaries were not required to sign or place their seals on orders or judgments. The original purpose of this drastic law was to “protect judges, prosecutors, and other officials involved in the judging of alleged members or collaborators of dissident armed groups, in the face of possible reprisals.”⁴⁴

d. Decree Law 25499 – Repentant Terrorist Law

³⁹ *Id.*

⁴⁰ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, Article 8(5).

⁴¹ DL 25475, at art. 13(c).

⁴² *Id.*

⁴³ *Peru Report*, at ¶ 102.

⁴⁴ *Id.* at ¶ 105.

DL 25499, also known as the Repentant Terrorist Law, was issued in May of 1992.⁴⁵ This law provided for the reduction, exemption or remission of a sentence for one accused or of one already sentenced for terrorism if he or she provided “useful, truthful and detailed information” about terrorist groups and if such information assisted the police in disrupting further terrorist activity.⁴⁶ However, this provision was not made available to persons detained or sentenced for their roles as leaders of terrorist cells or for acts of murder.⁴⁷ The law also called for the Public Ministry to confirm the information provided by the repentant terrorist, without independent verification.⁴⁸

5. Sentencing

a. Decree Law 25475, Article 3(a)(b)(c) – Penalty for Terrorism

Article 3(a) of DL 25475 imposed a life sentence for rebel leaders and persons directing the commission of violent acts as prohibited by Article 2 of DL 25475.⁴⁹ Article 3(b) mandated imprisonment of no less than 30 years to members of terrorist organizations who carried out violent acts.⁵⁰ Article 3(c) imposed imprisonment of not less than 25 years for any member of a terrorist organization who extorted, robbed, kidnapped, or took money, goods, or services from a governmental unit or private individual by unlawful means.⁵¹

b. Decree Law 25475, Article 4 – Penalty for Collaborating with Terrorists

Article 4 of DL 25475 mandated imprisonment of not less than 20 years for a person who voluntarily obtained, collected, or provided goods or methods of communication in collaboration

⁴⁵ Decree Law No. 25499, May 12, 1992, *available at* <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/25499.pdf> [hereinafter DL 25499].

⁴⁶ *Id.*

⁴⁷ *Id.* at art. 1 (III).

⁴⁸ *Id.* at art. 2.

⁴⁹ DL 25475, at art. 3(a).

⁵⁰ *Id.* at art. 3(b).

⁵¹ *Id.*

with terrorists in violation of this Decree.⁵² The article assigned the same imprisonment to those who collaborated in any way in the carrying out of crimes declared illegal in this Decree, or those who advanced the objectives of terrorist organizations.⁵³

c. Decree Law 25475, Article 5 – Punishment for Membership in a Terrorist Organization

Article 5 of DL 25475 called for the imprisonment of not less than 20 years for any person who was a member of a terrorist organization.⁵⁴

III.

CONSTITUTIONAL COURT OF PERU AND THE 2003 AMENDMENTS

On January 3, 2003, the Constitutional Court of Peru issued a ruling in the case of *Marcelino Tineo Silva y más de 5,000 ciudadanos* (hereinafter *Tineo Silva*).⁵⁵ The Constitutional Court recognized its jurisdiction over challenges to the constitutionality of Peruvian laws and decrees.⁵⁶ In *Tineo Silva*, the Tribunal reviewed several provisions of the 1992 anti-terrorism laws decreed by President Fujimori and the Peruvian Congress in light of the 1993 Constitution. The Court upheld many provisions of the law but declared other sections of the laws unconstitutional or in violation of the American Convention on Human Rights.

A. DL 25475

1. Definition of Terrorism

Article 2 of DL 25475 presented a major problem to the Constitutional Court. It noted that Article 2 mirrored the provision of DL 25659 which defined the crime of treason.⁵⁷ DL 25659, creating the crime of treason, is duplicative of Article 2 of DL 25475 defining terrorism.

⁵² *Id.* at art. 4.

⁵³ *Id.*

⁵⁴ *Id.* at art. 5.

⁵⁵ “*Marcelino Tineo Silva y más de 5,000 ciudadanos*”, TC [No. 8231] D.O. 236530 [hereinafter *Tineo Silva*].

⁵⁶ *Id.* at 236532.

This duplication and re-characterization of the same crime was found to have violated the principle of legality in the Peruvian Constitution because it gave the Public Ministry and the judiciary an unacceptable degree of discretion as to which crime fit a particular situation.⁵⁸ The Constitutional Court cited the judgment of the International Court of Human Rights⁵⁹ in the *Petruzzi* case, stating that the same definition for two separate crimes (terrorism and treason) adversely affected the legal rights of the accused with respect to the applicable sanction, the appropriate prosecuting authority, and the corresponding criminal process.⁶⁰

Next, the Constitutional Court analyzed the individual elements of DL 25475,⁶¹ finding that there were three elements that constitute terrorism under DL 25475. The first element of DL 25475 occurs when “[t]he party that provokes, creates or maintains a state of anxiety, alarm or fear in the population or a part of the population”⁶² The Constitutional Court found that the legislation opted for an objective standard as distinguished from a subjective standard of responsibility found in prior anti-terrorist legislation in DL 46.⁶³ Specifically, the Constitutional Court cited the Constitution of Peru, Article 2, Clause 24(d), which states that “no one will be condemned for an act or omission that is not previously qualified in law, in an express and unmistakable manner, as a punishable infraction.”⁶⁴ The Constitutional Court also noted that Article 2, Clause 24(d) of the Constitution of Peru reflects the principle found in Article 11 of the Universal Declaration of Human Rights, Article 9 of the American Convention on Human Rights, and Article 25 of the International Covenant of Civil and Political Rights.⁶⁵ The

⁵⁷ *Id.* at 236534.

⁵⁸ *Id.* at 236535.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Tineo Silva*, at 236536.

⁶² DL 25475, at art. 2.

⁶³ *Tineo Silva*, at 236536.

⁶⁴ *Id.* at 236535.

⁶⁵ *Id.*

Constitutional Court ultimately held that the Constitution of Peru and Article 12 of the Penal Code of 1991 require a subjective element of responsibility as a predicate for prosecution and punishment.⁶⁶ The Constitutional Court hesitated to declare the wording of DL 25475 unconstitutional but instead mandated that the decree should be read to include a subjective intent of the individual. It rejected an objective responsibility standard.⁶⁷

The second element in Article 2 of DL 25475 addresses acts directed against “the property, the security of public buildings, thoroughfares or communication media or transport of any type, energy or transmission towers, motor installations or any other goods or service.”⁶⁸ The open clauses “of any type” or “any other goods or service” were added to allow judges to examine the charges in light of the purpose of the law.⁶⁹ With respect to the second element, the Constitutional Court found that the prohibited conduct should be limited to goods or services that are protected in Title XII of the Second Book of the Penal Code to reduce the margin of application of DL 25475.⁷⁰ Specifically, the Constitutional Court took issue with two phrases in the second element: “media or transportation of *any type*” and “*any other good or service*” and limited the application to crimes against public security that affect the ways and means of transportation or communication.⁷¹ The Constitutional Court found that this violated Article 139(9) of the Constitution of Peru which delineates penal rights.⁷²

The third element in Article 2 of DL 25475 is the use of “arms, materials or explosive devices or any other medium capable of causing damage or serious injury to the public peace or

⁶⁶ *Id.* at 236537.

⁶⁷ *Id.*

⁶⁸ DL 25475, at art. 2.

⁶⁹ *Tineo Silva*, at 236537.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

affecting international relations or the security of the society and the State.”⁷³ The Court found that within the third element, the use of “arms, materials, or explosive devices” must first be connected to an act that causes a disruption to public peace.⁷⁴ Once the use of arms or explosives is shown to have disrupted the public peace, a judge should then evaluate whether the intent of the actor in using arms or explosives was to disrupt the public peace.⁷⁵

Ultimately, the Constitutional Court found that Article 2 of DL 25475 did not give adequate notice to a person as to what acts are prohibited and what acts are permitted.⁷⁶ The Constitutional Court found that Article 2 requires proof of three objective elements in addition to the subjective intent of the actor.⁷⁷ Anything less would not be sufficient to constitute the crime of terrorism.⁷⁸ There has been no further legislation to clear up the definition of current terrorism. To date, the guidelines of the Constitutional Court is the most current definition of “terrorism”.

2. Engaging in the Support of Terrorism

The Constitutional Court declared both parts of Article 7 unconstitutional.⁷⁹ The Constitutional Court found that the first part of the law failed to accurately describe what “apologetic” acts violated its provisions.⁸⁰ This vagueness was deemed harmful to the constitutional right of freedom of expression and dissemination of thought.⁸¹ Therefore, the Constitutional Court concluded that the legislature should narrow the law and to apply its provisions only to the following situations: inciting a new act of terrorism, publicly praising an

⁷³ *Id.* at 236538.

⁷⁴ *Id.*

⁷⁵ *Tineo Silva*, at 236538.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 236549-50.

⁸⁰ *Id.* at 236539.

⁸¹ *Tineo Silva*, at 236539.

act of terrorism, or praising a convicted terrorist prisoner.⁸² The Constitutional Court also stated that such praise must reach a wide audience and offend the democratic rules of plurality, tolerance, and consensus.⁸³ The Constitutional Court then directed that sentencing should follow Section 316 of the Penal Code.⁸⁴

As to the second part, the Constitutional Court held that stripping a Peruvian of his or her citizenship violates international treaties and Article 2, Clause 21 of the Peruvian Constitution.⁸⁵ Therefore, that part of the law was also unconstitutional.⁸⁶

In 2003, Congress passed Legislative Decree 924 in response to the Constitutional Court's ruling on Article 7. The legislative decree inserted a new paragraph in Penal Code 316, stating that an "apologist" who incites the commission of an act of terrorism, apologizes for a past terrorist crime, or praises a convicted terrorist will be sentenced to not more than 12 and not less than 6 years.⁸⁷ The government can also impose fines as well as other restrictions, such as barring the person from government employment and prohibiting the person from carrying firearms.⁸⁸

3. Police Procedure

The Constitutional Court examined the extent of governmental authority to hold suspects incommunicado and ruled that such authority must be clearly delineated by law, and that such authority cannot be absolute.⁸⁹ The plaintiffs in *Tineo Silva* argued that Article 12(d) of DL 25475 violated Article 24(g) of the 1993 Peruvian Constitution.⁹⁰ The Constitutional Court held

⁸² *Id.* at 236538.

⁸³ *Id.* at 236539.

⁸⁴ *Id.* at 236538.

⁸⁵ *Id.* at 236549.

⁸⁶ *Id.* at 236550.

⁸⁷ Decree Law No. 924, February 19, 2003, 8278 D.O. 239438 [hereinafter DL 924].

⁸⁸ Cod. Pen. Decree Law No. 635, August 1, 1981, 316 [hereinafter Cod. Pen.].

⁸⁹ *Tineo Silva*, at 236546.

⁹⁰ *Id.*

that a suspect may be held incommunicado only if such detention would assist the police in investigating terrorist acts, however such confinement must comply with time limits already established by Peruvian law.⁹¹ The Constitutional Court stated that holding a suspect incommunicado for any other reason would violate the Peruvian Constitution as well as rulings by the Inter-American Court of Human Rights.⁹² Ultimately, the Constitutional Court declared Article 12(d) of DL 25475 unconstitutional, as it did not clearly delineate the authority in ordering incommunicado detention, although the Constitutional Court found that such authority should normally lie with the investigatory judge.⁹³

Several changes were established in 2003 by DL 922 regarding the processing of terrorism suspects. Article 12(2) of DL 922 now allows the prosecutor to request a judge to order the incommunicado detention of a suspect.⁹⁴ This establishes authority in the investigative judge and addresses the problem the Constitutional Court found in Article 12(d) of DL 25475.

4. Right to Defense Counsel

The Constitutional Court refrained from making a final ruling on Article 12(f) of DL 25475, since this article was derogated by Article 2 of DL 26447, passed in 1994. However, the Constitutional Court discussed the right to counsel as a fundamental right under Article 139(14) of the 1993 Peruvian Constitution.⁹⁵ This right includes the right to freely choose an attorney and to communicate with and be advised by an attorney.⁹⁶ DL 26477 derogated Article 12(f) and now allows a suspect to designate a defense attorney and have his or her case evaluated by that attorney starting at the time of arrest.⁹⁷

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Decree Law No. 922, art. 12(2) February 11, 2003, [8270] D.O. 238970.

⁹⁵ *Tineo Silva*, at 236541.

⁹⁶ Const. Peru, art. 139(14).

⁹⁷ *Tineo Silva*, at 236542.

5. Investigatory and Trial Phases

a. Detention

The plaintiffs in *Tineo Silva* argued that pre-trial detention as authorized in Article 13(a) of DL 25475 violated the presumption of innocence guarantee found in the Peruvian Constitution.⁹⁸ Article 2 of the 1993 Constitution declared that a person is innocent until he or she has been found guilty of a crime.⁹⁹ The plaintiffs also argued that pretrial detention violated Articles 7 and 8 of the American Convention on Human Rights.¹⁰⁰ The Constitutional Court rejected the challenge, reasoning that the pretrial detention provision does not require the investigating judge to declare innocence or guilt; detention is merely used as a preventive measure which is permissible under Article 135 of the Criminal Procedure Code.¹⁰¹ The Constitutional Court noted that the legislature had provided reasons for preventive detention, such as deterring the accused from further criminal activity or preserving public order. The Court concluded that the pre-trial detention law was not *per se* unconstitutional.¹⁰² It cautioned, however, that the application of this provision may violate the Constitution as well as Peru's obligations under international human rights treaties.¹⁰³

The secrecy of trials was authorized under Article 13(f) of DL 25475.¹⁰⁴ Currently, Article 12(8) of DL 922 calls for public hearings except where national security, public order, morality or any other relevant reason is advanced.¹⁰⁵ A judge may on his or her own initiative, or at the request of any party, restrict public hearings during the trial and order individuals who

⁹⁸ *Id.* at 236543. DL 25475, Art. 13(a) authorized, *inter alia*, the Criminal Court judge to grant unconditional release pursuant to Article 201 of the Criminal Procedure Code.

⁹⁹ Const. Peru, art. 2(24)(e).

¹⁰⁰ *Tineo Silva*, at 236544, (citing American Convention on Human Rights, at art. 7, 8).

¹⁰¹ *Id.* at 236543.

¹⁰² *Id.* at 236544.

¹⁰³ *Id.*

¹⁰⁴ DL 25475, at art. 13(f).

¹⁰⁵ DL 922, at art. 8.

are not parties to a case to vacate the courtroom when certain evidence is presented.¹⁰⁶ Where the judge orders a non-public, or a closed hearing, the accused enjoys the right to an automatic appeal.¹⁰⁷

b. Faceless Judges

The Court found that Article 15 had been repealed with the passage of DL 26671, which declares that all judges who pass judgment on the crime of terrorism must be properly designated and identified.¹⁰⁸

c. Right to Defense Counsel

The Constitutional Court found that restrictions on access to counsel under the 1992 laws had significantly interfered with the right of the accused to freely choose his or her attorney, a right which is guaranteed under the Peruvian Constitution.¹⁰⁹ It recognized, however, that the State may restrict a constitutional right when it seeks to protect other constitutional rights.¹¹⁰ The Constitutional Court referred to the *Petruzzi* case decided by the Inter-American Court of Human Rights (hereinafter IACHR), in which the IACHR found that although the restrictions to counsel had limited the number of attorneys available, it was not a *per se* violation of the American Convention on Human Rights.¹¹¹ Looking at the problem from the perspective of the attorneys, the Constitutional Court found that while the Constitution provides that each person may work freely, government limitations imposed on defense attorneys did not materially harm this constitutional right.¹¹²

d. Witnesses

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at art. 12(8).

¹⁰⁸ *Tineo Silva*, at 236541.

¹⁰⁹ *Id.* at 236542.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

The Constitutional Court acknowledged the right of the accused to present proof under Article 139(3) of the 1993 Constitution.¹¹³ This provision of the Constitution guarantees that the accused cannot be deprived of the predetermined jurisdiction of his or her case, or have the case heard in a forum not previously established by law.¹¹⁴ The Constitutional Court also recognized the right of the accused to call witnesses on his or her behalf and to question them as guaranteed by Article 8(2)(f) of the American Convention on Human Rights.¹¹⁵ However, the Constitutional Court observed that these rights are subject to reasonable restrictions, if such restrictions advance and protect other constitutional rights.¹¹⁶ Since the restriction on the presentation of witnesses is limited to members of the National Police of Peru, the Constitutional Court found that the restriction was necessary to protect the lives of these police officers and their families, and was therefore constitutional.¹¹⁷ However, the Constitutional Court noted that a general prohibition on the right of the accused to call police officers, who has detained him or her, as witnesses and to confront them in open court is unconstitutional.¹¹⁸

Next, the Constitutional Court discussed the Peruvian method of evaluating evidence in a criminal trial. Since Peru does not employ a system of “fixed value” proof,¹¹⁹ Article 238 of the Criminal Procedure Code requires the judge to evaluate each piece of evidence by using “equitable criteria.”¹²⁰ Therefore, the Constitutional Court concluded that a trial judge should normally require some corroborating evidence for a police report that weighs heavily in favor of the judge’s verdict.¹²¹ This also applies to official reports which had been compiled during the

¹¹³ *Id.* at 236544

¹¹⁴ Const. Peru, art. 139(3).

¹¹⁵ *Tineo Silva*, at 236544.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 236545.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Tineo Silva*, at 236542.

preliminary investigation.¹²² However, Article 13 of DL 25475 placed strict limits on the presentation of witnesses at trial.¹²³ Certain witnesses, including police officers and government investigators, who were involved in the compilation of the official police report were excused from testifying.¹²⁴ The Constitutional Court found this limitation to be constitutional as long as it is used to protect the safety of police officers and their families.¹²⁵ The Constitutional Court noted that the atmosphere of violence against police officers is a persuasive reason in declaring the limitation constitutional.¹²⁶

The current law has not changed that practice. In fact, DL 922 exacerbates the constitutional problem of confrontation because it allows the trial judge to remove the accused from the courtroom if his or her presence would inhibit the nature of the witness' testimony,¹²⁷ be it a police officer or a repentant terrorist who has evaded incarceration by naming the accused as a terrorist.

The Constitutional Court acknowledged that the right of the accused to cross-examine witnesses is protected in Article 8(2)(f) of the American Convention on Human Rights,¹²⁸ a provision which was integrated into the 1993 Peruvian Constitution under the Constitution's "Fourth, Final and Transitory Disposition", calling for the interpretation of the Peruvian Constitution in accordance with Peru's international law obligations.¹²⁹ Whatever justification had been advanced in the past by the State to restrict the right of confrontation, changes in Peru since the departure of Fujimori make the likelihood of terrorist retribution against police officers or other witnesses substantially less likely to occur. The atmosphere of fear and danger that

¹²² *Id.*

¹²³ DL 25475, at art. 13(c).

¹²⁴ *Id.*

¹²⁵ *Tineo Silva* at 236545.

¹²⁶ *Id.*

¹²⁷ DL 922, at art. 12 (10).

¹²⁸ *Tineo Silva*, at 236544.

existed in 1992, when these restrictions were passed, does not exist to the same degree today. In order to bring the retrials of terrorism suspects in line with Peruvian constitutional norms and international standards of due process, the accused must be given the right to be present in the courtroom throughout the trial and be allowed to confront and cross-examine *all* available witnesses without regard to their status as police officers or repentant terrorists.

e. Source of Evidence

The Constitutional Court did not require any changes to the Repentant Terrorist Law and upheld the use of affidavits by repentant terrorists as part of the prosecutor's evidence at trial.¹³⁰ The Constitutional Court concluded that even if the rules for the admissibility of evidence were flawed in the initial trials, this did not necessarily mean that the *source* of such evidence was unreliable for purposes of the retrials.¹³¹

Currently, Article 8 of DL 922 establishes the standards of admissibility of evidence in the retrials of those previously convicted of terrorism under the 1992 laws.¹³² Permissible evidence includes official police reports, affidavits of denunciations made by previous terrorism suspects, technical and expert reports, as well as statements given to the police during an investigation.¹³³ The new law calls for the trial judge to weigh each item of evidence by using "equitable criteria" pursuant to the Peruvian Criminal Procedure Code, Article 283.¹³⁴ This procedure does not satisfy the guarantee of confrontation of witnesses under international law standards for a fair trial.

¹²⁹ Const. Peru, Fourth Final and Transitory Disposition (citing American Convention on Human Rights, at art. 8)

¹³⁰ *Tineo Silva*, at 236542.

¹³¹ *Id.*

¹³² DL 922, at art. 8.

¹³³ *Id.*

¹³⁴ *Id.* (citing Cod. Pen., DL 635 at art. 283).

The use of *ex parte* statements made by repentant terrorists, who name the accused as a terrorist, pursuant to the Repentant Terrorist Law of 1992, DL 25499, remains in effect.¹³⁵ Under the 1992 Repentant Terrorist Law, statements made by terrorist suspects could be used as evidence to investigate, detain and convict others of terrorism, while granting procedural and sentencing benefits to the repentant terrorist suspect.¹³⁶ Although the 1992 law called for a verification of these accusations, the authority of verification was given to the Public Ministry, the very governmental entity that was responsible for prosecuting persons accused of terrorism.¹³⁷ There was no requirement for an independent verification process by a neutral entity. Although currently Article 8 of DL 922 calls for a judge to use “equitable criteria” in evaluating the admissibility of such evidence, the judge is not required to order an independent investigation into the truth of the statements made by the repentant terrorist. Article 8 of DL 922 states that the evaluation of the evidence should not harm the accused’s right to contradiction,¹³⁸ it does not, however, go far enough. It fails to allow the *accused* to independently challenge the evidence itself. The history of using contaminated evidence, derived from terrorist suspects during police interrogation, including the use of torture, requires that the courts in Peru today deny the use of such evidence altogether. At a minimum, the law should allow the accused to confront the affiant accusers at trial and to have an opportunity to effectively cross-examine them in open court. The Peruvian Constitution also guarantees the accused the right to present a legitimate defense.¹³⁹ By permitting the use of contaminated uncross-examined evidence, the accused on retrial is stripped of that right as well.

f. Sentencing

¹³⁵ *Id.* at art. 8 (2).

¹³⁶ DL 25499.

¹³⁷ *Id.*

¹³⁸ DL 922, at art. 8.

¹³⁹ Const. Peru, art. 2(23).

The Constitutional Court declared Article 3(a), which had assigned a life term for a violation of Article 2 by terrorist leaders, as unconstitutional on several grounds.¹⁴⁰ The Constitutional Court, relying on the International Covenant of Civil and Political Rights, acknowledged that the purpose of incarceration is to reform and socially retrain inmates for reintegration into society.¹⁴¹ The Constitutional Court also referred to Article 139, Clause 22 of the Peruvian Constitution, which states that sentencing was to reflect, in part, the rehabilitation, reeducation, and reincorporation of a prisoner into Peruvian society.¹⁴² The Constitutional Court concluded that a term of life imprisonment is “a beginning without an end”, denies the prisoner the ability to be re-incorporated into Peruvian life, and frustrates the constitutional goal of rehabilitation.¹⁴³

In addition, the Constitutional Court looked at life sentences in terms of the constitutional principles of dignity and liberty.¹⁴⁴ The Constitutional Court declared that a life sentence results in the annulment of the prisoner’s liberty, and thus the sentence should be temporary.¹⁴⁵ The prisoner cannot be “rehabilitated,” “reformed,” “reincorporated into society,” and this violates the right of “dignity of the person” provided in Article 1 of the Peruvian Constitution.¹⁴⁶ In addition, a life sentence will not provide motivation for the State to rehabilitate the prisoner, since he or she will never be ever released.¹⁴⁷

¹⁴⁰ *Tineo Silva*, at 236547-8.

¹⁴¹ *Id.* at 236547.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 236547-48.

¹⁴⁵ *Id.* at 236547.

¹⁴⁶ *Tineo Silva*, at 236547.

¹⁴⁷ *Id.*

Furthermore, the Constitutional Court stated that the length of a prison sentence should be proportionate to the crime committed.¹⁴⁸ A life sentence is disproportionate to the crime of terrorism.¹⁴⁹ Therefore, according to the Constitutional Court, Article 3(a) is unconstitutional, and the legislature must write a law that allows parole for the prisoners.¹⁵⁰ Prisoners serving life sentences should be offered parole after 30 years.¹⁵¹ The Constitutional Court also declared all sentences under Article 3(b) and (c), Article 4, and Article 5, which have a minimum sentence but no maximum sentence, unconstitutional.¹⁵² The Constitutional Court stated that according to Article 200 of the Peruvian Constitution, punishment must satisfy the constitutional doctrine of proportionality.¹⁵³ In determining sentences, the legislature must account for the seriousness of the crime and the penalty it wishes to obtain.¹⁵⁴ While the Court must balance the rights of Peruvian citizens against the rights of the convicted, the punishment cannot exceed the crime.¹⁵⁵ Since there are no upper limits to these sentences, the sentencing guidelines are not proportionate to the crimes committed and therefore unconstitutional.¹⁵⁶

The Constitutional Court referred to Articles 45, 46 and 29 of the Penal Code in relation to Articles 3(b) and (c), 4 and 5 of DL 25475.¹⁵⁷ In Article 45 of the Penal Code, the judge should consider the social and cultural background of the accused and the interests of the victim, the victim's family, and the interests of the persons who depend on the victim.¹⁵⁸ In Article 46 of the Penal Code, the judge should consider the following criteria in sentencing: the nature of

¹⁴⁸ *Id.* at 236548.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Tineo Silva*, at 236548-9.

¹⁵³ *Id.* at 236548.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 236549.

¹⁵⁷ *Id.*

¹⁵⁸ Cod. Pen, at art. 45.

the crime, the means employed, and the extent of the harm caused by the accused.¹⁵⁹ Finally, in Article 29 of the Penal Code, the sentencing can be “temporary” or for life.¹⁶⁰ If the sentencing is temporary, then the minimum sentence is two days and the maximum is 35 years.¹⁶¹ The Court held that Articles 3(a), (b), (c), 4 and 5 are temporary sentences.¹⁶² Therefore, the legislature must impose a maximum sentence under these articles.¹⁶³

Congress passed Decree Law 921 in 2003 to amend the sentencing guidelines in Articles 3(a), (b) and (c), 4 and 5.¹⁶⁴ The first Article in DL 921 allows a prisoner with a life sentence under Article 2 in DL 25475 to be eligible for parole after 35 years.¹⁶⁵ The maximum sentences for Articles 3(b), (c), 4, and 5 in DL 25475 are five years more than the minimum sentence.¹⁶⁶ Repeat offenders of DL 25475 will be sentenced to life in prison.¹⁶⁷

IV.

THE INTER-AMERICAN CONVENTION ON HUMAN RIGHTS AND THE DECISIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND COURT OF HUMAN RIGHTS: ADDRESSING PERU’S ANTI-TERRORISM RECORD.

The American Convention on Human Rights is a significant international treaty established by the Organization of American States (OAS) to protect human rights. Member States explicitly commit themselves to respect the rights and freedoms enumerated in the Convention and to guarantee any person the free and full exercise of these rights without any form of discrimination. The Convention recognizes that a member State may encounter an internal conflict or acts of terrorism. Consequently, a member State may declare a state of

¹⁵⁹ *Id.* at art. 46.

¹⁶⁰ *Id.* at art. 29.

¹⁶¹ *Id.*

¹⁶² *Tineo Silva*, at 236549.

¹⁶³ *Id.*

¹⁶⁴ Decree Law No. 921, January 17, 2003, 8245 D.O. 237530 [hereinafter DL 921].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

emergency from time to time pursuant to its domestic laws to counter these problems. While the Convention allows a State to impose reasonable limitations on certain rights, the Convention also limits what rights cannot be suspended even under these circumstances. Article 27(1) of the Convention provides:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.¹⁶⁸

Article 27(2) prohibits the suspension of the following articles: Article 3 (Right to Juridical Personality); Article 4 (Right to Life); Article 5 (Right to Humane Treatment); Article 6 (Freedom from Slavery); Article 9 (Freedom from *Ex Post Facto* Laws); Article 12 (Freedom of Conscience and Religion); Article 17 (Rights of the Family); Article 18 (Right to a Name); Article 19 (Rights of the Child); Article 20 (Right to Nationality); and Article 23 (Right to Participate in Government), “or of the judicial guarantees essential for the protection of such rights.”¹⁶⁹

Peru has a long history of abuses. It has used its anti-terrorism laws to derogate non-derogable rights in contravention of the Convention. It had consistently rejected external criticism of its laws and conduct.

The international community has recognized that Peru’s internal procedures were woefully inadequate to redress human rights abuses. Claims of human rights were ignored

¹⁶⁸ *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978.

¹⁶⁹ *Id.*

altogether or minimized by parliamentary investigating commissions or by judicial decisions of the military and civilian courts, which were tightly controlled by the government.

Peru has consistently argued that its anti-terrorism laws were essential to combat subversive and terrorist activities which could not be addressed effectively in a judicial framework that is concerned more with human rights than the security of the State.

A. Decisions of the Inter-American Commission on Human Rights

Ever since Peru ratified the Inter-American Convention on Human Rights, the Commission has received numerous petitions from individuals and groups alleging a variety of human rights violations, especially after the enactment of the 1992 Peruvian anti-terrorism legislation. Uniformly, the Commission has ruled that Peru's anti-terrorism laws and practices violated core human rights which are protected under the American Convention on Human Rights (hereinafter "Convention"). In the following four cases, which we highlight, the Commission addressed allegations of serious misconduct by Peru in the arrest, detention and prosecution of individuals accused of terrorism. Finding serious violations under the Convention, the Commission granted remedies that would compensate the victims; it also suggested amendments to the Peruvian law to bring it into conformity with the Convention.

1. Case 11.084, IACHR (Peru, November 30, 1994)

The petitioner's husband, Major General (retd.) Jaime Salinas Sedo, and their son, Jaime Salinas Lopez Torres, met with several Peruvian army officers on November 12, 1992.¹⁷⁰ The purpose of this "coordination meeting" was to examine the possibility of "bringing down the de facto regime" of Alberto Fujimori.¹⁷¹ The individuals involved believed it was their constitutional duty to "restor[e] the democratic system", and that this belief was supported by

Articles 74, 82 and 307 of the Constitution of 1979.¹⁷² The meeting lasted past midnight, but discussion did not progress beyond a “preparatory stage.”¹⁷³ Any plans to move beyond this stage were cancelled prior to the end of the meeting at approximately 1 a.m.¹⁷⁴

Sedo and Torres remained at the location past the meeting's end with a number of officers.¹⁷⁵ At approximately 3:15 a.m., special army officers surrounded the location and opened fire on the unsuspecting individuals inside.¹⁷⁶ The special army officers shot at Sedo as he attempted to evacuate the building and reach his armored vehicle.¹⁷⁷ Sedo was unarmed and wearing civilian clothing.¹⁷⁸ He was wounded from the gunfire but managed to operate his car in order to drive to Army Headquarters.¹⁷⁹ His intentions were to surrender at once so that his life and the lives of the others still in the building might be spared.¹⁸⁰ Sedo and Torres, as well as the other people who attended the meeting, were subsequently arrested, without any warrant, by the army.¹⁸¹

All the individuals who had been arrested, the petitioners in the Commission case, asserted that their arrest and treatment during detention violated rights guaranteed by the Peruvian Constitution (Article 2, subparagraph 20(f) and Article 233, paragraphs 3 and 9) and the American Convention (Article 8, subparagraphs 2(b), (c), (f), (h) and Article 5).¹⁸² Before

¹⁷⁰ Case No. 11.084, ¶3(1), Inter-Am. C.H.R. 94, OEA/Ser.L/V/II.88, doc. 9 rev.1 (1994), [hereinafter Case No. 11.084].

¹⁷¹ Case No. 11.084, at ¶3(1).

¹⁷² *Id.* (citing CONST. PERU, articles 74, 82, and 307, 1979)

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Case No. 11.084, at ¶3(1).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Case No. 11.084, at ¶3(2) (citing CONST. PERU, art. 2 and 233, 1979; *American Convention on Human Rights*, at art. 5 and 8)

having an opportunity to consult with counsel, the army began to interrogate them.¹⁸³ During these initial interrogations, the petitioners alleged that they were psychologically coerced into signing statements without the benefit of first reading them to vouch for their accuracy.¹⁸⁴ The government did not acknowledge their right to a fair trial pursuant to usual procedures, but instead conducted secret proceedings in military court.¹⁸⁵ The final judgment in the Supreme Court of Military Justice relied completely on various reports which were developed during the police investigation.¹⁸⁶ The petitioners also contested the jurisdiction of the military court, since several individuals, including the petitioner's husband, had already retired from the army.¹⁸⁷ They argued that civil courts were the proper venue according to Article 2, subparagraph 20 of the Peruvian Constitution and Article 8, subparagraph 1 of the American Convention.¹⁸⁸

Sedo, Torres and the others, who later brought suit before the Commission, were found guilty by the Peruvian military court and were initially sent to the Miguel Castro prison, which normally housed only “extremely dangerous criminals.”¹⁸⁹ They were later moved to the Castillo Real Felipe.¹⁹⁰ Castillo Real Felipe had insufficient supply of water, no windows, offered no access to medical care and contained “unserviceable hygiene facilities.”¹⁹¹ In addition to these claims, they alleged that the Intelligence Service had monitored their conversations.¹⁹²

The Commission found that Special Forces held the detainees without access to an attorney for more than fifteen days in violation of Article 8 of the Convention, Article 2 of the

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Case No. 11.084, at ¶3(2).

¹⁸⁸ *Id.* (citing CONST. PERU, art. 2, 1979; *American Convention on Human Rights*, at art. 8).

¹⁸⁹ Case 11.084, at ¶4(1).

¹⁹⁰ *Id.* at ¶4(2).

¹⁹¹ *Id.*

¹⁹² *Id.*

1970 Constitution, and Article 526 of the Code of Military Justice. The Commission also found that the detainees were interrogated at abnormal times, usually at night or very early in the morning hours, and for over twelve hours at a time, all in clear violation of the right to personal liberty guaranteed in Article 8 of the Convention. They were physically and psychologically tortured into confessing. The Commission also determined that they were denied a fair trial and the right to adequately defend against the charges. Their attorneys' requests to inspect the files and the evidence and for oral testimony were denied as "unnecessary". The Commission held that the trial proceedings had violated Article 8(2) of the Convention, in that the military tribunal refused to accept defense witnesses; their lawyers' objections were systematically refused on grounds that they were unsustainable; and the sentences were disproportionate to the severity of the crime. Consequently, the Commission ordered Peru to conduct a serious, impartial, and effective investigation into the claim of torture, punish the offenders, and take steps to put an end to this practice. It also ordered Peru to compensate them monetarily for damages arising from these violations. Peru was ordered to review their convictions by an independent and impartial forum and to amend Decree Law 25475 so as to bring it into compliance with the Convention.¹⁹³

2. Case 10.970, IACHR (Peru March 1, 1999)

On October 17, 1991, Fernando Mejia Egocheaga and his wife Raquel Martin de Mejia petitioned the Commission alleging violations of Article 7 (right to personal liberty), Article 5 (right to humane treatment), Article 4 (right to life), and Article 25 (the right to an effective domestic remedy to protect against acts that violate fundamental rights) of the Convention.¹⁹⁴

In June 1989, several soldiers were killed by members of Sendero Luminoso ("Shining Path") in Posuzo. On June 15, 1989, a group of military personnel whose faces were covered

¹⁹³ *Id.*

¹⁹⁴ Case 10.970, Inter-AM C.H.R., OEA/Ser.L/V/II.91 Doc. 7 rev.1 (1996) [hereinafter case 10.970].

with ski masks and carrying machine guns violently entered the home of the Secretary General of the Peruvian Education Workers' Union. The soldiers made the union leader leave his home, beat him in front of his wife, and then ordered him to drive to Mejia's home. The ski masked personnel entered Mejia's home, struck him with a weapon and ordered him to leave the home with the group. Fifteen minutes later, the group returned to the Mejia home and one of the men raped Mrs. Mejia. Twenty minutes later, the same person returned and raped her again. The next day, she went to the police station in Oxapampa and reported the disappearance of her husband. She requested the assistance of the Mayor of Oxapampa but to no avail. On June 18, Mr. Mejia's dead body was found with clear signs of torture, cuts in the legs and arms and an open wound in the head, apparently caused by a bullet. On three occasions, between June 28 and 30 1989, Mrs. Mejia received anonymous telephone calls threatening her with death if she persisted with the investigation of the murder of her husband. Mrs. Mejia fled Peru in fear of her safety.¹⁹⁵

The Peruvian government published a list of accused subversives, including Mrs. Mejia's name, in which it alleged that she supported the Shining Path. The government demanded the extradition of the people on the list; if the named person did not return to Peru, the Peruvian government threatened to revoke his or her citizenship. In addition to the extradition list, the Peruvian government filed criminal charges against Mrs. Mejia under the anti-terrorism laws, accusing her of supporting the Shining Path.

Mejia maintained her innocence, sought redress from the Commission and attached copies of the opinions of the Lima Provincial Prosecutor and of the Senior Prosecutor for Terrorism to her Commission petition, showing that there was no evidence to substantiate the

¹⁹⁵ *Id.*

charges against her. Because the government failed to refute any of her allegations, the Commission accepted her factual claims as true.¹⁹⁶

a. Articles 5 and 11 of the Convention

The Commission determined that the repeated rape of Mrs. Mejia constituted a violation of Articles 5 and 11 of the Convention, which guarantee every person the right to have his or her physical, mental and moral integrity respected, and that no one should be subjected to torture or to cruel, inhumane or degrading punishment or treatment. Although the Convention does not precisely define “torture”, the Commission declared that it includes “any act performed intentionally by which physical and mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as a personal punishment, as a preventive measure, as a penalty or for any other purpose”.¹⁹⁷ In order to find torture, three elements must be present: (1) an act through which physical or mental pain and suffering is inflicted on a person; (2) the act is committed with intent; and (3) the act is committed by either a public official or by a private person acting at the instigation or direction of a public official. In applying this standard, the Commission found that the rape of Mrs. Mejia satisfied the first prong because rape is a violent act causing physical and mental pain.

The Special Rapporteur on Torture has noted that particularly in Peru, rape is used as a weapon to punish, intimidate or humiliate.¹⁹⁸ In applying the second prong, the Commission found that the rape here was intentionally done to produce a certain result, namely to scare and intimidate her so that she would not pursue an investigation of the murder of her husband. The third prong was also satisfied because the rapist was a member of the security forces. Having

¹⁹⁶ *Id.*

¹⁹⁷ *Inter-American Convention to Prevent and Punish Torture*, OEA/Ser.L.V./II.82 doc.6 rev. 1 at 83 (1992).

satisfied all the requirements of torture, the Commission found that Peru violated Article 5 of the Convention.¹⁹⁹

The Commission also found that Peru had violated Article 11 of the Convention, which requires a State to guarantee every person his or her dignity. The Special Rapporteur on Torture has stated that rape is an attack against human dignity.²⁰⁰ Further, the European Court of Human Rights has acknowledged that the concept of dignity extends to a person's physical and moral integrity.²⁰¹ Rape denied her dignity. Therefore, the rape of Mrs. Mejia also violated Article 11 of the Convention.²⁰²

b. Articles 25 and 8 of the Convention

The Court next analyzed Mrs. Mejia's claims that the denial of domestic remedies violated Articles 25 and 8(1) of the Convention. Article 25 provides that:

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 [or her] 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 [or her] 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.²⁰³

¹⁹⁸ UN Commission on Human Rights, Report of the Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. ELCN. 4/1994/31 (1994) see e.g.; http://www.umn.edu/humanrts/commission/torture/94/sr-torture_94.htm

¹⁹⁹ Case 10.970.

²⁰⁰ *Id.* See also, United Nations, Question of the Human Rights of all Persons subjected to any Form of Detention or Imprisonment, in Particular Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN.ELCN.4/1993/76 (1992). See e.g.; http://www.cidh.org/annualrep/95eng/Peru_10970.

²⁰¹ *Id.* See also, *X and Y vs. The Netherlands*, Application 8978180. Series A. No.167.

²⁰² *Id.*

²⁰³ *American Convention on Human Rights*, at art. 25.

Article 8 provides that every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal.²⁰⁴ The Commission pointed to the Inter-American Court of Human Rights decision in the *Velasquez Rodriguez* case to bring this Article to life.²⁰⁵ In that case, the Court had stated that “The State has the judicial duty to prevent...human rights violations, to purposefully investigate such violations and apply to those responsible the appropriate penalties and ensure adequate compensation to the victims.”²⁰⁶

A purposeful investigation implies that an appropriate State authority will undertake an investigation as a legal duty and “not as a simple matter of management of private interests that depends on the initiative of the victim or of his family in bringing suit.”²⁰⁷ In applying these principles, the Commission found that Mrs. Mejia did not have access to an effective domestic remedy to vindicate her claims of human rights violations. Therefore, Peru violated Articles 25 and 8 of the Convention.²⁰⁸

c. Article 13 of Decree Law No. 25.475 (The Anti-Terrorism Legislation)

The Commission next considered whether the Peruvian procedures in trying Mrs. Mejia for the crime of terrorism under Law No. 25.475 had violated her human rights under the Convention. Article 13 of this Decree-Law outlines the procedures for a preliminary investigation and subsequent proceedings against individuals suspected of terrorism.²⁰⁹

Article 8 of the Convention provides the accused the right to a fair trial by a competent, independent, and impartial tribunal and the presumption of innocence. The Commission

²⁰⁴ *Id.* at art. 8.

²⁰⁵ Case 10.147, 10.181, 10.240, 10.309 and 10.311, Inter-Am. C.H.R., OEA/Ser.L/V./II.83 doc. 14 rev.1 (1993).

²⁰⁶ *Velasquez Rodriguez Case*, Inter-Am. Ct.H.R. (Ser.C.) No.4 (1988).

²⁰⁷ *Id.*

²⁰⁸ Case 10.970.

²⁰⁹ *Velasquez and Rodriguez Case*, Inter-Am. Ct.H.R. (Ser.C) No.4 (1988).

concluded that Article 13 of the Decree-Law did not satisfy guarantees of Article 8. Contrary, Article 13 of the Decree-Law created judicial partiality and a presumption of guilt. In accordance with its decision, the Commission recommended that Peru conduct a thorough, rapid and impartial investigation into the rape, pay her fair compensation for her suffering, and to inform the Commission within sixty days of the decision what steps it took to give effect to the Commission's recommendations.²¹⁰

3. Cases 10.941, 10.942, 10.944, 10.945 IACHR (Peru February 19, 1998)

The Commission received petitions on behalf of Camilo Alarcon Espinoza and Sara Luz Mozombite (10.941), Jeronimo Villar Salome (10.942), Alvaro Hachiguy Izquierdo (10.944), and Daniel Huaman Amacifuen (10.945).²¹¹ The Commission combined the complaints because of their similarities in complaining about the disappearances of Luz Mozombite Quinonez, Camilo Alarcon Espinoza, Jeronimo Villar Salome, Alvaro Hachiguy Izquierdo and Daniel Huanman Amacifuen.²¹² The petitions claimed that members of the Peruvian Army stationed in the military base in Aucuyacu were responsible for the forced disappearances of these individuals in violation of Articles 4, 5, 7, 8 and 25 of the American Convention.²¹³ Since their disappearances, none of their families or friends had seen or heard from them.²¹⁴ Prior to filing these petitions, the claimants sought investigations of the disappearances from the government, however no investigations were initiated by Peru.²¹⁵

²¹⁰ *Id.*

²¹¹ Case No. 10.941, 10.942, 10.942, 10.944, 10.945, Inter-Am. C.H.R., OEA/Ser.L/V/II.98, doc.6 rev. (1998) [hereinafter Case No. 10.941].

²¹² *Id.*

²¹³ *Id.* (citing *American Convention on Human Rights*, at art. 4,5,7,8,25).

²¹⁴ Case No. 10.941.

²¹⁵ *Id.*

The Commission observed that the practice of forced disappearance violates fundamental human rights, including personal liberty and the right to due process.²¹⁶

a. Article 3 of the Convention: Right to Juridical Personality

Article 3 of the Convention establishes the right to recognition as a person before the law.²¹⁷ The Commission found that a forced disappearance effectively removes a person from any normal legal order of the State, thus violating Article 3 of the Convention.²¹⁸

b. Article 4 of the Convention: Right to Life

Article 4(1) of the Convention recognizes that all individuals have the right to life.²¹⁹ The Commission reiterated the position of the Inter-American Court of Human Rights, found in the *Velasquez Rodriguez* case, that a forced disappearance usually implicates an extra-judicial execution and the concealment of the body and of material evidence.²²⁰ This practice is a flagrant violation of the right to life provided in Article 4 of the Convention.²²¹

c. Article 5 of the Convention: Right to Humane Treatment

The Commission also followed another *Velasquez* finding that prolonged isolation and the denial of communication with the outside world constitute cruel and inhumane treatment, because these practices are harmful to the psychological and moral integrity of the person.²²² Therefore, Peru violated Article 5 of the Convention in this respect.²²³

d. Article 7 of the Convention: Right to Personal Liberty

²¹⁶ *Id.*

²¹⁷ *American Convention on Human Rights*, at art. 3.

²¹⁸ Case No. 10.941.

²¹⁹ *American Convention on Human Rights*, at art. 4.

²²⁰ Case No. 10.941 (discussing *Velasquez Rodriguez Case*, Inter-Am. Ct.H.R. (ser.c) no.1 ¶157.

²²¹ *Id.*

²²² *Id.* (discussing *Velasquez Rodriguez Case*, at ¶ 156).

²²³ Case No. 10.941.

Article 7 of the Convention guarantees each person the right to personal liberty.²²⁴ The Commission expounded on when a detention violates this provision.²²⁵ A detention is arbitrary and illegal when it is instituted for illegal purposes, carried out without observing appropriate legal standards, or used as punishment in derogation of the right to a fair trial.²²⁶ In applying these principles to the case, the Commission found that the Peruvian Army violated Article 7.²²⁷

The Commission noted that the government, in response to the petitions, claimed that the region was under a state of emergency and that it acted to combat terrorism.²²⁸ Consequently, the government suspended some constitutional guarantees to allow the military to detain individuals without court orders from a competent judge and without a showing that a serious crime had been committed.²²⁹ The Commission rejected the government's claim, stating that under the Convention, the right to personal liberty can never be derogated.²³⁰ Democratic principles demand observance of this right even under a state of emergency.²³¹ Therefore, the Commission concluded that Peru was responsible for violating the right to personal liberty and security as established in Article 7 of the Convention.²³²

e. Article 25 of the Convention: Right to Judicial Protection

Article 25 of the Convention provides that every person has the right to judicial protection.²³³ The Commission concluded that Peru failed to adequately investigate the disappearances.²³⁴ It recommended that Peru reactivate an investigation into the disappearances

²²⁴ *American Convention on Human Rights*, at art. 7.

²²⁵ Case No. 10.941.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Case No. 10.941.

²³² *Id.*

²³³ *American Convention on Human Rights*, at art. 25.

²³⁴ Case No. 10.941.

to establish the whereabouts of the individuals who had disappeared, identify those responsible and punish them accordingly.²³⁵ Further, the Commission recommended that Peru compensate the relatives.²³⁶ More importantly, the Commission recommended that Peru revise its domestic laws so as to provide meaningful investigations for similar claims of disappearance.²³⁷

4. Case 11.182, IACHR (Peru April 13, 2000)

On June 23, 1993, the nongovernmental organization APRODEH filed a petition against Peru claiming that Peru had violated the rights of Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca (hereinafter “the victims”). The undisputed facts of this case show that the victims were detained by DINCOTE on suspicion of terrorism, tortured, convicted and sentenced to 10-12 by faceless judges. For example, Rodolfo Gerbert Asencios Lindo testified before the 45th Criminal Judge of Lima that he was punched in the stomach, kidneys and head; kicked in the shin; placed against an inclined desk while his arms were twisted; threatened with rape; and kept blindfolded in a dark room the entire time. Further, the main case file was sent to the Special Chamber of the Superior Court, composed of “faceless” judges, which in turn sent it to the faceless superior prosecutor. The trial was held before faceless judges. The petitioner claimed that these actions had violated the victims’ right to personal freedom, humane treatment, and a fair trial in violation of Articles 7, 5, and 8 of the Convention. Peru did not dispute the facts and denied that its actions violated the Convention.²³⁸

The Commission acknowledged that the 1992 anti-terrorism legislation was enacted after Lima had suffered its most violent wave of terrorist attacks. Decree-Laws No. 25475 and 25659

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Case 11.182, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 6 rev. (1999) [hereinafter case 11.182].

governed the prosecution, trial, and sentencing of persons found guilty of the crimes of terrorism and treason. It was under this legislation that the victims here were accused, tried and convicted of the crime of terrorism. Therefore, the Commission addressed the question whether in following this Decree-Law, Peru had violated the Convention. The Commission clarified Article 27 of the Convention, which provides guidelines and procedures to be used in times of war, public danger, or other emergencies that threaten the security of the party State. The Commission's clarification of Article 27 of the Convention was well overdue because State parties, such as Peru, had often taken refuge in the fact that their anti-terrorism laws allowed them to relax or disregard legal formalities during a state of emergency.

The Commission stated that while Article 27 of the Convention allows State parties to suspend some of their international obligations, it clearly prohibits the suspension of Article 3 (Right to Juridical Personality); Article 4 (Right to Life); Article 5 (Right to Humane Treatment); Article 6 (Freedom from Slavery); Article 9 (Freedom from *Ex Post Facto* Laws); Article 12 (Freedom of Conscience and Religion); Article 17 (Rights of the Family); Article 18 (Right to a Name); Article 19 (Rights of the Child); Article 20 (Right to Nationality); and Article 23 (Right to Participate in Government). Additionally, Article 27 provides that any suspension of rights cannot permit discrimination of any kind against any person or group.²³⁹

The Commission concluded that Article 2 of the relevant legislation, which defined terrorism "as an act aimed at provoking, creating, or maintaining anxiety, alarm, and fear" and attempts to do the same, did not provide an adequate definition of what act constitutes a crime; equally, what was prohibited by the law was not foreseeable.²⁴⁰

²³⁹ *Id.*, see also *American Convention on Human Rights*, at arts. 3,4,5,6,9,12,17,18,19,20,23 and 27.

²⁴⁰ *Id.*, see also *American Convention on Human Rights*, at arts. 7 and 8.

The Commission also reviewed Article 12 of the legislation, which authorized the National Police to investigate terrorist crimes through DINCOTE. DINCOTE alone has the authority to decide whether the evidence is sufficient to charge, what charges to pursue, and whether the accused would appear before a civilian or a military court. Further, Article 12 also allowed the police to detain suspects for fifteen days incommunicado. Defense attorneys were prohibited from representing more than one person. The Commission concluded that Peru's legislation gave excessive powers to its police force in violation of Article 8, which guarantees the right to due process.²⁴¹

Before even ruling on whether Peru's actions had violated the rights of the victims here, the Commission ruled that Peru's anti-terrorism legislation, Decree Law 25475, violated Articles 7 and 8 of the Convention *per se*.²⁴² Accordingly, the Commission ruled that Peru's actions in apprehending, detaining and bringing charges against the accused had violated their rights enshrined in Articles 7 and 8 of the Convention.

B. Decisions of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACHR) is "an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights."²⁴³ The IACHR was established to enforce and interpret the provisions of the American Convention.²⁴⁴ While it does serve an advisory role, providing member States with its advice regarding legislation and procedures, the IACHR also serves an adjudicative purpose.²⁴⁵ When a case is brought before the Court, either through a State party or through the Inter-

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Statute of the Inter-American Court of Human Rights*, O.A.S. Res. 448, IX-0/79 (1992).

²⁴⁴ *The Inter-American Court of Human Rights, General Information*, available at <http://www.fact-index.com/i/in/inter_american_court_of_human_rights.html>.

²⁴⁵ *Id.*

American Commission on Human Rights, the adjudicatory function of IACHR requires it to rule for or against the member State that is accused of violating human rights under the American Convention. Member States must submit to the jurisdiction of the IACHR as a condition of membership.²⁴⁶

The cases discussed in this section demonstrate that the IACHR has consistently found Peru's former anti-terrorism legislation to be in violation of the American Convention. The following four cases, *Petruzzi*, *Tamayo*, *Altos* and *Durand and Ugarte*, illustrate recent decisions by the IACHR regarding Peru's 1992 legislation. Each ruling details the specific aspects of the 1992 legislation that the IACHR found to be in violation of the American Convention. In each of these cases, the IACHR had ordered Peru to make appropriate changes to its law in compliance with its decisions. However, as will be discussed at the conclusion of this section, Peru's current legislation fails to bring Peru into complete compliance with the Court's decisions, and thus Peru remains in violation of human rights under the American Convention.

The first two cases, *Petruzzi* and *Tamayo*, are the two most significant cases decided by the IACHR. While these two cases examined Peruvian 1992 laws and procedures, they remain extremely relevant in analyzing the legality of the 2003 amendments to the anti-terrorism laws. It is clear that these amendments fail in several respects to comply with the orders of the IACHR found in these cases.

1. The *Petruzzi* Case

Castillo Petruzzi was prosecuted before the Military Court of the Peruvian Air Force (FAP) on the charge of treason.²⁴⁷ Petruzzi and two other defendants were all found guilty in

²⁴⁶ *Id.*

²⁴⁷ *Castillo Petruzzi et al.*, Inter-Am. Ct. H.R. (Ser. C) No. 52, ¶ 1 (1999) [hereinafter *Petruzzi*].

“hooded trials” and sentenced to life imprisonment.²⁴⁸ Peru claimed that from 1980 to 1994, the State had experienced such “terrible social upheaval[,] caused by terrorist violence,” that it had to resort to military trials to sort out all the instances of terrorism.²⁴⁹

Petruzzi and his co-defendants, were tried in the military courts during a declared state of emergency.²⁵⁰ Peru claimed that a state of emergency allowed her to suspend certain provisions of its Constitution,²⁵¹ including Section 20 pertaining to arrest procedures and appearances before a judge.²⁵² The state of emergency, according to Peru, allowed it to establish a Military Political Commander who oversaw the judicial system during the declared state of emergency.²⁵³ In reference to this particular case, the state of emergency was in effect for the duration of the entire period in which the three individuals were on trial.²⁵⁴ The state of emergency allowed for a police investigation and the interrogation of a prisoner without the benefit of legal counsel.²⁵⁵ Suspects did not have normal procedural rights usually associated with a civilian criminal trial²⁵⁶ Here, “faceless judges” were permitted to conduct the hearings as they saw fit, free of any restraints. For example, when Petruzzi’s attorney filed two petitions for a writ of *habeas corpus*, seeking permission to contact his client while in prison and to allow his family to visit him,²⁵⁷ both petitions were denied.²⁵⁸

²⁴⁸ *Id.*

²⁴⁹ *Id.* at ¶ 86.1.

²⁵⁰ *Id.* at ¶ 86.5.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Petruzzi*, at ¶ 86.5.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Petruzzi*, at ¶ 86.11.

²⁵⁸ *Id.*

Mr. Petruzzi was provided defense counsel on November 25, 1993 in a hearing at the Las Palmas Military Base for depositions in the fact-finding phase of the trial.²⁵⁹ Defense counsel requested that he be allowed access to the case file, invoking the right of defense.²⁶⁰ On November 29, counsel was advised that he would be allowed access to the case file for thirty minutes on December 2, an “abbreviated time period that the law allows for cases of this kind,” meaning cases held in the military court system.²⁶¹ Although defense counsel repeatedly requested that he be allowed to access the file for a reasonable period of time, the judge of the special military court allowed Petruzzi’s counsel access to the case file for approximately thirty minutes.²⁶²

The Inter-American Court made the following factual findings. First, Petruzzi’s defense counsel was not permitted to privately confer with his client before the preliminary hearing or even before the finding of first instance.²⁶³ Instead, defense counsel was only permitted to meet privately with his client for fifteen minutes after the court had already reached a decision in the first instance.²⁶⁴ Secondly, after Petruzzi was taken into custody, he was blindfolded and handcuffed for the duration of the preliminary hearing.²⁶⁵ Third, during the hearing neither the accused nor his attorney was given any access to the prosecutor’s evidence against him.²⁶⁶ Similarly, the defense attorney was not permitted to cross-examine the witnesses who had provided testimony in the police investigative report. Additionally, Petruzzi’s preliminary

²⁵⁹ *Petruzzi*, at ¶ 86.11.

²⁶⁰ *Id.*

²⁶¹ *Id.* at ¶ 86.29.

²⁶² *Id.*

²⁶³ *Id.* at ¶ 86.29.

²⁶⁴ *Id.*

²⁶⁵ *Petruzzi*, at ¶ 86.30 (b).

²⁶⁶ *Id.* at ¶ 86.30 (c).

hearing was not signed by the officers of the court who presided at the hearing.²⁶⁷ Finally, defense counsel was intimidated when representing his client.²⁶⁸

On January 7, 1994, one day after defense counsel was given forty minutes to review the case file, the judge rejected his motion to dismiss the charge over a claim that the court lacked jurisdiction and convicted him of the crime of treason.²⁶⁹ The court sentenced Petruzzi to life imprisonment with continuous confinement to his cell during the first year of incarceration and followed by forced labor for the remainder of his term.²⁷⁰ Petruzzi's defense attorney sought to appeal the judgment, and the case was then referred to the special tribunal of the Supreme Court of Military Justice.²⁷¹ On May 3, 1994, the special tribunal of the Supreme Court of Military Justice dismissed the appeal.²⁷²

The IACHR first determined that it did not have jurisdiction to evaluate the nature or gravity of the crimes charged here, as each member State has the right and duty to determine its own security needs.²⁷³ However, the prosecution and sentencing procedures, which a member State deems necessary to preserve public safety or national security, are subject to scrutiny by the Court for human rights violations.²⁷⁴ When there are allegations that a member State has violated human rights provisions, the IACHR can adjudicate the claims against the member State. First, the IACHR has the authority to rule that a member State's actions, whether they are court procedures or prison conditions, violate human rights thereby subjecting the member State to its international responsibility.²⁷⁵ However, the question whether Petruzzi and his co-

²⁶⁷ *Id.* at ¶ 86.30 (d).

²⁶⁸ *Id.* at ¶ 86.30 (e).

²⁶⁹ *Id.* at ¶ 86.37.

²⁷⁰ *Id.*

²⁷¹ *Petruzzi*, at ¶ 86.41.

²⁷² *Id.* at ¶ 86.43.

²⁷³ *Id.* at ¶ 90.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

defendants were guilty of treason is beyond the competence of the Court. Second, while the Court has the authority to review claims of human rights violations, the claimant must first seek and exhaust the member State's domestic remedies before the IACHR can make a determination against the member State.²⁷⁶

a. **Violation of Article 7 (5): Right to Personal Liberty**

In this proceeding, the IACHR, by a vote of seven to one, found that Peru had violated Article 7(5).²⁷⁷ The IACHR determined that Peru had violated Article 7 of the Convention by not bringing the arrestees before a judge within a reasonable time.²⁷⁸ In the Petruzzi case, “the military judge was not notified of the arrests, searches and expert reports and opinions until 30 days after the fact.”²⁷⁹ According to the Court, the Convention, as stated in Article 7, requires that “any person detained is to be brought before a judge either immediately or after an acceptable delay.”²⁸⁰ According to the standards set forth by the Inter-American Commission, an acceptable delay would be limited to only “the amount of time needed to prepare the transfer” of a detainee.²⁸¹

The Court recognized the fact that a member State has the right and duty to protect itself from terrorist attacks, however, the steps that a State takes to protect itself must still ensure due process rights for those who are detained and charged.²⁸² While Article 27 of the Convention allows for more relaxed human rights standards during a state of emergency, even then, “only certain rights are derogable.”²⁸³ The Court concluded that Peru failed to prove the existence of a

²⁷⁶ *Id.*

²⁷⁷ *Petruzzi*, at ¶ 226 (2).

²⁷⁸ *Id.* at ¶ 105 (a) (citing *The American Commission on Human Rights*, Conv. H.R. art. 7 ¶5, November 22, 1969 [hereinafter *Inter-American Commission of Human Rights*]).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at ¶105 (a) (citing *The American Commission on Human Rights*, at art. 7 ¶ 5).

²⁸¹ *Id.*

²⁸² *Id.* at 105 (b).

²⁸³ *Petruzzi*, at 105 (c).

serious state of emergency to warrant these violations, finding that the rights that were denied here were too harsh in light of international standards.²⁸⁴

b. Violation of Article 8(1): Right to a Fair Trial

The Court found, in a unanimous decision, that Peru had violated Article 8.²⁸⁵ Under Article 8(1) of the Convention, “[e]very person has the right to a hearing, with due process guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law...”²⁸⁶ The military tribunal here did not satisfy this guarantee. Although the use of a military tribunal may not *per se* violate due process or fair trial rights, in recent times “an international consensus has developed in favor of the need to restrict it whenever possible, and to protect exercise of military jurisdiction *vis-à-vis* civilians, especially in emergency situations.”²⁸⁷ The Court concluded that Peru’s military court’s jurisdiction is limited and is designed to maintain discipline in the military and the police force.²⁸⁸ Therefore, the IACHR disagreed with Peru which had claimed that it should be allowed to use its military court system to prosecute persons charged as terrorists in order to protect the judges by keeping their identity secret. Military tribunals by hooded or faceless judges violate the accused’s right to due process of law and the right to be judged by an independent and impartial judge.²⁸⁹ The Court therefore concluded that the military court here had acted contrary to international human rights standards and in violation of the Convention.²⁹⁰

c. Violation of Article 8(2)(b) and 8(2)(c): Adequate Time and Means for the Preparation of the Defense

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 226 (4) (citing *The American Commission on Human Rights*, at art. 8 ¶ 1).

²⁸⁶ *Id.* at 125 (a).

²⁸⁷ *Id.* at ¶ 125 (a) (citing *The American Commission on Human Rights*, at art. 8 ¶ 1).

²⁸⁸ *Id.* at ¶ 125 (c).

²⁸⁹ *Petruzzi*, at ¶ 125 (g).

²⁹⁰ *Id.*

The IACHR determined six votes to one that Peru violated Article 8(2)(b) and (2)(c).²⁹¹ Under these articles, “any person accused of a criminal offense has the right to know the charges against him [or her] and to have adequate time and means to prepare his [or her] defense.”²⁹² The manner in which Peru treated its detainees through the use of military tribunals and hooded judges substantially affected the presumption of innocence and fundamental due process rights.²⁹³ Additionally, the IACHR found that the military courts in Peru had failed to provide defense attorneys adequate time with which to prepare a defense, giving them one day at most. Finally, Peru’s method of prosecuting suspected terrorists and gathering evidence makes justice meaningless, since the outcomes of the hooded trials were almost predetermined, noting that evidence that was used to convict persons of terrorism did not come from “evidence taken at trial, but rather [from] expanded police investigation reports that the accused had not seen.”²⁹⁴ The Court reasoned that according to international standards, including standards of the Convention, it is a fundamental principle of procedural law that the evidence which is used to establish the guilt of the accused must be produced in court and offered in such a way so as to allow the defense an adequate opportunity to contest it.²⁹⁵ The IACHR ruled that the investigation in the preliminary stage should be separate and distinct from the evidence gathering and fact finding phase of the trial.²⁹⁶ Here, defense counsel were unable to confer with their clients until after they made preliminary statements, and even then military personnel were present the entire time.²⁹⁷ The Court concluded that the verdict here was based exclusively on

²⁹¹ *Id.* at ¶ 226 (5) (citing *The American Commission on Human Rights*, at art. 8 ¶ 2(b)(c)).

²⁹² *Id.* at ¶ 136 (a).

²⁹³ *Id.*

²⁹⁴ *Id.* at ¶ 136 (d) (citing *The American Commission on Human Rights*, at art. 8 ¶ 2(b)(c)).

²⁹⁵ *Petruzzi*, at ¶ 136 (e).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at ¶ 136 (g).

evidence that the defense was not permitted to view or challenge in violation of Article 8 (2) (B) and (2) (C).²⁹⁸

d. Violation of Article 8(2)(d): Right to Legal Counsel of One's Choosing

By a vote of six to one, the Court found that Peru violated Article 8(2)(d).²⁹⁹ Every accused person has the right to defend himself or herself personally and to be represented by counsel of one's choosing. This right allows free and private consultation without interruption.³⁰⁰ Here, Petruzzi was denied the right to choose his own defense attorney and was not given the right to discuss his case privately with his attorney in violation of Article 8 (2)(D).³⁰¹

e. Violation of Article 8(2)(f): Right to Examine Witnesses

By a six to one vote, the IACHR determined that Peru also denied Petruzzi his right under Article 8 (2)(f).³⁰² The Court recognized that it is “very difficult to get the police or army agents who took part in the investigation to appear in court,” since they have an interest in convicting the accused and are not impartial. Under such circumstances, the accused is denied an opportunity to cross-examine the witnesses against him or her.³⁰³ Since neither Petruzzi nor his defense counsel was present when the agents' statements were taken, he and his co-defendants were denied their right of cross-examination.³⁰⁴

f. Violation of Article 8(2)(h): Right to Appeal the Judgment to a Higher Court

²⁹⁸ *Id.* at ¶ 136 (e).

²⁹⁹ *Id.* at ¶ 226 (5).

³⁰⁰ *Id.* at ¶ 143.

³⁰¹ *Petruzzi*, at ¶ 144.

³⁰² *Id.* at ¶ 226 (5) (citing *The American Commission on Human Rights*, at art. 8 ¶ 2(f)).

³⁰³ *Id.* at ¶ 151.

³⁰⁴ *Id.*

Unanimously, the IACHR determined that Peru violated Article 8(2)(h) in its handling of the *Petruzzi* case.³⁰⁵ The IACHR considers the right to appeal a conviction to a higher court as “an essential part of due process and is non-derogable,” under any circumstances.³⁰⁶ Here, the IACHR concluded that there was no option for Petruzzi to appeal to a higher court because the prosecution was conducted in the military court system.³⁰⁷

g. Violation of Articles 25 and 7(6): Judicial Protection

By a six to one vote, the IACHR also found that Peru had violated Articles 25 and 7(6).³⁰⁸ According to the IACHR, any person who is deprived of his or her liberty is entitled to recourse to a competent court which must decide without delay on the lawfulness of the arrest or detention.³⁰⁹ The Court concluded that Petruzzi and his co-defendants were not tried by a competent court and that they were denied judicial review of any kind to determine the lawfulness of their arrests.³¹⁰

h. Remedies

The Court unanimously ordered Peru to make the following remedial actions. First, Peru was ordered to adopt appropriate measures to amend those provisions of the law that were found to be in violation of the American Convention on Human Rights, without exception.³¹¹ Second, IACHR ordered Peru pay a sum totaling US \$10,000.00, or the equivalent in Peruvian currency, to the next of kin of Petruzzi and Francisco, the second remaining accused.³¹² Finally, the IACHR agreed to oversee that Peru complies with these orders.³¹³

³⁰⁵ *Id.* at ¶ 226 (6) (citing *The American Commission on Human Rights*, at art. 8 ¶ 2(h)).

³⁰⁶ *Id.* at ¶ 158 (a).

³⁰⁷ *Petruzzi*, at ¶ 158 (b).

³⁰⁸ *Id.* at ¶ 226 (9) (citing *The American Commission on Human Rights*, at art. 25, art. 7 ¶ 6).

³⁰⁹ *Id.* at ¶ 175.

³¹⁰ *Id.* at ¶ 175.

³¹¹ *Id.* at ¶ 226 (14).

³¹² *Id.* at ¶ 226 (15).

³¹³ *Petruzzi*, at ¶ 226 (16).

As the most significant Inter-American Court decision to date, the *Petruzzi* case is critical to any analysis of the legality of the 2003 amendments and the conduct of the retrials. Although, Peru has adopted a new constitution and its laws prohibit the prosecution of civilians in military courts, much of what the *Petruzzi* court said and did is very significant in evaluating the current state of the law and governmental practices in combating terrorism.³¹⁴ The analysis that follows will examine each of the *Petruzzi* court's rulings against the changes that were made in the law by the 2003 amendments. These changes in the law govern the retrials of persons previously convicted as terrorists.

i. Article 7(5): The Right to Personal Liberty

First, regarding the right to personal liberty, under Article 7(5) of the Convention, Petruzzi's right to personal liberty was violated when he was arrested, searched and detained without being formally charged with a crime.³¹⁵ Article 7(5) provides that "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings."³¹⁶ His [or her] release may be subject to guarantees to assure his [or her] appearance for trial.³¹⁷ The constitution currently provides for a prompt judicial presentment of a detained person.³¹⁸ The constitution also prohibits pre-trial detention, unless an order of detention is given by an investigatory judge.³¹⁹ Further factual

³¹⁴ *Country Reports on Human Rights: Peru*, The Bureau of Democracy, Human Rights and Labor ¶ D (Feb. 24, 2004) [hereinafter *Country Reports*].

³¹⁵ *Petruzzi*, Ct. H.R. at ¶ 105 (a) (citing *The American Convention on Human Rights*, at art. 7 ¶ (5)).

³¹⁶ *The American Convention on Human Rights*, at art. 7 ¶ (5)).

³¹⁷ *Petruzzi*, Ct. H.R. at ¶ 105 (a) (citing *The American Convention on Human Rights*, at art. 7 ¶ (5)).

³¹⁸ Const. Peru, art. 2(24)(f).

³¹⁹ *Id.*

investigation is necessary to determine whether Peru complies in this regard with its own constitution and the Convention.³²⁰

ii. Article 8: Judicial Guarantees and Due Process

Second, regarding the right to judicial guarantees and due process, under Article 8 of the Convention, Petruzzi's rights were violated when he was not properly prosecuted within a reasonable time by a competent, independent and impartial tribunal, or informed of the charges against him. He was also denied the right to an attorney of his own choosing and to confront and examine witnesses.³²¹ Although, the new constitution provides for an independent judiciary, as an institution the judiciary has not changed considerably.³²² It still suffers from eight years (1992 to 2000) of "intensive manipulation by the executive branch of the Fujimori administration."³²³ Many of the judges are the same.

When the Constitutional Court declared some provisions of the anti-terrorism laws to be unconstitutional, approximately 900 persons, who were initially convicted of terrorism in hooded military tribunals, became eligible to receive new trials in civilian criminal courts.³²⁴ Pursuant to the constitution, President Toledo decreed a new law that created procedures for these new trials.³²⁵ One of the most troubling aspects of the new law is that it allows evidence, which had been elicited unlawfully in the former trial proceedings, to be used again in the new trials.³²⁶ The use of such unreliable and untested evidence has and will continue to frustrate the right of the accused to be tried by a competent, independent and impartial tribunal, since that evidence is

³²⁰ *Country Reports on Human Rights: Peru*, at ¶ d.

³²¹ *Petruzzi*, Ct. H.R. at ¶ 105 (a) (citing *The American Commission on Human Rights*, at art. 8).

³²² *Country Reports*, at ¶ D; Const. Peru.

³²³ *Id.* at ¶ e.

³²⁴ *Id.*

³²⁵ *Id.* DL 922 art. 12(8).

³²⁶ *Country Reports*, at ¶ e; DL 922 art. 8(3).

primed to convict.³²⁷ A trial under such circumstances is a trial in name only. Because Peru had blatantly violated its own laws and international standards of due process, Peru should be barred from retrying these individuals. A State that now claims to adhere to the rule of law should not be given a second chance to convict those who were previously stripped of every aspect of their humanity by that State. Principles of equity, estoppel, and double jeopardy should shut the doors on Peru's attempt to reconvict.

2. The *Tamayo* Case

On February 6, 1993, officers of the National Counter-Terrorism Bureau, DINCOTE, of the Peruvian National Police, arrested Maria Elena Loayza-Tamayo, a Peruvian citizen and a professor at the Universidad San Martin de Peres, and her relative, Ladislao Alberto Huaman-Loayza, at her residence in Lima.³²⁸ Under Peru's Repentance Law, *Ley de Arrepentimiento*, enacted by Decree-Law No. 25.499, a captured criminal, Angelica Torres-Garcia, denounced Tamayo, leading to her eventual arrest.³²⁹ The Peruvian authorities failed to follow their own truth verification procedures and arrested Tamayo just one day after hearing Garcia's story without first obtaining an arrest warrant.³³⁰ The authorities believed that Tamayo was a collaborator of the Shining Path.³³¹

From February 6 to 26, 1993, DINCOTE detained Tamayo without taking her before the Special Naval Court, in violation of Article 12(c) of Decree-Law No. 25.475, detailing procedures when the State charges a person with the crime of terrorism.³³² She was held without any communication with the outside world and was subjected to torture, cruel, unusual and

³²⁷ *Country Reports*, at ¶ e.

³²⁸ *Id.* at ¶ 3 (a).

³²⁹ *Id.*, DL 25.499.

³³⁰ *Country Reports*, at ¶ 3(a).

³³¹ *Loayza Tamayo*, Inter. Am. Ct. H.R. (Ser C) No. 33, ¶ 3(a) (1997) [hereinafter *Tamayo*].

³³² *Id.* at ¶ 3 (b), DL 25.475 art. 12(c).

degrading treatment.³³³ As part of their efforts to force Tomayo to incriminate herself and to admit that she was, in fact, a member of the Shining Path, DINCOTE inflicted torture and threatened to rape and drown her on a nearby beach.³³⁴ Despite such efforts to force her to admit her involvement with the Shining Path, Tamayo maintained her innocence, without qualification; she even criticized the beliefs and practices of that group.³³⁵ She was allowed no contact with her family or her attorney.³³⁶ Because of the unusual circumstances surrounding her arrest, neither her family nor her attorney had any knowledge that she had been arrested in the first place.³³⁷ In fact, her family only found out about her arrest when they received an anonymous telephone call on February 8, 1993.³³⁸ Despite her family's and lawyer's best efforts, Tamayo was denied judicial review of her arrest, since Decree Law No. 25.659 prohibited the filing of a petition for a writ of *habeas corpus* when the detention is connected to the crime of terrorism.³³⁹ Ten days after her arrest, the authorities decided to exhibit her to the outside world via the press.³⁴⁰ DINCOTE paraded Tamayo in front of the press dressed in prison garb and publicly accused her of treason even before it obtained proper authority to arrest or charge her with this crime.³⁴¹ She was then taken to the former Army Veterinary Hospital, which was later converted to a holding station, and remained there from February 26 to March 3, when she was transferred to the Chorrillos Women's Maximum Security Prison.³⁴²

³³³ *Tamayo*, at ¶ 3 (c).

³³⁴ *Id.* at ¶ 3 (b).

³³⁵ *Id.*

³³⁶ *Id.* at ¶ 3 (c).

³³⁷ *Id.* at ¶ 3 (c).

³³⁸ *Id.*

³³⁹ *Tamayo*, at 3(c); DL 25.659.

³⁴⁰ *Id.* at ¶ 3 (d).

³⁴¹ *Id.*

³⁴² *Id.*

Although she was arrested on February 6, 1993, DINCOTE opened a police report on February 25, 1993, charging her with the crime of treason on the same day.³⁴³ On February 26, 1993, Tamayo was prosecuted in a military tribunal on the charge of treason. The proceedings were held before the Special Military Court, a tribunal composed of faceless military judges.³⁴⁴ On March 5, 1993, the Special Naval Court acquitted Tamayo of the charge of treason. However, on April, 2, 1993, her case was remanded to civil criminal court, where she was charged with the crime of terrorism.³⁴⁵ On August 11, 1993, the Special Tribunal of the Supreme Council of Military Justice rejected a state appeal of her acquittal.³⁴⁶ However, the Supreme Council ordered the case file to be remitted to the civil courts, so that she could be tried for the crime of terrorism.³⁴⁷ Thereafter, an Assistant Special Attorney General filed a petition for special review of her acquittal with the Full Chamber of the Special Supreme Military Tribunal, which upheld her acquittal on September 24, 1993.³⁴⁸ Despite her acquittal, Tamayo remained in detention until October 8, 1993.³⁴⁹ On that day, the Forty-third Criminal Court of Lima tried Tamayo for the crime of terrorism.³⁵⁰ Ms. Tamayo opposed the charge on *res judicata* and the principle of *non bis in idem*.³⁵¹ On October 10, 1993, a faceless Special Tribunal of the Civil Courts dismissed her objection, found her guilty and sentenced her to a twenty-year prison term.³⁵²

Her case eventually went before the IACHR. Among its general determinations about the Peruvian government's treatment of Ms. Tamayo, the IACHR focused on the fact that the

³⁴³ *Id.* at ¶ 3 (e).

³⁴⁴ *Id.*

³⁴⁵ *Tamayo*, at ¶ 3 (e).

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* at ¶ 3 (g).

³⁵⁰ *Id.*

³⁵¹ *Tamayo*, at ¶ 3(g).

military court system in Peru followed a practice of denying a person accused of treason to choose his or her own independent defense attorney.³⁵² The Court determined that Peru did not allow Tamayo access to an attorney of her own choosing in the military court trial.³⁵³ Additionally, the IACHR found that while Tamayo was eventually given an opportunity to choose her own attorney in the civilian criminal trial, her attorney was not permitted to freely access the case file.³⁵⁴ The IACHR further held that Peru's conduct violated her right to effective assistance of counsel and right to present a defense, since her lawyer was not allowed access the file and to prepare a proper defense in light of the information that was contained in the case file.³⁵⁵ The IACHR also found that the Peruvian government unlawfully confined her continuously before, during and after trial proceedings had taken place.³⁵⁶ She was detained for ten days before she was ever charged with any offense, during the term of the military trial, and during her civil criminal trial.³⁵⁷ Additionally the IACHR determined that she was "housed in a tiny cell block, without natural light, [where she] is [only] allowed an hour's sunlight each day," held in continuous isolation, and subjected to highly restrictive visits including her own family.³⁵⁸ The IACHR also determined, based upon the testimony of other prisoners in Peru, that while Tamayo was detained there was a widespread practice of inhumane and degrading treatment during the criminal investigation phase of those accused of treason and terrorism.³⁵⁹ The Report of the National Coordinator of Human Rights, which had examined the Peruvian prison system, concluded that between January 1993 and September 1994, persons imprisoned in

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.* at ¶ 46 (j).

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Tamayo*, at ¶ 46 (k).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at ¶ 46 (l).

Peru were victims of torture, cruel, inhumane and degrading treatment.³⁶¹ The Court made the following findings.

a. Violation of Article 5: Right to Humane Treatment

The IACHR unanimously decided that Peru violated Tamayo's right to humane treatment while incarcerated, in contravention of Article 5 of the Convention.³⁶² A prisoner is entitled to physical and psychological integrity. Violations of this right may include torture and other types of humiliation, or cruel, inhumane or degrading treatment with varying degrees of physical or psychological effects.³⁶³ The European Court of Human Rights has declared that even in the absence of physical harm, psychological ploys during interrogation may amount to inhumane treatment.³⁶⁴ The Court observed that in assessing whether a certain treatment, especially in a prison setting, is inhumane or degrading, it looks for the presence of fear, anxiety and humiliation that breaks the arrestee's physical and moral resistance.³⁶⁵ It concluded that the use of "any force that is not strictly necessary to ensure proper behavior on the part of the detainee... constitutes an assault on the dignity of the person in violation of Article 5 of the American Convention."³⁶⁶ The Court was aware that the Commission had previously investigated and rejected her claim that she had been raped while she was detained. The court records and the file of her detention did not sustain this accusation.³⁶⁷ However, the Commission did find that she was clearly a victim of inhumane treatment.³⁶⁸ In support, the Commission pointed to the fact that she was subjected to extended periods of isolated detention and afforded no communication whatsoever with the outside world. Her solitary confinement was in a tiny cell giving her no

³⁶¹ *Id.*

³⁶² *Id.* at ¶ 85 (1) (citing *The American Commission on Human Rights*, at art. 5).

³⁶³ *Tamayo*, at ¶ 57.

³⁶⁴ *Id.*

³⁶⁵ *Id.* (citing *The American Commission on Human Rights*, at art. 5).

³⁶⁶ *Id.*

³⁶⁷ *Id.* at ¶ 58.

natural light. She was also subjected to physical violence, including blows, maltreatment, and immersion in water; intimidation; and threats of future violence. Her visiting schedule was severely restricted, and she was paraded before the media in prison garb. The IACHR concluded that Ms. Tomayo was a victim of inhumane treatment under Article 5 (2) of the Convention.³⁶⁹

b. Violation of Article 8: Right of Due Process of Law

The IACHR found, in a unanimous decision, that Peru violated Ms. Tamayo's fundamental due process rights, under Article 8 of the American Convention on Human Rights.³⁷⁰ Specifically, Peru violated Article 8(1), the right to a hearing by an independent and impartial tribunal; Article 8(2), the right to be presumed innocent and the right to full equality under the law during the proceedings; Article 8(2)(d), the right to defend oneself, and Article 8(2)(g), the right not to be compelled to be a witness against herself, not to be subjected to coercion of any kind, and the right not to be subjected to double jeopardy.³⁷¹ The Court reasoned that the military court had violated her due process rights because it lacked jurisdiction to keep her in detention after she was acquitted. It also lacked authority to order that she be charged with terrorism in a civilian criminal court which necessitated her continued incarceration.³⁷² Second, in both the military and civilian trials, her fundamental rights were severely restricted.³⁷³ She was denied the presumption of innocence.³⁷⁴ Moreover, she was not allowed to examine or challenge the evidence that was used against her, either before or during the trial.³⁷⁵ Additionally, Tamayo's "defense attorney's power was curtailed in that he could not

³⁶⁸ *Id.*

³⁶⁹ *Tamayo*, at ¶ 58.

³⁷⁰ *Id.* at ¶ 85 (3) (citing *The American Commission on Human Rights*, at art. 8).

³⁷¹ *Id.* (citing *The American Commission on Human Rights*, at art. 8 ¶ 1, art. 2, art. 2 ¶ d, art. 8 ¶ 21(d), art. 8 ¶ 21(g), art. 3).

³⁷² *Id.*

³⁷³ *Id.* at ¶ 62.

³⁷⁴ *Id.*

³⁷⁵ *Tamayo*, at ¶ 62.

communicate freely with his client or intervene in all [the] stages of the proceedings in full possession of the facts.³⁷⁶ The civilian trial was tainted by the use of evidence from the military trial.³⁷⁷ Not only did the military court lack jurisdiction to order the remand of the case to the civil court in the first place, the civil court erroneously relied on the evidence that was produced in the military trial.³⁷⁸

According to Article 8(4) of the Convention, "[a]n accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause."³⁷⁹ The Court determined that Tamayo was tried in a military court for the crime of treason, a closely related crime to the crime of terrorism.³⁸⁰ Thereafter, the Special Naval Court acquitted her, and that was a nonappealable decision.³⁸¹ However, Tamayo was not released from her detention.³⁸² Instead, the Special Naval Court remanded the case to a civilian court, with direction that she be charged with the crime of terrorism.³⁸³ Consequently, the IACHR held that Peru violated Article 8(4) of the American Convention when it tried and acquitted her of treason in the military court and then tried her for the crime of terrorism in a civil criminal court. This amounted to double jeopardy in violation of her due process rights.³⁸⁴

c. Violation of Article 51: Refusing to Comply with the Commission's Recommendations

The IACHR further decided that Peru "violated Article 51(2) of the Convention by refusing to comply with the recommendations made by the Commission."³⁸⁵ Under Article 31(1)

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at ¶ 63.

³⁷⁹ *Id.* at ¶ 66 (citing *The American Commission on Human Rights*, at art. 4 ¶ 4).

³⁸⁰ *Id.*

³⁸¹ *Tamayo*, at ¶ 69.

³⁸² *Id.*

³⁸³ *Id.* at ¶ 76.

³⁸⁴ *Id.* (citing *The American Commission on Human Rights*, at art. 8 ¶ 4).

³⁸⁵ *Id.* at ¶ 78 (citing *The American Commission on Human Rights*, at art. 51 ¶ 2).

of the Vienna Convention, if a State signs and ratifies an international treaty, especially when the treaty involves some aspect of human rights, the State is obligated to make every possible effort to comply with the recommendations of a protective organization, such as the Organization of American States, which is dedicated to the promotion, observance and defense of human rights.³⁸⁶

By a vote of six to one, the Inter-American Court ordered Peru to release Maria Elena Loayza-Tamayo within a reasonable period of time according to the terms stated in paragraph 84 of its judgment.³⁸⁷ Additionally, by a unanimous vote, the IACHR ordered Peru to pay fair compensation to Tamayo and to her next-of-kin and to reimburse them for all their expenses.³⁸⁸

As a significant human rights case, the *Tamayo* decision remains timely and relevant despite Peru's 2003 legislation and its decision to grant retrials. The analysis that follows will examine each of *Tamayo*'s rulings in light of the changes made in the law in 2003.

i. Article 5: Right to Humane Treatment

The Inter-American Court determined in the *Tamayo* case that Peru had violated the claimant's right to humane treatment in contravention of Article 5 of the Convention.³⁸⁹ With the advent of a new constitution, including a prohibition against the use of military courts to try civilians, Peru has made structural changes in the law,³⁹⁰ however, these formal changes do not necessarily put an end to the types of rights violations that were criticized in the *Tamayo* case.³⁹¹ The new constitution requires "a written judicial warrant for an arrest unless the perpetrator of a crime is caught in the act."³⁹² The new laws specify that judges alone may authorize the

³⁸⁶ *Id.* at ¶ 79 (citing *The American Commission on Human Rights*, at art. 31 ¶ 1).

³⁸⁷ *Tamayo* at ¶ 85 (5).

³⁸⁸ *Id.* at ¶ 85 (6).

³⁸⁹ *Id.* at ¶ 85 (1) (citing *The American Commission on Human Rights*, at art. 5).

³⁹⁰ *Country Reports*, at ¶ d.

³⁹¹ *Id.*

³⁹² DL 25475, at art. 2.

detentions of individuals.³⁹³ Despite these changes in the law, the potential for human rights abuse remains.³⁹⁴ For example, according to the Organic Law of the National Police, the police are allowed to detain a person for any investigative purpose.³⁹⁵ Generally, the arraignment of an arrested person must be held within twenty-four hours of his or her arrest.³⁹⁶ However, when terrorism, drug trafficking, espionage or treason is the crimes charged, the arraignment period, including detention, is significantly longer, namely thirty days.³⁹⁷ Under the new provisions, "Military authorities must turn over persons they detain to the police within 24 hours; in remote areas, this must be accomplished as soon as practicable."³⁹⁸ Congress has also passed a series of laws to curb the problem of arbitrary detentions with the hope of enhancing the security of the detainee.³⁹⁹ However well meaning these legal provisions are for the protection of the rights of the accused, one must be mindful that the enforcement of these rights is in the hands of some of the very judges who, in years past, actively violated procedural due process of detainees. Police abuse of detainees continues to be a problem. While reports of abuse of detainees have declined since the new constitution and laws were enacted, some abuses have remained.⁴⁰⁰ Past practices of abuse generally occurred immediately after the arrest process. It logically follows that a thirty-day detention delay before an arraignment may invite the reoccurrence of the former abuses.⁴⁰¹

ii. Article 8: Right to a Fair Trial

³⁹³ *Id.*

³⁹⁴ *Country Reports*, at ¶ d.

³⁹⁵ DL 922, at art. 12 ¶ 2.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Country Reports*, at ¶ d.

⁴⁰⁰ *Id.*

⁴⁰¹ DL 922, at art/ 12 ¶ 2.

According to the Inter-American Court, Peru violated Ms. Tamayo's right to due process of law in violation of Article 8 of the Convention.⁴⁰² Given the changes to Peru's legal system, it might appear at first blush that there is no longer a need to worry about future due process violations in Peru. The contrary is true and similar problems linger on.⁴⁰³ For example, in the past few years, Peru dismissed almost two hundred police officers and other government officials because of poor performance, alleged criminal activity and corrupt practices.⁴⁰⁴ However, shortly after their dismissal, the courts compelled the reinstatement of most of the dismissed officers finding "that dismissal following previous administrative punishment constituted a form of double jeopardy."⁴⁰⁵ Ironically, Peru extends double jeopardy protection to the abusers but not to those who had been severely abused at the hands of these "law enforcement" personnel.

3. The *Barrios Altos* Case

Government agents had assassinated fifteen persons and injured four others who were suspected of plotting against the government.⁴⁰⁶ Subsequently, Peru granted amnesty to the agents who were involved in the massacre.⁴⁰⁷ As a consequence, the victims and the victims' families filed a complaint with the Inter-American Commission alleging that Peru had violated numerous articles of the Convention which it had signed and ratified on January 21, 1981.⁴⁰⁸

The evidence demonstrates that on November 3, 1991, six heavily armed persons arrived in two police style vehicles and entered a building located in Barrios Altos in Lima; they ranged in age from 25 to 30 years. Their faces were covered in an effort to hide their identity.⁴⁰⁹ These

⁴⁰² *Tamayo* at ¶ 85 (3).

⁴⁰³ *Country Reports*, at ¶ d.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Barrios Altos Case*, Inter-Am Ct. H.R. (Ser. C) No. 75 at ¶ 2 (2001)

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at ¶ 3.

⁴⁰⁹ *Id.* at ¶ 2.

“militants” ordered everyone in the house to lie on the floor.⁴¹⁰ The terrified individuals who were inside complied with their demands.⁴¹¹ The militants then began to savagely shoot the individuals in their heads and backs; the carnage lasted for about two minutes.⁴¹² At the end, fifteen persons were dead and four were seriously wounded.⁴¹³

Subsequently, judicial investigations revealed that those who carried out the massacre had worked for military intelligence as members of the Peruvian Army and acted on behalf of the death squadron known as the “Colina Group”. This group carried out their own anti-terrorist program in reprisal against alleged members of *Sendero Luminoso* (Shining Path).⁴¹⁴ According to Congressman Javier Diez Canseco, an intelligence document which was presented to the press indicated that “terrorists” had been meeting at the home where the shooting took place.⁴¹⁵ Five men were implicated in the shootings: Division General Julio Salazar Monroe (at that time head of the National Intelligence Service (SIN)), Major Santiago Martín Rivas, and Sergeant Majors Nelson Carbajal García, Juan Sosa Saavedra and Hugo Coral Goycochea.⁴¹⁶

When a judicial inquiry was initiated, it was immediately challenged by the military, claiming that the civilian court lacked jurisdiction over an alleged crime involving military officials.⁴¹⁷ Before the matter was resolved in the courts, Congress enacted Amnesty Law No. 26479, with the express purpose of granting blanket immunity and exoneration to members of

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Altos*, at ¶ 2.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at ¶ 2.

⁴¹⁷ *Id.*

the army, police force and other civilians who had engaged in human rights violations from 1980 to 1995 and clearing them of any legal responsibility.⁴¹⁸

However, there was opposition to the passage and the implementation of the amnesty law by victims and by the judge who had presided over the investigation. This judge refused to comply with the amnesty law.⁴¹⁹ Consequently, Congress passed a second amnesty law, Law No. 26492, which “was directed at [those who were] interfering with legal actions in the Barrios Altos case.”⁴²⁰ The second law declared the amnesty provision of the law could not be disregarded by a judicial officer because the law was obligatory.⁴²¹ Moreover, Decree Law No. 26492 extended the scope of Law No. 26479, by “granting a general amnesty to all military, police or civilian officials who might be the subject of indictments for human rights violations committed between 1980 and 1995, even though they had not been charged.”⁴²²

The practical effect of this was to prevent civilian judges from determining the legality or applicability of the first amnesty law and quashing any court rulings that opposed the first law.⁴²³ On July 14, 1995, the Eleventh Criminal Chamber of the Lima Superior Court issued a decision which held that “the Barrios Altos case should be quashed.”⁴²⁴ The court reasoned that “the Amnesty Law was not contrary to the Constitution of the Republic or to international human rights treaties.”⁴²⁵ Moreover, the court ordered an investigation of the judge who opposed the amnesty law.⁴²⁶ A petition was then filed with the Inter-American Commission on Human

⁴¹⁸ *Altos*, at ¶ 2 (discussing Decree Law No. 26479, June 14, 1995, available at <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/26492.pdf> [hereinafter DL 26492]).

⁴¹⁹ *Altos*, at ¶ 2.

⁴²⁰ *Id.* (discussing Decree Law No. 26492, June 28, 1995, available at <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/26492.pdf> [hereinafter DL 26492]).

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Altos*, at ¶ 2.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

Rights.⁴²⁷ After an extensive review of the case, on March 7, 2000, the Commission adopted Report No. 28/00, in which the Commission ordered in part that Peru “annul any domestic, legislative or any other measure aimed at preventing the investigation, prosecution and punishment of those responsible for the assassinations and injuries resulting from the events known as the “Barrios Altos operation.”⁴²⁸ Specifically, the Commission ordered Peru abrogate Amnesty Laws Nos. 26479 and 26492.⁴²⁹

In opposition, on May 9, 2000, Peru forwarded its answer to the Commission,⁴³⁰ explaining that the promulgation and application of the amnesty laws were “exceptional measures” adopted against terrorist violence. It also argued that the Constitutional Court had declared the laws constitutional⁴³¹ and that civil remedies could be pursued by the next of kin of those who had been killed and by the persons who were injured.⁴³² Based on the perceived inadequacies of the response, on May 10, 2000, the Commission submitted the case to the Court for review.⁴³³ On June 8, 2000, the IACHR accepted jurisdiction of the *Barrios Altos* case to review whether Peru had in fact violated Article 4 (right to life);⁴³⁴ Article 5 (right to humane treatment);⁴³⁵ Article 1(1) (obligation to respect rights), Article 2 (domestic legal remedies); Article 8 (right to a fair trial); Article 25 (judicial protection) and Article 13 (freedom of thought

⁴²⁷ *Id.* (discussing generally, The Inter-American Commission on Human Rights).

⁴²⁸ *Id.* at ¶ 17.

⁴²⁹ *Id.*

⁴³⁰ *Altos*, at ¶ 18.

⁴³¹ *Id.* (discussing DL 26479 and DL 26492).

⁴³² *Altos*, at ¶ 18.

⁴³³ *Id.* at ¶ 19.

⁴³⁴ With respect: to Placentina Marcela Chumbipuma Aguirre, Luis Alberto Díaz Astovilca, Octavio Benigno Huamanyauri Nolzaco, Luis Antonio León Borja, Filomeno León León, Máximo León León, Lucio Quispe Huanaco, Tito Ricardo Ramírez Alberto, Teobaldo Ríos Lira, Manuel Isaías Ríos Pérez, Javier Manuel Ríos Rojas, Alejandro Rosales Alejandro, Nelly María Rubina Arquiniño, Odar Mender Sifuentes Nuñez and Benedicta Yanque Churo; (discussing, The Inter-American Convention on Human Rights, at arts. 1(1), 2, 8, 25, 13).

⁴³⁵ With respect: to Natividad Condorcahuana Chicaña, Felipe León León, Tomás Livias Ortega and Alfonso Rodas Alvítez (discussing, The Inter-American Convention on Human Rights, at art. 5).

and expression), as a result of the of the passage and enforcement of Amnesty Laws No. 26479 and No. 26492.⁴³⁶

Peru responded immediately and withdrew “from the contentious jurisdiction of the Inter-American Court of Human Rights.”⁴³⁷ However, after extensive negotiations between the Court and Peru, Congress authorized the President to take all actions necessary to annul the previous withdrawal from the Court’s jurisdiction.⁴³⁸ Consequently, Peru initiated a settlement with the claimants.⁴³⁹ At a public hearing held on February 21, 2001, Peru officially accepted responsibility for the assassination of the fifteen individuals and the injury of four others in the *Barrios Altos* case.⁴⁴⁰ The settlement involved six primary components. First, Peru “propos[ed] integrated procedures for attending to the victims based on three fundamental elements: the right to truth, the right to justice and the right to obtain fair reparation.”⁴⁴¹ Second, Peru admitted that “the amnesty laws... directly entailed a violation of the right of all victims to obtain not only justice but also truth.”⁴⁴² Third, the State explicitly recognized its international responsibility for violating the right to life guarantee embodied in Article 4 of the Convention.⁴⁴³ Fourth, the State accepted international responsibility for violating of the right to humane treatment embodied in Article 5 of the American Convention.⁴⁴⁴ Fifth, the State recognized that it violated Article 8 (the right to a fair trial) and Article 25 (the right to judicial guarantee) of the Convention,⁴⁴⁵ because it had “failed to conduct a thorough investigation of the facts and had not duly punished

⁴³⁶ *Altos*, at ¶ 25.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.* at ¶ 33.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Altos*, at ¶ 35.

⁴⁴³ *Id.* at ¶ 35.

⁴⁴⁴ *Id.* (discussing The American Convention on Human Rights, at art. 4).

⁴⁴⁵ *Id.* (discussing The American Convention on Human Rights, at art. 5).

those responsible.”⁴⁴⁶ Finally, as a logical corollary, the State promised to investigate and identify the assailants and to try and punish them.⁴⁴⁷

Subsequently, the IACHR voted unanimously, on March 14, 2001, to accept the State’s recognition of its responsibility for the brutal deaths of the fifteen persons and the injury of four other individuals.⁴⁴⁸ Consequently, the Court found that Peru had violated Article 4 (right to life);⁴⁴⁹ Article 5 (right to humane treatment);⁴⁵⁰ Article 1(1) (obligation to respect rights); Article 2 (domestic legal remedies); Article 8 (right to a fair trial); Article 25 (judicial protection), as a direct result of the harm it caused to the nineteen individuals and by the subsequent passage and enforcement of Amnesty Laws No. 26479 and No. 26492.⁴⁵¹

On August 22, 2001 the Peruvian government made the first payment of indemnification ordered by the Inter-American Court to each one of the survivors and the relatives of the victims of the *Barrios Altos* massacre.⁴⁵² The total payment ordered by the Court was US \$175,000.00 to each of the survivors and relatives of the deceased victims.⁴⁵³ Moreover, in a dialogue with the survivors and the relatives of the deceased victims, Peru accepted international responsibility for the conduct of its agents and the violation of the right to life, personal integrity, and judicial guarantees of each person.⁴⁵⁴

4. The Ugarte and Rivera Case

⁴⁴⁶ *Id.* (discussing The American Convention on Human Rights, at arts. 8, 25).

⁴⁴⁷ *Id.*

⁴⁴⁸ *Altos*, at ¶ 35.

⁴⁴⁹ With respect: to Placentina Marcela Chumbipuma Aguirre, Luis Alberto Díaz Astovilca, Octavio Benigno Huamanyauri Nolzaco, Luis Antonio León Borja, Filomeno León León, Máximo León León, Lucio Quispe Huanaco, Tito Ricardo Ramírez Alberto, Teobaldo Ríos Lira, Manuel Isaías Ríos Pérez, Javier Manuel Ríos Rojas, Alejandro Rosales Alejandro, Nelly María Rubina Arquiniño, Odar Mender Sifuentes Nuñez and Benedicta Yanque Churo; (discussing, The Inter-American Convention on Human Rights, at arts. 4, 5, 1(1), 2, 8, 25).

⁴⁵⁰ With respect: to Natividad Condorcahuana Chicaña, Felipe León León, Tomás Livias Ortega and Alfonso Rodas Alvítez.

⁴⁵¹ *Altos*, at ¶ 35.

⁴⁵² Peruvian government realizes the first payment to the family and victims of the Barrios Altos massacre available at The Center for Justice and International Law, www.cejil.org.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

On February 14 and 15, 1986, Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were detained by individuals who were members of the Department Against Terrorism (DAT).⁴⁵⁵ The DAT claimed that they suspected the two of participating in acts of terrorism.⁴⁵⁶ The two were detained without an arrest warrant or a judicial determination of probable cause.⁴⁵⁷ Rivera was also forced to waive his right to a defense attorney.⁴⁵⁸ On February 25 and 26, 1986, two petitions for a writ of *habeas corpus* were filed by their relatives with the Judicial Court of Lima.⁴⁵⁹ The petitions demanded the protection of their physical integrity, access to defense counsel and their release from confinement.⁴⁶⁰

On June 18, 1986, three separate uprisings took place throughout the prison system in Lima.⁴⁶¹ One occurred at El Frontón where Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were imprisoned.⁴⁶² Some of the prisoners gained access to weapons and took hostages.⁴⁶³ The Peruvian government responded by ordering the military to subdue the rioting prisoners; however, the military applied excessive and disproportionate force to accomplish this task by crushing a wall, invading the prison, and killing or wounding a great number prisoners.⁴⁶⁴ Later, only seven of ninety-seven bodies were identified.⁴⁶⁵ Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were probably killed and their bodies were never identified.⁴⁶⁶

⁴⁵⁵ *Durand and Ugarte Case*, Judgment of August 16, 2000, Inter-Am Ct. H.R. (Ser. C) No. 68 ¶ 1 (2000) [Durand].

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* *Durand*, at ¶ 1.

⁴⁶¹ *Durand*, at ¶ 2.

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at ¶ 3.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

On June 26, 1986, relatives of the two filed a *habeas corpus* petition with the Judicial Court of Callao, pleading for an investigation as to the whereabouts of the two individuals after the army's intervention in the riots.⁴⁶⁷ Although the Supreme Court did not expressly suspend the privilege of *habeas corpus* during the emergency, nonetheless it prohibited civilians from investigating claims arising out of the suppression of the prison uprising because civilians were not allowed in restricted military zones.⁴⁶⁸ Ultimately, Ugarte and Rivera were absolved of any responsibility in the prison uprising and were ordered released from prison. However the order had no practical effect because they were missing and most likely dead.⁴⁶⁹

On April 27, 1987, the Commission received a complaint alleging various violations on behalf of Ugarte and Rivera.⁴⁷⁰ Specifically, the complaint alleged that Peru violated Article 1 (obligation to respect rights); Article 2 (domestic legal effects); Article 4 (right to life); Article 7(6) (right to personal freedom); Article 8(1) (judicial guarantees); Article 25(1) (judicial protection); and Article 27(2) (suspension of guarantees), all to the detriment of Ugarte and Rivera.⁴⁷¹ On September 29, 1989, Peru challenged the jurisdiction of the Commission, claiming that there was an ongoing "judicial process before the Exclusive Military Court of Peru, pursuant to the laws in force, [and] it must be stated that the internal jurisdiction of the State has not been yet exhausted, so it would be convenient for the Inter-American Court of Human Rights to wait until the closing of said cases, before taking a definitive stand on them."⁴⁷² The Commission rejected the challenge to its jurisdiction, and Peru failed to respond to the Commission's rejection.

⁴⁶⁷ *Durand*, at ¶ 3.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at ¶ 1 (discussing, The American Convention on Human Rights, at arts. 1, 2, 7(6)).

⁴⁷² *Id.* at ¶ 5.

On March 5, 1996, the Commission entered a default judgment and approved a report which was sent to the State.⁴⁷³ In this report, the Commission declared that “the State of Peru [was] responsible for the violations to the detriment of Gabriel Pablo Ugarte Rivera and Durand Ugarte, of the rights to personal freedom, life, and [denying them] an effective judicial remedy as well as judicial guarantees of due process of law that are recognized, respectively, by Articles 7, 4, 25 and 8 of the American Convention.”⁴⁷⁴ The Commission also concluded that Peru “[had] not fulfill[ed] the obligation to respect the rights and guarantees stipulated by Article 1(1) of the American Convention.”⁴⁷⁵

On August 8, 1996, the application was submitted to the Court.⁴⁷⁶ The Commission asked the Court for three remedies: punish the individuals who were responsible for the atrocities; determine where the bodies of Ugarte and Rivera were; and “to make full moral and material reparation and indemnification to the relatives of Nolberto Durand Ugarte and Gabriel Pablo Ugarte for the grave damage [they] sustained as a result of the multiple violations of the rights recognized in the Convention.”⁴⁷⁷

The Court recognized its responsibility to protect human rights⁴⁷⁸ and invited Peru to submit evidence, whether documentary, testimonial or by an expert, to fully investigate and adjudicate the claims.⁴⁷⁹ The Court also requested documentation regarding the charges of terrorism against Ugarte and Rivera and documentation about the status of the *habeas corpus* remedy.⁴⁸⁰ No documentation was ever submitted by Peru.⁴⁸¹ On, August 4, 1999, the Court

⁴⁷³ *Durand*, at ¶ 8.

⁴⁷⁴ *Id.* (discussing, The American Convention on Human Rights, at arts. 7, 4, 25).

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at ¶ 9.

⁴⁷⁷ *Id.* at ¶ 1.

⁴⁷⁸ *Durand and Ugarte Case*, at ¶ 46.

⁴⁷⁹ *Id.* at ¶ 51.

⁴⁸⁰ *Id.* at ¶ 21.

⁴⁸¹ *Id.* at ¶ 24.

summoned the Commission and Peru to attend a public hearing.⁴⁸² On September 20, 1999, a public hearing was held but Peru did not attend.⁴⁸³ The Court then reviewed each Article and examined Peru's and the Commission's arguments.⁴⁸⁴

a. Article 4(1) The Right To Life

The Court addressed Article 4(1) of the Convention which guarantees that "[e]very person has the right to have his [or her] life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his [or her] life."⁴⁸⁵ The Commission had concluded that the bodies of Durand Ugarte and Ugarte Rivera were not found, and it presumed that they had died as a result of being crushed.⁴⁸⁶ The Commission argued that "even though the State had the right and duty to subdue the riot, its suffocation was carried out by a disproportionate use of force [...making] the State responsible for the arbitrary deprivation of life those persons who died because of demolition of [the] San Juan Bautista Prison and, in particular, due to the violation of the right to life to the detriment of Durand Ugarte and Ugarte Rivera".⁴⁸⁷ Peru responded, claiming that "there was never disproportionate means employed, but the execution of a preconceived scheme to subdue the riots demanding [the use of] weapons, and members of the Navy. Operations were implemented within the legal and conventional framework that empowers every State to defend the principle of authority and security of its citizens."⁴⁸⁸ It contradicted a report that was issued by an official Investigating Commission, created by the Congress, which had concluded that "it is proven that the government [was] not fulfilling its obligation to protect human life, gave orders which

⁴⁸² *Id.* at ¶ 29.

⁴⁸³ *Durand and Ugarte Case*, at ¶ 30.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Durand and Ugarte Case*, at ¶ 64.

⁴⁸⁶ *Id.* at ¶ 62.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at ¶ 63.

brought about the consequences of an unjustified toll [and the use of] military force was disproportionate in relation to the existing danger.”⁴⁸⁹

The Court recognized that the State has a right to defend itself in case of a prison riot, however, the Court also determined that the State cannot use this power in a limitless way or utilize whatever means it chooses to justify the end.⁴⁹⁰ The facts argued by Peru “are far from constituting [...] sufficient elements to justify the amount of force used in this and in other rioted prisons.”⁴⁹¹ Consequently, the Court concluded that the disproportionate use of force, coupled with the fact that for fourteen years Peru could not account for the whereabouts of the bodies of Ugarte and Rivera, demonstrated that Peru had violated the right to life of Ugarte and Rivera, as guaranteed by Article 4(1) of the Convention.⁴⁹²

b. Article 5(2) Right To Humane Treatment

The Commission argued that Peru was unquestionably responsible for the disappearances of Ugarte and Rivera, since they were in the prison during the time of the rioting. From that it concluded that the State was guilty of depriving them of bodily integrity and depriving them of humane treatment under Article 5(2) of the Convention.⁴⁹³ The Court noted that Peru “did not expressly refer to Article 5(2) of the Convention, but instead claimed that “under all circumstances life and physical integrity of the inmates who surrendered during and after the riots were respected.”⁴⁹⁴ The Court observed that the two individuals were in state custody and that Peru refused to identify their bodies.⁴⁹⁵ However, in the absence of proof of inhumane treatment, the Court could not find a violation of Article 5(2). A violation under Article 5(2)

⁴⁸⁹ *Id.* at ¶ 65.

⁴⁹⁰ *Id.* at ¶ 69.

⁴⁹¹ *Durand*, at ¶ 70.

⁴⁹² *Id.* at ¶ 72.

⁴⁹³ *Id.* at ¶ 73 (discussing generally, The American Convention on Human Rights).

⁴⁹⁴ *Id.* at ¶ 74 (discussing generally, The American Convention on Human Rights).

⁴⁹⁵ *Id.* at ¶ 77.

cannot be inferred from a finding that Peru denied them the right to life.⁴⁹⁶ Consequently, the Court concluded that the Commission had failed to prove that Peru had violated Article 5(2) of the Convention.⁴⁹⁷

c. Articles 7(1) and 7(5) Right To Personal Freedom

Article 7(1) of the Convention guarantees “the right to personal liberty and security.” Liberty Article 7(5) guarantees that “[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings, [however, this] release may be subject to guarantees to assure his [or her] appearance for trial.”⁴⁹⁸ The Commission argued that since Ugarte and Rivera were detained by members of the Department Against Terrorism without an arrest warrant or judicial process, Peru had violated Article 7 of the Convention.⁴⁹⁹ Peru did not respond directly to this allegation but instead argued that the “investigation involved intelligence work, including a follow-up to discover other terrorists and to identify higher-ranking persons within the terrorist organizations.”⁵⁰⁰

The Court concluded that Ugarte and Rivera were held against their will by members loyal to the dictatorship without a warrant or judicial process.⁵⁰¹ Consequentially, the Court held that the State had violated the Articles 7(1) and 7(5) of the Convention.⁵⁰²

d. Articles 7(6) and 25(1), Judicial Protection

⁴⁹⁶ *Durand* at ¶ 79 (discussing, The American Convention on Human Rights, at art. 5(2)).

⁴⁹⁷ *Id.* at ¶ 80.

⁴⁹⁸ *Id.* at ¶ 83 (discussing, the American Convention on Human Rights, at arts. 7(1), 7(5)).

⁴⁹⁹ *Id.* at ¶ 81 (discussing, the American Convention on Human Rights).

⁵⁰⁰ *Id.* at ¶ 82.

⁵⁰¹ *Id.*

⁵⁰² *Durand* at ¶ 92 (discussing, The American Convention on Human Rights, at arts. 7(6), 25(1)).

The Court read Article 7(6) of the Convention to provide that “[a]nyone who is deprived of his [or her] liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his [or her] arrest or detention and order his [or her] release if the arrest or detention is unlawful. In States Parties, whose laws provide that anyone who believes himself [or herself] to be threatened with deprivation of his [her] liberty is entitled to recourse to a competent court that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person on his [or her] behalf is entitled to seek these remedies.”⁵⁰³ The Court also read Article 25(1) of the Convention to guarantee that “[e]veryone 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 [or her] 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.”⁵⁰⁴

The Commission argued that the Court had previously interpreted Article 25 of the Convention to require, *inter alia*, “a simple and prompt recourse or any other effective recourse for the protection of the fundamental rights of the person”, including the writ of *habeas corpus* to challenge the legality of that person’s detention.⁵⁰⁵ Moreover, the Commission argued that for recourse to be effective, the Court must give it full meaning, claiming that “Peruvian tribunals disregarded their obligation to inform [of the] victims' whereabouts, which was the fundamental objective...[of] the remedy.”⁵⁰⁶ In response, Peru argued that the remedy of *habeas corpus*

⁵⁰³ *Durand*, at ¶ 96.

⁵⁰⁴ *Id.* at ¶ 95 (discussing, The American Convention on Human Rights, at arts. 7(6), 25(1)).

⁵⁰⁵ *Id.* (discussing generally, The Inter-American Commission on Human Rights).

⁵⁰⁶ *Id.* at ¶ 93 (discussing generally, The Inter-American Commission on Human Rights).

could not be claimed here because it had lawful justification and legal authority to detain them.⁵⁰⁷

In weighing the two arguments, the Court held that the *habeas corpus* remedy provided in Article 7(6) of the Convention “is not only valid under normal circumstances, but also under [the] particular circumstance... [here] [because] *habeas corpus* represents the best means to assure respect for the rights of life and humane treatment, to prevent his disappearance and determine his place of detention, as well as to protect someone against cruel, inhumane, or degrading punishment or treatment.”⁵⁰⁸ Consequently, the Court concluded that Peru had violated Articles 7(6) and 25(1) of the Convention here.⁵⁰⁹

e. Articles 8(1) and 25(1) Due Process

The Commission argued that Ugarte was denied the right to an attorney and the right to a fair trial,⁵¹⁰ claiming that the military tribunal was not an independent, impartial, or competent judicial body.⁵¹¹ Peru submitted a very brief reply claiming that the Commission’s argument lacked evidentiary basis as to each finding.⁵¹²

The Court agreed with the Commission that civilians must not be tried in military tribunals.⁵¹³ Moreover, the Court reiterated what the Commission had found, namely, that the “exclusive military court does not offer the minimal guarantees of independence and impartiality as stipulated in Article 8(1) of the Convention.”⁵¹⁴

f. Articles 1(1) and 2 - Obligation to Respect Rights and Domestic Legal Effects

⁵⁰⁷ *Id.* at ¶ 94 (discussing generally, The Inter-American Commission on Human Rights).

⁵⁰⁸ *Durand*, at ¶ 103.

⁵⁰⁹ *Id.* at ¶ 110 (discussing, The American Convention on Human Rights, at arts. 7(6), 25(1)).

⁵¹⁰ *Id.* at ¶ 111 (discussing, The American Convention on Human Rights, at arts. 7(6), 25(1)).

⁵¹¹ *Id.* at ¶ 111 (discussing, The American Convention on Human Rights, at arts. 7(6), 25(1)).

⁵¹² *Durand and Ugarte Case*, at ¶ 112 (discussing, The American Convention on Human Rights, at arts. 7(6), 25(1)).

⁵¹³ *Id.* at ¶ 117.

⁵¹⁴ *Id.*

The Court read Article 1(1) of the Convention to require a State to “ensure to all persons subject to its jurisdiction the free and full exercise of rights and freedoms, without any discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”⁵¹⁵ Article 2 of the Convention, according to the Court, states that “where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties must undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”⁵¹⁶

The Commission argued that the Convention places an affirmative duty on a State “to take action in order to ensure every person a full enjoyment and exercise of said rights...”⁵¹⁷ The State is under a duty to adopt new measures and to revoke any laws which are incompatible with the Convention.⁵¹⁸ The Court agreed with the Commission and observed that if “Peru keeps Executive Order No. 23.201 (Organic Law of Military Justice) [as part of] its legislation, which contradicts the rights guaranteed in Articles 8 and 25 of the Convention, [it] similarly violates its obligations according to Article 2”.⁵¹⁹ Peru justified its conduct, claiming that it acted lawfully to maintain public order and advance the welfare of its citizens.⁵²⁰

The Court concluded that as a member State, Peru had to introduce changes in its national law to ensure her compliance with the obligations that she had assumed.⁵²¹ In this case Peru had

⁵¹⁵ *Durand and Ugarte Case*, at ¶ 134 (discussing, The American Convention on Human Rights, at art. 2).

⁵¹⁶ *Id.* at ¶ 135 (discussing, The American Convention on Human Rights, at art. 2).

⁵¹⁷ *Id.* at ¶ 132 (discussing generally, The Inter-American Commission on Human Rights).

⁵¹⁸ *Id.* at ¶ 132.

⁵¹⁹ *Id.* (discussing, The American Convention on Human Rights, at art. 2).

⁵²⁰ *Id.* at 132.

⁵²¹ *Durand and Ugarte Case*, at ¶ 136.

violated Articles 4(1), 7(1), 7(5), 7(6), 8(1) and 25(1) of the Convention.⁵²² Moreover, the Court concluded that Peru did not comply with the general mandates of Articles 1(1) and 2 of the Convention.⁵²³

g. Enforcement of Article 63(1)

Article 63(1) of the Convention provides for remedies for violations under the Convention.⁵²⁴ The Commission argued that Peru must punish those individuals who were responsible for the use of excessive force, inform the relatives of Ugarte and Rivera of the whereabouts of their bodies, and compensate the victims' families for the pain that they had suffered and the costs of pursuing their claims.⁵²⁵ The Court agreed with the Commission and ordered Peru to investigate the facts "even if it is not an easy task."⁵²⁶ It also included the payment of fair compensation for the loss of life and legal expenses incurred by the relatives.⁵²⁷ On November 26, 2001, the Peruvian government and the relatives of victims signed an agreement of compensation.⁵²⁸ The agreement included public acknowledgement by Peru that it violated the rights of Ugarte and Rivera to life, personal freedom, and judicial protection.⁵²⁹ In addition, the agreement obligated Peru to actively conduct an investigation and to sanction those individuals who were responsible for the various violations and to ascertain the whereabouts of the bodies of Ugarte and Rivera.⁵³⁰

V.

PERU'S ANTI-TERRORISM LAWS AND PRACTICES: INTERNATIONAL

⁵²² *Id.* at ¶ 138.

⁵²³ *Id.* at ¶ 139.

⁵²⁴ *Id.* at ¶ 139.

⁵²⁵ *Durand and Ugarte Case*, at ¶ 140.

⁵²⁶ *Id.* at ¶ 143.

⁵²⁷ *Id.* at ¶ 145.

⁵²⁸ The Peruvian government, the family, the victims and their legal representatives signed an accord of "integral reparation" in the *Durand and Ugarte* case available at The Center for Justice and International Law, www.cejil.org

⁵²⁹ *Id.*

⁵³⁰ *Id.*

LAW STANDARDS AND COMPARATIVE LAW ANALYSIS

In this section, the report focuses on Peru's international human rights obligations outside the Inter-American human rights system and provides a comparative analysis.

Subsection A surveys a number of international instruments, which we call the United Nations model, that strive to establish a fair balance between the needs of a State to maintain order and security and its responsibility to protect the basic human rights of its citizenry. Peru is a party to these conventions and treaties. The tension between legitimate State security interests and fundamental rights is a pressing issue today throughout the world. In focusing on Peru in this report, we do not mean to suggest that she is the primary or the only violator of human rights in the war against terrorism. Subsection B provides a comparative analysis that uses the European human rights system as a model. It also provides evidence of customary international law that Peru must respect.

A. International Law Standards - the United Nations Model

Since the events of September 11, 2001, it has become painfully clear that terrorism is a universal problem. For those nations that adhere to the rule of law, the war against terrorism creates serious challenges. How does the State wage battle against terrorism and still respect human rights in that effort? This challenge is particularly evident during critical times when a nation declares a state of emergency in its attempt to harness terrorism. International law allows a State to declare a state of emergency under certain circumstances, however, this is not a limitless option. The nature and scope of these unusual circumstances and the concomitant limitations are set out in the International Covenant on Civil and Political Rights (ICCPR), which Peru ratified on July 28, 1978.⁵³¹

⁵³¹ International Covenant on Civil and Political Rights, art. 4, ¶¶ 1 & 3, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter

1. The State's Duty to Protect Against and to Combat Terrorism

Every State is under a duty to protect all those within its borders and jurisdiction.⁵³² A State may not ignore known threats to those in its jurisdiction simply because they are not in its physical custody.⁵³³ A State is under a duty to take reasonable and appropriate measures to protect all people. The absence of such a duty would have serious and negative implications for human rights.⁵³⁴ This duty is especially important for the protection of women and children, who are at a distinct disadvantage during times of armed conflict or instability.⁵³⁵

2. State of Emergency – Some General Observations

During a state of emergency, which threatens the life of a nation, a State may suspend certain human rights.⁵³⁶ However non-derogable rights may never be suspended.⁵³⁷ Furthermore, any suspension must be consistent with the State's obligation under international law not to discriminate on the basis of race, color, sex, language, religion or social origin.⁵³⁸

a. Requirements for a Declaration of a State of Emergency

International law requires that a State adhere to strict guidelines when declaring a state of emergency.⁵³⁹ These guidelines include: (1) that there be a necessity for the declaration; (2) that the duration for which the declaration remains in effect be specified and limited; (3) that the legal provisions of the state of emergency be clearly defined; (4) that the declaration respect those

ICCPR]. Peru also ratified the Optional Protocol to the International Covenant on Civil and Political Rights on January 3, 1981. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976 [hereinafter ICCPROP1].

⁵³² *Delgado Páez v. Colombia*, U.N. GAOR, Hum. Rts. Comm., Communication No. 195/1985 (July 12, 1990), 45th Sess., Supp. No. 40, Vol. II, at 43, U.N. Doc. A/45/40 (1990).

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ Report of the Committee on the Elimination of Discrimination Against Women, 20th Sess., ¶ 78, at 17, U.N. Doc. A/54/38/Rev.1 (1999).

⁵³⁶ ICCPR, at art. 4(1).

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ ICCPR, at art. 4(3).

rights designated as non-derogable by international standards; and (5) that the courts of the state retain the right to review the legality of all the actions taken by the State during the state of emergency.⁵⁴⁰ When a State determines that it must declare a state of emergency, it is under a mandatory obligation to notify other States by informing the Secretary-General of the United Nations what, if any, human rights it intends to suspend.⁵⁴¹ Further, the United Nations must be informed of the reasons for the suspension.⁵⁴² Finally, a State must indicate at a later date to the Secretary-General when the suspension of rights will cease.⁵⁴³

b. Necessity

The United Nations has consistently warned States that a state of emergency is only to be declared under extreme circumstances of national emergency.⁵⁴⁴ This must be a measure of last resort taken with the least restrictive means possible.⁵⁴⁵ The United Nations has frequently admonished States when such declarations are taken for insufficient reasons.⁵⁴⁶

c. Duration

Another critical concern of international law is the length of time of the declared emergency. The United Nations has been critical of States that have kept the emergency in place for periods as long as 20 and 40 years,⁵⁴⁷ remain in states of emergency since their creation, and other states that retain semi-permanent states of emergency.⁵⁴⁸

d. Precision

⁵⁴⁰ *Id.*

⁵⁴¹ ICCPR, at art. 4(3).

⁵⁴² *Id.*

⁵⁴³ *Id.*

⁵⁴⁴ ICCPR, at art. 4(1).

⁵⁴⁵ *Id.*

⁵⁴⁶ Concluding Observations of the Human Rights Committee: Columbia, U.N. GAOR, Hum. Rts. Comm., ¶ 25, U.N. Doc. CCPR/C/79/Add.76 (1997).

⁵⁴⁷ Concluding Observations of the Human Rights Committee: Israel, U.N. GAOR, Hum. Rts. Comm., ¶ 11, U.N. Doc. CCPR/C/79/Add.93 (1998).

⁵⁴⁸ Concluding Observations of the Human Rights Committee: Syrian Arab Republic, U.N. GAOR, Hum. Rts. Comm., ¶ 6, U.N. Doc. CCPR/CO/71/SYR (2001).

The United Nations has expressed harsh criticism when a State had failed to inform it about the specific measures that the State took to protect human rights during the declaration of emergency.⁵⁴⁹ The United Nations has also taken issue with a State's assertions for the need to declare a state of emergency, urging that such a declaration must be supported with specific facts.⁵⁵⁰ A State must also inform the United Nations of the specific rights that had been derogated. Without qualification, a State has a duty to notify the United Nations and account for its conduct. The United Nations recognizes, however, that it is the sovereign right of the State to declare a state of emergency.⁵⁵¹

e. Curative Measures

States are responsible for bringing their own laws and practices into conformity with their obligations under international law.⁵⁵² The United Nations has recognized that curative measures are essential to promote and protect basic human rights.⁵⁵³ As to non-derogable rights, the United Nations has insisted that these rights be enumerated in the constitution of every State.⁵⁵⁴ It has also cautioned a State when its constitution or laws fall short of its obligations.⁵⁵⁵ States have been cautioned by the United Nations when they take actions that are in direct contravention of their human rights responsibilities.⁵⁵⁶

f. Judicial Control

⁵⁴⁹ Concluding Observations of the Human Rights Committee: Nepal, U.N. GAOR, Hum. Rts. Comm., ¶ 9, U.N. Doc. CCPR/C/79/Add.42 (1994). See also Concluding Observations of the Human Rights Committee: Zambia, U.N. GAOR, Hum. Rts. Comm., ¶ 11, U.N. Doc. CCPR/C/79/Add.62 (1996); Concluding Observations of the Human Rights Committee: Uruguay, U.N. GAOR, Hum. Rts. Comm., ¶ 8, U.N. Doc. CCPR/C/79/Add.90 (1998).

⁵⁵⁰ *Landinelli Silva v. Uruguay*, U.N. GAOR, Hum. Rts. Comm., Communication No. 34/1978 (April 8, 1981), 36th Sess., Supp. No. 40, Annex XII, ¶ 8.2, U.N. Doc. A/45/40 (1981) [hereinafter *Landinelli Silva*].

⁵⁵¹ *Id.*

⁵⁵² Concluding Observations of the Human Rights Committee: Kyrgyzstan, U.N. GAOR, Hum. Rts. Comm., ¶ 12, U.N. Doc. CCPR/C/69/KGZ (2000).

⁵⁵³ Concluding Observations of the Human Rights Committee: Uruguay, at ¶ 7.

⁵⁵⁴ *Id.*

⁵⁵⁵ Concluding Observations of the Human Rights Committee: Armenia, U.N. GAOR, Hum. Rts. Comm., ¶ 7, U.N. Doc. CCPR/C/79/Add. 100 (2001).

⁵⁵⁶ Concluding Observations of the Human Rights Committee: Uruguay, at ¶ 7.

The United Nations model recognizes the significance of an independent judiciary.⁵⁵⁷ This is especially true during a state of emergency. The judiciary must be free to review the legality of the laws and of governmental conduct that disrespect human rights.⁵⁵⁸ The United Nations has declared that it is the duty of an independent judiciary to examine whether a declaration creating a state of emergency is legitimate under the circumstances.⁵⁵⁹ The judiciary is also to act as a monitor of governmental human rights abuses during a state of emergency.⁵⁶⁰

3. Non-Derogable Rights

The International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to the ICCPR (CCPROP1), entered into force on March 23, 1976, protect certain non-derogable rights.⁵⁶¹ Peru has ratified both instruments. The ICCPROP1 gives the United Nations Human Rights Committee (HCR) authority to receive complaints regarding the violation of the rights which are enumerated in the ICCPR from any person who is subject to the jurisdiction of a State that signed and ratified the protocol.⁵⁶² The ICCPR requires every State party to take necessary steps to ensure the protection of every person's rights recognized in the ICCPR.⁵⁶³ Under Article 2 of the ICCPR, every State party must, either by current legislation, adoption of new legislation, or through other measures, protect, ensure, and recognize the rights that are enumerated in the ICCPR.⁵⁶⁴ Where the State party violates these rights, it must provide an effective remedy and enforce this remedy.⁵⁶⁵

⁵⁵⁷ Concluding Observations of the Human Rights Committee: Colombia, at ¶ 38.

⁵⁵⁸ Concluding Observations of the Human Rights Committee: Sri Lanka, U.N. GAOR, Hum. Rts. Comm., ¶ 13, U.N. Doc. CCPR/C/79/Add. 56 (1995).

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *See generally*, ICCPROP1.

⁵⁶² ICCPROP1, at arts. 1 & 8(2).

⁵⁶³ ICCPR, at arts. 2 & 6.

⁵⁶⁴ *Id.* at arts. 2(1) & (2).

⁵⁶⁵ *Id.* at art. 2(3).

a. Right to Life

Article 6(1) states that every person has the right to life and no person “shall be arbitrarily deprived” of this right.⁵⁶⁶ Under Article 4(2) of the ICCPR, the right to life is a non-derogable right, even during a state of emergency.⁵⁶⁷ A State party can be found to not comply with its obligation under the ICCPR when it takes no action to prevent the arbitrary deprivation of life by its own military or police force or by non-state actors.⁵⁶⁸ In *Suarez de Guerrero v. Colombia*, the HRC found that the Colombian police had ordered the raid of Guerrero’s home on the belief that suspected kidnappers were holding the former Ambassador of Colombia to France at this location.⁵⁶⁹ Upon entry and search of the home, the police failed to find the former Ambassador or any of the suspects.⁵⁷⁰ The police decided to hide out in the house and await the arrival of the suspected kidnappers.⁵⁷¹ The HRC stated that the evidence presented established that on the arrival of each suspect the Colombian police shot and killed the victims at point-blank without first determining whether they were the same persons they were looking for; that the victims were unarmed; and that each was killed as he entered the house.⁵⁷² An investigation that was conducted by the Office of the State Counsel of Colombia was dismissed on the basis that Article 7 of Decree No. 0070 was applicable, which provided a defense in both civil and criminal proceedings to police action taken in the course of an operation to combat the crimes of extortion and kidnapping.⁵⁷³ The HRC held that Colombia had violated Articles 2 and 6 by failing to

⁵⁶⁶ *Id.* at art. 6(1).

⁵⁶⁷ *Id.* at art. 4(2).

⁵⁶⁸ *Laureano Atachahua v. Peru*, U.N. GAOR, Hum. Rts. Comm., Communication No. 540/1993 (April 16, 1996), 56th Sess., U.N. Doc. CCPR/C/54/D/540/1993 (1996) [hereinafter *Atachahua*].

⁵⁶⁹ *Suarez de Guerrero v. Colombia*, U.N. GAOR, Hum. Rts. Comm., Communication No. 45/1979 (February 5, 1979), 37th Sess., Supp. No. 40, Annex XI, at 137, U.N. Doc. A/37/40 (1982) [hereinafter *Guerrero*].

⁵⁷⁰ *Id.* at ¶ 11.4.

⁵⁷¹ *Id.*

⁵⁷² *Id.* at ¶ 11.5.

⁵⁷³ *Id.* at ¶¶ 11.6 & 11.8.

adequately protect the life of Guerrero and by providing by law a legal defense and exoneration to the police for the acts committed during this operation.⁵⁷⁴

Article 6(1) of the ICCPR provides that every person has an “inherent right to life.”⁵⁷⁵ This right is “protected by law,” and he or she shall not be arbitrarily deprived of that right.⁵⁷⁶ One exception to Article 6(1) applies to States that have not abolished the death penalty; they may impose such a sentence only for the most serious crimes, however the accused must be afforded a right to judicial appeal or to seek a pardon, and it cannot be imposed on persons under the age of 18.⁵⁷⁷ Arbitrary deprivation of life can come in various forms, including arbitrary killings,⁵⁷⁸ abduction,⁵⁷⁹ failure to provide for an appeal after a sentence of death,⁵⁸⁰ failure to provide an effective remedy, or failure to protect a person’s life while in state custody.⁵⁸¹ In *Rodger Chongwe v. Zambia*, Chongwe, the claimant, was wounded while driving to a political rally with Dr. Kaunda when Zambian police personnel surrounded and fired upon them.⁵⁸² The Zambian government refused to investigate the matter, a police investigation was not completed or made public, no criminal charges were ever initiated, and claims for compensation were rejected.⁵⁸³ The HRC stated that a State party must “take adequate measures to protect” a person’s right to life “from threats of any kind” and provide an effective remedy when such right has been violated. The HRC found that the evidence had established that Zambia failed to

⁵⁷⁴ *Id.* at ¶ 13.3.

⁵⁷⁵ ICCPR, at art. 6(1).

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* at arts. 6(2), (3) & (4).

⁵⁷⁸ *Guerrero*, at ¶ 13.2.

⁵⁷⁹ *Atachahua*, at ¶ 8.4.

⁵⁸⁰ *Carlton Reid v. Jamaica*, U.N. GAOR, Hum. Rts. Comm., Communication No. 250/1987 (August 21, 1990), 39th Sess., U.N. Doc. CCPR/C/39/D/250/1987 (1990).

⁵⁸¹ *Barbato and Barbato v. Uruguay*, U.N. GAOR, Hum. Rts. Comm., Communication No. 84/1981 (February 27, 1981), 38th Sess., Supp. No. 40, Annex IX, at 124, U.N. Doc. A/38/40 (1983).

⁵⁸² *Chongwe v. Zambia*, U.N. GAOR, Hum. Rts. Comm., Communication No. 821/1998 (November 9, 2000), 70th Sess., U.N. Doc. CCPR/C/70/D/821/1998 (2000).

⁵⁸³ *Id.* at ¶ 5.3.

adequately protect Chongwe's life or provide him with an adequate and effective remedy, therefore Zambia was in violation of Article 6 of the ICCPR.⁵⁸⁴

b. Prohibition Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The prohibition against torture and other cruel, inhuman, or degrading treatment is found in two different international instruments, one is Article 7 of the ICCPR⁵⁸⁵ and the other in the Convention Prohibition Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).⁵⁸⁶ Violations of either instrument can result from a State party's failure to prohibit or prevent such acts by legislation or other measures or when it fails to investigate allegations of torture or other cruel, inhuman, or degrading treatment or punishment by its officials or by private actors.⁵⁸⁷

i. Protection Against Torture and Other Cruel, Inhuman, or Degrading Treatment under the ICCPR

Article 7 of the ICCPR states that "no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."⁵⁸⁸ Under Article 4, this is a non-derogable right.⁵⁸⁹ A State party is required to prohibit and prevent such acts through legislation or other measures and to provide an effective remedy for the violation of such right.⁵⁹⁰ The HRC has found that it is a violation of Article 7 of the ICCPR for a State party to not prevent torture or investigate an

⁵⁸⁴ *Id.* at ¶ 7.

⁵⁸⁵ ICCPR, at art. 7.

⁵⁸⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987 [hereinafter CAT].

⁵⁸⁷ *Teofila Casafranca de Gomez v. Peru*, U.N. GAOR, Hum. Rts. Comm., Communication No. 981/2001 (September 19, 2001), 78th Sess., U.N. Doc. CCPR/C/78/D/981/2001 (2003) [hereinafter *Casafranca*]; *Radivoje Ristic v. Yugoslavia*, U.N. GAOR, Comm. Against Torture, Communication No. 113/1998 (May 11, 2001), 26th Sess., U.N. Doc. CAT/C/26/D/113/1998 (2001) [hereinafter *Ristic*].

⁵⁸⁸ ICCPR, at art. 7.

⁵⁸⁹ *Id.* at art. 4.

⁵⁹⁰ *Id.* at art. 2.

allegation of torture.⁵⁹¹ In *Teofila Casafranca de Gomez v. Peru*, the HRC found that the claimant, de Gomez, was arrested, charged with terrorism, and subjected to torture by the Peruvian police.⁵⁹² Casafranca de Gomez was physically, psychologically and mentally tortured into giving incriminating statements. He claimed that the police bent his hands back, twisted his arms, put a pistol in his mouth, attempted to drown him, and raped him with a candle.⁵⁹³ Although the Lima Seventh Correctional Court acquitted him of all criminal charges, the Attorney General had the acquittal annulled by a faceless Supreme Court, and he was sentenced to 25 years.⁵⁹⁴ The HRC further determined that even though de Gomez reported the acts of torture and cruel treatment, no investigation was ever opened by the National Police, Department of Human Rights, which had claimed that his complaints were not submitted in a timely manner.⁵⁹⁵ The HRC found that Peru's failure to prevent and to investigate the acts of torture was a violation of Article 7 of the ICCPR.⁵⁹⁶

ii. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT

The Convention against Torture was entered into force on June 26, 1987.⁵⁹⁷ Peru ratified the Convention on August 6, 1988. Under Article 1, torture is defined as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the

⁵⁹¹ *Casafranca*, at ¶ 7.1.

⁵⁹² *Id.*

⁵⁹³ *Id.* at ¶ 2.2.

⁵⁹⁴ *Id.* at ¶ 2.6.

⁵⁹⁵ *Id.* at ¶ 2.2.

⁵⁹⁶ *Id.* at ¶ 7.2.

⁵⁹⁷ *See generally*, CAT.

consent or acquiescence of a public official or other person acting in an official capacity.⁵⁹⁸

The CAT does not provide for, allow, or recognize any exception to the prevention and prohibition of torture, including during times of war, threat of war, or any other emergency.⁵⁹⁹ Finally, Article 15 of the Convention prohibits the evidentiary use in any proceeding of statements that have been obtained through the use of torture.⁶⁰⁰ Every State party to the Convention is required to prevent torture through “effective legislation, administration, judicial, or other measures”⁶⁰¹ and ensure that acts of torture are treated as criminal offenses under their laws.⁶⁰² Should an alleged violation occur, Articles 12 and 13, mandate each State party to provide every individual who brings a claim that is based on reasonable grounds with protection against threats and a prompt and impartial investigation into his or her allegations.⁶⁰³ In the event that an allegation is established to be valid, a State party must ensure that the victim obtains redress and an “enforceable right to a fair and adequate compensation.”⁶⁰⁴

The Committee, in *Radivoje Ristic v. Yugoslavia*, determined that the claimant, father of the victim, alleged that three policemen were looking for a murder suspect when they came to his home.⁶⁰⁵ One of the officers hit his son with the butt of a rifle or pistol behind his left ear, killing him instantly.⁶⁰⁶ The officers proceeded to move his son’s body to the street where they broke both of his thighbones in an attempt to make it look like a suicide.⁶⁰⁷ The Committee found that the failure of the police to immediately inform an investigating judge of the incident, oversee the

⁵⁹⁸ *Id.* at art. 1(1).

⁵⁹⁹ *Id.* at art. 2(2).

⁶⁰⁰ *Id.* at art. 15.

⁶⁰¹ *Id.* at art. 2(1).

⁶⁰² *Id.* at art. 4(1).

⁶⁰³ CAT, at arts. 12 & 13.

⁶⁰⁴ *Id.* at art. 14.

⁶⁰⁵ *Ristic*, at ¶ 2.1.

⁶⁰⁶ *Id.*

⁶⁰⁷ *Id.*

on-site investigation in compliance with established procedures, and the failure to use a specialist in forensic medicine amounted to an ineffective investigation.⁶⁰⁸ Yugoslavia was held to be in violation of Articles 12 and 13 of the CAT for the failure to provide a prompt and impartial investigation.⁶⁰⁹

Article 16 of the CAT prohibits all other acts that may not rise to the level of torture but are otherwise cruel, inhuman, or degrading treatment or punishment.⁶¹⁰ Although Article 16 specifically mentions Articles 10, 11, 12, and 13 as being applicable to Article 16 violations, the Committee has held that this is not an exhaustive list of applicable provisions of the CAT.⁶¹¹ In *Hajrizi Dzemajl et al. v. Yugoslavia*, the complainants, all of Romani origin, alleged that their homes, cattle, and belongings were destroyed by non-Romani residents in the same town.⁶¹² This incident arose after news reported that two Romani boys had allegedly raped a non-Romani girl.⁶¹³ The local police warned the Romani settlement that they should leave because they would not be able to control the mob that was forming.⁶¹⁴ Although most of the Romani settlers left the area, a few stayed behind to protect their homes and belongings.⁶¹⁵ Once the angry mob reached the Romani settlement, they began to slaughter the cattle, set fire to homes, and destroyed their belongings.⁶¹⁶ Although the local police were patrolling the settlement, they did nothing to stop the mob.⁶¹⁷ The subsequent criminal investigation into the incident failed to

⁶⁰⁸ *Id.* at ¶ 9.6.

⁶⁰⁹ *Id.* at ¶¶ 9.4, 9.5 & 9.8.

⁶¹⁰ CAT, at art. 16.

⁶¹¹ *Hajrizi Dzemajl et al. v. Yugoslavia*, U.N. GAOR, Comm. Against Torture, Communication No. 161/2000 (December 2, 2002), 29th Sess., U.N. Doc. CAT/C/29/D/161/2000 (2002) [hereinafter *Dzemajl*].

⁶¹² *Id.* at ¶ 2.4.

⁶¹³ *Id.* at ¶ 2.1.

⁶¹⁴ *Id.* at ¶ 2.4.

⁶¹⁵ *Id.*

⁶¹⁶ *Id.* at ¶ 2.7.

⁶¹⁷ *Dzemajl*, at ¶ 2.8.

produce any criminal charges or convictions, allegedly for lack of evidence, even though the police and several hundred non-Romanis were present when these events took place.⁶¹⁸

The Committee found that the fact that some of the Romani settlers were still there when the burning and destruction occurred and that these acts were racially motivated amounted to acts of cruel, inhuman or degrading treatment or punishment.⁶¹⁹ The Committee further found that although these acts were committed by non-State actors, the failure of the police to take appropriate steps to stop the acts of cruel, inhuman or degrading treatment or punishment implied State “acquiescence.”⁶²⁰ It was held that these acts were committed with the acquiescence of public officials and constituted a violation of Article 16 of the CAT. The investigation that followed this event was insufficient to satisfy the requirements of Articles 12 and 13.⁶²¹

c. Principle of Legality (*nullum crimen, nulla poena sine lege*)

The internationally recognized principle of *nullum crimen, nulla poena sine lege* holds that there can be no crime, unless it is first defined by law before the offense is committed. Furthermore, the crime must be defined with sufficient precision to prevent arbitrary enforcement. This principle is enshrined in Article 15 of the ICCPR,⁶²² one of the non-derogable provisions of the ICCPR.⁶²³ The HRC noted that a broad definition of the crime of terrorism and of membership in a terrorist group may adversely affect the protection of rights under the *nullum*

⁶¹⁸ *Id.* at ¶¶ 2.24 & 9.4.

⁶¹⁹ *Id.* at ¶ 9.2.

⁶²⁰ *Id.*

⁶²¹ *Id.* at ¶¶ 9.2, 9.4 & 9.5.

⁶²² ICCPR, at art. 15. “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”

⁶²³ *Id.* at art. 4 (stating that “[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision”).

crimen provision of the ICCPR.⁶²⁴ The Committee encouraged countries to define terrorism precisely so as to not encompass “a wide range of acts of differing gravity,”⁶²⁵ especially when the such offenses may be punishable with the death penalty, observing that this penalty is limited to the most serious crimes.⁶²⁶

d. Freedom of Thought, Conscience and Belief

Article 18(1) of the ICCPR recognizes that “[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his [or her] choice, and freedom, either individually or in community with others, and in public or private, to manifest his [or her] religion or belief in worship, observance, practice and teaching.”⁶²⁷ This right is non-derogable under the ICCPR.⁶²⁸ The HRC has urged member States to expand criminal legislation to “cover offences motivated by religious hatred and [that they] should take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs.”⁶²⁹ In addressing a provision in the Armenian Constitution which allowed derogation and limitations to freedom of thought and religion during a state of emergency, in violation of Articles 18 and 4(b) of the ICCPR, the Committee stated that the “inconsistency of domestic law with provisions of the Covenant not only engenders legal insecurity, but is likely to lead to violations of rights protected under the Covenant.”⁶³⁰

4. Derogable Rights

⁶²⁴ Concluding Observations of the Human Rights Committee: Estonia, U.N. GAOR, Hum. Rts. Comm., ¶ 8, U.N. Doc. CCPR/CO/77/EST (2003).

⁶²⁵ Concluding Observations of the Human Rights Committee: Egypt, U.N. GAOR, Hum. Rts. Comm., ¶ 8, U.N. Doc. CCPR/C/79/Add.23 (1993). *See also* Concluding Observations of the Human Rights Committee: Egypt, U.N. GAOR, Hum. Rts. Comm., ¶ 16, U.N. Doc. CCPR/CO/76/EGY (2002).

⁶²⁶ ICCPR, at art. 6, ¶ 2.

⁶²⁷ *Id.* at art. 18(1).

⁶²⁸ *Id.* at art. 4(2).

⁶²⁹ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, U.N. GAOR, Hum. Rts. Comm., ¶ 14, U.N. Doc. CCPR/CO/73/UK (2001).

⁶³⁰ Concluding Observations of the Human Rights Committee: Armenia, at ¶ 7.

a. Right to Liberty and Security of the Person

International human rights standards begin with a simple premise regarding pre-adjudicative detention of the accused. No one may be subjected to arbitrary arrest, detention or imprisonment.⁶³¹ This is a right based on the principle of “liberty.” While the nature of liberty may vary from state to state, international organizations have hailed it in similar forms. In the broadest sense, everyone has the right to his or her personal liberty.⁶³² This is considered a fundamental human right.⁶³³ But this right is not absolute. The State may infringe on an individual’s personal liberty before, during, or after an adjudication. However, a State may only deprive an individual of his or her liberty on valid grounds and according to lawful procedures previously established by law.⁶³⁴ It is also axiomatic that governmental action cannot be arbitrary.⁶³⁵

Times of national crisis pose particular dangers for personal liberty because each State has a responsibility to protect its citizenry. This in turn may conflict with its duty to observe human rights. For example, the Human Rights Committee has addressed the problem of “preventive detention.”⁶³⁶ Preventive detentions may be justified on the basis of public security or national security.⁶³⁷ However, safeguards must be present to ensure the rights of those detained.⁶³⁸ The detention may not be arbitrary, and it must be based on procedures established by law; court control of the detention must be available to the detainee; the detainee must be

⁶³¹ ICCPR, at art. 9(1). See also Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 9, U.N. Doc A/810, at 71 (1948) [hereinafter UDHR].

⁶³² ICCPR, at art. 9. See also UDHR, *supra* note 532, at art. 3.

⁶³³ *Id.*

⁶³⁴ ICCPR, at art. 4.

⁶³⁵ *Albert Womah Mukong v. Cameroon*, U.N. GAOR, Human Rts. Comm., Communication No. 458/1991 (August 10, 1994), 51th Sess., ¶ 12, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

⁶³⁶ Human Rights Committee, General Comment 8, Article 9, ¶ 4, 16th Sess. (1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 8 (1994) [hereinafter General Comment 8].

⁶³⁷ *Id.*

informed of the reason for his or her detention; and when the detention is unlawful, the detainee should be compensated for the violation.⁶³⁹ If criminal charges are eventually brought against the detainee, he or she is entitled to the full protection of Article 9(2) and (3) as well as Article 14 of the Covenant.⁶⁴⁰

As a general rule, individuals awaiting trial should not be held in custody.⁶⁴¹ Naturally, international standards have developed a number of situational guidelines when it is appropriate for a State to deviate from this general principle.⁶⁴² A State may impose conditions on a person's liberty or otherwise detain him or her while awaiting trial when the person is a risk for flight, or he or she may interfere with witnesses or pose a serious risk to others which cannot be curtailed by a less restrictive means.⁶⁴³ International standards have stressed that the State's judiciary has an important role in monitoring the lawfulness of a person's detention prior to a final adjudication. While international standards consistently call for judicial review of detentions, it is during times of national emergency when that review is especially critical. During a state of emergency, the State usually exercises expanded powers to arrest and detain individuals, and consequently, there is a greater opportunity for abuses of basic rights.

b. Charges, Right to Be Informed of the Reasons for Arrest, and Access to Counsel

It is essential for the arrested or detained person to have the means to challenge the legality of the detention or arrest and to be informed of the reason for the deprivation of his or

⁶³⁸ *Id.*

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ ICCPR, at art. 9(3). See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988) [hereinafter Body of Principles].

⁶⁴² *Id.*

⁶⁴³ *Id.*

her liberty. Any person arrested or detained must be informed immediately of the reason.⁶⁴⁴ Equally, the detainee's attorney must be promptly and fully informed of any order of detention and the reasons for the order.⁶⁴⁵ As a corollary, the detainee must have access to an attorney at the time of arrest and detention. Otherwise the ability of the accused to receive a fair trial and to defend effectively will be compromised.⁶⁴⁶ The right to the assistance of an attorney is not, however, absolute. International standards recognize that access to counsel may be restricted or suspended when a judicial or other lawful authority deems the restriction indispensable to maintaining security or order.⁶⁴⁷ However this limited exception does not give the State a free pass; the restriction must be specified by law and cannot go on indefinitely.⁶⁴⁸

The HRC has addressed the question of access to counsel with respect to pre-trial and administrative detention. The Committee has expressed concern over a detention of 48 hours without access to an attorney, even when the police suspect that "such access would lead, for example, to interference with evidence or alerting another suspect."⁶⁴⁹ Where less intrusive means for achieving the same result are available, the Committee has encouraged compliance with Article 14 of the ICCPR.⁶⁵⁰

c. Prolonged Pre-Trial or Administrative Detention

⁶⁴⁴ ICCPR, at art. 9(2). See also Body of Principles, at Principle 11(2).

⁶⁴⁵ Body of Principles, at Principle 11.

⁶⁴⁶ *Id.* at Principle 18(1).

⁶⁴⁷ *Id.* at Principle 18(3).

⁶⁴⁸ *Id.*

⁶⁴⁹ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, at ¶ 13. See also Concluding Observations of the Human Rights Committee: France, U.N. GAOR, Hum. Rts. Comm., ¶ 23, U.N. Doc. CCPR/C/79/Add.80 (1997) (expressing concern regarding no access to counsel in the initial 72 hours of detention in police custody).

⁶⁵⁰ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, at ¶ 13.

It is generally accepted that the accused is entitled to a trial within a reasonable period of time, unless he or she is released pending the trial.⁶⁵¹ What is “reasonable” is generally assessed on a case by case basis.⁶⁵² Relevant factors to the inquiry include “the seriousness of the offence alleged to have been committed; the nature and severity of the possible penalties; and the danger that the accused will abscond if released.”⁶⁵³

d. Incommunicado Detention

A prohibition on incommunicado detention serves two primary purposes. Prolonged detention without access to the outside world can amount to cruel, inhuman, or degrading treatment.⁶⁵⁴ The second problem associated with incommunicado detention is that it is conducive to torture, ill-treatment and disappearances.⁶⁵⁵ It should be noted, however, that solitary confinement is distinguishable from incommunicado detention. Solitary confinement describes a prisoner who is held separately from other prisoners but is still permitted access with those outside the prison.

A person arrested, detained or imprisoned has the right to personally, or through the authorities, to inform his or her family of the arrest or detention and the location where he or she is being held.⁶⁵⁶ If the person is transferred to another place of custody, the family and friends must again be notified.⁶⁵⁷ Notification may be delayed if a competent authority determines that exceptional circumstances exist which may require a reasonable delay to facilitate the investigation.⁶⁵⁸

⁶⁵¹ ICCPR, at art. 9(3). See also Body of Principles, at Principle 38.

⁶⁵² AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL FAIR TRIALS MANUAL § 7.2 (1998) [hereinafter FAIR TRIALS MANUAL].

⁶⁵³ *Id.*

⁶⁵⁴ ICCPR, at arts. 7 & 10.

⁶⁵⁵ FAIR TRIALS MANUAL, at § 4.1.1.

⁶⁵⁶ Body of Principles, at Principle 16(1).

⁶⁵⁷ *Id.*

⁶⁵⁸ Body of Principles, at Principle 14.

5. Right to Political Participation and Freedom of Expression, Opinion and Assembly

Article 25 of the ICCPR grants to each person the right to political participation.⁶⁵⁹

These rights are derogable provided the State follows specific requirements and adheres to strict limitations. These rights may be restricted only in certain limited situations, such as when there is a need to “respect... the right or reputations of others” or for “the protection of national security or of public order..., or of public health or morals.”⁶⁶⁰ In *Landinelli Silva v. Uruguay*,⁶⁶¹ the HRC found that denying political rights to all citizens for a period up to fifteen years was in violation of Article 25 of the ICCPR.⁶⁶² Although Uruguay had invoked its right to restrict political participation during the existence of a state of emergency, the Committee found that the restrictions were applied to everyone and failed to distinguish between those who “sought to promote their political opinions by peaceful means or by resorting to, or advocating the use of, violent means.”⁶⁶³ Uruguay’s failure to show why the restriction on all kinds of political dissent was needed to deal with her emergency situation and its failure to pave the way back to political freedom violated Article 25 of the ICCPR.⁶⁶⁴

In *Kim v. Republic of Korea*,⁶⁶⁵ the HRC held that a State would have to give specific reasons why certain actions threatened its national security in order to justify its restrictions on the freedom of expression.⁶⁶⁶ In this case, the claimant was convicted of distributing materials

⁶⁵⁹ ICCPR, at art. 25. Specifically, this includes the right: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country. *Id.*

⁶⁶⁰ *Id.* at art. 19(3).

⁶⁶¹ *Landinelli Silva*, at ¶ 8.4.

⁶⁶² *Id.*

⁶⁶³ *Id.*

⁶⁶⁴ *Id.*

⁶⁶⁵ *Kim v. Republic of Korea*, U.N. GAOR, Human Rts. Comm., Communication No. 574/1994 (January 4, 1999), 64th Sess., ¶¶ 12.4 & 12.5, U.N. Doc. CCPR/C/64/D/574/1994 (1999) [hereinafter *Kim*].

⁶⁶⁶ *Id.*

which appeared to voice the policies of the DPRK (North Korea), with whom the State party was in a state of war.⁶⁶⁷ He was convicted on a finding that he had done this with the intent of siding with the activities of the DPRK.⁶⁶⁸ The Committee examined whether the restrictions were warranted by a legitimate state concern, such as national security.⁶⁶⁹ The Committee noted that the State had failed to identify the precise nature of the alleged threat that the claimant's exercise of the freedom of expression posed, and that the State party had not provided specific justifications as to why it was necessary for national security reasons to prosecute him for the exercise of his freedom of expression.⁶⁷⁰ The Committee found that the restriction here was a violation of Article 19(3) of the ICCPR.⁶⁷¹

6. Freedom of Movement

Article 12 of the ICCPR guarantees the right to freedom of movement.⁶⁷² Specifically, it provides that “[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence,”⁶⁷³ and that “[e]veryone shall be free to leave any country, including his own.”⁶⁷⁴ These rights are derogable provided that the State follows specific requirements and acts with strict limitations. The right to freedom of movement may only be restricted “to protect national security, public order . . . , public health or morals and the rights and freedoms of others.”⁶⁷⁵ In *Celepli v. Sweden*, the HRC found that restrictions placed by Sweden on a person suspected of involvement in terrorist activities were

⁶⁶⁷ *Id.*

⁶⁶⁸ *Id.*

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.*

⁶⁷¹ *Kim*, at ¶¶ 12.4 & 12.5.

⁶⁷² ICCPR, at art. 12.

⁶⁷³ *Id.* at art. 12(1).

⁶⁷⁴ *Id.* at art. 12(2).

⁶⁷⁵ Human Rights Committee, General Comment 27, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999).

compatible with Article 12(3) of the ICCPR.⁶⁷⁶ In this case, the initial expulsion order of the claimant was not enforced, and he was allowed to stay in Sweden, subject to restrictions on his freedom of movement.⁶⁷⁷ The Committee concluded that the reason Sweden offered to justify the restriction of movement, in exchange for allowing him to remain in the country, was national security, which the Committee noted is a valid reason for the derogation of the right of movement under the ICCPR.⁶⁷⁸

7. Right of Accused to a Fair Trial, Presumption of Innocence, and Other Rights

Trial proceedings must be fair. “Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he [or she] has had all the guarantees necessary for his [or her] defence.”⁶⁷⁹ Further, all persons shall be treated without discrimination and afforded equal protection before the law.⁶⁸⁰ It is a necessary element of human rights that the tribunal be independent. The concept of independence of the judiciary is rooted in the democratic concept of separation of powers.⁶⁸¹ The judiciary’s independence should be guaranteed by the State, established by law, and respected by all governmental institutions.⁶⁸² A State must ensure that structural and functional protections are in place to insulate the judiciary from political or other interference in the fair administration of justice.⁶⁸³ The judiciary is to adjudicate impartially based on evidence and in accordance with

⁶⁷⁶ *Celepli v. Sweden*, U.N. GAOR, Human Rts. Comm., Communication No. 456/1991 (August 2, 1994), 51th Sess., ¶¶ 9.2, U.N. Doc. CCPR/C/51/D/456/1991 (1994) [hereinafter *Celepli*].

⁶⁷⁷ *Id.*

⁶⁷⁸ *Id.*

⁶⁷⁹ UDHR, at art. 11.1.

⁶⁸⁰ *Id.* at art. 7. See also ICCPR, at art. 2.

⁶⁸¹ Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OAS Doc. OEA/ser. L./V./II.96, doc. 10, rev. 1, ch. IX, at 73 (1997).

⁶⁸² U.N. Basic Principles on the Independence of the Judiciary, G.A. Res. 146, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/146 (1985) [hereinafter U.N. Judiciary Principles].

⁶⁸³ *Id.*

the law.⁶⁸⁴ A judge should be free from any restrictions, improper influences, inducements, pressures, threats or other interferences, direct or indirect, from any source and for any reason.⁶⁸⁵ It follows that judges should be chosen for their legal competency rather than for political or ideological grounds. To protect the integrity of judges, a State should establish safeguards to facilitate the independence of the judiciary. A State should establish a tenure program to prevent the removal of judges based on political reactions to their decisions.⁶⁸⁶ Regardless whether a judge is elected or appointed, premature suspension or removal of a judge should only occur as the result of his or her incapacity or misconduct.⁶⁸⁷ Additionally, the State should be held liable to pay damages for official misconduct on the part of judges, but judges should hold immunity from civil suits for their improper acts or omissions.⁶⁸⁸ These principles are necessary so that judges may properly exercise their duties.

8. Military and Other Special Courts

Civilians face special dangers to their liberty when trials are conducted by a military tribunal or court. For example, in reference to Uzbekistan, the Human Rights Committee noted with concern that its military courts have broad jurisdiction.⁶⁸⁹ The jurisdiction of these courts was not confined to criminal cases involving members of the armed forces. It also covered civil and criminal cases when, in the opinion of the executive, and in exceptional circumstances, normal operation of the courts of general jurisdiction were bypassed.⁶⁹⁰ The Committee noted that the State party had not provided information on the definition of “exceptional

⁶⁸⁴ *Id.* at Principle 2.

⁶⁸⁵ *Id.*

⁶⁸⁶ *Id.* at Principles 12 & 18.

⁶⁸⁷ *Id.*

⁶⁸⁸ U.N. Judiciary Principles, at Principles 16, 17, 19 & 20.

⁶⁸⁹ Concluding Observations of the Human Rights Committee: Uzbekistan, U.N. GAOR, Hum. Rts. Comm., ¶ 15, U.N. Doc. CCPR/CO/71/UZB (2001).

⁶⁹⁰ *Id.*

circumstances.”⁶⁹¹ It observed that the use of military courts over civil and criminal cases involving non-military personnel contravenes Articles 14 and 26 of the Covenant.⁶⁹² A State party should adopt legislative measures to restrict the jurisdiction of its military courts to the trials of members of the military who are accused of military offenses.⁶⁹³ The Committee also urged States to review their policies of trying civilians in military courts and to transfer the accused to ordinary courts of civilian jurisdiction.⁶⁹⁴ The Committee has also reviewed the laws and practices of Peru, concluding that the use of military tribunals with “faceless judges”, anonymous witnesses, and the absence of a public hearing violated due process of law and the right to a fair trial.⁶⁹⁵ “In a system of trial by ‘faceless judges’, neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established ad hoc, may comprise serving members of the armed forces.”⁶⁹⁶

9. Right to Appeal

A necessary component of a fair trial is the right of the accused to have his or her conviction and sentence reviewed on appeal. This becomes especially problematic when the review is from a military or special court, which exists outside the judicial branch.⁶⁹⁷ For the protection of the accused, the entire criminal process must be considered as a single event.⁶⁹⁸ A violation of any right of the accused at any stage in the process taints the entire process.⁶⁹⁹ The mere existence of a higher court does not by itself satisfy the Convention. What is critical is that

⁶⁹¹ *Id.*

⁶⁹² *Id.*

⁶⁹³ *Id.*

⁶⁹⁴ Concluding Observations of the Human Rights Committee: Lebanon, U.N. GAOR, Hum. Rts. Comm., ¶ 14, U.N. Doc. CCPR/C/79/Add.78 (1997).

⁶⁹⁵ Concluding Observations of the Human Rights Committee: Peru, U.N. GAOR, Hum. Rts. Comm., ¶ 14, U.N. Doc. CCPR/C/79/Add.67 (1996).

⁶⁹⁶ *Polay Campos v. Peru*, U.N. GAOR, Human Rts. Comm., Communication No. 577/1994 (January 9, 1998), 61th Sess., ¶ 8.8, U.N. Doc. CCPR/C/61/D/577/1994 (1998).

⁶⁹⁷ Concluding Observations of the Human Rights Committee: France, at ¶ 23.

⁶⁹⁸ *Petruzzi*, at ¶ 160.

the court of review must have actual jurisdictional authority to take up the particular case in question.⁷⁰⁰ If the court of review fails to satisfy the requirements of fairness, impartiality and independence, or does not conduct itself according to procedures previously established by law, then the appellate review process is neither meaningful or valid.⁷⁰¹

B. The European Human Rights Model

In this subsection of the report, we analyze the European model of human rights and learn from it how it treats individuals accused of terrorism. Although the European norms do not bind Peru directly, they are persuasive evidence of customary international law. The European standards for the protection of human rights have been firmly established with the creation of the European Court of Human Rights (ECHR). Beginning in 1950, the European Convention on Human Rights laid a foundation for these protections.⁷⁰² The Court was formed in the same year, but it did not formally begin to operate until 1959.⁷⁰³ All European Union Member States are signatories to the Convention, and all except Ireland and Norway have incorporated the Convention into their own domestic law. Each signatory State binds itself to the principles set forth by the Convention. The Convention allows any person to lodge a complaint against the offending State at the European Court of Human Rights, provided the claimant first exhausts all domestic remedies. The Convention protects a wide variety of fundamental rights.⁷⁰⁴ The

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.*

⁷⁰¹ *Id.*

⁷⁰² Registrar of the European Court of Human Rights, *The European Court of Human Rights: Historical Background, Organization and Procedure* ¶1, *available at* <http://www.echr.coe.int/Eng/EDOCS/HistoricalBackground.htm> [hereinafter *European Court: Historical Background*].

⁷⁰³ *Id.*

⁷⁰⁴ *European Convention*, at art. 2,3,5,6, and 7. These fundamental rights also include: Article 4 Prohibition of slavery and forced labor; Article 8 Right to respect for private and family life; Article 9 Freedom of thought, conscience and religion; Article 10 Freedom of expression; Article 11 Freedom of assembly and association; Article 12 Right to marry; Article 13 Right to an effective remedy; and Article 14 Prohibition of discrimination. Protocol 1, 4, 6, 7, and 13 to the European convention added: protection of property, right to education, right to free elections, prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals, prohibition of

original principles of the Convention included the right to life, a prohibition against torture, the right to liberty and security, a right to a fair trial, and a prohibition against punishment without law. These standards form the basis of every Court decision.⁷⁰⁵

One of the most basic human rights is the right to the due process of the law.

In [the] future no official shall place a man on trial upon his own unsupported statement, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.⁷⁰⁶

These words were penned long before the horrors of two world wars or the events of September 11, 2001. However, they remain meaningful today as they were in 1215, written into the Magna Carta to denounce the feudal system and stake a claim on freedom, equality and justice for the common man.⁷⁰⁷ Like its predecessor, the European Convention was written in a time of great unrest following World War II. In 1948, the year of its inception, Stalin shut down the East, and fear pervaded the European continent. The writers of the Convention hoped to unify a New Europe and to protect itself against dangerous ideologies. Taking the lead from the Universal Declaration of Human Rights, the Convention attempted, in a sense, to codify those ideals. Recognizing the diversity within the European community, the decisions of the ECHR serve as a model for the rest of the international community whose current fears spring from terrorism.⁷⁰⁸

collective expulsion of aliens, abolition of the death penalty, procedural safeguards relating to expulsion of aliens, right of appeal in criminal matters, compensation for wrongful conviction, right not to be tried or punished twice, equality between spouses, and abolition of the death penalty.

⁷⁰⁵ *European Court: Historical Background*, at ¶5.

⁷⁰⁶ Claire Breay, *Magna Carte: Manuscript and Myths*, British Library 2002, ¶47, 48 available at <http://www.bl.uk/collections/treasures/magnatranslation.html>.

⁷⁰⁷ *Id.*

⁷⁰⁸ See, e.g., <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (visited March 1, 2004). The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222

The Convention, *inter alia*, provides clear and unambiguous standards for the rights of the accused. The Convention in Article 6 establishes the right to a fair trial and prohibits punishment without law.⁷⁰⁹ Article 6 provides that the accused shall have a fair and public hearing within a reasonable time, conducted by an independent and impartial tribunal in accordance with the law.⁷¹⁰ The accused is presumed innocent until proven guilty according to the law.⁷¹¹ The accused is entitled to know the nature and the cause of his or her accusation.⁷¹² The accused must be given adequate time to prepare for his or her defense, to have the assistance of counsel and to aid in his or her defense. Counsel should be provided free of charge if necessary to promote the interests of justice.⁷¹³ The accused has the right to examine and cross examine all the witnesses against him or her and to present witnesses in his or her own defense. The accused is also entitled to have a free interpreter if the trial is conducted in a language that he or she cannot understand.⁷¹⁴ In its interpretation of the Convention, the ECHR has established convincing precedent for evaluating governmental conduct that interferes with the notion of due process for the accused, and as such it serves as an international “role model”.⁷¹⁵

The European Court of Human Rights has developed a body of case law that implements the human rights standards of the European Convention on Human Rights, reiterating many of the rights that are recognized by various United Nations documents. All Council of Europe member States have ratified the European Convention on Human Rights.⁷¹⁶ The Council’s Committee of Ministers has also adopted comprehensive guidelines to protect human rights for

⁷⁰⁹ *European Convention*, at art. 6.

⁷¹⁰ *Id.*

⁷¹¹ *Id.*

⁷¹² *Id.*

⁷¹³ *Id.*

⁷¹⁴ *Id.*

⁷¹⁵ *European Court: Historical Background*, at ¶ 6.

⁷¹⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, entered into force Sept. 3, 1953 [hereinafter *European Convention*].

states that fight terrorism. While these recommendations are not binding on European Council member States, they are highly persuasive. In examining the European model for the protection of human rights in the age of terrorism, the laws and practices of the United Kingdom and France are particularly illustrative.

1. The United Kingdom: A Brief Historical Overview of British Terrorism Legislation

After a lull in violence between the Catholic minority and the Protestant majority in Northern Ireland in the 1960's, the Irish Republican Army ("IRA") began an intensive and violent campaign against the British Government beginning in 1969.⁷¹⁷ In response to acts of terrorism, including bombings against police and civilian targets, the United Kingdom passed a series of legislative measures in 1971 through 1975. These anti-terrorism laws implemented a series of extrajudicial powers of arrest, detention and internment as a means to combat "the longest and most violent terrorist campaign witnessed in either part of the island of Ireland."⁷¹⁸ In August, 1971, the United Kingdom introduced the "Special Powers Act" and inaugurated "Operation Demetrius" by arresting 452 individuals whose names were on a list of suspected terrorists.⁷¹⁹ The authorities released 104 prisoners within forty-eight hours of their arrest; the others were placed on a prison ship called the "Maidstone".⁷²⁰ Twelve prisoners were moved to an unidentified location for "interrogation in depth" that lasted several days.⁷²¹ This mass arrest

⁷¹⁷ *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (Ser. A) at 15, 25 (1978).

⁷¹⁸ *Id.* at 11.

⁷¹⁹ *Id.* at 39. The Special Powers Act was first enacted in 1922. Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 Geo. 6, c. 5 (N. Ir.). This temporary measure was made permanent in 1933. Civil Authorities (Special Powers) Act (Northern Ireland), 1933, 23 & 24 Geo. 5, ch. 12 (N. Ir.). In August 1971, the United Kingdom relied on this Act to introduce a policy of indefinite detention without trial.

⁷²⁰ *Id.*

⁷²¹ *Id.*

only intensified the violence, and between August 9, 1971 and March 31, 1972, over 1,600 persons were charged with “terrorist type” offenses.⁷²²

2. Framework of the United Kingdom Legislation allowing for Extrajudicial Deprivation of Liberty in Northern Ireland

In order to combat terrorism, Parliament passed various acts, each canceling or modifying previous legislation, allowing for extrajudicial deprivation of liberty in three main areas: the initial arrest for interrogation; detention for further interrogation; and internment.⁷²³ Each successive legislation modified these three processes. The Special Powers Act was the earliest legislation, first passed in 1922.⁷²⁴ Regulation 11, which called for detention, and Regulation 12, which allowed for internment continued through November 1972.⁷²⁵ Regulation 10, the arrest provision, continued until August 1973.⁷²⁶ Regulation 10 of the Act allowed for the arrest of a person without a warrant.⁷²⁷ To justify a warrantless arrest, a police officer had to believe that the arrest was needed “for the preservation of the peace and the maintenance of order.”⁷²⁸ Although the arrest was limited to forty-eight hours, the officer could arrest without suspicion of a specific offense, and the arrestee was usually not informed of the cause of his or her arrest.⁷²⁹ The purpose of the arrest was to interrogate the arrestee for his or her activities and the activities of other individuals.⁷³⁰ No bail was allowed in these forty-eight hours, and there was no court review of the arrest.⁷³¹

⁷²² *Id.* at 48.

⁷²³ *Ireland*, 25 Eur. Ct. H.R. at 78.

⁷²⁴ Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 Geo. 6, c. 5 (N. Ir.) [hereinafter Special Powers Act].

⁷²⁵ *Ireland*, 25 Eur. Ct. H.R. at 82-84.

⁷²⁶ *Id.* at 81.

⁷²⁷ *Id.*

⁷²⁸ *Id.*

⁷²⁹ *Id.*

⁷³⁰ *Id.*

⁷³¹ *Ireland*, 25 Eur. Ct. H.R. at 81.

Detention under Regulation 11 required mere suspicion that the individual was acting in a “manner prejudicial to the preservation of the peace.”⁷³² The legislation did not place a time limit on the detention, however it was customary to limit the detention to twenty-eight days.⁷³³ Detention was used to gather evidence against the individual for a trial before an ordinary criminal court.⁷³⁴ While initially detained and being interrogated, the arrestee did not have to be informed of the purpose of the detention, however, the arrestee was entitled to at least twenty-four hour notice of the charge before going to trial.⁷³⁵

The Special Powers Act allowed for internment for an unlimited period of time. To justify the internment of an individual, a senior police officer had to make a recommendation to the Minister of Home Affairs, who then had the power to issue an internment order.⁷³⁶ All internments were reviewed by a committee comprised of one judge and two lay persons who had the authority to make recommendations on whether the internment was proper,⁷³⁷ however the committee had no power to release the individual. Although the legislation did not mandate that the internee appear before the committee, it was customary that he or she did in fact appear.⁷³⁸ The internee was not allowed to examine witnesses and all the witnesses remained confidential.⁷³⁹ This committee reviewed the entire evidence, even if it was not admissible in court. Pursuant to Regulation 12, 796 orders of internment were made, and 170 orders were still upheld when the Terrorists Order cancelled the regulation in November, 1972.⁷⁴⁰

⁷³² *Id.* at 82.

⁷³³ *Id.* at 83.

⁷³⁴ *Id.*

⁷³⁵ *Id.* at 82-83.

⁷³⁶ *Id.* at 84.

⁷³⁷ *Ireland*, 25 Eur. Ct. H.R. at 84.

⁷³⁸ *Id.*

⁷³⁹ *Id.*

⁷⁴⁰ *Id.* at 84-85.

In March, 1972, the United Kingdom introduced Direct Rule in Northern Ireland, suspending the Northern Ireland Parliament and empowering the Queen to legislate for the country.⁷⁴¹ The Temporary Provisions Act of 1972 finally defined “terrorism” as “the use of violence for political ends [including] any use of violence for the purpose of putting the public or any section of the public in fear.”⁷⁴² The Temporary Provisions Act ended Regulations 11(2) and 12 (detention and internment) of the Special Powers Act.⁷⁴³ In its place, the United Kingdom allowed “interim custody” under Article 4 and “detention” under Article 5.⁷⁴⁴ All prior internments and detentions were converted into interim custody orders.⁷⁴⁵ To justify both, the police needed suspicion that the suspect committed terrorist acts or attempted to commit terrorist acts.⁷⁴⁶ Interim custody without formal charge was limited to twenty-eight days, but custody could be extended by the Chief Constable.⁷⁴⁷ During the twenty-eight days, the detainee was not allowed to challenge the legality of his or her custody.⁷⁴⁸ After the twenty-eight days, only an independent commissioner could issue a detention order based on a finding that the individual committed or attempted to commit a terrorist act.⁷⁴⁹ The accused had to be given at least three days written notice before appearing before the Commissioner.⁷⁵⁰ The proceeding before the Commissioner was private, however the accused had the right to be represented by an attorney and was in practice allowed to examine and cross-examine witnesses.⁷⁵¹ The accused was

⁷⁴¹ *Id.* at 39.

⁷⁴² *Id.* at 85.

⁷⁴³ *Ireland*, 25 Eur. Ct. H.R. at 85.

⁷⁴⁴ *Id.* at 86-87.

⁷⁴⁵ *Id.* at 85.

⁷⁴⁶ *Id.*

⁷⁴⁷ *Id.* at 86.

⁷⁴⁸ *Id.*

⁷⁴⁹ *Ireland*, 25 Eur. Ct. H.R. at 87.

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.*

required to answer questions.⁷⁵² The Commissioner was allowed to examine all the evidence, no matter how it was obtained or whether it was admissible in court.⁷⁵³ The accused had a right to appeal the ruling within twenty-one days to an independent tribunal.⁷⁵⁴

The Temporary Provisions Act was replaced with the Emergency Provisions Act in August 1973.⁷⁵⁵ This Act revoked Regulation 10 (the arrest for crime against the peace) from the Special Powers Act.⁷⁵⁶ The Emergency Provisions Act, however, retained the definition of terrorism, the interim custody procedures and the detention orders.⁷⁵⁷ However, a detainee was now required to receive written notice from the commissioner at least seven days before the hearing.⁷⁵⁸ But most importantly, the Emergency Provision Act excluded statements of the accused (but not of third persons) that were obtained through torture or inhumane or degrading treatment.⁷⁵⁹

3. Decisions of the European Court of Human Rights Regarding the United Kingdom's Anti-Terrorism Legislation

a. Derogable Rights during National Emergencies

Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes that:

[in] time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.⁷⁶⁰

⁷⁵² *Id.*

⁷⁵³ *Id.*

⁷⁵⁴ *Id.*

⁷⁵⁵ *Ireland*, 25 Eur. Ct. H.R. at 68.

⁷⁵⁶ *Id.* at 88.

⁷⁵⁷ *Id.*

⁷⁵⁸ *Id.*

⁷⁵⁹ *Id.* at 136.

⁷⁶⁰ European Convention, at art. 15.

Article 15 can be invoked only in times of war or when the very existence of the nation is threatened.⁷⁶¹ Even when this occurs, it is not an unlimited right for the State to take any means it deems necessary.⁷⁶² To justify an exception under Article 15, the State must first demonstrate that the life of the nation was threatened.⁷⁶³ The European Court of Human Rights gives deference to the respondent State's good faith determination that it has an emergency, and an international judge will not second-guess that determination.⁷⁶⁴ However, the Court determines whether the actions taken by the State have exceeded the "extent strictly required by the exigencies."⁷⁶⁵ The Court must look at all the evidence to make this determination.⁷⁶⁶ In *Ireland v. United Kingdom*, the Court recognized that the British government was justified in enacting anti-terrorist legislation.⁷⁶⁷ There was a "massive wave of violence and intimidation", and normal legislation was ineffective in combating terrorism.⁷⁶⁸ Individuals were reluctant to report the identity of the perpetrators in fear of retaliation. However, the Court strongly criticized Regulations 10 and 11, because they did not provide any judicial or administrative remedy for the arrestees.⁷⁶⁹ The Court expressed sympathy for States that make strides for human rights. The Court also observed that the United Kingdom legislation in question showed an "increasing respect for individual liberty."⁷⁷⁰ It noted that numerous internal commissions and studies were conducted by the governments on its own initiative, and that the government took prompt steps to alleviate problems and to improve compliance with human right obligations. The Court examined the entire process, stating that "it would be unrealistic to isolate the first from the later

⁷⁶¹ *Id.*

⁷⁶² *Ireland*, 25 Eur. Ct. H.R. at 207.

⁷⁶³ European Convention, at art. 15.

⁷⁶⁴ *Ireland*, 25 Eur. Ct. H.R. at 207.

⁷⁶⁵ *Id.*

⁷⁶⁶ *Id.*

⁷⁶⁷ *Id.* at 212.

⁷⁶⁸ *Id.*

⁷⁶⁹ *Id.* at 216-17.

phases.”⁷⁷¹ Also, “[w]hen a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once.”⁷⁷²

b. Definition of Terrorism

In *Ireland v. United Kingdom*, the Court held that the definition of what a person could be arrested for under Regulation 10, namely “for the preservation of the peace and the maintenance of order,”⁷⁷³ was too vague and violated Article 5. It was not until the promulgation of the Emergency Provisions that Parliament defined terrorism as “the use of violence for political ends [including] any use of violence for the purpose of putting the public or any section of the public in fear.”⁷⁷⁴

c. Defining Torture and Inhumane or Degrading Treatment

Torture, inhumane or degrading treatment is never allowed, even when a State declares an emergency.⁷⁷⁵ At various unidentified detention centers, the British Police Department employed the “Five Techniques” in order to gain information and the identity of more than 700 IRA members.⁷⁷⁶ These methods were authorized at the highest level of the police force and were used from August 1971, until they were officially ended in October, 1971.⁷⁷⁷ The Five Techniques consisted of the following:

⁷⁷⁰ *Ireland*, 25 Eur. Ct. H.R. at 220.

⁷⁷¹ *Id.*

⁷⁷² *Id.*

⁷⁷³ *Id.* at 81.

⁷⁷⁴ *Id.* at 85.

⁷⁷⁵ *Ireland*, 25 Eur. Ct. H.R. at 163.

⁷⁷⁶ *Ireland*, 25 Eur. Ct. H.R. at 96. These are also known as “disorientation” or “sensory deprivation” techniques. *Id.*

⁷⁷⁷ *Id.* The British government ended the practice after Parliament conducted an investigation into the allegations and condemned the practice. Before the European Court of Human Rights case, the United Kingdom promised that the “Five Techniques’ will not in any circumstances be introduced as an aid to interrogation.” *Id.* at 153. The Court also noted that the United Kingdom had taken the initiative to establish various programs and training to ensure that lower level police officers will not use these or similar procedures. *Id.*

? “Wall standing” where individuals were put “spread eagle against the wall with their fingers put high above their head against the wall, their legs spread apart and the feet back.”⁷⁷⁸ The individual would have to stand for hours in this position and support the entire body by fingertips.⁷⁷⁹ Sometimes this position was accompanied with beatings.⁷⁸⁰

? “Hooding” where a black or navy bag was placed over a person’s head at all times and removed only during interrogations.⁷⁸¹

? Playing a loud and continuous hissing noise.⁷⁸²

? Sleep deprivation.⁷⁸³

? Food and water deprivation.⁷⁸⁴

In other situations, there was documented medical evidence that demonstrated bruising that was consistent with beatings.

The European Court of Human Rights in the case of *Ireland v. United Kingdom* defined torture and inhumane treatment. In order to determine whether an action is torture, inhumane or degrading conduct, the Court must examine all the relevant circumstances involving the individual who is subjected to such treatment.⁷⁸⁵ Age, sex, and the physical health of the person, and duration of the treatment are all relevant factors.⁷⁸⁶ There is a fine line between torture and inhumane treatment; the distinction is usually drawn on the degree or intensity of the treatment

⁷⁷⁸ *Id.*

⁷⁷⁹ *Id.*

⁷⁸⁰ *Id.* at 103.

⁷⁸¹ *Ireland*, 25 Eur. Ct. H.R. at 96.

⁷⁸² *Id.*

⁷⁸³ *Id.*

⁷⁸⁴ *Id.*

⁷⁸⁵ *Id.* at 162.

⁷⁸⁶ *Id.*

and the suffering inflicted on the person.⁷⁸⁷ “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”⁷⁸⁸ It takes a very high standard to find an action to be torture as demonstrated by the Court’s holding in *Ireland v. United Kingdom*, where the use of the Five Techniques was found inhumane but not intense or cruel enough to be torture.⁷⁸⁹ The standard constituting inhumane treatment falls below torture. Any intense suffering or practice of beating that leads to physical injury clearly constitutes inhumane treatment.⁷⁹⁰ However, intense discomfort alone may not be enough. For example, where inmates at Ballykinler Prison were made to sit with their heads touching the floor for long periods of time and at other times were subjected to harsh exercise,⁷⁹¹ this was held not to be inhumane.⁷⁹²

It is important to observe that persons in higher authority are strictly liable for the conduct of subordinates who commit torture or inhumane and degrading treatment; “they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.”⁷⁹³

d. The Use of Evidence Obtained Through the Use of Torture, Right to Counsel, and Restrictions on the Right to Counsel

Section 6 of the Emergency Provisions Act, passed in August, 1973, excluded all confessions and other evidence of the accused that was obtained through the use of torture or inhumane treatment.⁷⁹⁴ However, this did not apply to evidence that was obtained through the

⁷⁸⁷ *Ireland*, 25 Eur. Ct. H.R. at 167.

⁷⁸⁸ *Id.* (emphasis added).

⁷⁸⁹ *Id.*

⁷⁹⁰ *Id.* at 170.

⁷⁹¹ *Id.* at 179-180.

⁷⁹² *Id.* at 181.

⁷⁹³ *Ireland*, 25 Eur. Ct. H.R. at 159.

⁷⁹⁴ *Id.* at 136.

torture of third persons.⁷⁹⁵ The European Court did not specifically address this issue in the case of *Ireland v. The United Kingdom*.

In *Magee v. United Kingdom*,⁷⁹⁶ Magee was arrested in 1992 in connection with an attempted bombing of military personnel. He asked for a lawyer and was refused⁷⁹⁷ and was interrogated at least eight times.⁷⁹⁸ He was “repeatedly slapped and occasionally punched in the back of the head ... [and] a few times in the stomach.”⁷⁹⁹ He was allowed to see a physician who substantiated the bruising and injuries.⁸⁰⁰ Magee was told by his interrogators that if he remained silent, but later testified in court, the court would draw adverse inferences from his interrogation silence. However, this was never explained to him by his own attorney, since he was still refused counsel. Finally, after six interrogation sessions, he confessed.⁸⁰¹ The European Court of Human Rights did not directly confront Article Three of the Criminal Evidence (Northern Ireland) Order 1988 which allowed the drawing of such inferences. The Court held, however, that it was fundamentally unfair to find that a person who had been denied the right to counsel would be expected to fully understand the consequences of his or her silence.⁸⁰² The Court also addressed the request for the assistance of counsel. It concluded that normally an accused has a right to the assistance of a lawyer in the initial stages of police interrogation. This right can only be restricted for good cause.⁸⁰³ Here, because the prisoner had no access to an attorney and was virtually kept incommunicado (he was only allowed

⁷⁹⁵ *Id.*

⁷⁹⁶ *Magee v. United Kingdom*, 31 Eur. H.R. Rep. 822 (2000).

⁷⁹⁷ *Id.* at 8.

⁷⁹⁸ *Id.* at 9 & 11.

⁷⁹⁹ *Id.* at 8.

⁸⁰⁰ *Id.* at 10.

⁸⁰¹ *Id.* at 11.

⁸⁰² *Magee*, 31 Eur. H.R. Rep. 822, at 39.

⁸⁰³ *Id.* at 41.

communication with a physician) while being interrogated, the authorities had violated his right to a fair trial.⁸⁰⁴

Another case that addressed the effect of silence at trial was *Averill v. United Kingdom*.⁸⁰⁵ Liam Averill was arrested and interrogated on suspicion that he was involved in a carjacking and murder of two individuals. In custody, his requests for an attorney were refused while he was interrogated thirty-six times over five days. He claimed to his interrogators that he was helping a friend on his farm at the time of the murders. Fiber evidence which matched the hat and gloves of the killer was found on Averhill. When his interrogators confronted him with this evidence, he refused to answer their questions. Later he alleged that he wore the hat and gloves while working on the farm. The trial court drew a “very strong adverse inference” from Averhill’s silence.⁸⁰⁶

The European Court of Human Rights recognized that the right of silence is not an absolute right. To determine whether a trial court may legitimately draw an adverse inference from silence, the European Court looks to all the circumstances of the interrogation, including the degree of compulsion involved, whether the detainee was allowed to discuss the case with an attorney, whether he or she was constantly interrogated, and whether he or she was allowed contact with the outside world.⁸⁰⁷ The Court concluded that a conviction which was based solely on an adverse inference that had been drawn from silence could not be sustained.⁸⁰⁸

e. The Process of Bringing Charges

Article 5 of the European Convention recognizes the right of each person to liberty and security. It also establishes the safeguards for a lawful arrest “for the purpose of bringing him

⁸⁰⁴ *Id.* at 43.

⁸⁰⁵ Case of *Averill v. United Kingdom*, App. No. 36408/97 (Eur. Ct. H.R. 2000).

⁸⁰⁶ *Id.*

⁸⁰⁷ *Id.*

[or her] before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so.”⁸⁰⁹ In *Ireland v. United Kingdom*, the Court found that the United Kingdom did not comply with this Article because the detainee was not brought before a competent legal authority and was interrogated about the activities of others.⁸¹⁰ The bringing of the arrestee promptly before a judicial authority is mandatory in every arrest.⁸¹¹ Furthermore, under Regulation 10 of the Special Powers Act there was no requirement for the authorities to hold the person on “suspicion” that he or she committed an offense or to prevent a crime or flight from a crime.⁸¹² All that was needed to justify an arrest was a determination by the authorities that it was made to “preser[ve]... the peace and the maintenance of order.”⁸¹³ This too was in violation of Article 5.⁸¹⁴

Another illustrative case is *Fox, Campbell and Hartley v. United Kingdom*.⁸¹⁵ Fox and Campbell were arrested in 1986 on suspicion of terrorism.⁸¹⁶ They were detained for 44 hours but never charged or brought before a judge.⁸¹⁷ Hartley was arrested in 1986, suspected of involvement in a kidnapping.⁸¹⁸ The claimants admitted that their arrests had comported with the laws of the UK but argued that the law fell below acceptable international human rights standards, since there was no requirement in the law to find suspicion on the basis of

⁸⁰⁸ *Id.*

⁸⁰⁹ European Convention, at art. 5.

⁸¹⁰ *Ireland*, 25 Eur. Ct. H.R. at 196.

⁸¹¹ *Id.* at 198.

⁸¹² *Id.* at 196.

⁸¹³ *Id.* at 81.

⁸¹⁴ *Id.* at 147.

⁸¹⁵ *Fox, Campbell, and Hartley v. United Kingdom*, Apps. Nos. 12244/86, 12245/86 & 12383/86, 13 Eur. H.R. Rep. 157 (Eur. Comm'n on H.R. 1990).

⁸¹⁶ *Id.* at 9.

⁸¹⁷ *Id.* at 10.

⁸¹⁸ *Id.* at 13-14.

reasonableness.⁸¹⁹ They claimed that the purpose of their arrests was to gather information from them because they had been previously convicted of terrorism and were members of the Irish Republican Army.⁸²⁰

The European Court of Human Rights recognized that a State may impose tighter restrictions on liberty in dealing with terrorism. The State may use information obtained from secret sources, and it does not have to reveal its sources because it has the right to protect informants. However, the Court must have some other ascertainable facts to ensure that there was reasonableness for the arrests.⁸²¹ The fact that they were previously convicted of terrorism was not enough. The arrests here were in violation of human rights standards because the UK did not provide essential evidence to establish reasonableness. However, the Court did not find a violation of Article 5§2 of the Convention. It reasoned that charges do not have to be conveyed at the time of arrest as long as they are conveyed “promptly”, including the interrogation phase.⁸²²

4. Post September 11, 2001 ATCSA Law

A new international terrorism bill was introduced in Parliament on November 13, 2001, in reaction to the events of September 11 and was enacted as law on December 14, 2001.⁸²³ The law, the Anti-Terrorism, Crime and Security Act (ATCSA), addresses the detention of foreigners in the United Kingdom and various procedures that impact on immigrant and refugee status. Part 4 of the law allows the Secretary of State to certify certain arrestees as “suspected international terrorists and national security risks.”⁸²⁴ This certification is appealable, however, there is only

⁸¹⁹ *Id.* at 29-30.

⁸²⁰ *Id.* at 30.

⁸²¹ *Fox, Campbell, and Hartley*, 13 Eur. H.R. Rep. 157, at 34.

⁸²² *Id.* at 40.

⁸²³ Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

⁸²⁴ *Id.*

one appeal and the determination of the Special Immigration Appeals Commission is final.⁸²⁵

The House of Lords in the case of *Home Secretary v. Rehman*, allowed the Secretary of State considerable discretion in certifying arrestees as “suspected international terrorists.”⁸²⁶ When a person is certified to be a “suspected international terrorist,” he or she is then denied refugee status under the Convention relating to the Status of Refugees.⁸²⁷

There are two more cases that are pertinent. One involved eleven persons who were not citizens of the UK, who alleged that ATCSA had violated their human rights.⁸²⁸ The Special Immigration Appeals Commission held that there was a “public emergency threatening the life of the nation” and that the law did not violate their human rights.⁸²⁹ The other alleged terrorism case involved Lotfi Raissi, an Algerian national, who was released in February, 2002, after spending five months in Belmarsh prison.⁸³⁰ A District Court judge had ruled that there was no evidence to substantiate the charge that he was a suspected terrorist.⁸³¹ He was arrested under an earlier terrorism act.⁸³²

The European Committee on the Prevention of Torture and Inhuman Degrading Treatment or Punishment completed a site visit to UK prisons at Belmarsh, Woodhill and Highdown in February 2002, to assess the treatment of prisoners under the Anti-Terrorism, Crime and Security Act.⁸³³ The Committee reported that some of the prisoners complained that they were subjected to verbal abuse. One prisoner alleged that a prison officer had punched him

⁸²⁵ *Id.*

⁸²⁶ *Home Secretary v. Rehman*, [2001] 3 W.L.R. 877 (Eng. C.A.).

⁸²⁷ *Id.* See also Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954.

⁸²⁸ *UK Accused of Human Rights Abuse* (September 5, 2002), available at

<http://news.bbc.co.uk/1/hi/uk/2237301.stm>

⁸²⁹ *Id.*

⁸³⁰ *Id.*

⁸³¹ *Id.*

⁸³² *Id.*

⁸³³ Report to the Government of the United Kingdom on the Visit to the United Kingdom Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),

in the stomach, and there were reports of bruises in his medical file. Although the Committee found that the prison conditions were “adequate”, it also observed that social interaction was lacking because prisoners were not let out of their cells. Health care, especially psychological and psychiatric health care, needed improvement. Several of the prisoners were diagnosed with post-traumatic stress syndrome or had a history of suicide attempts.⁸³⁴

5. Recommendations of the Committee of Ministers

The fight against terrorism calls for an intricate balance of interests. On the one hand the State has an obligation to use its full legal arsenal to combat legitimate terrorist threats, but on the other hand it still has an obligation to respect human rights. However, the threat of terrorism cannot be used as a pretext for arbitrary and capricious governmental conduct by a State. As a reaction to the September 11, 2001 terrorist attacks on the United States, the Committee of Ministers of the Council of Europe adopted guidelines intended to combat terrorism and protect human rights.⁸³⁵ Walter Schwimmer, the Secretary General of the Council of Europe declared: “It is precisely in situations of crisis, such as those brought about by terrorism, that respect for human rights is even more important, and that even greater vigilance is called for.”⁸³⁶

Some of the recommendations of the Committee of Ministers outlined in *Guidelines on Human Rights and the Fight against Terrorism* are: 1. The first article requires a State to protect everyone within its jurisdiction against terrorist acts and recognizes that this can be accomplished while protecting human rights. 2. There is an absolute prohibition on torture, degrading treatment or punishment. 3. Prohibition on arbitrariness: restrictions must be defined

from 17 to 21 February 2002, CPT/Inf (2003) 18 (February 12, 2003), available at <http://www.cpt.coe.int/documents/gbr/2003-18-inf-eng.pdf>.

⁸³⁴ *Id.*

⁸³⁵ See GUIDELINES ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM, adopted by Comm. of Ministers, 804th Meeting of the Ministers’ Deputies (2002) [hereinafter HUMAN RIGHTS GUIDELINES].

⁸³⁶ *Id.* at 5.

as precisely as possible. 4. Individuals must have the ability to challenge the lawfulness of the State's measures. 5. The authorities must have reasonable suspicions to justify an arrest and must inform the arrestee of the charges against him or her. The arrestee must be brought promptly before a judicial officer. An arrestee must be able to challenge the lawfulness of the arrest. 6. The authorities may restrict access to counsel, to case file and to anonymous informants, however such restrictions must be strictly proportionate to their purpose. 7. There is an absolute prohibition on the imposition of the death penalty. Even if the domestic law of the State allows the death penalty, it must not be carried out. 8. A prisoner convicted of terrorism cannot be subjected to more severe restrictions than other prisoners, especially in his or her communication with counsel. Nor can the prisoner be held in isolation. 9. Lastly, the authorities may place freezing orders on the assets and property of individuals convicted of terrorism.⁸³⁷

6. The Experiences of France and Anti-Terrorism Laws and the European Court of Human Rights

In 1978, France enacted the Plan Vigipirate, which is aimed at mobilizing the police and armed forces to take necessary measures to ensure the protection and security of France.⁸³⁸ In 1986, the September 9th Act was enacted to provide a definition of terrorism and the procedures for the prosecution of alleged terrorists.⁸³⁹ Under the Act, terrorism is defined as “an infraction committed by an individual, or a group of individuals, aimed at seriously disrupting public order through intimidation or terror.”⁸⁴⁰ Both of these laws were enacted in response to Middle East

⁸³⁷ *Id.*

⁸³⁸ Embassy of France, France's Experience with-and Methods Combating- Terrorism, ¶ 2, available at http://www.ambafrance-us.org/printfriendly/atoz/terrorism_pf.asp.

⁸³⁹ *Id.*

⁸⁴⁰ Erik van de Linde et. Al., Quick scan of post 9/11 national counter-terrorism policymaking and implementation in selected European countries, Rand Europe for the Netherlands Ministry of Justice MR-1590 (May 2002), [hereinafter Linde].

terrorism.⁸⁴¹ France has also enacted new anti-terrorism laws post September 11, 2001. In November, 2001⁸⁴² and September, 2002, France enacted new laws building on previous legislation. These laws extend the maximum duration of police custody to four days, allow for night searches, allow detainees to be held up to 72 hours without access to an attorney, allow terrorist trials to be held by special courts, and allow alleged terrorists to receive reduced sentences if they are repentant.⁸⁴³ The September 11th inspired laws allow the prosecution of all acts of terrorism as separate offenses, punishable with increased sentences.⁸⁴⁴ The European Convention on Human Rights does not prohibit a State from enacting anti-terrorism legislation, however, these measures must not be vague or arbitrary so as to flout the rights of the accused that are enumerated in the Convention.⁸⁴⁵

Given France's long and bitter battle against terrorism and the international condemnation that it generated at times, the European Court's decision in *Tomasi v. France*⁸⁴⁶ is extremely significant. The claimant Tomasi was a Corsican born resident of France. His ordeal began in March 1983, when he was apprehended in his shop and placed in police custody. He was suspected of participating in an attack on the French Foreign Legion that had left one guard wounded and another dead. Based on his affiliation with a separatist political organization and his contributions to the political candidacy of separatist candidates, Tomasi was accused of crimes related to terrorism. Based on the French law of 1986, Tomasi was denied a trial by jury, because his crime was related to acts of terrorism. "Where the crime is related to an indirect or collective undertaking aimed at seriously prejudicing public order by intimidation or terror, the

⁸⁴¹ Jeremie J. Wattellier, *Comparative Legal Response to Terrorism; Lessons from Europe*, 27 *Hastings Int'l & Comp. L. Rev.* 397 (Winter 2004).

⁸⁴² *Linde*, at page 50.

⁸⁴³ *Id.*

⁸⁴⁴ *Id.*

⁸⁴⁵ European Convention, at art. 1.

⁸⁴⁶ *See, Case if Tomasi v. France, REF0000038 European Court of Human Rights, 08/27/92.*

accused must be tried before a court of *assize* without a jury”.⁸⁴⁷ After his arrest Tomasi was subjected to brutal interrogation methods. Tomasi was examined by a physician shortly after his initial interrogation, who said that he was covered with bruises and had a dysfunctional eardrum, possibly the result of being battered about the head. Tomasi alleged that he was made to stand naked in front of an open window for close to 24 hours, and that he was verbally assaulted by insults and degrading words. The most serious allegations were of prolonged detention and an untimely trial. Ultimately, the first trial, appeal and retrial took a number of years. He was eventually acquitted on October 22, 1988. The case before the ECHR alleged that he was held for over one year without any judicial proceedings. He also alleged police brutality and violations of the provisions of the Convention that guarantee the right to a fair and speedy trial. In total, he was detained for over five years.⁸⁴⁸

The French government defended its actions, citing as reasons the complexity of the process of gathering evidence and the gravity of the crimes and their terrorist nature. The ECHR ruled that the initial detention of forty-eight hours was just the beginning of the many violations of his human rights. It determined that he was held without food or water, beaten and brutalized, and interrogated for more than fourteen hours. The Court found that France had violated Articles 3, 5-3 and 6-1. Tomasi was awarded over 900,000FF in pecuniary damages and costs and fees for prosecuting the proceeding.⁸⁴⁹

The case establishes a precedent that ill-treatment of an arrestee in custody constitutes a serious violation of Article 3, freedom from torture, inhumane treatment or humiliation while in

⁸⁴⁷ *Id.*, see also, Article 706-16, French Code of Criminal Procedure.

⁸⁴⁸ *Id.*

⁸⁴⁹ *Id.*

custody.⁸⁵⁰ The difference between “torture” and “inhumane treatment” is a matter of degree.⁸⁵¹ Tomasi was a victim of purposeful and systematic humiliation and degradation at the hands of the French police.⁸⁵² The Court was especially disgusted by the initial treatment of Mr. Tomasi. He was singled out as a terrorist and “treated like an animal.”⁸⁵³

The *Tomasi* case has been used by the ECHR in reviewing legitimacy of other anti-terrorist legislation.⁸⁵⁴ The concern of the Court has been to find a fair balance between a person’s fundamental rights and the interests of national security and public safety. What is evident is that the State must maintain a fair, independent and impartial judicial system. The Court will apply strict scrutiny of governmental conduct involving the detention and interrogation of alleged terrorists. The State has the burden to demonstrate that its criminal laws and investigatory procedures are fair and that the treatment of alleged terrorists meets the standards of the Convention. The State has the burden of demonstrating to the Court that it did not practice inhumane or degrading methods in the interrogation of alleged terrorists or deprive the detainee of his or her right to the assistance of counsel. Lastly, the State must afford the accused a civilian criminal trial within a reasonable time.⁸⁵⁵

VI.

SOME FINAL CONCLUSIONS

⁸⁵⁰ Michael K. Addo and Nickolas Grief, Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?; European J. at Int’l Law Vol. 9 (1998) No. 3. See, e.g., www.ejil.org/journal/Vol9/No3/art4-01.html.

⁸⁵¹ *Id.*

⁸⁵² *Id.*

⁸⁵³ *Id.*

⁸⁵⁴ See, The following cases that formed the basis of the *Tomasi* decision, citing Articles 3, 5-3 and 6-1: *Drozd and Janousek v. France and Spain* (A/240) (1992), 14 EHRR 745; *Clooth v. Belgium* (A/225) (1992), 14 EHRR 717; *Kemmache v. France* (A/218) (1992), 14 EHRR 520; *Lettelier v. France* (A/207) (1992), 14 EHRR 83; *Toth v. Austria* (A/224) (1992), 14 EHRR 551; *Ireland v. United Kingdom* (A/25) (1979-80) 2 EHRR 25; *Tyrer v. United Kingdom* (A/26) (1979-80), 2 EHRR 1; *Moreira de Azevedo v. Portugal* (A/208-C) (1992), 14 EHRR 113; and *Cassation, Criminelle*, 9 February 1961 [1961] Dalloz Jur 306.

⁸⁵⁵ *Id.*

1. We have reviewed the record and come to appreciate the many positive changes that have taken place in Peru during difficult times. We recognize that Peru has amended the law and instituted new procedures. In its war on terrorism, Peru had, in the past, disregarded her obligations under the Peruvian constitution and international law. However, today, by judicial executive and legislative measures, Peru is on her way to realize her obligations. It is a very good start. We encourage Peru to go further in her quest to become a nation that adheres to the rule of law.

2. The decision of the Constitutional Court and the 2003 amendments to the law have addressed some vexing problems. The Constitutional Court has prohibited the use of military tribunals over civilians and limited the practice of incommunicado detention. Although the Constitutional Court has permitted the use of incommunicado detention in the investigation of alleged terrorist acts, the authority to allow an incommunicado detention rests exclusively with the investigating judge, thereby adding judicial oversight to this practice. Peru should go further and ban incommunicado detentions altogether to satisfy international due process standards.

3. Article 2 of DL No. 26,447 replaced Article 12(c) of DL No. 25,475. An accused person now has the right to choose any defense attorney he or she wishes, regardless whether counsel also represents other suspected terrorism detainees. The law also allows for the presence of defense counsel while the detainee makes a statement, rather than after the fact. This is a very positive development.

4. DL No. 26,671, made a very important change to the 1992 law by putting an end to faceless military tribunals, and consequently, pursuant to DL No. 926, 2003, terrorism convictions were annulled, and retrials were ordered per Article 2. The retrials, based on new prosecutorial charges, are to take place in ordinary civilian criminal courts. Article 2 excludes

from the retrials any individual who had completed his or her sentence or had been pardoned. The changes in the law, however, did not go far enough. Because Peru had engaged in blatant human rights violations in the past in the pursuit of convictions of alleged terrorists, including the use of torture, it should be barred from retrying these individuals. A State that now claims to adhere to the rule of law should not be given a second chance to convict those who were previously stripped of every aspect of their humanity by that State. Principles of equity, estoppel, and double jeopardy should shut the doors on Peru's attempt to reconvict on tainted evidence.

5. The Constitutional Court has reaffirmed the right of the accused to the assistance of counsel as a fundamental right under the constitution. The recognition of this right and of the right to freely communicate with counsel is a very important step in bringing Peru into compliance with its international obligations. There is, however, a need to investigate whether Peru complies in practice.

6. Peru also recognizes that the accused enjoys a presumption of innocence and the right to a public trial. Public trials are now mandated except where demands of national security, public order, or morality call for closed hearings. This change in the law is not enough. No civilian criminal trial should ever be held in closed proceedings. To allow such closure is to invite further abuses. More investigation is also needed to determine whether Peru abuses this open-ended and rather vague statutory exception.

7. Currently, Peru's judiciary has greater oversight responsibilities over the investigation, arrest and the adjudication of a person charged with an act of terrorism and related crimes. What remains to be a major deviation from acceptable international norms of due process is the admissibility of tainted evidence – primarily coerced confessions – in the retrials of previously

convicted persons accused of terrorism and related crimes. Peru must not permit the use of confessions, admissions, and other related testimonial statements, given by the accused or by a third person, that are the product of torture and similar illegal police practices.

8. Another problem is the vagueness of the term “terrorism” in the criminal law. Although the Constitutional Court has clarified what the prosecution needs to prove in order to obtain a valid conviction, it also directed the Congress to amend the law and to provide a clear definition of “terrorism”. However, Congress has yet to define the term. A vague criminal statute that fails to adequately inform an individual as to what conduct is prohibited and punishable violates international standards of due process.

9. There are other serious deficiencies in the current anti-terrorism laws. For example, Decree Law 922 allows a judge to order the removal of the accused from the courtroom proceedings during the testimony of *any* witness, if the judge discretionarily concludes that the presence of the accused would adversely affect the candor of a reluctant witness who fears for his or her safety. The Constitutional Court had recognized a limited right of exclusion in order to protect the safety of police officer- witnesses and their families. The Constitutional Court created a vague standard which invites further abuses. The accused should never be excused from his or her trial. The accused must be allowed to remain throughout the trial to confront his or her accusers and to assist counsel in the cross examination of prosecution witnesses. The European Court of Human Rights has recognized that the right of confrontation and cross examination is fundamental in establishing the truth of the accusation and judging the credibility of the witnesses. Peru should do the same.

10. Another troublesome concern is Peru’s evidence law that still allows the use of affidavits of “repentant terrorists” as admissible evidence at trial. The verification of this evidence is made

solely by the Public Ministry, the very governmental entity that is responsible for the prosecution of alleged terrorists. Since the verification is made by the prosecution, and not by an independent and impartial judge, the law invites abuse. Although Article 8 of DL 922 calls for the judge to use “equitable criteria” in evaluating the admissibility of such evidence, the judge is not required to order an independent investigation into the truth of these statements. This standard is also sufficiently vague. Article 8 of DL 922 does not go far enough. It fails to allow the *accused* to independently challenge the evidence at trial. The history of using contaminated evidence, mostly derived from terrorist suspects during police interrogation, including the use of torture, requires that courts in Peru today deny the use of such evidence altogether, or require its verification by an independent and impartial judge. At a minimum, the law must allow the accused to confront the affiant accusers in person at trial and to have an opportunity to effectively cross-examine them in open court.

11. The Peruvian Constitution guarantees the accused the right to present a legitimate defense. By permitting the use of contaminated uncross-examined evidence, the accused on retrial is stripped of that right as well. International human rights standards have long recognized that confessions which are the product of torture or inhumane treatment must not be allowed as evidence in a criminal trial. Such evidence is inherently unreliable.

12. Peru’s anti-terrorism laws also fail to adequately promote the prohibition against torture and other cruel, inhumane or degrading treatment or punishment. Coerced confessions, obtained by torture, are admissible today in the retrials of alleged terrorists. Moreover, there are no provisions in the law for the education and dissemination of information regarding this prohibition in the training of appropriate State personnel. One must be mindful that many current law enforcement personnel and judicial officers were active participants in various

human rights abuses. They were the problem. They are not the solution. Further investigation is needed to determine whether Peru provides adequate and prompt investigations of claims of torture, and if these allegations are shown to be valid, whether it provides effective remedies.

13. Peru has made substantial changes in the law since the end of the Fujimori regime. The judiciary, President Toledo and the Congress have taken bold steps to cure human rights violations during difficult times. Peru has demonstrated that the law is not silent in times of war. The task for Peru is to complete the transformation process and to embrace human rights guarantees fully.