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File Number(s): Report No. 49/00; Case 11.182
Title/Style of Cause: Carlos Florentino Molero Coca, Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio and Ambrosio Concha v. Peru
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Decided by: Chairman: Helio Bicudo;
First Vice-Chairman: Claudio Grossman;
Second Vice-Chairman: Juan Mendez;
Commissioners: Marta Altolaguirre, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo
Dated: 13 April 2000
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I. SUMMARY

1. In a petition submitted to the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) by the nongovernmental organization APRODEH on June 23, 1993, it was denounced that the Republic of Peru (hereinafter “Peru,” “the State,” or “the Peruvian State”) violated the human rights of Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca (hereinafter “the victims”) by detaining and torturing them and, subsequently, by sentencing the first three to 10 years and the fourth to 12 years in prison on terrorism charges at trials that were totally lacking in due judicial guarantees and that concluded with sentences handed down by “faceless” courts. The petitioner alleges that in doing so, the State violated the victims’ right to personal freedom, right to humane treatment, and right to a fair trial as set forth in Articles 7, 5, and 8 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”). The State denies having violated the victims’ rights. The Commission concludes that Peru violated, in respect of these named persons, the rights enshrined in Articles 7, 5, and 8 of the Convention, in connection with the terms of its Article 1(1), and extends the relevant recommendations to the Peruvian State.

II. PROCESSING BY THE COMMISSION

A. Processing prior to admissibility

2. On July 30, 1993, the Commission opened this case, transmitted the relevant parts of the complaint to the Peruvian State, and requested it to provide information within 90 days. The State responded on December 2, 1993, and the petitioner submitted comments on that response on January 17, 1994. Both parties submitted additional information on different occasions. On

May 10, 1998, Mr. Carlos Florentino Molero Coca appointed Dr. Luis Alberto Molero Miranda and Dr. Luis Alberto Molero Coca to act as his representatives.

B. Admissibility — Friendly settlement

3. On September 28, 1998, the Commission adopted Report on Admissibility N° 53/98 with regard to this case. In that report, the Commission agreed to make itself available to the parties in order to reach a friendly settlement based on respect for the rights set forth in the Convention and it invited the parties to respond regarding that possibility with a period of two months. The report was sent to the parties on October 20, 1998. On January 13, 1999, the State replied that it did not believe it was appropriate for it to submit to the friendly settlement procedure.

III. POSITIONS OF THE PARTIES

A. The petitioners

4. The petitioners allege that on April 30, 1992, during a security operation conducted on the streets of Lima, a group of police officers stopped a public transport vehicle and proceeded to search the passengers' belongings. As a result, they arrested one of the passengers—named Gladys Helen Ramos Vargas—who was found to be carrying four homemade explosive devices of the type known as *quesos rusos* and an ID card identifying her as a sociology student at San Marcos University.

5. They state that the detainee was handed over to police officers from the anti-terrorist division, DINCOTE, who arrived at the scene; these officers immediately went to her home, where they found her mother, Mrs. Dolores Vargas Vergaray, with her grandson. The officers entered the home and searched it. They then drew up a report stating they had found subversive printed materials; the report did not speak of any arrests being made.

6. They state that as a result of Gladys Helen Ramos Vargas's arrest, the police immediately launched an operation in the neighborhood (La Curva del Diablo, in Villa El Salvador district). They asked several people who were in the area for their IDs and arrested several of them, simply because they identified themselves as students. The victims were among the people arrested on the street: Rodolfo Gerbert Asencios Lindo, a biology student at San Marcos National University, and his twin brother Rodolfo Dynnik Asencios Lindo, an anthropology student at the same university; Marco Antonio Ambrosio Concha, a sociology student at San Martín de Porres University (a private school); and Carlos Florentino Molero Coca, an anthropology student from San Marcos National University.

7. Mr. Rodolfo Gerbert Asencios Lindo and Mr. Rodolfo Dynnik Asencios Lindo report that they were in the vicinity of the Curva del Diablo neighborhood on their way to the home of Fortunato Bajonero Trujillo, a relative of theirs, when a group of police officers asked them for their ID. They identified themselves as students at San Marcos University, whereupon the officers began to accuse them of being terrorists. One of the officers asked them if they were related to the lawyer Rodolfo Asencios Martel, to which they replied that he was their father. The officers then arrested them and took them to DINCOTE headquarters; there they told the

two students that since they could do nothing against their father, who as a lawyer belonging to the Association of Democratic Lawyers had defended individuals accused of terrorism, they were going to do it to them.

8. They claim that once with the police, they were both tortured in order to force them into stating that they had been arrested at the home of the student Gladys Helen Ramos; they never made any such admission, since they did not know that person and had not been arrested at her home. Regarding the torture they suffered, Mr. Rodolfo Gerbert Asencios Lindo made the following statement before the 45th Criminal Judge of Lima:

They punched me in the pit of the stomach and, when I bent over with the pain, they punched me in the head and kicked me in the shin; they then took us out to another room, turned the volume up on the television, and on a table with a mattress they laid my face against the inclined desk and twisted my arms. They then punched me in the kidneys and threatened me with rape, blows with the knee to the thigh. Then they put me in a dark room, I was blindfold all the time, and they continued with my brother. On May 1st, they also mistreated me when they were taking my fingerprints, with blows to the lungs and slapping my face. We are constantly being threatened that they are going to take us to the beach and that we won't get out alive.

9. They state that this torture was even recorded by a forensic physician, who, during a habeas corpus action that was brought, went to DINCOTE headquarters with the judge, examined the two brothers, and declared that they had been mistreated and were displaying recent wounds caused by a blunt object. This habeas corpus action was admitted by the 3rd Criminal Chamber, which ordered the 46th Prosecutor in Lima to file the corresponding criminal complaint against Capt. Manuel Arriola Cueva of the Peruvian National Police (PNP). However, no such complaint was filed by the prosecutor.

10. They also report that Mr. Marco Antonio Ambrosio Concha was in the Curva del Diablo neighborhood on April 30, 1992, waiting for a bus to take him to the home of his friend Víctor Oré Ucharina. When he identified himself as a student of San Martín de Porres University, he was arrested by several police officers and, along with a number of other individuals, taken to the DINCOTE's facilities.

11. Mr. Carlos Florentino Molero Coca, in turn, states that he was preparing to return to his home in the Surco district when he was suddenly intercepted by several police officers who were conducting an operation in the Curva del Diablo neighborhood. The officers asked Mr. Molero Coca to identify himself, which he did by showing them an ID that accredited his status as an anthropology student at San Marcos National University. Upon discovering he was a student, the police officers covered his face and rushed him into a van along with several other persons unknown to him. They were then all taken to a DINCOTE police facility.

12. They allege that upon arriving at that police facility, Mr. Molero Coca received brutal and inhumane treatment and was brought before all the other persons arrested during the operation, in an attempt to get them to admit they knew each other and had ties with Ms. Gladys Helen Ramos Vargas, who had been arrested while carrying explosives and subversive material.

13. They claim that Mr. Molero Coca was tortured in an attempt to get him to confess and identify the other detainees as members of the Shining Path (SL). However, he repeatedly refused, since he did not know any of the individuals placed alongside him.

14. They state that during the interrogation, Mr. Molero Coca said that his father, Dr. Luis Alberto Molero Miranda, had been a magistrate and that the officers must know him, because as an investigating judge in Lima he had handled a number of well-known cases, including many involving terrorism. The officers' reaction was surprising and violent: they proceeded to insult him, beat him savagely, and make threats along the lines that "they were going to destroy me, because my father had done the same to some police officers when he was a judge, by admitting habeas corpus remedies brought against them."

15. They state that the police officers, who never prepared an arrest report specifying the circumstances under which they arrested the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, decided to describe the incident differently, making out that they had discovered and arrested a group of terrorists instead of simply arresting a single person with alleged terrorist ties.

16. They claim that two days after the victims were arrested—that is, May 2, 1992—the police officers went to Gladys Helen Ramos Vargas's house and conducted a "home interview" of her mother, Mrs. Dolores Vargas Vergaray. After threatening that her daughter would be hurt, as she later claimed in court, they made her sign a statement that the four victims were arrested at her home while allegedly waiting for her daughter to arrive.

17. They claim that the police also searched Mr. Molero Coca's home and, in order to create doubts, took a notebook containing notes for a research project titled "The Influence of Linguistics on Anthropology," carried out during the 1992 academic year for a class at university, in which he had copied out the text of a poster on display on the university campus. This text would later be used as evidence of Mr. Molero Coca's alleged status as a terrorist.

18. They state that based on these false assumptions and biased actions, with no evidence whatsoever, without a deed of arrest or a report covering the victims' detention, and without an identification parade being conducted so that the owner of the house where the police claimed the victims were arrested could identify them, the police drew up the corresponding police affidavit (N° 095-D3-DINCOTE) in which they maliciously concluded that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were members of Shining Path and should be brought to justice.

19. They claim that on May 14, 1992, when the victims had been under arrest for two weeks, the police affidavit was received by Lima's 43rd Provincial Criminal Prosecutor, responsible for terrorism cases, which drew up criminal charges against the detainees for the crimes described in Articles 319 and 320 of the Criminal Code in force on the date of their arrest, covering actions intended to cause terror, unrest, and alarm in urban areas.

20. They state that on May 15, 1992, the Judge of the 43rd Criminal Court in Lima drew up judicial file N° 082-92, began preliminary proceedings, and issued arrest warrants for all the

defendants; she also specified that regarding the substance of the allegations, the terms of Articles 319 and 320 of the Criminal Code would apply, but that adjective or procedural matters would be handled in accordance with the procedure set forth in Decree Law N° 25475 of May 5, 1992.

21. They claim that in their statements to the investigating judge, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca repeated that they were innocent and kept to the story they had told the police: that they did not know each other prior to their arrest, that they had no personal relationships of any kind, that they were not arrested at the address given in the police report, that they were not members of any subversive organization, and that they were not involved in any sort of political activity. They also stated that they had been falsely accused by the police to justify their arbitrary arrest and the abuses committed during their time in the DINCOTE's cells.

22. They claim that during this preparatory phase, the accused Gladys Helen Ramos Vargas specifically stated that she did not know Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, or Carlos Florentino Molero Coca, and that it was untrue that they were arrested at her home. Similarly, on June 12, 1992, her mother made a statement under oath in these preparatory proceedings to the effect that she did not know the Asencios Lindo brother or Messrs. Ambrosio Concha and Molero Coca and that they were not arrested at her home. In this statement she recanted her earlier statement to the police, claiming that:

If I said what appears there in that statement it was because that same Thursday afternoon, when they brought my daughter to my house, they told me that was what I had to say. I was threatened as well, with them telling me they were going to take my daughter to the beach to do away with her, and that was why I made that declaration in the statement before me.

23. They state that the representative of the Attorney General's office then drew up her decision, concluding that the responsibility of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca had not been proven and stating that the investigation had revealed no ties between them and any subversive group or any evidence of their involvement in terrorist acts. The 43rd Criminal Judge stated in her final conclusions that "no deed was drawn up in connection with the arrest of these four accused showing the date, place, and circumstances of their arrest" and concluded that they were not criminally liable since no ties between them and subversive organizations were established and no evidence was provided of their involvement in any terrorist acts. She did, however, identify criminal responsibility on the part of the accused Gladys Helen Ramos Vargas.

24. They state that on August 19, 1992, the 43rd Criminal Judge ordered the release of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, and decided to consult the Superior Court regarding her decision prior to carrying it out. She thus ordered an extra document to be added to the case file for this consultation to take place, including with it the relevant parts of the proceedings. Both files--the main one and the one dealing with the release of Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca-- were sent to the higher court.

25. They claim that Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, and Marco Antonio Ambrosio Concha filed a habeas corpus motion to secure compliance with the decision of the 43rd Criminal Judge ordering their release. On August 25, 1992, this motion was dismissed by Lima's 15th Criminal Judge in accordance with the terms of Decree Law 25475, under which no releases of any kind would be granted at that time, and with the terms of Decree Law 25859, which stipulated that guarantee actions were not admissible at any stage of police or criminal investigations into the crimes covered by Decree Law 25475. An appeal against this ruling was heard by the Supreme Court of Justice, which upheld it in a decision dated October 5, 1992.

26. They state that 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. This superior prosecutor, instead of only filing charges against the accused Gladys Helen Ramos Vargas in accordance with the conclusions reached by the provincial prosecutor and the investigating judge, included the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca in his accusation, based on the terms of Articles 319 and 320 of the Criminal Code, and asked for their conviction and expressed his opinion that they should appear at trial.

27. They report that this trial was held on October 22-24, 1992, in accordance with the terms of Decree Law N° 25475, before the Special Chamber of the Superior Court, composed of "faceless" judges, in a room furnished for the purpose in Miguel Castro Castro prison in Lima.

28. They claim that the trial at which they appeared was plagued by limitations of the right of defense and that it came to end with a sentence handed down on October 24, 1992, condemning Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, and Marco Antonio Ambrosio Concha to ten years in prison and Carlos Florentino Molero Coca to twelve years.

29. They maintain that although the investigation carried out in their case and the charges drawn up by the superior prosecutor of the office of the Attorney General had been prepared in accordance with Articles 319 and 320 of the Criminal Code, which typified as crimes actions intended to cause terror, unrest, and alarm in urban areas, the sentence convicted them under entirely different provisions: Articles 321 and 322 of the Criminal Code, for actions related to "criminal association" which were covered in neither the "investigation, judgment, or accusation."

30. They say that this sentence from the Special Chamber of the Superior Court did not resolve objections and challenges that were filed at the appropriate time, nor did it rule on questions of substance posed during the judicial proceedings. The three basic pieces of evidence upon which the sentence was based were the following: the police report of April 30, 1992, dealing with the search conducted at Gladys Helen Ramos Vargas's home, which does not state that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero were arrested there; the record of the interview with Gladys Helen Ramos Vargas's mother, who later recanted her statement in court, claiming that the police had forced her to say that the four of them were arrested at her home; and the police affidavit drawn up by the DINCOTE, in which the police offered a series of subjective, malicious, and utterly unfounded conclusions.

31. They report that an appeal for annulment against this sentence was filed with the Supreme Court which, in a ruling dated September 30, 1994, decided there were no grounds for its annulment and upheld it. This ruling was reached in secret by “faceless” judges of the Supreme Court’s Special Chamber, who were solely identified by the numbers 10913297, 11329027, 11709197, 11004297, 10829137, and 29202405.

32. They note that the terrorism convictions handed down to Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca were widely reported in the media and received special coverage and emphasis because they were among the first sentences given under the procedure set by Decree Law N° 25475. They add that the convictions, and the accompanying publicity, caused both the defendants and their families moral injuries and other damages.

33. They report that national and international campaigns were subsequently waged to get the Peruvian State to accept the innocence of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca and to release them. Mr. Molero Coca and Mr. Ambrosio Concha were declared prisoners of conscience by Amnesty International.

34. The petitioners claim that as a result of these incidents, the State violated the victims’ right to personal liberty, right to humane treatment, and right to a fair trial, as set forth in Articles 7, 5, and 8 of the American Convention.

B. The State

35. On December 2, 1993, Peru gave the Commission a report on this case, drawn up by the Ministry of Defense, according to which the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were arrested by officers of the San Juan de Miraflores national police and taken to the DINCOTE, the agency responsible for investigating and later drawing up police affidavits for terrorist crimes.

36. This report added that the criminal proceedings against the individuals in question were lodged with the Special Chamber of the Supreme Court, by virtue of an appeal for annulment filed against a sentence of the Special Chamber of the Superior Court that sentenced the Asencios Lindo brothers and Mr. Ambrosio Concha to 10 years in prison and Mr. Molero Coca to 12 years. This report specified that these individuals were being held at the Yanamayo and Castro Castro prisons in Lima.

37. On April 21, 1994, Peru gave the Commission a report on this case, drawn up by the Ministry of the Interior, according to which the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca “were brought before the DINCOTE under deed N° 1833-D3-DINCOTE of April 30, 1992, after being arrested by national police personnel from this specialized unit inside the home of the suspected terrorist criminal Gladys Helen Ramos Vargas (21), in whose possession national police personnel from the San Juan de Miraflores detachment found four explosive devices (homemade bombs known as *quesos rusos*) and subversive documents. After investigations were conducted, affidavit N° 095-D3-DINCOTE of May 12,

1992, was drawn up, it having been established that they were suspected perpetrators of terrorist crimes after it was shown that they belonged to or worked within the subversive organization PCP-SL.”

38. On April 22, 1994, Peru gave the Commission another report on this case, drawn up by the Ministry of the Interior, according to which “on September 30, 1993, a supreme writ of execution declared there were no grounds for the annulment of the ruling of October 24, 1992, that sentenced Gladys Helen Ramos Vargas and others as perpetrators of crimes against public order and terrorism to the detriment of the State. The case file has been returned to the Special Chamber of the Lima Superior Court for applicable legal purposes, and that is its current status.”

39. On July 8, 1994, Peru gave the Commission a report on this case, drawn up by the Ministry of the Interior, according to which “report N° 20-93 by the Health Division of the PNP in Puno shows that citizens (. . .) Asencios Lindo and (. . .) Ambrosio Concha are clinically healthy. Attached documents also show that the aforesaid inmates receive the correspondence, foodstuffs, and personal items sent by their relatives.”

40. On August 5, 1994, Peru sent the Commission a report on this case, drawn up by the Ministry of Justice for the Executive Secretariat of the National Human Rights Council. This report states that:

With the issuing of the supreme writ of execution on September 30, 1993, which stated that there were no grounds for annulling the sentence of October 24, 1992, against which the appeal was made and which convicted Gladys Helen Ramos Vargas and others for crimes against public order and terrorism to the detriment of the State, it would be impertinent to base dismissals on facts and police actions that have been seen by the competent judicial bodies in accordance with the rules of due process. Thus, I suggest the following: Reply to the IACHR that the university students GERBERT ASENCIOS LINDO and others were not arbitrarily detained but arrested by the police and submitted to a judicial process in accordance with the normal procedures of our domestic law, which concluded with the issuing of the supreme writ of execution on September 30, 1993.

41. In a communication dated August 11, 1994, the content of which was ratified on February 1, 1996, the State said that the sentence of October 24, 1992, convicting the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, was definitively upheld on September 30, 1993, when the Supreme Court ruled there were no grounds for annulling the sentence of October 24, 1992.

42. On January 13, 1999, the State indicated that it was unable to begin friendly settlement proceedings, because that would imply its acceptance of responsibility in these incidents, which would have been contradicted by the documents submitted to the Commission.

IV. ANALYSIS

A. Introduction

43. Based on an analysis of the petitioners' allegations and the reply given by the Peruvian State, the Commission notes that Peru has not disputed the incidents on which the petitioners' claim is based. The Peruvian State expressly stated that, "it would be impertinent to base dismissals on facts and police actions that have been seen by the competent judicial bodies in accordance with the rules of due process," and went on to say that the students in question "were not arbitrarily detained but arrested by the police and submitted to a judicial process in accordance with the normal procedures of our domestic law, which concluded with the issuing of the supreme writ of execution on September 30, 1993."

44. In accordance with the above, the Commission accepts the facts not disputed by the parties, which are basically all those set forth by the petitioners: to summarize, that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were arrested on July 30, 1992, by police officers and taken to the DINCOTE, where they were tortured to get them to admit that they were members of Shining Path and that they had been arrested at the home of the student Gladys Helen Ramos Vargas. Their torture was even corroborated by a forensic physician, as a result of which the 3rd Criminal Chamber ordered Lima's 46th Prosecutor to prepare criminal charges against Capt. Manuel Arriola Cueva of the national police; charges which were not made. In their statements to the police and in spite of the torture they suffered, the students declared that they did not know each other prior to their arrest, that there was no personal relationship of any kind between them, that they were not arrested at the address given in the police report, that they were not members of any subversive organization, and that they were not involved in any kind of political activity. The police later drew up the corresponding police affidavit (N° 095-D3-DINCOTE), in which they concluded that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were members of Shining Path and should be brought to justice.

45. The parties agree that on May 14, 1992, after the victims had been in detention for two weeks, the police affidavit was received by the 43rd Provincial Criminal Prosecutor in Lima, responsible for terrorism cases, who drew up criminal charges against all the detainees for the crimes referred to in Articles 319 and 320 of the Criminal Code in force on the day of their arrest: actions intended to cause terror, unrest, and alarm in urban zones. On May 15, 1992, the judge of Lima's 43rd Criminal Court drew up case file N° 082-92, began preliminary investigations, and issued arrest warrants for all the defendants; she also specified that regarding the substance of the allegations, the terms of Articles 319 and 320 of the Criminal Code would apply, but that adjective or procedural matters would be handled in accordance with the procedure set forth in Decree Law N° 25475 of May 5, 1992. In their statements to the judge, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca repeated their innocence and kept to the version of events they had told the police.

46. Neither do the parties dispute the fact that, during this phase of the investigations, the accused Gladys Helen Ramos Vargas stated explicitly that she did not know the students and that it was untrue that they were arrested at her home. Ramos Vargas's mother made a statement under oath in these preparatory proceedings on June 12, 1992, stating that she did not know the Asencios Lindo brothers or Messrs. Ambrosio Concha and Molero Coca and that they had not been arrested at her home. In this statement she recanted her earlier testimony to the police and claimed that her previous declarations had been made under duress in the form of police threats

that her daughter would come to harm. The representative of the Attorney General's office then drew up her ruling, concluding that the responsibility of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca had not been proven and stating that the investigation had revealed no ties between them and any subversive group and had revealed no evidence of their involvement in any terrorist act. The 43rd Criminal Judge, in a decision dated August 19, 1992, found that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were not responsible of the crimes with which they were charged, ordered their release, and decided to consult the Superior Court regarding her decision prior to carrying it out.

47. The parties also agree that the Asencios Lindo brothers and Mr. Ambrosio Concha filed a habeas corpus motion to ensure enforcement of the 43rd Criminal Judge's decision ordering their release. This motion was dismissed by Lima's 15th Criminal Judge on August 25, 1992. The basis for this decision was Decree Law 25475, under which no releases of any kind would be granted at that time, and Decree Law 25859, which stipulated that guarantee actions were not admissible at any stage of police or criminal investigations into the crimes covered by Decree Law 25475. The appeal against this ruling was heard by the Supreme Court of Justice, which upheld it in a decision handed down on October 5, 1992.

48. Neither do the parties dispute the fact that 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. This superior prosecutor filed charges against the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, based on Articles 319 and 320 of the Criminal Code, asked for them to be convicted, and expressed his opinion that they should appear at trial. This trial was held on October 22-24, 1992, in accordance with the terms of Decree Law N° 25475, before the Special Chamber of the Superior Court, composed of "faceless" judges," in a room furnished for the purpose in Miguel Castro Castro prison in Lima. This trial ended with a sentence issued on October 24, 1992, the relevant part of which condemned Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, and Marco Antonio Ambrosio Concha to ten years in prison, and Carlos Florentino Molero Coca to a twelve-year prison term.

49. The parties do not dispute the fact that although the investigation carried out in this case and the charges drawn up by the superior prosecutor of the office of the Attorney General had been prepared in accordance with Articles 319 and 320 of the Criminal Code, dealing with actions intended to cause terror, unrest, and alarm in urban areas, the sentence convicted the victims under different provisions: Articles 321 and 322 of the Criminal Code, on charges related to "criminal association" that were not an issue in either the investigation, the judgment, or the accusations. Neither do the parties deny that the three basic pieces of evidence upon which the sentence was based were the police report of April 30, 1992, regarding the search conducted at Gladys Helen Ramos Vargas's home, the record of the interview with Gladys Helen Ramos Vargas's mother, and the police affidavit drawn up by the DINCOTE.

50. Both parties concur that a motion for annulment was filed against this sentence with the Supreme Court of Justice, which, in a ruling dated September 30, 1994, and arrived at in secret by a bench of "faceless" judges, decided there were no grounds for its annulment and upheld the sentence.

51. Where the parties do not agree is regarding the place where the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were arrested. The petitioners maintain they were detained in public, on the street; the State, in contrast, holds that the arrests took place at the home of Ms. Gladys Helen Ramos Vargas. The Commission notes, however, that the parties do not dispute the fact that the sentence convicting the students failed to take into account the judicial statement made by Mrs. Gladys Vargas Vergaray on June 12, 1992, in which she recanted her earlier testimony to the police in which she had said that the students were arrested at her home and claimed that the police statement had been obtained under police duress.

52. Hence, the Peruvian State does not dispute the facts, and its defense centers on the fact that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were tried and convicted pursuant to normal procedures under Peruvian domestic law: specifically, Decree Law N° 25475, of May 6, 1992, dealing with terrorist crimes.

53. Consequently, the issue before the Commission is whether the aforesaid Decree Law N° 25475 and its ancillary provisions are compliant with the obligations Peru assumed by ratifying the American Convention on Human Rights, in light of the undisputed facts of the present case. In this regard, it should be noted that the Commission is competent to determine whether the effects of enforcing a domestic law constitute violations of the obligations of a State that is a party to the American Convention. In this regard, the Inter-American Court has said that:

There should be no doubt that the Commission has in that regard the same powers it would have if confronted with any other type of violation and could express itself in the same way as in other cases. Said in another way, that it is a question of “domestic legislation“ which has been “ adopted pursuant to the provisions of the Constitution“ is meaningless if, by means of that legislation, any of the rights or freedoms protected have been violated. The powers of the Commission in this sense are not restricted in any way by the means by which the Convention is violated.

(. . .)

At the international level, what is important to determine is whether a law violates the international obligations assumed by the State by virtue of a treaty. This the Commission can and should do upon examining the communications and petitions submitted to it concerning violations of human rights and freedoms protected by the Convention.[FN1]

[FN1] Inter-Am.Ct.H.R., Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13, July 16, 1993, Series A No. 13, paragraphs 27 and 30.

54. In accordance with this, the Commission will now undertake an analysis of Decree Law N° 25475 and its ancillary provisions, in light of the undisputed facts of the present case, in order to determine whether they comply with the obligations Peru acquired by ratifying the American

Convention on Human Rights. The Commission will then be able to determine whether those procedures constituted in and of themselves a legal structure contrary to the rights and guarantees enshrined in the American Convention (a violation per se), the application of which to persons brought to trial under such legal parameters would have meant a violation of the human rights set forth in the Convention. The starting point for this analysis is the present case, in which those procedures were applied to the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, who were among the first people to be tried and convicted under those provisions.

B. Context of the anti-terrorist legislation

55. Between 1980 y 1992, Peru underwent a period of armed internal conflict that led to the death and disappearance of thousands of people and caused massive material losses. The main participants in this conflict were, on the one hand, individuals associated with the “Shining Path” (SL) and “Tupac Amaru Revolutionary Movement” (MRTA) dissident groups, and, on the other, the State’s police and military forces.

56. On April 5, 1992, President Alberto Fujimori promulgated Decree Law N° 25418, establishing an Emergency Government for National Reconstruction. Among his reasons for this, he stated, was the desire to reorganize the judiciary to purge it of corruption and prevent terrorism-related crimes from going unpunished. The Emergency Government dissolved Congress and summarily dismissed judges and public prosecutors at all echelons of the system.

57. Against this backdrop, in 1992 Lima suffered its most violent wave of terrorist attacks. Consequently, on July 24, 1992, President Fujimori addressed the nation and announced drastic new legal measures to counter the situation. Among these were two Decree Laws (Nos. 25475 and 25659) for prosecuting, trying, and punishing persons guilty of the crimes of terrorism and treason against the fatherland.

58. The State’s national and international obligation to confront individuals or groups who use violent methods to create terror among the populace, and to investigate, try, and punish those who commit such acts means that it must punish all the guilty, but only the guilty. The State must function within the rule of law, punishing only the guilty and refraining from punishing the innocent. The administration of justice according to the law and with due judicial guarantees acts as a safeguard of the fundamental right of freedom inherent to all human beings who have committed no punishable crimes. The only way in which the State can perform that jurisdictional function with true justice is by ensuring that the accused are guaranteed a fair trial.

59. For this reason the American Convention on Human Rights expressly sets forth the right to freedom and the right to due process. A trial with due guarantees is the best way to avoid the injustice of convicting the innocent. In this regard, the aforesaid Decree Law N° 25.475--which was intended, along with other related provisions, to prosecute, try, and punish the perpetrators of terrorism--led to human rights violations, as shall be seen in this report, by establishing procedures that undermined the guarantees of due process of the individuals tried under them and sentenced innocent people to lengthy prison terms, as occurred in the case at hand with the convictions of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca.

60. The Commission notes that the Peruvian State has made efforts to resolve some cases of individuals convicted without ties of any sort to terrorist activities or organizations. Thus, on 15 August 1996, the Peruvian State enacted Law N° 26655, creating an Ad Hoc Commission charged with evaluating cases and suggesting to the President of the Republic that pardons be granted to individuals accused or convicted of terrorist crimes when it could be reasonably assumed that they had no connections to terrorist organizations or activities.[FN2] This Commission, which continues to operate, is composed of three members: People's Defender (ombudsman) Dr. Jorge Santistevan de Noriega, who serves as its chairman; Father Hubert Lanssiers, representing the President of the Republic; and the Justice Minister. To date the Commission has received some 3,000 petitions and, as of November 8, 1998, had presented President Alberto Fujimori with proposals for 494 pardons, of which 457 have been granted.[FN3]

[FN2] Article 1 of Law 26655 stipulates the following: "An Ad Hoc Commission shall be established, charged with evaluating, assessing, and, in exceptional cases, proposing to the President of the Republic the granting of pardons to individuals convicted of the crimes of terrorism or treason against the fatherland based on inadequate evidence that would allow the Commission to reasonably assume that they had no connections of any kind with terrorist elements, activities, or organizations."

[FN3] Ad Hoc Commission, Pardon Recommendations, Statistical Report, October 1998; drawn up for the Inter-American Commission on Human Rights on the occasion of its on-site visit to Peru, Lima, 1998.

61. With regard to this Ad Hoc Commission, the Special Rapporteur of the UN Commission on Human Rights responsible for the independence of the judiciary and lawyers said that he:

. . . welcome[d] the establishment of the Ad Hoc Commission by the Government as an attempt to correct the wrong done to the innocent people who were tried and sentenced by "faceless" civil and military tribunals; however, the Special Rapporteur would like to point out that the establishment of the Commission is itself an acknowledgement by the Government of the serious irregularities that surrounded the procedures for trying cases of terrorism and treason, which amounted to a miscarriage of justice.[FN4]

[FN4] UN, Commission on Human Rights, Report on the Mission to Peru by the Special Rapporteur on the independence of the judiciary and lawyers, Mr. Param Cumaraswamy, Doc. E/CN.4/1998/39/Add.1 (1998), paragraph 85.

62. The Commission believes it should clarify that Article 27 of the American Convention stipulates that during times of war, public danger, or other emergencies that threaten its independence or security, a state party may suspend some of the international obligations to which it is subject. Thus, Article 27 of the Convention reads as follows:

1 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.

2. The foregoing provision does not authorize any 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.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

63. In accordance with Article 27 of the Convention and the guidelines set down by the Court, a fundamental principle of respect toward the representative democratic regime is needed and certain requirements must be met for a country to validly declare a state of emergency.

64. Regarding the principle that the representative democratic regime is to be respected, it should be noted that under Article 3.d of the Charter of Bogotá (1948), one of the basic principles governing the Organization of American States is the requirement that its members must be organized politically on the basis of the effective exercise of representative democracy. Consequently, the preamble to the Convention reiterates its “intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.” Similarly, Article 29 of the Convention prohibits the interpretation of any of its provisions as “precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government,” while Articles 15, 16, 22, and 32 also refer to the democratic principle within the political organization of the member states.

65. Regarding the requirements for declaring a state of emergency, the Inter-American Court has said that the starting point for a legally sound analysis of Article 27 of the Convention:

. . . is the fact that it is a provision for exceptional situations only. It applies solely “in time of war, public danger, or other emergency that threatens the independence or security of a State Party.” And even then, it permits the suspension of certain rights and freedoms only “to the extent and for the period of time strictly required by the exigencies of the situation.” Such measures must also not violate the State Party’s other international legal obligations, nor may they involve “discrimination on the ground of race, color, sex, language, religion or social origin.”[FN5]

[FN5] Inter-Am.Ct.H.R., Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Series A N° 8, paragraph 19.

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66. Thus, the prerequisites for declaring a state of emergency are the following:

67. Need: Under Article 27 of the Convention, for a true emergency to be deemed to exist, the country must be facing a situation of extreme gravity, such as a state of war, public danger, or other emergencies that threaten the independence or security of the member state. The Commission has ruled that measures relating to states of emergency “can only be justified when there is a real threat to law and order or the security of the state.”[FN6]

[FN6] IACHR, Annual Report 1980-1981, p. 115.

68. Nonpermanence: This requirement refers to the duration of the suspension which, as stipulated by Article 27(1) of the Convention, must last only for the period of time strictly required by the exigencies of the situation. In this regard the Commission has said that it is a matter of great gravity to declare states of emergency for lengthy or indefinite periods of time, particularly when they grant heads of state broad powers, including the submission of the judiciary to measures decreed by the executive, which in certain cases can lead to the suspension of the rule of law itself.[FN7]

[FN7] Idem.

69. Proportion: Article 27(1) of the Convention states that the suspension can only take place to the extent strictly required by the exigencies of the situation. This requirement prevents the unnecessary suspension of certain rights, the imposition of greater restrictions than are necessary, and the extension of the suspension into areas not affected by the emergency.

70. Nondiscrimination: As stipulated by Article 27(1) of the Convention, in conjunction with Articles 1 and 24, the suspension of rights cannot entail discrimination of any kind against any person or group.

71. Consistency with other international obligations: The suspension of given rights must be consistent with all other obligations imposed by other international instruments ratified by the country.

72. Notice: In compliance with Article 27(3) of the Convention, notice of the declaration of the state of emergency must immediately be given to the Convention’s other states parties, through the Secretary General of the OAS.

73. Even when these conditions are met, the Convention contains certain rights and guarantees that states cannot suspend.

74. Non-derogable rights: With regard to the rights that can be suspended when a state of emergency is imposed, the Inter-American Court has said that:

It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions – those laid down in Article 27(1) – are met. . . . Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.[FN8]

[FN8] Inter-Am.Ct.H.R., *Habeas Corpus in Emergency Situations* . . ., op. cit., paragraph 21.

75. The rights that the State cannot suspend, regardless of the gravity of the emergency, are for the most part listed in Article 27(2) of the Convention and are those contained in the following Articles: 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment), 6 (freedom from slavery), 9 (freedom from ex post facto laws), 12 (freedom of conscience and religion), 17 (rights of the family), 18 (right to a name), 19 (rights of the child), 20 (right to nationality), and 23 (right to participate in government). As stipulated by Article 27(1) of the Convention, the suspension of rights must be consistent with all other obligations imposed by other international instruments ratified by the country.

76. The Inter-American Court has stated that the suspension of guarantees must not entail the suspension of the rule or law or the principle of legality:

The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law (The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A N° 6, para. 32).[FN9]

[FN9] *Ibid.*, paragraph 24.

77. Thus, “in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that the judicial guarantees essential for their protection remain in force.”[FN10] Similarly, the independence of the judiciary is vital, since that independence is the keystone of the rule of law and of human rights protection. The Court has therefore ruled that habeas corpus and amparo remedies are judicial guarantees that protect non-derogable rights and those “judicial remedies [are] essential to ensure the protection of those rights. “[FN11] The judiciary serves to protect legality and the rule of law during a state of emergency.

[FN10] Ibid., paragraph 27.

[FN11] Ibid.

78. Non-derogable guarantees: The Inter-American Court of Human Rights has stated that, “guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof. The States Parties not only have the obligation to recognize and to respect the rights and freedoms of all persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (Art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms.”[FN12]

[FN12] Ibid., paragraph 25.

79. In addition to the rights mentioned above, according to the final part of Article 27(2) of the Convention, the judicial guarantees that are essential for protecting non-derogable rights cannot be suspended either; as the Court has said:

It must also be understood that the declaration of a state of emergency--whatever its breadth or denomination in internal law--cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency.[FN13]

[FN13] Inter-Am.Ct.H.R., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Series A N° 9, paragraph 25.

80. The Inter-American Court of Human Rights has concluded that:

The judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.[FN14]

[FN14] Ibid., paragraph 38.

81. In conclusion, as indicated by the jurisprudence of the Inter-American Court quoted above, the judicial guarantees that cannot be suspended during states of emergency are essentially habeas corpus, amparo, remedies intended to preserve the rule of law, and, in general, all other judicial procedures ordinarily used to guarantee full enjoyment of the non-derogable rights referred to in Article 27(2) of the Convention, which, even during states of emergency, must be followed.

82. If it had fully complied with the principles and prerequisites described above, Peru could have, under certain conditions, suspended either in whole or part the enjoyment of some of the rights and guarantees enshrined in the American Convention, provided that said rights and guarantees were not non-derogable. However, since it failed to comply in full with the requirements set forth in Article 27 of the Convention, the obligations acquired by Peru through its free and sovereign ratification of the American Convention remain in full force and effect.

83. The Commission is not unaware of the situation prevailing in Peru when the anti-terrorist legislation was enacted, with constant incursions by armed groups having caused a state of permanent alarm among the populace. For that reason, a state of emergency had been declared in several of the country's departments, which would appear, *prima facie*, to be justified by the crisis faced by the Peruvian State in combating terrorism. Under this state of emergency, Article 2.20.g[FN15] of the 1979 Peruvian Constitution had been suspended in many departments, and the police and armed forces had been given the power to legally arrest individuals without an order from a competent judge and without their being caught in *flagrante delicto*.

[FN15] According to which: "All persons shall have the following rights: . . . 20. To personal freedom and personal security. Consequently, . . . (g) No person may be detained except under a written, grounded order from a judge or by police authorities in *flagrante delicto*."

84. It must nevertheless be noted that, in spite of the *prima facie* legitimacy of this measure, the authority to conduct arrests does not grant the security forces unlimited power for arresting citizens arbitrarily. Suspending the need for a court-provided arrest warrant does not mean that public officials have been freed from the legal prerequisites needed to legally decree such a measure, nor that the jurisdictional controls over how arrests are conducted have been cancelled.

85. The suspension of some of the components of the right to personal liberty, authorized in certain cases by Article 27 of the American Convention, can never be total. In any democratic society there are underlying principles that the security forces must observe in making an arrest, even during a state of emergency. The legal grounds for an arrest are obligations that state authorities must respect, in compliance with the international commitment to protecting and respecting human rights that was acquired under the Convention.

86. Similarly, based on the above principles, police or military arrest as a precautionary measure must solely be intended to prevent the flight of an individual suspected of a criminal act, thereby ensuring his appearance before a competent judge to be tried within a reasonable delay or, if appropriate, released. No state can impose punishments without the guarantee of a prior trial.[FN16] In a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person's guilt has been established with all due guarantees at a fair trial. The existence of a state of emergency does not authorize the state to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled *ius puniendi*.

[FN16] The Commission has established that: "The rationale behind this guarantee is that no person should be punished without a prior trial which includes a charge, the opportunity to defend oneself, and a sentence. All these stages must be completed within a reasonable time. The time limit is intended to protect the accused with respect to his or her fundamental right to personal liberty, as well as the accused's personal security against being the object of an unjustified procedural risk." IACHR, Report N° 12/96, paragraph 76 (Case 11.245, Argentina), published in Annual Report, 1995.

87. The Commission will next analyze Decree Law N° 25475 and its ancillary provisions in light of the undisputed facts of this case, in order to determine whether by enacting and enforcing them--specifically, to the cases of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca--the Peruvian State violated the obligations it acquired by ratifying the American Convention on Human Rights.

C. Decree law N° 25475 on the crime of terrorism

88. Article 2 of Decree Law N° 25475 of May 6, 1992, defines terrorism as an act aimed at "provoking, creating, or maintaining anxiety, alarm, and fear in the public, or a sector thereof; making attempts to harm the life, body, health, freedom, and safety of the individual, or property, the security of public buildings, modes and means of communication and transportation of any kind, electric towers and power lines, power plants, or any other facility or service, through the use of weapons or explosive devices or substances, or any other means capable of inflicting damage or seriously disrupting the peace or adversely affecting international relations or the security of society and the State." This decree expressly repealed the provisions of the Criminal Code that, since April 1991, had applied to terrorism-related offenses, and it also established

prison terms ranging from a minimum of 20 years up to a maximum of life imprisonment for those found guilty.

89. The definition of terrorism contained in this decree is totally abstract and inaccurate and, as such, the decree violates the principle of legality, an inherent part of criminal law that is ultimately intended to secure the juridical certainty an individual needs in order to know exactly what actions or omissions will give rise to criminal responsibility.

90. The Commission stands by the comments it offered in its 1993 report on the general human rights situation in Peru regarding the inadequate definition of terrorist crimes: the criminal actions that constitute terrorism are defined and described in Article 2 of Decree Law N° 25475 with a patent lack of clarity, using very broad terminology and thus creating open definitions of crimes that use very inexact terms and are therefore “contrary to one of the basic principles of modern criminal justice, which is that the language used to describe the prohibited conduct must be precise so as to leave as little discretionary latitude as possible to those whose function it is to enforce and interpret the law.”[FN17] On that occasion the Commission reached the following conclusion, which it now reiterates: “This new body of law is contrary to universally accepted principles of legality, due process, judicial guarantees and the right of self-defense; under these laws, merely being suspected of a terrorist act or of in any way collaborating in terrorist acts is sufficient cause to hold someone in prison for long periods, regardless of whether that person actually committed an act classified as terrorism or treason. In the opinion of the Commission, this is a grave threat to the people’s juridical security.”[FN18]

[FN17] IACHR, Annual Report, 1993, p. 807.

[FN18] Ibid.

91. In connection with this, the Inter-American Court of Human Rights has pointed out that the right enshrined in Article 7(2) of the American Convention--that no one shall be deprived of his physical liberty except for reasons established beforehand by law--involves a principle under which “no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.”[FN19]

[FN19] Inter-Am.Ct.H.R., Gangaram Panday Case, Judgment of January 21, 1994, Series C N° 16, paragraph 47.

92. Continuing with the analysis of Decree Law N° 25475, Article 12 stipulates that Peru’s National Police is charged with investigating terrorist crimes through the DINCOTE, its National Anti-Terrorist Directorate. The DINCOTE is empowered to decide whether the evidence it gathers is enough to bring charges. In addition, it also decides what charges are to be brought and whether the defendant is to appear before a civilian or a military court.

93. The UN's Special Rapporteur on the independence of the judiciary and lawyers stated, in the report quoted above, that Decree N° 25475 gave the police excessive powers,

. . . enabling them to impose incommunicado detention unilaterally, without consulting with a judge, and the restrictions of the right of defence at both civil and military "faceless" tribunals are inconsistent with provisions of international human rights treaties to which Peru is a party, in particular those that provide for the right to due process and its components. Article 8 of the American Convention on Human Rights is of particular relevance because it provides for the right to due process and is regarded as a non-derogable right even during a state of emergency.[FN20]

[FN20] UN, Commission on Human Rights, Report by Special Rapporteur Param Cumaraswamy, op. cit., paragraph 71.

94. Thus, under Article 12(c) of the Decree, the national police is empowered to detain suspects for fifteen days and is merely required to notify the judge and the office of the Attorney General within 24 hours of their arrest. Article 12(d) further states that during this time, the police can keep detainees completely incommunicado, while Article 12(f) stipulates that defendants' appointed lawyers can only act in their defense after the detainees have given a statement to the office of the Attorney General.[FN21] Article 18 of the Decree stated that in terrorism trials, defense lawyers could not simultaneously represent more than one defendant, and excepted court-appointed attorneys from the terms of that provision.[FN22],[FN23]

[FN21] Later legislation partially amended Decree Law 25475, allowing defendants in terrorism cases the right to receive counsel from their defense lawyers immediately following arrest.

[FN22] This article was repealed by Law N° 26248 of November 25, 1993.

[FN23] In a recent report the Commission concluded that the right to defense had been restricted and, consequently, that Article 8(2) of the Convention had been violated by a series of restrictions that were imposed on a defense lawyer, such as forcing her to undress prior to visiting her client in prison, forbidding her to converse in private with her client, and refusing to issue her with the ID card needed to enter the prison facility. See Report N° 2/99, Case 11.209 (Mexico), IACHR, Annual Report, 1998, paragraphs 88-102.

95. In the case at hand, the ban preventing defense lawyers from representing more than one defendant at once was applicable to the defense of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, since they were arrested on April 30, 1992, and appeared at trial on October 22-24, 1992, when the provision was in force.

96. The UN's Human Rights Committee, set up under the Covenant on Civil and Political Rights, has also recorded its concern regarding the provisions of Decree Law N° 25475 that authorize extension of preventive detention in certain cases for up to 15 days, and it has stated

that those provisions raise serious issues with regard to Article 9 of the Covenant, which deals with personal liberty and is similar in content to Article 7 of the American Convention.[FN24]

[FN24] UN, Human Rights Committee, Examination of the Third Report Submitted by Peru to the Committee, Documents of the 51st Session, Vol. I, Supplement N° 40 (A/51/40), paragraph 356.

97. The Commission believes that the aforesaid provisions of Decree N° 25475 constitute a violation per se of Articles 7 and 8 of the American Convention, in that the power given to the police under which they can arrest a person and keep him incommunicado for 15 days clearly contravenes the terms of Article 7(5) of the American Convention, according to which “any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”, as well as those of Article 8(2)(d), which establishes as a minimum procedural guarantee the right of the accused “to communicate freely and privately with his counsel.” In addition, the restriction limiting each lawyer to the representation of a single defendant affected the defendants’ right to freely choose their own legal counsel enshrined in Article 8(1)(d) of the American Convention.

98. In this case it can be seen that, pursuant to these provisions, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were detained for 15 days (April 30 through May 14, 1992), during which time they were kept incommunicado. Thus, as explained above, the Peruvian State violated the rights enshrined in Articles 7 and 8 of the American Convention with respect to the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca.

99. It is important to stress the numerous statements regarding the fact that while they were detained and kept incommunicado, the defendants were subjected to serious torture, frequently with the aim of securing a self-incriminating “confession” from them. In 1992, the Commission of International Jurists noted that:

During this critical period, the detainee is completely controlled by the police and is not subject to any effective judicial supervision. We have been told that a suspect when questioned normally is kept bound and blindfolded and never sees his interrogators. The entire police squad that made the arrest frequently takes part in the interrogations, which means that generally there are eight to ten police officers exerting tremendous pressure on the detainee. For the most part, the suspect is questioned during his first days in custody. These sessions can take place at any time, day or night, although, as a rule, they are conducted at night. A representative of the Public Prosecutor’s Office is required to be present during the police interrogations. However, we have been told that this is not always the case, and that when a prosecutor is present his attendance is merely a formality since he exercises no control over the interrogators. We believe that this period of prolonged incommunicado detention is, prima facie, incompatible with the guarantees stipulated in Articles 7 and 9 of the American Convention and the International Covenant, respectively[FN25]

[FN25] Report of the Commission of International Jurists on the Administration of Justice in Peru, Instituto de Defensa Legal, Lima 1993, pap.60.

100. Similarly, the Inter-American Court of Human Rights has established that, “during the period when Ms. María Elena Loayza-Tamayo was detained [1993] there was a widespread practice in Peru of cruel, inhuman and degrading treatment during criminal investigations into the crimes of treason and terrorism.”[FN26] The UN’s Human Rights Committee also made the following statement in this regard:

[FN26] Inter-Am.Ct.H.R., Loayza Tamayo Case, Judgment of September 17, 1997, paragraph 46.

The Committee is deeply concerned by persistent reports of torture or cruel, inhuman or degrading treatment of persons detained under suspicion of involvement in terrorist activities or other criminal activities. It regrets the failure of the State party to provide the Committee with detailed information on the measures adopted to prevent torture and cruel, degrading or inhuman treatment, and to punish those responsible. It draws attention to the legislation which permits incommunicado detention in certain cases. In this connection, the Committee reiterates its view, as expressed in its General Comment 20 on article 7, that incommunicado detention is conducive to torture and that, consequently, this practice should be avoided.[FN27]

[FN27] UN, Human Rights Committee, op. cit., paragraph 355.

101. The Commission also stresses that under Article 5 of the Inter-American Convention to Prevent and Punish Torture, ratified by Peru on March 28, 1991, “the existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.”

102. Article 10 of the Convention to Prevent and Punish Torture also states that: “No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.”

103. In accordance with the foregoing, the Commission also concludes that the provisions of Decree Law 25475, granting the police power to conduct arrests and to keep detainees incommunicado for fifteen days, created conditions that allowed individuals under investigation for terrorist crimes to be systematically tortured during this period of police arrest in order to secure criminal confessions from them. This is a violation of Article 5 of the American

Convention, which states that “every person has the right to have his physical, mental, and moral integrity respected,” and that “no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” In this case, the “confessions” obtained by torture were the main evidence used to convict the detainees.

104. In the case at hand and in accordance with the facts that the Commission has established, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were tortured[FN28] at the DINCOTE facility, a fact that was even certified by a forensic physician.[FN29] By doing this, as explained above, the Peruvian State violated, to the detriment of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, the right to humane treatment enshrined in Article 5 of the American Convention.

[FN28] As an example of the torture that was inflicted, Mr. Rodolfo Gerbert Asencios Lindo made the following statement before the 45th Criminal Court in Lima: “They punched me in the pit of the stomach and, when I bent over with the pain, they punched me in the head and kicked me in the shin; they then took us out to another room, turned the volume up on the television, and on a table with a mattress they laid my face against the inclined desk and twisted my arms. They then punched me in the kidneys and threatened me with rape, blows with the knee to the thigh. Then they put me in a dark room, I was blindfold all the time, and they continued with my brother. On May 1st, they also mistreated me when they were taking my fingerprints, with blows to the lungs and slapping my face. We are constantly being threatened that they are going to take us to the beach and that we won’t get out alive.”

[FN29] Among the documents before the Commission is a copy of a decision handed down by the 45th Criminal Court in Lima, dated May 15, 1992, in which the existence and content of the forensic report can be inferred. This decision reads as follows: “Since (. . .) the deed drawn up by the Criminal Court (. . .) indicates that the citizens (. . .) were examined by the forensic physician, who verified that they presented traces of wounds caused by a blunt object, and that those wounds were recent—that is, not more than about seven days old—thus indicating that they were indeed inflicted during the time when the aforesaid citizens were detained at the premises of the National Police’s Anti-Terrorism Directorate.”

105. Aggravating the defenselessness and isolation of individuals being investigated and tried for terrorist crimes, Article 6 of Decree Law 25669 stipulated that at no time during police investigations or criminal proceedings would relief injunctions be admitted, including the habeas corpus action provided for in Articles 295 and 200 of the Peruvian Constitutions of 1979 and 1983, respectively.[FN30] A suspect arrested and held incommunicado was thus denied the only legal remedy available for challenging the reasonableness of his arrest and for enabling a judge to verify that the arrest was properly made.

[FN30] Law N° 26248 of November 25, 1993, reinstated the admissibility of habeas corpus in cases involving terrorism and treason against the fatherland.

106. In order to analyze the consequences of this denial of the right to habeas corpus relief vis-à-vis the terms of the American Convention, it must first be noted that Article 25 of the Convention stipulates that: “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.” In turn, Article 7(6) of the Convention, which deals with the right of personal liberty, states that anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. Similarly, as analyzed in detail above, Article 27 of the Convention states that there are certain rights that cannot be suspended even during a state of emergency and, further, that the judicial guarantees needed to protect those rights can never be suspended.

107. In this regard, the Inter-American Court of Human Rights has stated that: “Guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof. The States Parties not only have the obligation to recognize and to respect the rights and freedoms of all persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (Art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms.”[FN31]

[FN31] Inter-Am.Ct.H.R., Habeas Corpus in Emergency Situations . . ., op. cit., paragraph 25.

108. The Court has maintained that habeas corpus constitutes a fundamental guarantee that States Parties may not suspend even during a state of emergency, ruling that:

The judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.[FN32]

[FN32] Inter-Am.Ct.H.R., Judicial Guarantees in States of Emergency . . ., op. cit., paragraph 38.

109. Thus, suspending the right to the judicial guarantee of habeas corpus relief of those facing trial for terrorist offenses is also a violation per se of Article 7(6) of the American Convention, which deals with the right to personal freedom in the following terms:

Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a

competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

110. Denying access to habeas corpus relief is also a violation of Article 25 of the American Convention, which provides that, “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.”

111. In the case at hand and in accordance with the facts that the Commission has established, it can be seen that the illegal denial of habeas corpus relief indeed took place when on August 5, 1992, the 15th Criminal Judge in Lima invoked the terms of the aforesaid Decree Law N° 25859 to dismiss the habeas corpus action that had been brought by the Asencios Lindo brothers and Mr. Ambrosio Concha to ensure compliance with the decision of the 43rd Criminal Judge ordering their release. With this, as explained above, the Peruvian State violated the right of habeas corpus set forth in Article 7.6 of the American Convention, in conjunction with the terms of Article 25 thereof.

112. Continuing with its analysis of Decree Law N° 25475, the Commission notes that it requires the DINCOTE, at the end of its investigation, to prepare a police report (affidavit) and send it to the prosecutor at the office of the Attorney General, who, in theory, assesses it independently and decides what charges to bring before the corresponding criminal court judge. Nevertheless, the ICJ reports that: it has “been repeatedly told by knowledgeable persons both within and outside the government that, in actual practice, DINCOTE formalizes the charges which then are invariably endorsed by the prosecutor. Thus, DINCOTE ultimately decides whether the prisoner will be tried by a civilian court for terrorism or by a military court for treason.”[FN33] This situation is obviously anomalous, in that it implies that the police--which is not a judicial body, nor independent, nor impartial--is performing jurisdictional functions.

[FN33] Report of the Commission of International Jurists, op. cit. (Note 25).

113. The office of the Attorney General then submits formal charges to a criminal judge, who has 24 hours to issue an order beginning the investigation phase, with arrest warrants. Article 13.a of Decree Law N° 25475 stipulates that the criminal judge can rule on no prior issues, objections, or defense, and neither can he order the defendant’s release. Thus, even were he convinced of the prisoner’s innocence, he could not have him freed. This clearly constitutes another violation per se within the procedure, infringing on the right to presumption of innocence enshrined in Article 8(2) of the American Convention, under which “every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.” It should be noted that Law N° 26248 of November 25, 1993, amended this provision, stipulating that the investigating judge, either on an ex officio basis or at the party’s request, could order a prisoner’s conditional release, but that this decision had to be confirmed by a superior court and the release could not be carried out until this had taken place. In the case

at hand, however, on August 19, 1992, the 43rd Criminal Judge ordered the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca to be released and, when a habeas corpus action was filed to bring about enforcement of that decision, Lima's 15th Criminal Judge declared it inadmissible in a ruling dated August 25, 1992, later upheld by the Supreme Court of Justice on October 5, 1992, on the grounds that Decree Law N° 25475 disallowed any sort of release during judicial investigations.

114. Decree Law N° 25475 required that once the initial phase was concluded, the investigating judge would send the case file to the presiding magistrate of the corresponding Superior Court of Justice. This magistrate would then in turn refer it to the chief superior prosecutor, who would appoint a superior prosecutor to present the charges within a period of three days. Once the superior prosecutor had formulated the charges, the presiding magistrate would appoint the members of the Specialized Chamber charged with the judgment from among all the judges in the judicial district. In accordance with the terms of Article 15 of Decree Law N° 25475:

The identities of magistrates and members of the Office of the Attorney General, as well as of judicial auxiliaries involved in trying terrorism cases shall be secret, to which end the necessary arrangements shall be made. Court decisions shall not bear the signatures or initials of the magistrates involved, nor of the judicial auxiliaries. Codes will be used for that purpose, which shall also be kept secret.[FN34]

[FN34] Law N° 26671 was published on October 12, 1996, which stipulated that as of October 15, 1997, terrorist trials would be judged by the corresponding competent judges, thus abolishing trials by "faceless" judges.

115. Such a system of secret justice constituted a flagrant violation per se of the right--that is an integral part of due process--to be tried by an independent and impartial judge or tribunal, enshrined in Article 8(1) of the American Convention, and of the guarantee providing for the public nature of criminal proceedings, enshrined in Article 8(2)(5). In connection with this, in its 1993 Report on the Situation of Human Rights in Peru, the Commission stated that: "If no one knows the identity of the presiding judges, then nothing can be said about their impartiality and independence. This in itself is questionable, given the measures adopted by the Executive Power in relation to the Judiciary since April 5 [1992]."[FN35] Furthermore, Article 13(h) of Decree Law N° 25475 provided that in terrorism proceedings, challenges to judges or judicial auxiliaries were inadmissible. To some extent, this last provision was certainly redundant, since the secret identities of the aforesaid officials prevented defendants and their attorneys from learning of the existence of any grounds for challenges.

[FN35] IACHR, Report on the Situation of Human Rights in Peru, 1993, paragraph 64.

116. In connection with this, the UN's Human Rights Committee has criticized the fact that defendants did not know who was judging them and were denied the right to a public trial.[FN36] Evidently, the right of the accused in any proceedings to know who is judging him and to be able to determine that judge's subjective competence--that is, whether there are any grounds for challenging or removing the judge--is a basic guarantee. The anonymity of judges deprives the accused of this basic guarantee and violates his right to be tried by an impartial court, since he is unable to object to a judge when there are grounds for a challenge.

[FN36] UN, Human Rights Committee, *op. cit.*, paragraph 355.

117. The reason given for establishing the aforementioned system of secret justice seemingly has to do with the protection of judges, prosecutors, and other officials involved in the trial from possible reprisals by terrorist groups. In this regard, the UN's Special Rapporteur on the independence of judges and lawyers made the following remarks:

The main argument presented by the Government for providing "faceless" judges was to protect the physical integrity of the judges, given the terrorist threat. Based upon the testimony received from the judges themselves, the general impression of the Special Rapporteur was that the judges and prosecutors who are supposed to benefit from the fact that they operate anonymously do not feel protected by the system. In their opinion, it is quite easy to discover who the judges and prosecutors are, in particular in the provinces or small towns; therefore, they consider that the system does not serve the purpose for which it was established (i.e. the protection of the judges and prosecutors), and the majority of those interviewed acknowledged that under this system there is a lack of guarantees for due process. In this respect, international standards provide that derogatory measures shall be implemented only if they are strictly necessary. According to the information received by the Special Rapporteur, from 1992 to 1997, judges were not targets of the terrorist-related violence. Therefore, the use of "faceless" tribunals does not meet the principle of strict necessity. Moreover, even if a real need existed to implement measures to protect the physical integrity of the judges and of judicial auxiliaries, these measures should be consistent with other international obligations of the Government and they should not impair the right of the accused to due process.[FN37]

[FN37] UN, Commission on Human Rights, Report by Special Rapporteur Param Cumaraswamy, *op. cit.*, paragraph 74.

118. In accordance with the above, the Commission reiterates that this system of secret justice constituted a flagrant violation per se of the guarantee--inherent to due process--of being judged by an independent and impartial tribunal, set forth in Article 8(1) of the American Convention, and of the guarantee of public criminal proceedings, enshrined in Article 8(2)(5) thereof.

119. In the case at hand and in accordance with the facts that the Commission has established, it can be seen that this system of secret justice was applied in full in convicting the Asencios

Lindo brothers and Messrs. Ambrosio Concha and Molero Coca: their trial was conducted by “faceless” prosecutors and decided on by the Special Chamber of the Superior Court, composed of “faceless” judges, in a ruling handed down on October 24, 1992. In addition, the members of the Supreme Court of Justice who heard the annulment motion filed against that ruling were also “faceless” judges. Thus, as explained above, the Peruvian State violated the victims’ right to due process, as set forth in Article 8 of the American Convention.

120. Continuing with its analysis of Decree N° 25475 and its ancillary provisions, the Commission notes that under Article 16, terrorism trials are held in the respective penitentiary centers, in rooms equipped so as to prevent judges, prosecutors, and judicial auxiliaries from being visually or aurally identified by the defendants and their defense counsel. Regarding these trials, the UN’s Special Rapporteur on the independence of judges and lawyers offered the following comments:

The main characteristic of the proceedings before “faceless” courts, both civilian and military, is secrecy. Judges and prosecutors are identified by codes. When handling treason cases, Supreme Court judges also identify themselves by secret codes. The judges are at all times invisible to the defendants and their counsel, and trial proceedings are conducted in private. Hearings take place in specially equipped courtrooms inside high-security prisons or, in treason cases, at military bases. The courtrooms are small, with a single door and a large one-way mirror along one wall. In an adjoining room on the other side of the mirror, the judges, prosecutor and court secretaries have their seats. They communicate with the accused persons and their counsel through voice-distorting microphones. Since the sound system does not always function properly, it is sometimes impossible for the defendant or his or her counsel to understand what is being said, which has in many cases seriously obstructed the proceedings or affected the defence.[FN38]

[FN38] Ibid., paragraph 73.

121. In turn, Article 13(c) of Decree Law N° 25475 and Article 2.b of Decree Law 25744 prohibit the officers involved in preparing the police affidavit and the members of the armed forces who captured or arrested the accused from appearing as witnesses at trials dealing with the crimes of terrorism and treason against the fatherland.

122. The Commission finds that the aforementioned legal denial of the right of defendants to cross-examine the persons who arrested them or who otherwise played a major part in gathering--and even fabricating--the evidence later used to convict them constitutes another violation per se of the guarantee of due process enshrined in Article 8(2)(f) of the American Convention, under which the defense has the right to “examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.”

123. In the case at hand and in accordance with the facts that the Commission has established, it can be seen that pursuant to the aforesaid provisions, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were unable to cross-examine the police officers who had arrested them. This was of particular relevance since the victims never accepted that they had

been detained at the home of Mrs. Gladys Vargas Vergaray, as the police claimed; it was thus vitally important that the victims' defense lawyers were allowed to question the arresting officers. By denying them that, the Peruvian State violated, with respect to the victims, the right set forth in Article 8(2)(f) of the American Convention, according to which the defense is entitled to "examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts."

124. In addition to the restriction preventing the defense from examining the police officers who produced the evidence for the prosecution, and to the above-mentioned initial limitation under which an individual lawyer can only represent one person indicted for terrorism, the UN's Special Rapporteur on the independence of judges and lawyers, among other sources, has stated that:

In the civil "faceless" tribunals, defence attorneys claim that they have restricted access to evidence. Further, they are not allowed to cross-examine police or military witnesses whose identities are not revealed prior to, during or after the trial. In the military "faceless" tribunals, defence lawyers claim that they have serious difficulties in accessing trial documents.[FN39]

[FN39] Ibid., paragraph 72.

125. As a result of the various restrictions imposed on defendants and their attorneys, the defense of persons on trial for terrorism implied a virtual inversion of the burden of proof, to the point where it could be said that, in practice, irrespective of the evidence that might exist, the accused was presumed guilty and not innocent, in flagrant violation of Article 8(2) of the American Convention. As the Commission has previously remarked, such circumstances turn the defense counsel into a "mere spectator to the proceedings." [FN40] This role was even more symbolic when defense counsel was provided by the Justice Ministry and appointed on an ex officio basis by the police, in accordance with Article 12(f) of Decree Law N° 25475. For example, during its on-site visit to Peru in November 1998, the Commission was told by inmates at Ayacucho prison that in such cases, affecting all defendants who were unable to pay for an attorney's services, suspects were even more defenseless, since the appointed lawyers did not even attempt to conduct any sort of conscientious defense of their clients, with whom they had one brief formal meeting at the most. In practice, therefore, such defendants were convicted from a position of total defenselessness.

[FN40] IACHR, Annual Report, 1993, p. 845.

126. Similarly, pursuant to the terms of Decree Law N° 25475, once the Superior Court has issued a conviction, the defendant can challenge the sentence or apply for annulment with the Supreme Court of Justice, for the matter to be decided by other "faceless" judges within a Specialized Chamber. It has been reported that defense attorneys at the Supreme Court faced practically the same difficulties as at the superior courts; in addition, on account of the

provisional status of the Supreme Court's judges, their independence was not guaranteed. As a result, the possibilities of a successful appeal, regardless of how well grounded it was, were practically nonexistent.[FN41]

[FN41] See, for example, UN, Commission on Human Rights, Report by Special Rapporteur Param Cumaraswamy, *op. cit.*, paragraph 53.

127. The Commission must note that according to the information it has obtained from complaints brought before it, from different general reports on the human rights situation in Peru, from press reports, and from its direct contacts with detainees during its on-site visits to the country, the actions of the police officers, prosecutors, judges, and judicial auxiliaries were generally aimed at convicting defendants regardless of whether they were innocent or guilty. In light of this, the temporary status of the vast majority of judges and prosecutors, the result of steps taken by the Government after April 5, 1992 obviously, affected their independence and impartiality to the extent that they were unable to make decisions based on the facts of the case and their legal knowledge and experience; instead, their rulings were more in response to their natural interest in preserving their positions and their earnings: they were expected to act blindly to secure convictions, and that was what they provided.

128. The foregoing characteristics of terrorism trials thus constituted violations of the right of every person to a hearing, with due guarantees, in order to substantiate any accusation of a criminal nature made against him; to be presumed innocent so long as his guilt has not been proven according to law; to prior notification in detail of the charges against him; and to adequate time and means for the preparation of his defense. All these are guarantees that are expressly enshrined in Article 8 of the American Convention.

D. Human rights violations in trials for the crimes of terrorism

129. It is therefore clear that procedures in terrorism trials violate the minimum standards necessary for a fair trial. In this regard, after analyzing the case of one person who was tried and convicted under those procedures, the Inter-American Court of Human Rights stated that:

Ms. María Elena Loayza-Tamayo was tried and convicted by application of an exceptional procedure in which it is obvious that the fundamental rights embodied in the concept of due process were greatly restricted. Those proceedings do not meet the criteria of a fair trial, since the presumption of innocence was not observed; the defendants were not allowed to challenge or examine the evidence; the defense attorney's power was curtailed in that he could not communicate freely with his client or intervene in all stages of the proceeding in full possession of the facts.[FN42]

[FN42] Inter-Am.Ct.H.R., Loayza Tamayo Case, Judgment of September 17, 1997, paragraph 62.

130. Similarly, the Special Rapporteur on the independence of judges and lawyers of the UN Commission on Human Rights has stated that:

The shortcomings of the anti-terrorist legislation enacted by the Government have already been pointed out by different national and international organizations. The consensus is that Peru did not observe the general conditions provided in international law for a state of emergency; in particular, the Peruvian Government, in vaguely defining the crimes of terrorism and treason and by punishing them with disproportionate penalties, failed to observe the rule of proportionality. In enacting such measures it failed to abide by its international obligations, and it suspended fundamental rights that are non-derogable even during a state of emergency, principally the right to due process and the right to have an independent and impartial judge to hear one's case.[FN43]

[FN43] UN, Commission on Human Rights, Report by Special Rapporteur Param Cumaraswamy, *op. cit.*, paragraph 70.

131. Pursuant to the above and in accordance with the analysis of the procedures for trying the terrorist crimes contained in Decree Law N° 25475 and its ancillary provisions, the Commission reaffirms its conclusion that said procedures constitute a violation per se of the right to personal freedom enshrined in Article 7 of the American Convention, which reads as follows:

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.
(. . .)
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any 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. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

132. In this case, as has already been said, the violation of Article 7 of the Convention occurred when the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were arrested and kept incommunicado for a period of 15 days (from April 30 to May 14, 1992)

under the terms of Decree Law N° 25475. As has also been shown, and in accordance with the jurisprudence of the Inter-American Court quoted above, the State also violated Article 7 of the Convention in respect of the victims by denying them the right to habeas corpus relief.

133. The Commission also reaffirms its conclusions that the procedure in question established a legal framework that facilitated violations of the right to humane treatment, through the power granted to the police to arrest people and keep them incommunicado, and that created conditions that meant that people under investigation for the crime of terrorism were coerced or even tortured during those periods of detention and isolation in order to secure confessions from them, which were then used as the main evidence at their trials and in their convictions, in contravention of the aforesaid provisions of the Inter-American Convention to Prevent and Punish Torture and in violation of Article 5 of the American Convention, which reads as follows:

Article 5. Right to Humane Treatment

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

134. In this case, as has already been said, the violation of Article 5 of the Convention occurred with the torture inflicted on the victims during their detention at the DINCOTE facility, which was even documented by a forensic physician.

135. The Commission also reaffirms its conclusion that the procedure in question constituted a violation per se of the right to a fair trial set forth in Article 8 of the American Convention, which states the following:

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 - b. prior notification in detail to the accused of the charges against him;
 - c. adequate time and means for the preparation of his defense;
 - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

- e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
 - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - g. the right not to be compelled to be a witness against himself or to plead guilty; and
 - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
 4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

136. In this case, as has already been said, the violation of Article 8 of the Convention occurred when the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were subjected to a secret trial for terrorist offenses under the provisions of Decree Law N° 25475, which was heard and ruled on by “faceless” judges, with the cited restrictions of the fundamental rights that make up due process.

137. In light of the above considerations, the Commission concludes that trials and convictions in Peru for terrorist crimes conducted in accordance with the procedure set forth in Decree Law N° 25475 and its ancillary provisions constituted violations per se by the Peruvian State of the aforesaid human rights enshrined in the Convention, to the detriment of the individuals tried and convicted under that procedure — specifically, in the case at hand, Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca; this does not imply that every person tried and convicted under that procedure was necessarily subjected to torture.

V. DEVELOPMENTS SINCE THE ADOPTION OF REPORT N° 91/99

138. The Commission adopted Report N° 91/99 (Article 50) on this case at its 104th session. This report, containing the Commission’s recommendations, was transmitted to the Peruvian State on October 21, 1999. The State was granted a period of two months following that date to comply with the recommendations.

139. In Note N° 7-5-M/561, dated December 20, 1999, Peru sent the Commission its comments on Report N° 91/99; it said was in disagreement with some matters of fact and law contained therein and with the conclusion reached by the Commission. Specifically, the State said, inter alia, that it disagreed with the IACHR’s conclusion that Decree Law N° 25475 violated human rights per se, that the petition did not make claims questioning the anti-terrorist legislation, and that the legislation in question has since been toned down, at the State’s initiative.

140. Peru added that the IACHR had not duly assessed the state of internal political emergency that required the enactment of extraordinary legislative measures, which did accord with the exceptions in international human rights instruments under which certain rights could be suspended. The State noted that the IACHR did not recommend that the Ad Hoc Commission conduct a review of the cases of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca and indicated that, as regards the payment of damages, the complainants could initiate such legal action as they deem appropriate.

141. In concluding, the Peruvian State said that the IACHR did not have the authority to review a judicial proceeding that had concluded within the State and that the Commission's recommendations were inadmissible because "even under conditions of complex terrorist violence, the rule of law was respected and the investigations and judgments were serious and impartial."

142. Peru ended by saying that "the Peruvian State, at its own initiative, has taken the steps necessary to determine whether the cases of the aforesaid citizens are being studied by the Ad Hoc Pardons Commission, bearing in mind the restricted nature of that Commission's files, and it will notify the IACHR in due course. If they are not under analysis, the Government will conduct prior assessments in order to recommend the relevant study."

143. The Commission refrains from analyzing the Peruvian State's comments that do not address its compliance with the recommendations made by the Commission in Report N° 91/99 since, pursuant to Article 51(1) of the Convention, what the Commission must determine at this stage in the proceedings is whether the State did or did not resolve the matter. In this regard, the IACHR notes that the Peruvian State has not complied with any of the recommendations made by the Commission in Report N° 91/99.

144. Irrespective of the above and in connection with Peru's claim that Decree Law N° 25475 did not constitute a violation per se of the American Convention, the Commission must point out that, as has been demonstrated in the case at hand, the very structure of the Decree is intrinsically incompatible with the Convention. It is not that the police officers, judges, and prosecutors interpreted the terms of the Decree incorrectly; instead, they enforced it strictly and rigorously and, in doing so, violated a series of rights and guarantees that were due to the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca. In connection with this, the Commission notes the Peruvian State's report that some of the Decree Law N° 25475's provisions have been modified, which has been reflected by the Commission in the corresponding paragraphs of this report. Nevertheless, those modifications do not change the fact that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were tried in accordance with the original parameters of Decree Law N° 25475 and that they have been denied physical freedom for the past eight years.

145. The Peruvian State argued that the petition covering this case made no claims questioning Decree Law N° 25475. In this regard, it should be remembered that the Commission is competent to determine whether the effects of implementing laws lead to violations of the obligations assumed by states under the American Convention. The Inter-American Court has said that:

At the international level, what is important to determine is whether a law violates the international obligations assumed by the State by virtue of a treaty. This the Commission can and should do upon examining the communications and petitions submitted to it concerning violations of human rights and freedoms protected by the Convention.[FN44]

[FN44] Inter-Am.Ct.H.R., Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13, July 16, 1993, Series A N° 13, paragraph 30.

146. Regarding Peru's claim that the IACHR did not give due consideration to the situation of internal political emergency that required the introduction of extraordinary legislative measures that were in line with the exceptions allowed by international human rights instruments for suspending certain rights, the IACHR refers back to the content of paragraphs 55 through 87 above, in which the Commission offers an extensive analysis of the context behind the anti-terrorist legislation, including the conflict that led to the death and disappearance of thousands of people, massive material losses, the terrorist attacks in Lima in 1992, the international obligations of States in situations of this kind, and the non-derogable nature, even during states of emergency, of some of the rights and guarantees enshrined in the American Convention.

147. Regarding the State's claim that the IACHR lacks the authority to review judicial proceedings that have concluded within the State, the Commission must inform Peru that, as was recently pointed out by the Inter-American Court of Human Rights:

In order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceedings. In this respect, the European Court has indicated that the proceedings should be considered as a whole, including the decisions of the courts of appeal, and that the function of the international court is to determine if all the proceedings, and the way in which the evidence was produced were fair.

(...)

To this end, in view of the characteristics of the case and the nature of the violations alleged by the Commission, the Court must examine all the domestic judicial proceedings in order to obtain an integrated vision of these acts and establish whether or not it is evident that they violated the norms on the obligations to investigate, and the right to be heard and to an effective recourse, which arise from Articles 1.1, 8 and 25 of the Convention.[FN45]

[FN45] Inter-Am.Ct.H.R., Case of Villagrán Morales et al., Judgment of November 19, 1999, paragraphs 222 and 224.

148. Although Peru has not to date complied with the IACHR's recommendations, the Commission hopes that the Peruvian State will continue with "the prior assessments in order to

recommend the relevant study” to which it refers and that these will lead to a review of the aforesaid proceedings, which ended with the conviction of four innocent people who, more than eight years later, are still being denied the basic human rights of liberty.

VI. CONCLUSIONS

The Commission repeats the following conclusions that it reached in its aforesaid Report N° 91/99:

149. The conviction of Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynn timer Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca was handed down by “faceless” judges in accordance with the procedure for terrorist cases set forth in Decree Law N° 25475 and its ancillary provisions. Also involved in those proceedings were “faceless” prosecutors. The case shows that they were tortured, as was duly certified by a forensic physician. The case also reveals that victims were denied the immediate execution of the decision ordering their release handed down by the 43rd Criminal Judge on August 19, 1992, pursuant to the terms of Decree Law N° 25475 forbidding the release of defendants during police or judicial investigations. The same Decree Law was also used as a the basis for denying Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynn timer Asencios Lindo, and Marco Antonio Ambrosio Concha the habeas corpus relief they filed to secure execution of the August 19 decision.

150. The Commission also notes that the conviction handed down on October 24, 1992, by the Special Chamber of the Superior Court did not take into account the judicial statement made by Mrs. Gladys Vargas Vergaray on June 12, 1992, in which she recanted her earlier police statement according to which the victims were arrested at her home, since said police statement was obtained under duress from the police. The Commission must therefore point out that the sentence appears to be totally arbitrary in that it contains no evidence that, assessed in accordance with sound criticism, could reasonably indicate that the defendants were guilty of the crimes with which they were charged; consequently, the proceedings appear to have concluded with the conviction of four innocent men.

151. In connection with this, and since the Commission has ruled that judgments and convictions in Peru for terrorist crimes under the procedure set forth in Decree Law N° 25475 and its ancillary provisions constituted violations per se of human rights enshrined in the American Convention by the Peruvian State, the Commission concludes that Peru violated, with respect to the persons tried and convicted under those parameters--in the specific case at hand, Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynn timer Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca--the right to personal freedom contained in Article 7 of the American Convention, the right to humane treatment contained in Article 5 of the American Convention, and the right to a fair trial contained in Article 8 of the same Convention, by trying and convicting them under the terms of Decree Law N° 25475.

152. These conclusions additionally imply that the Peruvian State has not complied with the terms of Article 1(1) of the Convention--to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and

freedoms--that it violated the rights of the victims enshrined in Articles 7, 5, and 8 of the Convention.

153. Similarly, the second obligation arising from Article 1(1) of the Convention is that States must ensure the free and full exercise of the rights and freedoms the instrument contains. In this regard, the Inter-American Court's jurisprudence has stated that: "This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention." [FN46] It is clear that Peru also failed to meet that obligation, by establishing government practices and judicial and police procedures that curtailed the full exercise of the rights enshrined in the American Convention.

[FN46] Inter-Am.Ct.H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 166.

VII. RECOMMENDATIONS

Based on the foregoing analysis and conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ONCE AGAIN RECOMMENDS THAT THE PERUVIAN STATE SHOULD:

1. Conduct a serious, impartial, and effective official investigation into the torture reported by Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca; punish the guilty, if applicable; and take the steps necessary to put an end to this practice.
2. Make full amends for, by means of different applicable measures, the human rights violations committed against Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca, including the immediate review of their convictions by an independent and impartial body, with all pertinent guarantees of due process.
3. Compensate Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca for the physical, moral, and material harm arising from the aforesaid violations of their human rights by the Peruvian State.
4. Amend Decree Law N° 25475 and its ancillary provisions in order to bring it into line with the rights and guarantees enshrined in the American Convention.

VIII. PUBLICATION

154. On March 2, 2000, the Commission transmitted Report 18/00--the text of which precedes--to the Peruvian State and to the petitioners, according to article 51(2) of the

Convention, and granted Peru a one-month period to comply with the recommendations set above. On April 10, 2000 the State forwarded the Commission a note and reiterated its considerations pertaining the conclusions of fact and of law of the Commission, and did not exposed any action taken towards the compliance of the recommendations made by the Commission.

155. According to the above considerations, and to Articles 51(3) of the American Convention and 48 of the Commission's regulations, the Commission decides to reiterate the conclusion and the recommendations set forth in chapters V and VI; to make public the present report and to include it in its Annual Report to the OAS General Assembly. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the Peruvian State in respect to the above recommendations, until they have been complied with by the Peruvian State.

Done and signed by the Inter-American Commission on Human Rights on the 13 day of the month of April, 2000. (Signed): Hélio Bicudo, Chairman, Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman; Commissioners, Marta Altolaguirre, Robert K. Goldman, Peter Laurie and Julio Prado Vallejo.