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Institution: Inter-American Court of Human Rights  
Title/Style of Cause: Maria Elena Loayza-Tamayo v. Peru  
Doc. Type: Judgment (Merits)  
Decided by: President: Hernan Salgado-Pesantes;  
Vice President: Antonio A. Cancado Trindade;  
Judges: Hector Fix-Zamudio; Alejandro Montiel-Arguello; Maximo Pacheco-Gomez; Oliver Jackman; Alirio Abreu-Burelli  
Dated: 17 September 1997  
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In the Loayza Tamayo Case,

the Inter-American Court of Human Rights, pursuant to Articles 29 and 55 of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), delivers the following Judgment in the instant Case.

## I.

1. On January 12, 1995, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") submitted to the Inter-American Court a Case against the Republic of Peru (hereinafter "the State" or "Peru") which originated in a petition (N° 11.154). In its petition, the Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 26 et seq. of the Rules of Procedure of the Court that were then in force [FN1]. The Commission submitted this case for a ruling on whether the following articles of the Convention were violated: 7 (Right to Personal Liberty), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), all these in relation to Article 1(1) of the Convention for the alleged "unlawful deprivation of liberty, torture, cruel, inhuman or degrading treatment, violation of the judicial guarantees, and double jeopardy to María Elena Loayza-Tamayo for the same cause, in violation of the Convention," and of Article 51(2) of the Convention for refusing "to comply with the recommendations formulated by the Commission." It also asked the Court to declare that Peru "must pay full compensation to María Elena Loayza-Tamayo for the grave damage -material and moral- she has suffered and, consequently, [to] instruct the Peruvian State to order her immediate release and make her appropriate reparation" and to pay the costs incurred in processing the Case.

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[FN1] Rules of Procedure approved by the Court at its XXIII Regular Session, held from January 9 to 18, 1991, amended on January 25, 1993, and July 16, 1993.

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II.

2. The Court is competent to hear the instant Case. Peru ratified the Convention on July 28, 1978, and recognized the jurisdiction of the Court on January 21, 1981.

III.

3. The facts set out in the application are summarized in the following paragraphs:

a. On February 6, 1993, Ms. María Elena Loayza-Tamayo, a Peruvian citizen and a professor at the Universidad San Martín de Porres, was arrested together with a relative, Mr. Ladislao Alberto Huamán-Loayza, by officers of the National Counter-Terrorism Bureau (hereinafter "DINCOTE") of the Peruvian National Police Force, at a property on Mitobamba Street, Block D, Lot 18, Los Naranjos Estate, Los Olivos District, Lima, Peru. Under the Ley de Arrepentimiento (Repentance Law) enacted through Decree-Law No. 25.499, Angélica Torres-García, alias "Mirtha," captured on February 5, 1993, denounced Ms. María Elena Loayza-Tamayo. The application also indicates that the Peruvian State, failing to observe the verification procedure required by that law and its regulations, arrested Ms. Loayza-Tamayo the following day without an arrest warrant issued by the competent judicial authority, as an alleged collaborator of the subversive group "Shining Path".

b. Ms. María Elena Loayza-Tamayo was detained by DINCOTE from February 6 to 26, 1993, and was not taken before the Special Naval Court, in violation of Article 12(c) of Decree-Law N° 25.475 (crime of terrorism). She was held incommunicado in the DINCOTE offices for ten days and subjected to torture, cruel and degrading treatment and unlawful pressure, for example, "torture, ... threats of drowning on the beach at night and rape to [which] she was subjected by members of DINCOTE," in an effort to force her to incriminate herself and admit that she was a member of the Peruvian Communist Party -Shining Path- (hereinafter "PCP SL"). However, Ms. María Elena Loayza-Tamayo claimed that she was innocent, denied membership in the PCP SL, and, in fact, "criticized its methods: the violence and the human rights violations committed by that subversive group."

c. During the ten days in which she was held incommunicado, Ms. Loayza-Tamayo was allowed no contact with her family or attorney, nor were they informed of her arrest. Her family learned of her arrest through an anonymous telephone call on February 8, 1993. No protective remedy could be filed on her behalf because Decree-Law N° 25.659 (Treason) prohibited the filing of "a petition of habeas corpus when the acts in question concern the crime of terrorism."

d. On February 26, 1993, Ms. María Elena Loayza-Tamayo was exhibited to the press in "prison stripes," and accused of the crime of treason. She was then taken to the former Army Veterinary Hospital later converted into a "holding-station"-where she remained until March 3 of that year when she was transferred to the Chorrillos Women's Maximum Security Prison.

e. María Elena Loayza-Tamayo was prosecuted before the military jurisdiction on the charge of treason. Police Report N° 049 DIVICOTE 3 DINCOTE was established, charging her with that crime on February 25, 1993. She was later brought before the Special Naval Court for

trial. The Special Naval Court, composed of faceless military judges, acquitted her in its judgment of March 5, 1993. She was subsequently convicted by the Special Naval Court Martial in its judgment of April 2, 1993. The Special Tribunal of the Supreme Council of Military Justice, in its judgment of August 11, 1993, rejected a petition seeking nullification of the sentence, acquitted her of treason and ordered the case file to be remitted to the civil courts so that she could be tried for the crime of terrorism. The Assistant Special Attorney General filed with the Full Chamber of the Special Supreme Military Tribunal a petition for special review of that sentence, which culminated in a judgment upholding her acquittal on September 24, 1993.

f. Ms. María Elena Loayza-Tamayo continued in detention for the period between the judgment of the Special Tribunal of the Supreme Council of Military Justice issued on August 11, 1993, and the detention order issued by the civil courts on October 8, 1993, although during that period "her judicial position was that of an acquitted detainee who had been neither tried nor convicted."

g. Ms. María Elena Loayza-Tamayo was tried in various instances of the civil courts for the crime of terrorism: the Forty-third Criminal Court of Lima bound her over for trial on October 8, 1993. Ms. Loayza filed a *res judicata* objection based on the principle of *non bis in idem*. On October 10, 1994, the "faceless special tribunal of the civil courts" dismissed her objection and sentenced her to 20 years' imprisonment on the basis of the same cause.

h. Subsequent to the filing of its application, the Commission informed the Court that a writ seeking nullification of that judgment was filed with the Supreme Court of Justice and was dismissed on October 6, 1995. Ms. María Elena Loayza-Tamayo remained in prison throughout the proceedings in both the military and the civil courts.

#### IV.

4. The following paragraphs contain the Court's summary of the file submitted to it by the Commission on the proceeding before it:

a. On May 6, 1993, the Commission received the complaint against the detention of Ms. María Elena Loayza-Tamayo and transmitted it to the State six days later. On August 23, 1993, the Commission received the State's answer, together with documentation concerning the case, and the information that the Office of the Attorney General had initiated criminal proceedings against Ms. María Elena Loayza-Tamayo in the military courts, pursuant to Decree-Law N° 25.659 (Treason Law).

b. On July 13, 1994, to the Commission's request of November 17, 1993, Peru responded that "file 41-93 was before the Fortieth [rectius: Forty-third] Criminal Court of Lima, against María Elena Loayza-Tamayo for the crime of terrorism, and that the file had been remitted to the President of the Superior Court of Lima ... for initiation of the oral proceedings."

c. At the request of one of the petitioners, on September 16, 1994, a public hearing was held at the seat of the Commission.

d. On September 26, 1994, the Commission approved Report N° 20/94, in the final part of which it decided:

1. To declare that the Peruvian State is responsible for the violations, against María Elena Loayza, of the rights to Personal Liberty, Humane Treatment and Judicial Protection enshrined in Articles 7, 5 and 25 of the American Convention on Human Rights.

2. To recommend to the Peruvian State that, on the basis of the Commission's analysis of the events and of the law, it immediately release María Elena Loayza-Tamayo once it has received notification of this Report.

3. To recommend to the Peruvian State that it pay compensation to the plaintiff in the instant case, for the damage caused as a result of her unlawful deprivation of liberty from February 6, 1993, until such time as it orders her release.

4. To inform the Government of Peru that it is not at liberty to publish this Report.

5. To request that the Government of Peru inform the Inter-American Commission on Human Rights, within thirty days, of any measures it has taken in the instant case, in accordance with the recommendations contained in paragraphs 2 and 3 above.

e. On October 13, 1994, Report N° 20/94 was transmitted to Peru by the Commission. The State replied that it was unable to concur with the Commission's analysis, findings and recommendations, and attached a brief prepared by a Task Force composed of government officials, indicating that:

[d]omestic remedies have not been exhausted inasmuch as María Elena Loayza-Tamayo's legal situation should be defined at the end of the judicial proceeding for the CRIME OF TERRORISM in the civil court system [and that] the recommendations made by the ICHR [Inter-American Commission] would involve deciding on a case still pending in the Peruvian justice administration. This is not possible, since under Peru's current Political Constitution, no authority may arrogate that power. It is for the Judicial Branch to rule on María Elena Loayza-Tamayo's legal situation through the proper criminal process.

f. On January 12, 1995, the Commission, not having reached agreement with the Government, submitted this case for the consideration and decision of the Court.

V.

5. The application which the Commission filed with the Court on January 12, 1995, was notified to the State by the Secretariat of the Court (hereinafter "the Secretariat"), together with its attachments, on February 9, 1995, and was received by the latter on February 13. The Commission appointed Oscar Luján-Fappiano as its Delegate, and Edith Márquez-Rodríguez and Domingo E. Acevedo as its Attorneys. It also appointed the following persons to act as their assistants, representing the plaintiff as petitioners before the Commission: Juan Méndez, José Miguel Vivanco, Carolina Loayza, Viviana Krsticevic, Verónica Gómez, and Ariel E. Dulitzky. Mr. Méndez subsequently withdrew as the representative of the plaintiff by note of September 16, 1996.

6. On March 23, 1995, the State informed the Court that it had appointed Mario Cavagnaro-Basile as its Agent, and on the following day, it communicated its appointment of Iván Paredes-Yataco as its Alternate Agent.

7. On March 24, 1995, Peru filed a preliminary objection of "non-exhaustion of domestic remedies."

8. On May 5, 1995, the State submitted its answer to the application, in which it "denie[d] and challenge[d] it in all its parts." It further requested the Court to declare it entirely groundless, and filed objections to some of the witnesses.

9. By Order of May 17, 1995, the Court declared inadmissible the State's request for suspension of the proceeding on the merits of the matter until such time as the preliminary objection filed had been disposed of (*supra*, para. 7). It further decided to continue processing the case.

10. On July 11, 1995, and January 9, 1996, in response to the Secretariat's request of May 20, 1995, the State submitted the documentation concerning the Case against Ms. María Elena Loayza-Tamayo in the domestic courts.

11. In a brief of December 29, 1995, the Commission submitted a copy of the judgment of October 6 of that year, issued by the Supreme Court of Justice, upholding the conviction of Ms. María Elena Loayza-Tamayo et al for the crime of terrorism. On January 22, 1996, the State asked the Court to dismiss that brief and deemed it not to have been presented. On January 30 of that year, the President of the Court (hereinafter "the President") communicated that the brief would be evaluated in due course.

12. By Judgment of January 31, 1996, the Court unanimously decided to dismiss the preliminary objection of non-exhaustion of domestic remedies lodged by Peru and to proceed with the consideration of the merits in the case (Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996. Series C No. 25, Operative paragraphs 1 and 2).

13. On March 4, 1996, the Commission submitted the list of the following witnesses to be summoned by the Court to appear at the public hearings on the merits: Luis Guzmán-Casas, Luis Alberto Cantoral-Benavides, María Elena Loayza-Tamayo, María de la Cruz-Pari, Juan Alberto Delgadillo, Enrique Pineda-González, Santiago Felipe Agüero-Obregón, Pedro Telmo Vega-Valle, Iván Bazán-Chacón, and Víctor Alvarez. On April 24, 1996, Peru submitted a brief in which it upheld the objections filed in the answer to the application, concerning the first six witnesses, and objected to the remainder, with the exception of the last, on the ground that they had been convicted, some of the crime of terrorism, and others of treason, and to Mr. Bazán-Chacón because he was a defense attorney for the convicted prisoner Pedro Telmo Vega-Valle. The Commission also proposed the following experts: Nigel Rodley, Julio Maier, Carlos Arslanian, and Héctor Faúndez. It further pointed out that some of the witnesses were imprisoned in various Peruvian penitentiaries, and requested that if they were unable to appear at the seat of the Court, the proceedings should be held at the various penal establishments.

14. On July 2, 1996, the Court decided to dismiss the objections filed by the State against the aforementioned witnesses (*supra*, para. 13) and reserved the right to evaluate their statements at a later date. It also authorized the President to order the pertinent measures to ensure that the witnesses and experts proposed by the Commission could deliver their statements and opinions.

15. On October 11, 1996, the President, after informing the State, decided to appoint as expert Dr. Eduardo Ferrero-Costa to lead the interrogation in Peru of a number of witnesses

imprisoned in different Peruvian jails. Those statements would be heard in the presence of the Agent of the State and the Delegate of the Commission. On that same day, the President issued another Order in which he summoned the parties to a public hearing on February 5, 1997, to hear the statements of the witnesses proposed by the Commission, Mr. Iván Bazán-Chacón and Mr. Víctor Alvarez, and of the experts Nigel Rodley, Julio Maier, Carlos Arslanian, and Héctor Faúndez.

16. In a communication of December 13, 1996, which reached the Secretariat on January 6, 1997, the expert Dr. Eduardo Ferrero-Costa informed the Court of the development and conclusion of the arrangements for receiving the statements in Peru, and indicated that he had taken statements from the following witnesses: Luis Guzmán-Casas, Luis Alberto Cantoral-Benavides, Juan Alberto Delgadillo, Pedro Telmo Vega-Valle, and María Elena Loayza-Tamayo. He also reported that Ms. María de la Cruz-Pari had categorically refused and so had not been questioned, and that the taking of evidence from Mr. Santiago Felipe Agüero-Obregón had been canceled at the behest of the delegate of the Inter-American Commission. No statement was taken from Mr. Enrique Pineda-González, because the expert, for health reasons, had been unable to travel to Puno. Subsequently, the Commission informed the Court by note of April 15, 1997, that it did not consider it necessary to hear the testimony of Mr. Enrique Pineda-González and Ms. María de la Cruz-Pari. Mr. Ferrero submitted the record of the proceedings, the tapes containing the witnesses' statements, and the corresponding transcripts, all of which were duly transmitted to the parties.

17. On February 5, 1997, the Court held a public hearing on the merits of the case and heard the parties' closing arguments.

There appeared before the Court:

for the State of Peru:

Mario Cavagnaro-Basile, Agent; and  
Mariano García Godos-McBride, Minister in the Diplomatic Services;

for the Inter-American Commission on Human Rights:

Oscar Luján-Fappiano, Delegate;  
Domingo E. Acevedo, Deputy Executive Secretary;  
Carolina Loayza, Assistant;  
Viviana Krsticevic, Assistant;  
Ariel Dulitzky, Assistant; and  
Marcela Matamoros, Assistant.

Witnesses presented by the Inter-American Commission on Human Rights:

Víctor Alvarez-Pérez; and  
Iván Bazán-Chacón.

Expert witnesses presented by the Inter-American Commission on Human Rights:

Julio Maier;  
León Carlos Arslanian; and  
Héctor Faúndez-Ledezma.

Mr. Nigel Rodley, one of the experts witnesses presented by the Inter-American Commission, did not attend this hearing, although he had been summoned by the Court.

18. On April 21, 1997, Peru presented the brief containing its closing arguments, and the Commission did so on April 30.

19. On June 23, 1997, the Court, so as better to decide, requested Peru to furnish it with a number of legal texts, and asked the Commission to dispatch the communication in which Ms. María Elena Loayza-Tamayo filed the *res judicata* objection based on the principle of *non bis in idem*. On July 16, 1997, the Commission filed a copy of that communication together with a copy of an explanatory document dated April 14, 1994; the 1993 Political Constitution of Peru and a publication entitled "Legislación sobre Terrorismo y Pacificación." On August 28, 1997, the State forwarded the other legal texts requested by the Court.

20. On June 23, 1997, Peru wrote to the Court and informed it that on September 27, 1996, Ms. María Elena Loayza-Tamayo requested a pardon to the *ad hoc* Commission created by Law N° 26.655.

21. On August 24, 1995, and May 16, 1996, the "Fundación Ecuémica para el Desarrollo y la Paz" (FEDEPAZ) and Mr. Nicolás de Piérola-Balta, submitted *amici curiae* briefs on the principle of *non bis in idem*.

22. On September 22, 1995, and August 8, 1996, Peru requested that the *amici curiae* presented be declared inadmissible. The President, through his communications of September 23, 1995, and September 11, 1996, informed the State that "documents of this type are added to the file without being formally incorporated into the record of the proceedings," and that the Court would evaluate those documents in due course.

VI.

23. On April 19, 1996, the Inter-American Commission remitted to the Secretariat a copy of a brief that had been sent to Peru concerning Ms. María Elena Loayza-Tamayo's conditions of detention. In that brief it requested the State, pursuant to Article 29 of its Regulations, to adopt precautionary measures on behalf of Ms. Loayza. On May 28, 1996, Peru submitted a note to the Secretariat, in response to the Commission's inquiries concerning the detention conditions, informing it that Loayza Tamayo had now been convicted by the Supreme Court of Justice and that she would have to serve her sentence in the manner and conditions dictated by the laws in force in Peru.

24. On May 30, 1996, the Inter-American Commission submitted a request for provisional measures on behalf of Ms. María Elena Loayza-Tamayo, in accordance with Article 63(2) of the Convention and Article 24(1) of the Rules of Procedure then in force, in which it asked the Inter-American Court to order the State to "bring to an end the solitary confinement and incommunicado detention imposed on María Elena Loayza-Tamayo on April 9, 1996, and that she be returned to Block 'A' of the Chorrillos Women's Maximum Security Penitentiary in the conditions in which she had been held prior to her transfer." The basis of the Commission's request is summarized below:

a. The Penitentiary in question has three blocks designated "A", "B" and "C". Block "A" houses inmates categorized as least dangerous, that is, those who claim to be innocent and to have no connection with subversive or terrorist groups, and have openly denounced such groups, as is the case of Ms. María Elena Loayza-Tamayo. Blocks "B" and "C" house inmates categorized as highly and moderately dangerous and those who have declared themselves in favor of the so-called "peace accord". Block "C" also houses prisoners awaiting classification and those who express their desire to sever connections with their subversive or terrorist groups, as well as inmates who do not wish to participate in other daily prison activities.

b. Peru ordered Ms. María Elena Loayza-Tamayo to be transferred to that prison's maximum danger Block and held in continuous solitary confinement, which constitutes an arbitrary and unlawful deterioration of her detention conditions, thereby violating, among other instruments, the American Convention and the (United Nations) Standard Minimum Rules for the Treatment of Prisoners.

c. When there is an international complaint against a State for violations of rights guaranteed by the American Convention, that State has the obligation, in good faith, to refrain from needlessly adopting measures that may adversely affect the situation of the plaintiff.

d. Peru promulgated Decree-Law N° 25.475 (crime of terrorism) and Supreme Decision N° 114-92-JUS as part of a counter-insurgency strategy, both of which establish procedures that are incompatible with the international obligations contracted by the State. e. The State's argument that "any deviation" from the agreement of the Penal Technical Council regarding Ms. María Elena Loayza-Tamayo's conditions of imprisonment would "put the security system and the principle of authority at risk" is also unfounded, since Ms. Loayza was confined in Block "A" and "has never, and will never, constitute a risk to the so-called Security system."

f. There is a dual sense of urgency about this case: firstly, Peru, through the measure adopted, has caused irreparable harm to a person who has been arbitrarily tried and sentenced, in violation of the Convention; secondly, the physical and mental suffering inflicted on Ms. María Elena Loayza-Tamayo as a consequence of her confinement in a tiny cell for twenty-three and a half hours a day, and her incommunicado detention for one year, as well as the severe restrictions on visits, also constitute cruel and inhuman treatment.

25. On June 12, 1996, the President adopted, on the basis of the Commission's petition and Articles 63(2) of the Convention and 24(4) of the Rules of Procedure then in force, urgent measures on behalf of Ms. María Elena Loayza-Tamayo, and requested that Peru adopt forthwith such measures as were necessary to effectively ensure her physical, psychological and moral integrity. He further requested the State to issue a report on the measures taken so that they could be brought to the attention of the Court at its next session, saying that he would submit that Order for the Court's consideration and pertinent effects.



26. On June 24, 1996, Peru submitted the report requested by the President in his Order of June 12, in which it indicated that Ms. María Elena Loayza-Tamayo was serving her sentence and that at no time have [her] imprisonment conditions deteriorated ... she is regularly visited by her next-of-kin and attorneys as stipulated in the legislation in force in Peru, and that claims that she is being held in a different (smaller) cell from those inhabited by other prisoners are false ...; that her living conditions are the same as the rest of the prison population and there is therefore no danger to her physical, psychological and moral integrity, since she is imprisoned with other prisoners whose behavior is similar to her own...

27. On July 1, 1996, the Commission presented its comments on the above brief, reiterating the arguments it adduced in its request of May 30, 1996, for provisional measures, reporting that Ms. María Elena Loayza-Tamayo was subjected to a regime of incommunicado detention in which she is deprived of light and is confined to a tiny cell for twenty-three and a half hours a day, which facts constitute "in themselves, forms of cruel and inhuman treatment." The Commission also repeated its request that the Court order Peru "[to] bring to an end the solitary confinement and incommunicado detention imposed on María Elena Loayza-Tamayo on April 9, 1996, and that she be returned to Block "A" of the Chorrillos Women's Maximum Security Penitentiary, in the same conditions in which she had been held prior to her transfer."

28. By Order of July 2, 1996, the Court adopted provisional measures, ratified the Order of the President of June 12, and once more called upon the State to take all the measures necessary for the effective safeguard of Ms. María Elena Loayza-Tamayo's physical, psychological and moral integrity. It also called upon Peru to report every two months to the Court on the measures it has taken, and on the Commission to submit to the Court its comments on that information not later than one month from the date of its receipt.

29. The Commission, in its comments of September 12, 1996, reiterated its request to the Court that it call upon Peru to bring to an end the solitary confinement imposed on Ms. María Elena Loayza-Tamayo, since her health has deteriorated, owing to the fact that she is subjected to an inhuman and degrading regime, derived from her state of incommunicado and 23,5 hours of incarceration per day, from a humid and cold prison, measuring approximately two by three meters, without direct ventilation, where there are cement slabs, a letrine and lavatory for hands... The prison cell has no direct light; the light enters in a narrow and indirect way from the fluorescent lights in the hallways. She is not allowed to have a radio, newspaper or magazine. She is only authorize to see the daylight 20 or 30 minutes per day.

In addition, in a medical document of July 25, 1996, Dr. Julia Ruiz-Camacho, Chief Physician of Health for the Penitentiary of High Security Chorrillos certified that after having examined Ms. María Elena Loayza-Tamayo, she found her suffering from physical and psychological illnesses, among them, a syndrome of anxious depression.

30. On September 13, 1996, the Court dictated an Order with respect to the request of the Commission from the former day which considered-taking into account that the State has not presented the Report requested by the President in the Order of July 2, 1996 -that the prison conditions of Ms. María Elena Loayza-Tamayo were aggravating her physical, psychological

and moral health, according to the Commission. Consequently, the Court requested Peru to change the prison conditions, in particular the conditions of isolation to which she was subjected, in order to comply with what is established in Article 5 of the American Convention. It also requested that she be given medical treatment, physical and psychiatric as soon as possible.

31. On October 11, 1996, the Secretariat reiterated to Peru its request for the Report on the measures taken, as according to the Order of September 13, 1996, it should have been presented two weeks after the date of the Order. By writing of October 14, 1996, Peru requested an extension to present its Report, which was granted until November 1, 1996.

32. By note of October 18, 1996, received in the Secretariat on October 28, 1996, the State informed the Court that Ms. María Elena Loayza-Tamayo was not in isolation, according to the "Reports of the Governor and Prison Records" and was receiving visitors. In an attachment to the writing, it indicated that Ms. Loayza-Tamayo was in perfect physical and mental conditions, in accordance with the medical and psychological reports. It added that Ms. Loayza-Tamayo was doing jobs outside her cell and that she was placed in a "two-person cell, unlike the rest of the prison population of this Establishment, who were in three-person cells for lack of space."

33. On February 3, 1997, the Secretariat requested the Commission to present its observations in accordance with point 4 of the Order of the Court of September 13, 1996. On March 20, 1997, the Commission presented a writing with its observations to the report of Peru and indicated that the situation of Ms. María Elena Loayza-Tamayo

has definitely not changed since she was translated to the other block on April 19, 1996... she continues locked in her cell for 23 hours and 30 minutes per day, and is granted no more than 30 minutes in the prison court yard, which, per se, constitutes cruel and inhuman treatment and impairs the plaintiffs', psychological and moral integrity, as well as her right to respect for the inherent dignity as a human being.

34. By note of April 3, 1997, received at the Secretariat on April 10, 1997, Peru submitted comments on the brief cited in the previous paragraph, claiming that the situation it reports was false and attempted to misrepresent Ms. María Elena Loayza-Tamayo's state of health, which was "stable, not to say normal for someone of her age." It further stated that it should be borne in mind that she had been convicted and must serve her prison sentence for the crime of terrorism against the State. She should therefore be subjected to the same conditions as other convicts and no special treatment could be claimed on her behalf.

35. On August 1, 1997, the Secretariat asked Peru to send at its earliest convenience the reports requested through the Order of September 13, 1996, Peru having thus far submitted only two briefs, those of October 18, 1996, and April 3, 1997. On August 28 of that year, Peru submitted some comments on the Court's request, in which it declared that it had fulfilled the requirement contained in the Order of September 13 by presenting its briefs dated October 14, 18 and 30, 1996. It went on to say that during the interrogation held in Peru in the presence of Dr. Eduardo Ferrero-Costa, the expert designated by the Court, Ms. María Elena Loayza-Tamayo, in response to a question from Mr. Oscar Luján-Fappiano, had said that the inmates "[l]ive together

in blocks ... [in which] all the cells are the same," confirming that there were no cells for solitary confinement.

36. So far, between the submission of that information and the delivery of this Judgment, the Commission has not submitted its observations to the Court.

## VII.

37. In the brief in which it submitted its petition and in its subsequent communications to the Court, the Commission presented its arguments, which the Court summarizes as follows:

a. Peru did not respect the right to due process of law, the case having been improperly processed and the minimum judicial guarantees not observed. Ms. María Elena Loayza-Tamayo was tried both in the military and civil court systems by "faceless judges" who were neither independent nor impartial." Also, Ms. Loayza was charged with treason, governed by Decree-Law N° 25.659, which provides that persons accused of that crime must be tried in the military courts, thereby submitting civilians to trial by a military court, which is a special jurisdiction. That this regulation "patently fails to observe the guarantees of due process and the right to be tried by a competent civil court". The Commission also claimed that the defense "became a mere spectator to the proceedings. The case was based on evidence obtained through coercion, intimidation tactics used against the defense counsel, obstruction of counsel's access to the case file, grossly tardy notifications, etc".

b. The principle of "full procedural equality" or parity was also violated, as was the right to be presumed innocent. Further, it was the National Police, DINCOTE, that defined the crime which allegedly had occurred, and that DINCOTE has the faculty to decide which jurisdictions and courts are competent to try a case. According to the Commission, this resulted in Ms. María Elena Loayza-Tamayo being tried for the same acts in different courts for the same cause, with the consequent violation of the principle of non bis in idem. Certain facts which were not proven by the military jurisdiction were attributed to Ms. Loayza-Tamayo. The Commission also alleges that Ms. María Elena Loayza-Tamayo's second trial in the civil courts on the charge of terrorism was based on allegations founded on the very same facts.

c. In its brief of closing arguments the Commission drew attention to the inconsistency of Peru's claim that Ms. María Elena Loayza-Tamayo's detention "was not the result of Angélica Torres-García's false accusations. Moreover, since she is not a 'repentant' terrorist, there was no need to go through the verification process required under the Ley de Arrepentimiento (Law of Repentance)," while it had claimed the opposite in Police Report N° 049 DIVICOTE 3 DINCOTE and other documents.

d. That the faceless Special Tribunal of the civil jurisdiction, through its Judgment of October 10, 1994, convicted Ms. María Elena Loayza-Tamayo of the crime of terrorism for sheltering two persons whom the faceless tribunal described as Shining Path "elements", and not because terrorist propaganda had been found in the property in which she was arrested. The Commission further contended that it was untrue that "the policemen who entered the building found 'sufficient evidence' for María Elena Loayza-Tamayo to be charged with 'the crime of terrorism'", and that had such been the case, there would be no reason to prosecute her on a charge of treason in three different branches of the military court system.

e. Regarding the argument adduced by the State at the public hearing held on September 23, 1995, that Ms. María Elena Loayza-Tamayo had every opportunity to file an action of guarantee "to claim her release on the ground that she had been acquitted of the charge of treason," the Commission considered it to constitute a clear admission of unlawful deprivation of liberty. At the same time, it averred that such a guarantee could not be invoked because Decree-Law N° 25.659 (relating to treason) impeded her access to the remedy of "amparo" or habeas corpus at that time.

f. With regard to the claim of double jeopardy, the Commission believes it to be false that when the Special Supreme Military Tribunal of the Supreme Court of Military Justice and the Full Chamber of the Special Supreme Military Tribunal handed down the judgments of August 11 and September 24, 1993, respectively, what they did was to renounce jurisdiction, as this was the "procedural formula employed by military justice;" and that, on the contrary, the military jurisdiction made full use of its competence when it analyzed and ruled on questions of merit. According to the Commission, Ms. María Elena Loayza-Tamayo was therefore acquitted three times and convicted once.

g. Finally, the Commission holds the view that the action of an attorney for a defendant may not be used "in a malicious and unfounded attempt to link the defense counsel to unlawful activities imputed to her client." It therefore requested the Court to "compensate" Ms. María Elena Loayza-Tamayo's defense attorney for DINCOTE's intimidation tactics and false accusations.

38. In its answer to the application and in its closing arguments, Peru expressed its views, which the Court summarizes as follows:

a. In its answer to the application, Peru expressed the view that in the consideration of the facts and arguments on which the Commission's application was based, account should be taken, first and foremost, of Article 233, paragraph 1, of the 1979 Political Constitution of Peru, which was in force until it was superseded by the 1993 Constitution, and which stipulated that the arbitration courts and the military courts were exceptions to the principle of unity and exclusiveness of the jurisdictional function of the Peruvian Judiciary, a concept which was later enshrined in the current Constitution.... Consequently, ... for a better understanding, in referring to the intervention of military judges, the term Military Justice or, in any event, Military Jurisdiction sh[ould be] used.

b. With regard to the procedural aspects, Peru claimed that for the inter-American system of human rights to function, it was necessary for domestic remedies to be filed and exhausted, although exceptions to that rule do exist. That in the instant case, both the Commission and the Inter-American Court "have assumed undue jurisdiction" in that at the time the petition was filed Ms. María Elena Loayza-Tamayo's trial was still pending and she had not been notified of a final ruling. In its closing arguments, the State insisted that "the application was inadmissible on the ground of non-exhaustion of domestic remedies."

c. The State also argued that the Commission did not observe due process of law since it failed to inform Peru that it had admitted the complaint, as it is required to do by Article 48 of the Convention and that during the public hearing held on February 5, 1997, the Commission conceded that the decision on admissibility was made on the final report.

d. According to the answer to the application, Ms. María Elena Loayza-Tamayo was apprehended on the accusation of a repentant terrorist. However, Peru, in the same brief,

claimed that the arrest had not been the result of Angélica Torres-García's accusation, who was not a repentant terrorist, and for that reason it had not undertaken the verification procedure required by the Ley de Arrepentimiento ("Law of Repentance"), inasmuch as the detention was carried out in response to actions by the National Intelligence Bureau, which learned that Ms. María Elena Loayza-Tamayo was a member of the terrorist organization "Shining Path", a claim corroborated by Angélica Torres-García, who was arrested on a warrant for the crime of Treason and claimed to be familiar with the Loayza-Tamayo domicile.

e. Ms. María Elena Loayza-Tamayo was detained and held incommunicado under Article 2(20)(i) of the 1979 Political Constitution of Peru and that, pursuant to Article 2 of Decree-Law N° 25.744 of September 27, 1992, the National Police had the authority to carry out preventive arrests of persons purportedly implicated, for a period of fifteen days extendible for a further fifteen days under the Decree. To the allegation that Ms. María Elena Loayza-Tamayo was kept in detention after the Special Tribunal of the Supreme Council of Military Justice had acquitted her through its judgment of August 11, 1993, the State responded that a petition for special review had been filed against that judgment; the trial was therefore still in progress and no final judgment has been rendered. It was only on September 24, 1993, that the Full Chamber of the Special Military Supreme Tribunal maintained that judgment, making it final; more than fifteen calendar days had not elapsed "between the date of the review petition and the date on which the process before the civil jurisdiction was initiated (by means of the auto apertorio de instrucción); in other words, the provision of the Political Constitution was not breached."The State therefore denied that Ms. Loayza-Tamayo's arrest and subsequent trial constituted a violation of her liberty and her right to humane treatment.

f. During her interrogation by DINCOTE on February 15, 1993, Ms. María Elena Loayza-Tamayo "did not in any of her replies claim that she had been tortured [or] raped," and in the medical examination she underwent "showing that she was treated" for injuries resulting from sexual abuse, for which reason the State refuted the allegations contained in the application. The State also denied that Ms. María Elena Loayza-Tamayo had been struck on the head and arms, had her arms tied behind her back and that she was forced to remain standing or sitting for long periods, without support for her back, was not allowed to use the hygiene facilities, relieve herself, or receive food and water, all for the purpose of forcing her to incriminate herself and confess that she was a member of the Peruvian Communist Party Faction Shining Path ... all of them unlawful acts.

g. The prosecution of persons accused of the crimes of terrorism and treason is governed by Decree-Laws N° 25.475 (crime of terrorism) and N° 25.659 (crime of treason) respectively. Trials for the former crime are the province of the civil courts, and for the latter that of Military Justice. Treason is not aggravated terrorism, but draws "specific criminal actions [from the former] and incorporates them into the new crime, which cannot be interpreted as constituting the same unlawful criminal act." Also, when the Special Supreme Military Tribunal delivered its judgment of August 11, 1993, it was simply ruling that the acts imputed to María Elena Loayza-Tamayo did not constitute the crime of Treason, but the crime of terrorism ... and [the] term acquittal used by the Military Justice ... is the procedural formula employed by the Military Justice when it deems that acts imputed to a particular person are not provided for in D.L. 25.659 and its extensions, but in Decree-Law 25.475.

h. It claimed that the trial was conducted lawfully and that both the military and the civil courts were independent and impartial, as were the "faceless judges who tried María Elena Loayza-Tamayo" in those courts. In its closing arguments the State also contended that Ms.

María Elena Loayza-Tamayo was not tried twice for the same acts and sentenced in two trials, inasmuch as the Military Justice relinquished competence to hear the case against her for treason, and referred the case for trial by the civil or civil courts.

i. As to the claim that Ms. María Elena Loayza-Tamayo's attorney was not informed of the charges against her, the State claimed that the attorney and the defendant repeatedly submitted observations on the facts and processing of the case -paragraphs 15, 34 and 37 of the application- which suggests that they were perfectly aware of the proceeding and were not impeded in the exercise of their rights. It also denies that the defense attorney or any other lawyer acting on Ms. María Elena Loayza-Tamayo's behalf either in the military or civil courts, "had been subjected to intimidation or any other tactics that prevented them from freely practicing their profession."

j. That on February 6, 1993, the date on which Ms. María Elena Loayza-Tamayo was detained, a state of emergency had been declared in the Department of Lima and the Constitutional Province of Callao under Supreme Decree 006 93 DE CCFFAA of January 19, 1993, for a period of sixty days starting on January 22, 1993. Further, the constitutional guarantees established in paragraphs 7 (inviolability of domicile), 9 (free choice of domicile, and freedom of transit within the national territory), 10 (freedom of unarmed association), and 20(g) (right to personal liberty and security except, inter alia, in cases of terrorism) of Article 2 of the 1979 Constitution of Peru had been suspended.

k. In its closing arguments, Peru maintained that when the Commission cross-examined the witnesses and experts at the public hearing held on February 5, 1997, it put questions that had no connection with the purpose of the hearing. The State therefore requested that any statements by the witnesses and expert opinions unrelated to the purpose for which they were called be deemed neither to have been asked nor answered. It further argued that Ms. Loayza-Tamayo's appearance as a witness before the Court was an anomaly inasmuch as she was a party with a direct interest in the outcome of the case. The State argued that the testimony of Luis Guzmán-Casas, Luis Alberto Cantoral-Benavides, Juan Alberto Delgadillo-Castañeda, and Pedro Telmo Vega-Valle, who were sentenced to prison terms for the crimes of terrorism and treason, were biased as they had an interest in the outcome of the instant Case.

## VIII.

39. The Commission submitted copies of a series of documents and statements concerning cumulative cases against a number of persons, including Ms. María Elena Loayza-Tamayo, in the military and civil courts, and of reports from the Office of the Attorney General, judgments, and copies of statements and declarations. It also submitted official communications from several State departments, newspaper clippings, two videos, reports from various organizations, and some Peruvian legal texts.

40. The State produced evidence in the form of numerous documents relating to the trials in the civil and military authorities, including prosecution reports, judgments, copies of statements and declarations, official registration of domicile, and some Peruvian legal texts.

41. In the instant Case the Court evaluates the documents submitted by the Commission and the State, which, incidentally, were neither refuted nor contested.

42. The State objected to certain witnesses called by the Commission, for the reasons set forth in this Judgment (*supra*, para. 13), and the Court reserved the right to evaluate at a later date the statements given at this stage of the proceeding, that is, when it came to render its Judgment on the merits. The Court observes that the criteria for evaluating evidence in an international human rights tribunal are endowed with special characteristics. This Court is not a criminal court; the grounds for objecting to witnesses do not operate in the same way, so that the investigation into a State's international liability for human rights violations bestows on the Court greater latitude to use logic and experience in its evaluation of oral testimony. It should be noted, in this particular, that the Court has found that under the American Convention on Human Rights, it is contradictory to deny a witness *a priori* -on the ground that he has been prosecuted or even convicted in the domestic courts- the opportunity to testify on facts in a case submitted to the Court, even if that case refers to matters that affect him (*Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 145).

43. The Court's evaluation of the evidence contained in the statements of the witnesses challenged by Peru is as follows. The Court considers that the statement given by Ms. María Elena Loayza-Tamayo, as the alleged victim in this case with a possible direct interest, should be evaluated in the context of the evidence as a whole. The Court admits the other statements only in so far as they relate to the purpose of the investigation proposed by the Commission, and the expert opinions as they relate to national or comparative law, without reference to the specific case.

44. In evaluating the evidence, the Court takes cognizance of the State's observations on terrorism, which leads to an escalation of violence to the detriment of human rights. However, the Court cautions that exceptional circumstances cannot be invoked in order to undermine human rights. None of the provisions of the American Convention may be interpreted in such a way as to allow States Parties or any group or person to suppress the enjoyment or exercise of recognized rights or to restrict them to a greater extent than is provided therein (Article 29(2)). The origin of this precept is to be found as far back as the 1948 Universal Declaration of Human Rights (Article 30).

## IX.

45. The view of the Court is that the statements and expert opinions received on Peruvian territory and at the seat of the Court were as follows:

### a. Testimony of Juan Alberto Delgadillo-Castañeda

Juan Alberto Delgadillo-Castañeda, convicted in Peru on a charge of terrorism, testified as follows: he was accused of belonging to the "Shining Path", the Communist Party of Peru; he was arrested at his home, taken to DINCOTE where he was blindfolded, beaten, interrogated and threatened; he was later taken to an unknown beach together with Ms. Loayza and another detainee by the name of Delaine; they were questioned, tortured, and physically assaulted; with his hands tied behind his back, he was placed head-first into the water. He was held incommunicado during his detention; 21 days after he was detained, he was exhibited to the press wearing "prison stripes", together with seven men and seven women; he was assigned a

court-appointed counsel, who wore an uniform and Balaclava helmet; he was not allowed to appoint an attorney of his choosing, and he was taken before the military courts where the trial lasted three days at the Army Veterinary Hospital; he was acquitted during the oral proceedings before the military court of appeal. His second trial, in the civil court system, was held at the office of the Director of the Penitentiary in Ica, Cachiche. In the military courts he was forced to corroborate the statement he had made to the police; he was blindfolded and beaten. With regard to the prison regime, he testified that they are locked up for twenty-three and a half hours; they receive visits once a month for half an hour; the medical service is irregular; they perform small tasks in prison. He knew María Elena Loayza-Tamayo because they had spent 20 days in detention together.

b. Testimony of Luis Guzmán-Casas

Luis Guzmán-Casas, convicted of treason in Peru, testified that he was charged with terrorism; he was sentenced to 25 years in prison by the military courts; he was detained on January 6, 1993, without being shown an arrest warrant; no representative of the Attorney General was present, only three policemen, who said that they belonged to DINCOTE but showed no identification; they blindfolded him and took him to DINCOTE, where he was held in a dark cell for approximately 29 days; he was unable to speak to a Prosecutor because none was present; approximately twelve days after he arrived at the police establishment he was seen by a doctor, who merely asked him how he came to have bruises; he was neither allowed to communicate with his family, nor was he informed of his right to an attorney; when they interrogated him he was blindfolded and bound and no lawyer was present; after one or two days he was brought a paper which he refused to sign; when he asked for an attorney, he was beaten and transferred to another cell in which he was kept in isolation, blindfolded and bound; that night he was taken with a man and a woman to the beach, where he was undressed, beaten, tortured, wrapped in a cloth and placed in the sea; that same day they were torturing a woman by the name of María, whom he did not know; he heard the policemen say that she had been raped, but he did not see anything; he was acquitted on August 11 of the same year and released on August 25, 1993; on September 12 or 13 he was again apprehended, and tried in the military courts, where he was convicted; he receives visits once a month; he is allowed to write to his family, but the letters are censored by the warden of the block; he has asked for his sentence to be commuted; he demanded that an attorney be present when he was questioned at DINCOTE; in the military court he refused to be represented by the court-appointed attorney assigned to him, who was dressed in military uniform; he did not take advantage of the Repentance Law.

c. Testimony of Luis Alberto Cantoral-Benavides

Luis Alberto Cantoral-Benavides, convicted in Peru for the crime of treason, testified that he was arbitrarily detained on February 6, 1993, by members of DINCOTE; the person they were seeking was his brother, who had been denounced by a repentant terrorist by the name of Angélica Torres; at the time of his detention and when he signed the act of seizure he was told that a prosecutor was present, but no one presented himself in that capacity; there he was beaten; he did not sign the paper presented to him by a member of DINCOTE, in which he was accused of treason; after he was detained, they went to Ms. Loayza-Tamayo's home which was pointed out to them by Angélica Torres, who identified Ms. María Elena Loayza-Tamayo at the time of



her detention; they apprehended her and took them all to DINCOTE, where they were blindfolded and tied up in a large room; he remained in detention for almost one month until March 4 or 5; he was kept bound and handcuffed; during questioning they were tortured and subjected to physical and psychological abuse; he was taken to the beach where he was undressed, wrapped in a cloth and placed head-first in the water; they threw him onto the sand and twisted his arm, whereupon he fainted; his brother was also taken to the beach and tortured, and told him that Ms. Loayza-Tamayo has also been taken to the beach; during the oral proceeding in the civil courts Ms. Loayza-Tamayo said that she had been taken to the beach and tortured; the policemen who arrested him were wearing civilian clothes, as was the prosecutor; the arrest had been led by Captain Zárate, and he could hear that he was one of the persons who took him to the beach; he was held incommunicado, and was presented to the press wearing "prison stripes". He testified that he was brought before the military courts and that his pretrial statement was taken at the Navy Veterinary Hospital; the attorneys did not appear because they had not been notified; the persons there always wore Balaclava helmets, hoods and spectacles, were armed with "FALS", and wore military uniform; one of their number was supposedly a court-appointed attorney in uniform; he was acquitted by the military courts of first, second and third instances, which ordered his release; his attorneys had been Dr. Iván Bazán and Dr. Víctor Alvarez; his release was ordered but never effected; his attorney filed a petition of habeas corpus which was twice rejected; he was then prosecuted in the civil court; he was examined by a police doctor before he was tortured, but was not examined afterwards; he did not have an attorney present when he appeared before the police, in the military court, or in the civil court; his attorney was present at the military court of second instance; Dr. Washington Durand was only present when he gave his statement to the police, but was not allowed to confer with him; in the first military court he was represented by a court-appointed attorney.

d. Testimony of Pedro Telmo Vega-Valle

Pedro Telmo Vega-Valle, convicted in Peru for the crime of treason, testified that he was detained by members of DINCOTE on January 9, 1993, at his home for his purported links to the terrorist organization "Shining Path"; no representative of the Office of the Attorney General was present; he was then taken blindfolded to DINCOTE, where he was held for 27 days; he was made to sign an act of seizure; he was interrogated and taken to the beach with three other persons; once on the beach, he was undressed on the orders of an officer in charge, and, still blindfolded, was thrown onto the sand, forced to lie on a cloth, abused, wrapped in a cloth, and submerged face-up in the water; he was beaten and lost consciousness; he was taken before the Naval Military Tribunal; his attorney was present when his statement was taken, but when they spoke there was an official nearby; he was represented by the same attorney up to the time he was acquitted by the Special Tribunal of the Supreme Council of Military Justice and released; he was subsequently rearrested on the same charge; he had never met Ms. Loayza-Tamayo, as she was detained after he was; in Cachiche they were beaten with an electrically charged rod and abused; they complained of this treatment to the Red Cross, but when this was discovered, they were terrorized by the police; they were only allowed visits on the third Tuesday of every month; during the first week of August, he learned that his wife had filed a complaint with the Attorney General and the Prosecutor of Ica on the ground that he had been abused, beaten and tortured; the Attorney General told him that this was normal practice, and that it was the initiation meted out to all new inmates at all prisons.

e. Testimony of María Elena Loayza-Tamayo

María Elena Loayza-Tamayo testified that she was accused by a repentant terrorist and arrested on February 6, 1993, at a property she was having built; she did not live in that building, but usually resided elsewhere with her parents, sisters and children; the policemen, one of whom presented himself as Captain Zárate, came in search of a manila envelope and informed her that she was being arrested on the accusation of a repentant terrorist; she was put in a car blindfolded and presented with an act of seizure which she refused to sign; a prosecutor was present and she was taken to DINCOTE, where she was bound, blindfolded, beaten and abused throughout the day; she was interrogated by Captain Zárate; the police bound her hands and touched her all over her body; they abused her and beat her; they took her to the beach together with other detainees; she was blindfolded and bound; she was beaten, undressed, and raped through the vagina and rectum, and plunged in the sea; she thought that she fainted; the policemen continued to beat her on the way to DINCOTE; every day she was abused and fondled; she saw her sister after fifteen days, but was unable to speak to her; Captain Zárate was present when she was interrogated on February 15; a statement was taken from her, in which she denied that she belonged to any subversive group; Captain Zárate was also in charge of the squad that arrested her and took her to the beach; she remained at the police station from February 6 to 26, and was always kept handcuffed and blindfolded; there were several persons there, and they slept on the floor; on March 3, 1993, she was taken to the establishment where she was currently held; she had initially been detained at DINCOTE; she thought she had also been at the Military Veterinary Hospital; the atmosphere there was like a prison, and they slept on the floor; the military interrogation had taken place there; she refused to cooperate in the initial interrogation on the ground that her attorney was not present; on the second day the military prosecutors continued to question her; she was assigned a court-appointed attorney, and the Judge and the Naval Military Prosecutor were also present; she was harassed and tortured, and threatened with the death of her sister and daughter to force her to make a pretrial statement to ensure her family's safety; she was transferred to the prison; the interrogation lasted about three days; she was acquitted by the court of first instance; she never enjoyed the right to legal counsel or to have her attorney present; when she was tried in the civil courts she was in detention at Chorrillos Women's Maximum Security Prison; there the inmates lived in blocks, there was no isolation cell, and all the cells were the same; after she had been taken to the beach she was examined by a doctor and told him that her arms were bruised; the only person present for her pretrial statement at DINCOTE was Captain Zárate, but the prosecutor was not present; when she made her pretrial statement before the Special Naval Court the persons there were wearing hoods, and neither Captain Zárate nor her attorney attended; the attorneys who represented her were Dr. Carolina Loayza-Tamayo and Dr. Nicolás de Piérola.

f. Testimony of Víctor Alvarez-Pérez

Víctor Alvarez-Pérez, defense attorney for witness Mr. Cantoral-Benavides, testified that he felt fear in his professional task as the attorney for a co-defendant in the case against María Elena Loayza-Tamayo; one reason was that the crime of collaboration in terrorism was governed by law and he could be charged with that crime or the crime of activities against the public administration; a number of lawyers had been prosecuted on charges of terrorism; another reason

for his fear was that he had been investigated along with other lawyers, having appeared on a secret list of persons allegedly suspected of unlawful practice of the profession, comprising for the most part lawyers who were human rights activists, including Carolina Loayza. He testified that he had received several threats. The police arbitrarily and unlawfully decided in which courts a detainee should be tried, without the legal authority to do so; counter-insurgency legislation extended the military jurisdiction to civil proceedings. He declared that the military proceeding was irregular and the military judges faceless, wearing hoods and military uniforms; they had no legal training, and could not be recused. The military hearing took place in a barracks on the Las Palmas military base, and was only one phase of the judicial investigation, which was followed by an appeal to the Special Naval Court Martial, which reviewed the judgment of the court, thence to the Special Military Supreme Council also for review of the judgment; any representations had to be made within ten days of being bound over for trial, before a court of faceless military judges. The law did not allow persons who took part in arrests to testify, and the only evidence permitted were documents attesting to the person's honor. Arrests of persons accused of terrorism were carried out with great violence by policemen, and a prosecutor who played virtually no role because he did not identify himself as such and did nothing to ensure that the detainee's rights were respected; nor were the detainees informed of the charges against them or the guarantees to which they were entitled. Habeas corpus was prohibited in cases of terrorism. He went on to say that María Elena Loayza-Tamayo had been detained on the accusation of a repentant terrorist, whom no one had ever been able to question; Ms. Loayza was accused of being a "Shining Path" leader code-named "Rita"; a curious fact is that more than one "comadre Rita" subsequently appeared in other case files, which was contradictory inasmuch as the aliases of the leaders were never the same; the only evidence against them was that they were, often falsely, denounced by repentant terrorists, so that the accusers could reap the benefits of the Ley de Arrepentimiento (Law Repentant), including that of keeping the repentant's identity secret, thus restricting the defendant's right of defense. He further testified that the detainees were held incommunicado, and that María Elena Loayza-Tamayo was tortured and raped; many persons had been taken to the beach to be tortured by drunken policemen; what is more, the detainees did not report their torture because they were afraid, and because of the possibility of availing themselves of the Amnesty Law; the crime of torture was not codified in Peruvian legislation; the only complaint that could be brought was that of injury or abuse of authority. He said that the defense had been obstructed, inasmuch as access to the case file needed to be sought in writing; only 15 minutes were allowed for a meeting with the defendant and those meetings never took place in private. María Elena Loayza-Tamayo was acquitted of the crime of treason, but was never released; she had been brought before the civil courts, where she was subjected to a second trial for the same acts, and convicted after she had been acquitted by the military court. In the civil court the judges sat behind a dark glass and were not visible, and their voices were distorted; they could not be recused because this was not permitted by Peruvian legislation and because the identity of the judges was unknown. The normal procedure comprised a pretrial phase, after which the judge and the prosecutor handed down a decision which was then referred to the Criminal Chamber of the Supreme Court, where the oral proceeding took place; in that court neither the judge nor the prosecutor wore hoods. In conclusion, the witness told the Court that a state of emergency had existed in Peru since the upsurge of political violence, but that a group of basic rights were still protected; however, the counter-insurgency legislation did not permit petitions of habeas corpus during a state of emergency.

g. Testimony of Iván Arturo Bazán-Chacón

Iván Bazán-Chacón, defense attorney for witness Pedro Telmo Vega-Valle, testified that in 1992 a political process had taken place in Peru; it was known as the National Reconstruction Process, and in it President Alberto Fujimori had dissolved Congress, reorganized the Judiciary and the Ministry of the Interior, dissolved the Tribunal of Constitutional Guarantees and the National Council of the Judiciary, and initiated a period of emission of legislation by means of decree-laws, on account of the grave political and social problem caused by the escalation of the violence and the destruction inflicted by subversive elements; the list of crimes was expanded to include the new crime of treason; the military jurisdiction was also expanded and authorized to prosecute civilians on charges of treason, imposing restrictions on the right of defense, and keeping secret the identity of the military judges and the prosecutors and clerks of the Superior Tribunals of the civil court system. Regarding the right of defense, he explained that persons investigated or prosecuted on a charge of terrorism or treason were labeled, and that this also extended to their attorneys. He reported that in 1993, several lawyers had been prosecuted and that in the early months of that year Decree-Law N° 25.475 (crime of terrorism) was enacted and prohibited a lawyer from defending more than one person on trial on a charge of terrorism. He further testified that access to the case files had to be applied for in writing and was subject to a notified decision; in the case of his client, Mr. Pedro Telmo Vega, the case file consisted of nine volumes, and he was granted only seven hours in which to examine it, so that he could hardly apprise himself of all the judicial proceedings. The witness testified that Decree-Law N° 25.475 (crime of terrorism) stipulates that a person convicted of that crime must spend one year in continuous solitary confinement, which involved receiving no visits from his relatives and not being allowed to confer with his attorneys. He said that Ms. Loayza-Tamayo had the right to be visited by her attorney once a week for a limited time; Ms. Loayza-Tamayo received a visit from her defense attorney once a week on Tuesdays; contact was made using a booth, and lasted fifteen minutes; any communication the attorney wished to deliver had first to be censored by the person in charge; detainees had no access to newspapers or magazines; visits -only allowed to close relatives- were permitted once a month and lasted thirty minutes. Ms. Loayza-Tamayo has two sons and the regime of visits for minors was thirty minutes every three months, which meant that she could only see them for a total of two hours each year. The witness testified that these visits were all made without any physical contact. He did not enjoy full guarantees to act, and that although he had not himself been directly harassed or intimidated, his colleagues had been, some having even been prosecuted on charges of terrorism. He hoped that nothing would happen to him on his return to the country. He knew that persons detained in connection with the Loayza Tamayo case had been tortured; they apparently received no medical care since the forensic doctor performed only a very superficial examination; he knew of no case in which members of the security forces accused of torturing detainees had been punished or investigated. He said that in Peru there was no autonomous codification of the crime of torture, and that complaints could only be filed for injuries and abuse of authority. He referred to the enactment in 1995 of the Amnesty Law which allowed them to go unpunished, inasmuch as it ordered the discontinuance of all judicial proceedings and administrative or legal investigations of events connected with the fight against subversion. On the topic of Ms. Loayza-Tamayo's incarceration, the witness testified that she was transferred from Block A to Block C, where she was subjected to a regime in which those indicted on charges of terrorism were obliged to remain

in their cells for twenty-three and a half hours and were only allowed into the courtyard for half an hour, unlike the regime in Block A, where there was greater flexibility and some tasks could be performed. He said that statistics disseminated by the Special Tribunal of the Supreme Council of Military Justice on trials for the crime of terrorism showed that acquittals since 1992 accounted for three percent; he knew of cases in which innocent persons had been convicted; Ms. Loayza-Tamayo was acquitted by the military court but was not released, and was later convicted in the civil courts for the same facts of which the military court had acquitted her. He said that in the military proceeding an appeal could be filed against a conviction by the military examining magistrate with the Military Court Martial, and later with the Special Tribunal of the Supreme Court of Military Justice, which was the court of last instance. The judicial investigation in the civil court system did not culminate in any jurisdictional decision; it was followed by the oral proceeding in which a special faceless chamber rendered a judgment, which could be examined by the Supreme Court of Justice through an equally faceless Special court.

h. Expert report of Hector Faúndez-Ledezma

Expert and university professor Hector Faúndez Ledezma referred to the right to personal liberty, the ways in which arrests were made and their arbitrariness. He explained the general conditions and principles on which a fair trial were based, mentioning the principle of non bis in idem and the content of Article 27 of the Convention.

i. Expert opinion of Julio Maier

Expert and university professor Julio Maier referred to the principle of non bis in idem, to the principle of innocence, the statement of the accused as a means of defense, and to the broad interpretation that could be given to the American Convention.

j. Expert opinion of León Carlos Arslanian

Expert León Carlos Arslanian, who was a member of the Commission of International Jurists on the Administration of Justice in Peru in 1993, referred to the harassment, tactics of intimidation and threats used by the Intelligence Bureau of the Ministry of the Interior of Peru against attorneys defending the human rights of persons accused of terrorism. He said that, studying Peruvian legislation with other experts and comparing it to international rules, he had encountered contradictions. As an example, he cited the fact that a number of decrees described treason and terrorism in identical terms, making for uncertainty as to which law was to be applied, and making for arbitrariness.

X.

46. The Court deems the following facts to have been proven:

a. That on February 6, 1993, Ms. María Elena Loayza-Tamayo was detained by members of DINCOTE at a property she owned on Mitobamba Street, Block D, Lot 18, Los Naranjos Estate, Los Olivos District, Lima, Peru (cf. 1994 Report of the Task Force of the Government of Peru; Expanded Police Report N° 049-DIVICOTE 3-DINCOTE of February 25, 1993; DINCOTE

notification of detention of María Elena Loayza-Tamayo on February 6, 1993; Report N° 176-93-DEGPNP-EMP-EMG/DIPANDH; María Elena Loayza-Tamayo's statement to DINCOTE of February 15, 1993; testimony of María Elena Loayza-Tamayo of December 12, 1996, and that of Luis Alberto Cantoral-Benavides of December 11, 1996).

b. That when María Elena Loayza-Tamayo was detained, there existed in the Department of Lima and in the Constitutional Province of Callao a state of emergency and suspension of the guarantees provided in Article 2(7), (9), (10), and (20)(g) of the Peruvian Constitution in force at that time (cf. 1979 Political Constitution of Peru, and Supreme Emergency Decree N° 006-93-DE-CCFFAA of January 19, 1993; and answer to the application).

c. That from February 6 to 26, 1993, Ms. María Elena Loayza-Tamayo was held in administrative detention at DINCOTE, and was held incommunicado from February 6 to 15 (cf. 1994 Report of the Task Force of the Government of Peru; Expanded Police Report N° 049-DIVICOTE 3-DINCOTE of February 25, 1993; statement of María Elena Loayza-Tamayo of February 15, 1993, to DINCOTE; testimony of Juan Alberto Delgadillo-Castañeda, Luis Guzmán-Casas, and Luis Alberto Cantoral-Benavides of December 11, 1996; testimony of María Elena Loayza-Tamayo of December 12, 1996; testimony of Víctor Alvarez-Pérez of February 5, 1997, and expert opinion of León Carlos Arslanian of February 5, 1997; application; answer to the application); she was unable to exercise her right to file an action for the safeguard of her personal liberty, or to question the lawfulness or arbitrariness of her arrest (cf. Decree-Laws N° 25.475 (crime of terrorism), and N° 25.659 (crime of treason)).

d. That Ms. María Elena Loayza-Tamayo, together with other persons, was exhibited publicly through the media wearing "prison stripes", and introduced as a terrorist, although she had been neither tried nor convicted (cf. Article in the daily newspaper "La República" of Lima, Peru, entitled, "Fourteen Senderistas who killed eight soldiers and dynamited two police stations are apprehended," of February 27, 1993, and videotape produced as evidence by the Commission).

e. That Ms. María Elena Loayza-Tamayo was not allowed to communicate with her family while she was held incommunicado at DINCOTE, and during that period she was examined by a doctor, who diagnosed ecchymosis (cf. Testimony of María Elena Loayza-Tamayo of December 12, 1996; copy of detailed medical certificate N° 5323 L of February 8, 1993; official communication N° 3623 94 MP FN of November 19, 1994, and official communication N° 3064 94 MP FN of November 8, 1994).

f. That Ms. María Elena Loayza-Tamayo was tried -together with other defendants in a cumulative trial- for the crime of treason in the military courts; that on February 25, 1993, Police File N° 049 DIVICOTE 3-DINCOTE was opened for that crime; that she was subsequently brought for trial before the Special Naval Court and, by decision of that Court, was released, was held at the Army Veterinary Hospital from February 27 to March 3, 1993; on March 5, 1993 she was acquitted by the Special Naval Court; on April 2, 1993, she was convicted by the Special Naval Court Martial; on August 11, 1993, she was acquitted of the crime of treason by the Special Tribunal of the Supreme Council of Military Justice, and on September 24, 1993, the Full Chamber of the Special Supreme Military Tribunal upheld Ms. María Elena Loayza-Tamayo's acquittal; that the proceedings were summary (cf. Police Report N° 049 DIVICOTE 3 DINCOTE of February 25, 1993; judgment of March 5, 1993, of the Special Naval Court, judgment of April 2, 1993 of the Special Naval Court Martial; judgment of August 11, 1993, of the Special Tribunal of the Supreme Council of Military Justice; and judgment of September 24, 1993, of the Full Chamber of the Special Supreme Military Tribunal).

g. That Ms. Loayza-Tamayo remained in detention from September 24, 1993, the date on which the Full Chamber of the Special Military Tribunal upheld her acquittal, until October 8 of that year, when she was bound over for trial in the civil courts (cf. judgment of September 24, 1993, of the Full Chamber of the Special Supreme Military Tribunal; ruling of the Forty-third Criminal Court of Lima of October 8, 1993, a closing for trial; testimony of María Elena Loayza-Tamayo of December 12, 1996; brief containing the Commission's application; brief containing the State's answer to the application; brief of closing arguments of the Commission, and the 1994 Report of the Task Force of the Government of Peru).

h. That Ms. María Elena Loayza-Tamayo was later tried in the civil court system for the crime of terrorism; that on October 8, 1993, the Forty-third Criminal Court of Lima initiated the proceedings; that on October 10, 1994, the faceless Special Tribunal of the civil court system sentenced her to twenty years in prison, and on October 6, 1995, the Supreme Court of Justice upheld that sentence (cf. Order of the Forty-third Criminal Court of Lima of October 8, 1993; judgment of October 10, 1994, of the faceless Special Tribunal of the civil court system, and judgment of October 6, 1995, of the Supreme Court of Justice).

i. That military justice is also meted out to civilians in Peru; that Ms. María Elena Loayza-Tamayo was tried in both the military and the civil court system by "faceless judges"; that it was DINCOTE that classified as unlawful the acts which were used as grounds in both jurisdictions (cf. Decree-Laws N° 25.659 (crime of treason) and N° 25.475 (crime of terrorism); Police Report N° 049 DIVICOTE 3 DINCOTE of February 25, 1993, and the 1994 Report of the Task Force of the Government of Peru).

j. That the military court system followed a practice of obstruction of the right of persons accused of treason to be represented by a lawyer of their own choosing (cf. Testimony of Juan Alberto Delgadillo-Castañeda, Luis Guzmán-Casas, and Luis Alberto Cantoral-Benavides of December 11, 1996; of María Elena Loayza-Tamayo of December 12, 1996; of Víctor Alvarez-Pérez of February 5, 1997; and expert opinion of León Carlos Arslanian of February 5, 1997; there was no freedom of choice during the pretrial investigation of Ms. María Elena Loayza-Tamayo in the military courts; that, however, during the trial on the charge of terrorism in the civil courts, she was allowed to be represented by the attorney of her choice; access to the case file was obstructed, as was the right to free and full exercise of her right of defense (cf. Testimony of María Elena Loayza-Tamayo of February 15, 1993; testimony of Víctor Alvarez-Pérez and Iván Arturo Bazán-Chacón of February 5, 1997; expert report of León Carlos Arslanian of February 5, 1997, and Decree-Law N° 25.475 (crime of terrorism)).

k. That Ms. María Elena Loayza-Tamayo has been continuously deprived of her freedom from February 6, 1993, up to the present (cf. Notification of detention of María Elena Loayza-Tamayo of February 6, 1993; statements of María Elena Loayza-Tamayo of December 12, 1996, and of Luis Alberto Cantoral-Benavides of December 11, 1996; Expanded Police Report N° 049 DIVICOTE 3 DINCOTE; Document No. 2630 DIVICOTE 3 DINCOTE of June 30, 1993, and the 1994 Report of the Task Force of the Government of Peru); that she is still incarcerated in Block "C" of the Chorrillos Women's Maximum Security Prison, where she is housed in a tiny cell, without natural light, is allowed half an hour's sunlight each day, is held in continuing isolation and subjected to highly restrictive regime of visits even from her children, which situation was the subject of provisional measures before this Court (cf. Judgment of October 6, 1995, of the Supreme Court of Justice; Decree-Law N° 25.475 (crime of terrorism); official communication N° 7 5 M/121 from Peru of April 29, 1996, and Order of September 13, 1996, of the Inter-American Court).

1. That during the period when Ms. María Elena Loayza-Tamayo was detained there was a widespread practice in Peru of cruel, inhuman and degrading treatment during criminal investigations into the crimes of treason and terrorism (cf. Testimony of Juan Alberto Delgadillo-Castañeda, Luis Guzmán-Casas, Luis Alberto Cantoral-Benavides, and Pedro Telmo Vega-Valle of December 11, 1996; of María Elena Loayza-Tamayo of December 12, 1996; of Víctor Alvarez-Pérez and Iván Arturo Bazán-Chacón of February 5, 1997; expert report of León Carlos Arslanian; newspaper article entitled "Confesión a Golpes" ("Beaten into Confession"), and Report of the National Coordinator of Human Rights on the situation of torture in Peru and other cruel, inhuman or degrading treatment, January 1993 to September 1994).

## XI.

47. Before considering the arguments adduced by the parties, the Court must dispose of Peru's objection of "inadmissibility of the application on the ground of non-exhaustion of domestic remedies ...," in which it considered that the Court had "improperly arrogated jurisdiction to itself."

48. The Court deems that, with that argument, Peru is attempting to reopen, at the current stage of consideration of the merits of the Case, a question of admissibility already ruled on by the Court. It therefore dismisses the argument on grounds of gross impropriety, inasmuch as it deals with a matter already disposed of in the Judgment of January 31, 1996 (*supra*, para. 12), which is final and nonappealable.

## XII.

49. The Court now turns to the arguments and evidence submitted by the parties, and deems that:

a. The fact that Ms. María Elena Loayza-Tamayo was apprehended on February 6, 1993, by members of DINCOTE at a building located at Mitobamba Street, Block D, Lot 18, Los Naranjos Estate, Los Olivos District, Lima, Peru, is not in dispute, nor is the allegation that she was held incommunicado between February 6 and 15, 1993 (*supra*, para. 46(a) and (c)).

b. It is for this Court to determine whether that detention was carried out in conformity with Article 7 of the Convention and, if so, whether the state of emergency and suspension of guarantees imposed in the Department of Lima and the Constitutional Province of Callao as of January 22, 1993, is germane to the instant case.

50. Article 27 of the American Convention governs the suspension of guarantees in time of war, public danger, or other emergency that poses a threat to the independence or security of a State Party, in which eventuality the latter must inform the other States Parties, through the Secretary General of the OAS, "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." While it is true that personal liberty is not expressly included in those rights, the suspension of which is, in any event, not authorized, it is equally true that the Court has found that writs of habeas corpus and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve,



moreover, to preserve legality in a democratic society [and that] the Constitution and legal systems of the States Parties that authorize, expressly or by implication, the suspension of the legal remedies of habeas corpus or of "amparo" in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention (Habeas Corpus in Emergency Situations) (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paras. 42 and 43).

...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 (Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 38.)

51. Article 6 of Decree-Law N° 25.659 (crime of treason) provides that

[a]t no stage of the police investigation and the criminal proceedings may detainees implicated or prosecuted for the crime of terrorism, and covered by Decree-Law No. 25.474, file Guarantee Remedies, or petitions against the provisions of the present Decree-Law.

The Court notes in its file on the case before it that the police notified Ms. María Elena Loayza-Tamayo on February 6, 1993, that she was being apprehended in connection with "the crime of terrorism."

The State has argued that while Ms. María Elena Loayza-Tamayo lacked access to the remedy of habeas corpus, she could have sought other remedies, which, nonetheless, Peru did not specify.

52. The Court considers that, pursuant to Article 6 of Decree-Law N° 25.659 (crime of treason), Ms. María Elena Loayza-Tamayo did not have the right to file a petition for any guarantee to safeguard her personal liberty or challenge the lawfulness of her detention (*supra*, para. 46.c), irrespective of whether guarantees had or had not been suspended.

53. While Ms. María Elena Loayza-Tamayo was held incommunicado and during her subsequent trial, she was unable to avail herself of guarantee remedies, which, in the view of this Court, may not be suspended.

54. With all the more reason, this Court deems it unlawful that Ms. María Elena Loayza-Tamayo was kept in detention after the final judgment handed down by the military court on September 24, 1993, and until the order was issued for her to be bound over for trial was issued in the civil courts on October 8 of that year. The trial proceedings show that Article 6 of Decree-Law N° 25.659 (crime of treason) was also applied during that period.

55. The Court therefore finds that Peru violated Ms. María Elena Loayza-Tamayo's right to personal liberty and the guarantee of judicial protection enshrined, respectively, in Articles 7 and 25 of the American Convention.

### XIII.

56. The Inter-American Commission claimed that Peru violated Ms. María Elena Loayza-Tamayo's right to humane treatment, in breach of Article 5 of the Convention.

57. The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation. The European Court of Human Rights has declared that, even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance (cf. Eur. Cour H.R., Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, para. 167). That situation is exacerbated by the vulnerability of a person who is unlawfully detained (cf. Eur. Court HR, Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, para. 36). Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person (cf. Ibid., para. 38), in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity.

58. Although the Commission contended in its application that the victim was raped during her detention, after examination of the file and, given the nature of this fact, the accusation could not be substantiated. However, the other facts alleged, such as incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, a restrictive visiting schedule (supra, para. 46 c., d., e., k. and l.), all constitute forms of cruel, inhuman or degrading treatment in the terms of Article 5(2) of the American Convention. A study of the arguments and evidence proffered shows grave and convergent acts that were not refuted by the State and give reason to believe that cruel, inhuman and degrading treatment was meted out in the instant case of Ms. María Elena Loayza-Tamayo, in violation of her right to humane treatment enshrined in Article 5 of the American Convention.

### XIV.

59. The Commission claimed that in the trials conducted in the military criminal courts for the crime of treason and in the civil courts for the crime of terrorism, against Ms. María Elena Loayza-Tamayo, the Peruvian State violated the following rights and guarantees of due process enshrined in the American Convention: Right to a hearing by an Independent and Impartial Tribunal (Article 8(1)); Right to be Presumed Innocent (Article 8(1) and 8(2)); Right to Full Equality during the proceedings (Article 8(2)); Right to Defend Oneself (Article 8(2)(d)); Right not to be Compelled to be a Witness Against Oneself and not to be Subject to Coercion of any

Kind (Articles 8(2)(g) and 8(3)); and the Judicial Guarantee not to be subjected to Double Jeopardy (Article 8(4)).

60. The Court deems it unnecessary to rule on the Commission's argument that the military tribunals that tried Ms. María Elena Loayza-Tamayo lacked independence and impartiality, requirements embodied in Article 8(1) of the Convention as prerequisites of due process, inasmuch as Ms. María Elena Loayza-Tamayo was acquitted by that military court and, therefore, the possible failure to meet those requirements did not cause her legal injury in that regard, irrespective of the other violations which will be examined in the following paragraphs of this Judgment.

61. First and foremost, in applying Decree-Laws N° 25.659 (crime of treason) and N° 25.475 (crime of terrorism) enacted by the State, Peru's military courts violated Article 8(1) of the Convention with regard to the requirement to be tried by a competent court. Indeed, in rendering a final judgment acquitting the defendant Ms. María Elena Loayza-Tamayo of the crime of treason, the military court lacked jurisdiction to keep her in detention, let alone to declare in the verdict of acquittal of last instance, that "there being evidence of the commission of the crime of terrorism, it orders the case file to be remitted to the civil courts, and the defendant to be placed in the custody of the competent authority." In so doing, the military tribunal acted *ultra vires*, usurped jurisdiction, and arrogated to itself the powers of the regular judicial organs, inasmuch as Decree-Law N° 25.475 (crime of terrorism) stipulates that the aforesaid crime is to be investigated by the National Police and the Ministry of the Interior, and tried in the civil courts. Further, the regular judicial authorities were the only organs with the power to order the detention and imprisonment of the persons accused. As may be seen from the foregoing, the aforementioned Decree-Laws N° 25.659 (crime of treason) and N° 25.475 (crime of terrorism) separated the jurisdiction of the military and civil courts, assigning the crime of treason to the former, and the crime of terrorism to the latter.

62. Secondly, 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. The fact that Ms. María Elena Loayza-Tamayo was convicted in the civil courts on evidence allegedly obtained in the military courts -even though the latter lacked jurisdiction- militated against her on two occasions in the civil courts.

63. Peru, by means of the military courts, breached Article 8(2) of the Convention, in which the principle of innocence is embodied, by accusing Ms. María Elena Loayza-Tamayo of a different crime to the one for which she was prosecuted and convicted, without having jurisdiction to do so, since, in any event, as indicated above (*supra*, para. 61) that charge could only be brought by the competent civil courts.

64. The Commission contends that Ms. María Elena Loayza-Tamayo was coerced into testifying against herself and admitting that she had participated in the acts for which she was

charged. There is no such evidence on the record, for which reason the Court deems that there is no proven violation of Article 8(2)(g) and 8(3) of the American Convention.

65. The Commission requested reparation for Ms. Carolina Loayza-Tamayo, defense counsel for Ms. María Elena Loayza-Tamayo, for the alleged intimidation tactics and false accusations to which she was subjected by DINCOTE. The Court observes that the aforesaid attorney was not listed as a victim in the report submitted to the State by the Commission, in accordance with Article 50 of the Convention, and therefore deems the request to be inadmissible.

## XV

66. With regard to the Commission's complaint of the violation of the judicial guarantee that prohibits double jeopardy, to the detriment of Ms. María Elena Loayza-Tamayo, the Court observes that the principle of non bis in idem is established in Article 8(4) of the Convention in the following terms:

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

This principle is intended to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause. Unlike the formula used by other international human rights protection instruments (for example, the United Nations International Covenant on Civil and Political Rights, Article 14(7), which refers to the same "crime"), the American Convention uses the expression "the same cause," which is a much broader term in the victim's favor.

67. In the instant Case, the Court observes that Ms. María Elena Loayza-Tamayo was tried in the military criminal courts for the crime of treason, which is closely linked to the crime of terrorism, as may be seen from a comparative reading of Article 2(a), (b) and (c) of Decree-Law N° 25.659 (crime of treason) and Articles 2 and 4 of Decree-Law N° 25.475 (crime of terrorism.)

68. Both Decree-Laws refer to actions not strictly defined, so that they may be interpreted similarly within both crimes, in the view of the Ministry of the Interior and the corresponding judges and, as in the case under consideration, of the "Police (DINCOTE) itself." Consequently, the aforementioned Decree-Laws are contrary to Article 8(4) of the American Convention in this regard.

69. The Special Naval Court, in its judgment of March 5, 1993, which remained in force after all the available appeals had been exhausted, acquitted Ms. María Elena Loayza-Tamayo of the crime of treason, specifying that since there is evidence and signs in the records that suggest liability ... for the crime of terrorism, an unlawful activity codified in Decree Law Number twenty-five thousand four hundred and seventy-five, it is appropriate that a certified copy of all the police and judicial files be remitted to the Provincial Prosecutor ... so that the appropriate authority may take cognizance of them and act in accordance with their legal powers....

70. The Court does not accept the State's argument that the judgment of March 5, 1993, "merely finds that the acts attributed to Ms. María Elena Loayza-Tamayo do not constitute the crime of treason, but that of terrorism, [since] the term acquittal used by the Military Justice ... is not used with its usual meaning ...". In the aforementioned judgment, which concluded a case in which others were also involved, the Tribunal, in referring to some of them, used the phrase "relinquished jurisdiction to consider the case in regard to .... "If the judicial intention had been to restrict its ruling to a matter of no jurisdiction, it would have used the same term when referring to Ms. María Elena Loayza-Tamayo. It did not do so, but used the term "acquittal" instead.

71. The Commission submitted copies of several judgments rendered by the military tribunals to demonstrate that, when that jurisdiction deems itself to lack jurisdiction to hear a similar case, it uses the juridical concept of "relinquishment." In one such case, the Special Naval Court Martial decided "[its r]elinquishment ... in favor of the civil courts, and that the proceedings should be remitted to the District Attorney in charge, inasmuch as they constitute facts relating to the crime of Terrorism, so that it may rule according to its jurisdiction; and they returned them."

72. The Court observes that the Special Naval Examining Magistrate, in acquitting Ms. María Elena Loayza-Tamayo and other defendants, handed down a judgment using the usual procedure, when he said

Administering Justice on behalf of the Nation, weighing objectively the evidence for and against, in exercise of the authority conferred in Article One of Decree-Law twenty-five thousand seven hundred and eight, and Article One of Decree-Law twenty-five thousand seven hundred and twenty-five, in accordance with the Constitutional Law of the sixth of January nineteen hundred and ninety-three.

He also ruled the request concerning "the payment of civil reparation inadmissible," such reparation being proper only when a person is acquitted, and not when the court deems itself to lack jurisdiction.

73. Accordingly, in the firm judgments rendered by the military and civil tribunals in relation to Ms. María Elena Loayza-Tamayo, the grounds for her acquittal and her subsequent conviction were not specified, and can only be determined from the police files and the corresponding charges.

74. Before the military courts, the aforementioned facts were imprecisely stated in Expanded Police Report N° 049 DIVICOTE 3 DINCOTE of February 25, 1993; more specifically, in the part relating to the charge brought by the Military Prosecutor in the Special Naval Court on March 4 of that year, Ms. María Elena Loayza-Tamayo was accused of

[being a member] of the Departamento de Socorro Popular [People's Assistance Department] of the Peruvian Communist Party Shining Path, and a member of the 'Leadership Cell,' and was in charge of elaborating the plans for each campaign or given period, and plan, supervise, control

and provide logistical support to the detachments and troops that carry out the various terrorist acts.

...

It was also decided that María Elena Loayza-Tamayo, alias 'Rita' [is an author] of the crime of Treason and is covered under Decree-Law N° 25.659 for the following reasons:

- For having carried out activities for the Communist Party of Peru-Shining Path terrorist organization, using firearms and explosive devices.
- For being a member of the leadership of the PCP-SL terrorist organization: "Communist," "Political Command," "Military Command," "Activist," "Combatants," all designations corroborated in her statements, acts of recognition, and documents seized.
- For belonging to a group dedicated to "annihilating" various persons and as such responsible for selecting targets and planning and executing those actions ....
- For having consistently demonstrated that she has been ideologically schooled and occupies an important position within the terrorist organization by steadfastly denying her association with it or admitting to as little as possible in order to pretend to be what she is not and prove her alibi in order to avoid being held criminally accountable, which is typical of the members of that organization and reveals their cynicism and fanaticism about preserving their "golden rule" (secrecy and not informing), thus adhering to the tenets of their doctrine.
- It has been established that the properties on which meetings were held to plan, coordinate, pass along instructions from above, evaluate actions, render accounts, and for political ideological indoctrination are the following:
  - The building owned by María Elena Loayza-Tamayo, alias 'Rita,' where Nataly Mercedes Salas-Morales, alias 'Cristina,' and Vilma Ulda-Antaurco, alias 'Mónica' lived clandestinely...

75. The accused was bound over for trial by the Forty-third Criminal Court of Lima on October 8, 1993, on the basis of the same Expanded Police Report. The pertinent part of that order maintained that

there being evidence of the commission of the crime of terrorism by the aforementioned defendants; accused of being members of the Peruvian Communist Party -Shining Path- who use terrorist methods for attaining their objectives ...

The same order required DINCOTE to remit the documents, police statements, and attachments to the aforementioned police report, including the statements by Ms. María Elena Loayza-Tamayo, the notification of her arrest, her civil record, the official documentation concerning her domicile, and the documents seized there.

76. The Court deems that in the instant case, Ms. María Elena Loayza-Tamayo was acquitted of the crime of treason in the military jurisdiction, not only because of the technical acceptance of the word "acquittal," but also because the military court, instead of declaring itself to lack jurisdiction, took cognizance of the facts, circumstances and evidence relating to the alleged acts, evaluated them, and ruled to acquit her.

77. In the light of the foregoing, the Court finds that the Peruvian State violated Article 8(4) of the American Convention with Ms. María Elena Loayza-Tamayo's trial in the civil jurisdiction for the same facts of which she had been acquitted in the military jurisdiction.

#### XVI.

78. The Commission requested the Court to find that the State violated Article 51(2) of the Convention by refusing to "comply with the recommendations made by the Commission."

79. The Court has previously stated that, in accordance with the stipulation regarding interpretation contained in Article 31(1) of the Vienna Convention on the Law of Treaties, the term "recommendations" used by the American Convention, should be interpreted to conform to its ordinary meaning (Caballero Delgado and Santana Case, Judgment of December 8, 1995. Series C No. 22, para. 67, and Genie Lacayo Case, Judgment of January 29, 1997. Series C No. 30, para. 93).

80. However, in accordance with the principle of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to apply with the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American States, whose function is "to promote the observance and defense of human rights" in the hemisphere (OAS Charter, Articles 52 and 111).

81. Likewise, Article 33 of the American Convention states that the Inter-American Commission is, as the Court, competent "with respect to matters relating to the fulfillment of the commitments made by the State Parties", which means that by ratifying said Convention, States Parties engage themselves to apply the recommendations made by the Commission in its reports.

82. With respect to this matter, the Court is of the opinion that it cannot decide whether article 51(2) of the Convention was violated or not in a case which, like the present one, has been submitted before the Court, because the report established in the above-mentioned Article does not exist.

#### XVII.

83. In its application, the Commission requested that the Court order Peru to repair "in full María Elena Loayza-Tamayo for the grave harm --material and moral-- suffered by her" and to order her "immediate release"

Article 63(1) of the American Convention reads as follows:

[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be insured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure

or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

84. As a consequence of the violation of the rights enshrined in the Convention, particularly the prohibition of double jeopardy, to the detriment of Ms. María Elena Loayza-Tamayo, and pursuant to the aforementioned article, the Court considers that the State of Peru must, in accordance with its domestic legislation, order the release of Ms. María Elena Loayza-Tamayo within a reasonable time.

85. With respect to other reparations, the Court will require sufficient information and evidence, for which purpose its orders that the appropriate stage of the procedure be initiated, and, to this end, commissions its President to adopt in due course such measures as may be necessary.

### XVIII.

Now, therefore,

THE COURT,

DECIDES:

unanimously,

1. That the State of Peru violated, to the detriment of María Elena Loayza-Tamayo, the Right to Personal Liberty recognized in Article 7 of the American Convention on Human Rights, in relation to Articles 25 and 1(1) thereof.

unanimously,

2. That the State of Peru violated, to the detriment of María Elena Loayza-Tamayo, the right to Humane Treatment recognized in Article 5 of the American Convention on Human Rights, in relation to Article 1(1) thereof.

unanimously,

3. That the State of Peru violated, to the detriment of María Elena Loayza-Tamayo, the Judicial guarantees established in Article 8(1) and (2) of the American Convention on Human Rights, in relation to Articles 25 and 1(1) thereof, on the terms set forth in this Judgment.

by six votes to one,

4. That the State of Peru violated, to the detriment of María Elena Loayza-Tamayo, the Judicial Guarantees established in Article 8(4) of the American Convention on Human Rights, in relation to Article 1(1) thereof.



Judge Alejandro Montiel-Argüello dissenting.

by six votes to one,

5. To order the State of Peru to release María Elena Loayza-Tamayo within a reasonable time, on the terms set forth in paragraph 84 of this Judgment.

Judge Alejandro Montiel-Argüello dissenting.

unanimously,

6. That the State of Peru is obliged to pay fair compensation to the victim and her next-of-kin and to reimburse them for any expenses they may have incurred in their representations before the Peruvian authorities in connection with this process, for which purpose the corresponding proceeding remains open.

Judge Montiel-Argüello informed the Court of his Dissenting Opinion, and Judge Cançado and Judge Jackman of their Joint Concurring Opinion, both of which are attached to this Judgment.

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on this seventeenth day of September, 1997.

Hernán Salgado-Pesantes  
President

Antônio A. Cançado Trindade  
Héctor Fix-Zamudio  
Alejandro Montiel-Argüello  
Máximo Pacheco-Gómez  
Oliver Jackman  
Alirio Abreu-Burelli

Manuel E. Ventura-Robles  
Secretary

Read at a public session at the seat of the Court in San Jose, Costa Rica, on this twentieth day of November, 1997.

So ordered,

Hernán Salgado-Pesantes  
President

Manuel E. Ventura-Robles  
Secretary

## DISSENTING OPINION OF JUDGE MONTIEL-ARGÜELLO

1. I am dissatisfied with some of the assertions, assessments, and arguments made in the Judgment in so far as they concern violations of the American Convention; although, I consider it unnecessary to enter into each one in detail in such a complex case, except when they lead to conclusions contrary to those that have been approved.

2. I voted in favor of all the operative paragraphs, save those relating to the double jeopardy of Ms. María Elena Loayza-Tamayo (Article 8(4) of the Convention) and to the order for her release. The reasons that induced me to vote against the decision of the Court on those two points are explained below.

3. While it is true that the judgment delivered by the Plenary Court of the Special Supreme Military Tribunal on September 24, 1993, upheld María Elena Loayza's acquittal of the crime of Treason, that phrase cannot be interpreted literally and out of context.

4. If the phrase had been used to signify that the accused had not committed the acts for which she was tried in the military courts, it would constitute a trial that would impede any subsequent trial in the civil jurisdiction.

5. While it is also true that the aforesaid judgment does not explicitly state the grounds on which she was "acquitted," they may be easily deduced from the remainder of the principal clause containing the word "acquittal."

6. Indeed, the remainder of the operative sentence reads as follows:

María Elena Loayza-Tamayo is acquitted of the crime of Treason, and there being evidence of the commission of the crime of terrorism, orders the case file to be remitted to the civil jurisdiction, and the defendant to be placed in the custody of the competent authority.

7. It is clear from the above that what the Military Tribunal decided in its verdict was not that María Elena Loayza-Tamayo had not committed the acts attributed to her, but that those acts did not constitute the crime of Treason and that the tribunal lacked jurisdiction to try the crime of terrorism, which was the province of other courts.

8. The fact that in other cases the courts relinquished jurisdiction, which would be technically correct, does not alter the interpretation that must be given to its ruling in the instant Case. Nor is that interpretation altered by the fact that the ruling found that there was "no civil liability," since that, too, would require that the alleged acts do not fall within the jurisdiction of the court.

9. In the light of the foregoing, the military courts cannot be said to have tried María Elena Loayza-Tamayo, but rather, merely provided a juridical classification of the acts imputed to her, and, finding that they did not constitute the crime which it had jurisdiction to try, refrained from so doing and remitted the file to the civil courts which did have that jurisdiction.

10. The fact that the case was tried in the civil courts, which found the defendant guilty of the crime of terrorism, does not constitute double jeopardy or a violation of the Convention.

11. With regard to the order for María Elena Loayza-Tamayo's release, the Court has used a somewhat obscure formula equivalent to an order acquitting the defendant, on the ground of violations of rights enshrined in the Convention, particularly the prohibition of double jeopardy. Whatever the defects of a case, they may give rise to its annulment by a superior instance, but not to the defendant's acquittal. Other considerations can be invoked as far as double jeopardy is concerned, but I consider it unnecessary to do so since, in my view, that violation did not occur.

Alejandro Montiel-Argüello

Judge

Manuel E. Ventura-Robles

Secretary

#### JOINT CONCURRING OPINION OF JUDGES CANÇADO TRINDADE AND JACKMAN

We have voted in favour of operative paragraph 3 of the present Judgment, but we feel obliged to place on record our understanding of the scope of Article 8(1) of the American Convention on Human Rights as considered by the Court in the circumstances of the present case Loayza Tamayo. On the ground that the Peruvian military tribunals found Ms. María Elena Loayza-Tamayo not guilty of the charges brought against her, the Court has deemed it unnecessary to make a pronouncement on the argument raised by the Inter-American Commission on Human Rights to the effect that these tribunals lack the independence and impartiality that is required by Article 8(1) of the Convention.

While it is true that, in the present case, those tribunals did absolve Ms. Loayza-Tamayo, we are of the opinion that special military tribunals composed of military personnel appointed by the Executive Power and subject to the dictates of military discipline, assuming a function which belongs to the Judicial Power, endowed with jurisdiction to judge not only the military but civilians as well, and - as in the present case - rendering judgments for which no reasons are given, do not meet the standards of independence and impartiality imposed by Article 8(1) of the American Convention, as an essential element of the concept of due process.

Antônio A. Cançado Trindade

Judge

Oliver Jackman

Judge

Manuel E. Ventura-Robles

Secretary