TSO#16

PN-ABZ-345

91963

REPORT

OF

THE COMMISSION OF INTERNATIONAL JURISTS

ON

THE ADMINISTRATION OF JUSTICE IN PERU

November 30, 1993

A

REPORT

OF

THE COMMISSION OF INTERNATIONAL JURISTS

ON

THE ADMINISTRATION OF JUSTICE IN PERU

B

TABLE OF CONTENTS

PREFACE 1

CHAPTER I 3

SOURCES AND STANDARDS FOR EVALUATING
JUDICIAL INDEPENDENCE AND DUE PROCESS RIGHTS IN PERU 3
I. INTRODUCTION 3
II. METHODOLOGY 6
A. INTERNATIONAL AGREEMENTS AND DECLARATIONS 6
B. STANDARDS APPLICABLE TO THE INDEPENDENCE AND PROTECTION OF JUDGES AND LAWYERS 11

CHAPTER II 14

THE CRIMES OF TERRORISM AND TREASON
UNDER PERUVIAN LAW 14
I. INTRODUCTION 14
II. A COMPARISON OF ANTI-TERRORISM LAWS 14
A. Italian Law 14
B. Spanish Law 16
C. German Law 18
D. French Law 19
III. PERU'S ANTI-TERRORISM LEGISLATION 21
A. The Crime of Terrorism 21
B. The Crime of Treason 23

CHAPTER III 25

PROCEDURES APPLICABLE TO THE INVESTIGATION
AND TRIAL OF THE CRIME OF TERRORISM 25
I. PRELIMINARY CONSIDERATIONS 25
II. APPLICABLE STANDARDS GOVERNING JUDICIAL INDEPENDENCE AND IMPARTIALITY 28
III. THE INDEPENDENCE OF PERU'S CIVILIAN JUDICIARY AFTER APRIL 5, 1992 29
IV. DUE PROCESS ISSUES ASSOCIATED WITH TERRORISM AND RELATED OFFENSES 30
A. Detention and Pre-Trial Investigation Procedures 30
B. Judicial Procedures for the Crime of Terrorism 31
C. Trials Before Faceless Courts 32
D. Appeal Procedures 33

CHAPTER IV 35

C

I. PRELIMINARY CONSIDERATIONS 35
II. RELEVANT STANDARDS ON JUDICIAL INDEPENDENCE AND IMPARTIALITY 36
III. PRE-TRIAL INVESTIGATION OF TREASON SUSPECTS 39
IV. TRIAL AND APPEAL PROCEDURES BEFORE MILITARY TRIBUNALS 39
V. OTHER CONCERNS RELATED TO THE TERRORISM AND TREASON LAWS 41

CHAPTER V 42

THE RECENTLY APPROVED NEW CONSTITUTION 42

CHAPTER VI 47

EQUAL PROTECTION AND APPLICATION OF THE LAW 47

CHAPTER VII 49

SUGGESTIONS 49

Appendix 1 The Universal Declaration of Human Rights 53

Appendix 2 American Declaration of the Rights and Duties of Man 56

Appendix 3 International Covenant on Civil and Political Rights 59

Appendix 4 American Convention on Human Rights 67

Appendix 5 Protocol II Additional to the 1949 Geneva Conventions 81

Appendix 6 United Nations Basic Principles on the Independence of the Judiciary 93

Appendix 7 United Nations Basic Principles on the Role of Lawyers 96

Appendix 8 Draft Universal Declaration on the Independence of Justice 102

Appendix 9 International Bar Association's Minimum Standards of Judicial Independence . . 121

Appendix 10 The Paris Minimum Standards of Human Rights Norms
in a State of Emergency 127

PREFACE

As a result of an understanding between the government of the United States of America and the government of Peru, a Commission of International Jurists ("Commission") visited Peru from September 7 to 17, 1993 to review key features and projected reforms of the justice system in Peru. The members of the Commission were:

Leon Carlos Arslanian. A lawyer in private practice in Buenos Aires, Dr. Arslanian was from 1991 to 1993 Argentina's Minister of Justice. In 1964, he became a member of Argentina's justice branch, from which he retired as a criminal appellate court judge in 1988. During his career on the bench, he served as Chief Judge of the Federal Appellate Court which prosecuted members of the military juntas accused of crimes committed during the period of de facto military rule in Argentina.

Robert Kogod Goldman. A Professor of Law and Louis C. James Scholar at the Washington College of Law of the American University in Washington, D.C., Professor Goldman is also co-director of the Law School's Center for Human Rights and Humanitarian Law and Acting Director of the International Legal Studies Program. He is a member of the Board of Directors of numerous United States and European based non-governmental organizations and, since 1977, has participated in over twenty human rights related missions, mostly in Latin America. Professor Goldman was designated the Commission's chairman.

Ferdinando Imposimato. A member of the Italian Congress for the past seven years, Dr. Imposimato served as a Senator from 1987 to 1992 and is now a member of the Chamber of Deputies. He presently serves on both the Anti-Mafia and Justice Commissions of the Congress. From 1964 to 1986, he was a criminal court judge, during which time he accumulated unique expertise in prosecuting persons accused of terrorist acts. In 1990, he traveled to Peru on an international mission to assist efforts to strengthen Peru's judicial system.

Jose Raffucci. A Commander in the United States Navy and lawyer with membership in the Puerto Rico and District of Columbia Bar Associations, Cdr. Raffucci is presently the head of Base Rights Negotiation and Foreign Criminal Jurisdiction at the International Law Division of the Office of the Judge Advocate General of the Navy at the Pentagon. He is a specialist in the law of armed conflict and military justice systems and has extensive practical experience with the legal systems of Europe, Central America and South America. Previously he was Deputy Legal Advisor on international law for the Commander in Chief, United States Southern Command in Panama and the Command, United States Naval Activities in Spain.

* * *

In conducting their review, the Commission was requested to evaluate all legal measures and procedures presently in force affecting the independence of the Peruvian judiciary and to determine the extent to which defendants are accorded basic due process rights, particularly in the case of persons prosecuted by "faceless" civilian courts and "faceless" military tribunals for the crimes of terrorism and treason, respectively.

The Commission was also asked to study the proposed new Constitution to determine the manner in which it addresses the concept of judicial independence and safeguards due process rights. It was agreed that the Commission would prepare a written report to be submitted to the

governments of the United States and Peru which would set forth its findings and make suggestions regarding changes in the legal framework, practices and/or conditions in Peru that, in the Commission's opinion, limit judicial independence and the exercise of due process rights in contravention of Peru's international obligations.*

* The Commisssion's report addresses only those legal arrangements in effect in Peru from April 6, 1992 to November 15, 1993.

CHAPTER I
SOURCES AND STANDARDS FOR EVALUATING JUDICIAL INDEPENDENCE AND DUE PROCESS RIGHTS IN PERU

I. INTRODUCTION

At the outset, we wish to emphasize that, although our mission was funded by an agency of the United States Government, we pursued our work with total independence in our individual capacity as jurists. We were, in short, free actors constrained only by the terms of our mandate.

We also think it appropriate to note that at our first meeting in Lima we agreed that, since ours was a collaboration of equals, if any member disagreed with the content of this report, he could prepare a statement of his own views which would be published as part of the report. Since there was no dissenter, this report, to which all members of the Commission contributed, states our unanimous findings, conclusions and suggestions.

While in Peru, we held meetings with members of the Peruvian government, representatives of non-governmental organizations and other persons with knowledge about the administration of justice in Peru. On the government side, we met with the Prime Minister, Alfonso Bustamante, the Minister of Justice, Fernando Vega, the Minister of the Economy, Jorge Camet, the Minister of the Interior, General Juan Briones, the Attorney General, Blanca Nélida Colán, the President of the Supreme Court of Justice, Luis Serpa, the Special Human Rights Prosecutor, Clodomiro Chavez, the Senior Prosecutor, Lima District, Juan Chill, the State's Attorney for Terrorism, Daniel Espichán, the General Manager of the Judicial Branch, Emilio Flores, the President of the Supreme Council of Military Justice, Vice-Admiral Jorge Duboc, the Chairman of the Congress' Constitution Committee, Carlos Torres y Torres Lara, and the Chairman of the Congress', Justice Committee, Cesar Fernandez Arce.

We also met with the President of Lima's Bar Association, Jorge Avendaño, representatives of the National Coordinating Committee of Human Rights (*Coordinadora Nacional*) and the Andean Commission of Jurists, as well as with several constitutional and criminal law scholars.

During our visit, we received every courtesy from and the full cooperation of the Peruvian government which greatly facilitated the carrying out of our mission. We are particularly indebted to Dr. Cesar San Martin, Dr. Manuel Balarezo Gamarra, and Dr. Luis Vargas Valdivia, who were designated by the Minister of Justice as our liaisons, and to Dra. Maria Soledad Gara-Gorri and Dra. Ana G. Reategui Napuri, who also assisted us with our official meetings.

* * *

In our discussions with representatives of the Peruvian government, we have sought to establish a fruitful dialogue based on mutual understanding and respect for divergent views. Where we have identified problems and deficiencies in the justice system, we have not sought to condemn. Rather, we have tried to be constructive by suggesting possible solutions. Our work, moreover, has not been pursued without a keen appreciation of the very difficult and tragic situation which has engulfed Peru for more than twelve years and which has exacted a heavy toll in human life, suffering and treasure.

We strongly condemn the use of indiscriminate violence by The Shining Path (Sendero Luminoso) and by any other person or group, be they private actors or state agents, whose purpose is to terrorize and intimidate the peaceable population. The government of Peru clearly has the legal right to defend itself from violent overthrow and, indeed, a duty to maintain public order and

ensure the physical safety of its citizenry. We firmly believe that the government must act forcefully and decisively against and seek out and bring to justice the perpetrators of terrorist and other illicit acts. However, as we indicated to Peruvian authorities, the government does not have unlimited license in its choice of means and methods to quell dissident groups and maintain public order. Instead, it is duty bound to always act within the limitations and prohibitions established in applicable rules of law.

Before discussing the legal standards which guided us in our work, we think it useful to clarify our views on the nature of the ongoing conflict in Peru. This is particularly important since we detected in our discussions, primarily with Peruvian military personnel, what we regard as a basic misunderstanding of the relevance and applicability of international humanitarian law, i.e., the law of armed conflict, to the conflict in Peru. Moreover, this misunderstanding extended to an unwarranted apprehension about the legal effects that ensue from that law's application to the hostilities. For example, these officials, on the one hand, would vigorously assert that the country was engaged in an "internal" war, but, on the other, would argue implicitly that since the enemy were mere criminals and terrorists, the situation was not governed by humanitarian law.

We disagree with this position and believe without question that a non-international, i.e., internal, armed conflict is underway in Peru and, as such, it is directly governed by the terms of Article 3 common to the four 1949 Geneva Conventions ("Article 3"), to which Peru is a State Party.

It is important to understand that the existence of such a conflict does not depend on the highly subjective determinations of the parties to the conflict, nor on the tactics or methods of combat, be they illegal or not, employed by either or both parties. Rather, the question, which is essentially factual or objective in nature, is whether the level of violence meets Article 3's threshold, in which case its provisions automatically apply to the armed conflict. In this regard, a Commission of Experts convened by the International Committee of the Red Cross made the following pertinent observation:

> The existence of an armed conflict is undeniable, in the sense of Article 3, if hostile action against a lawful government assumes a collective character and a minimum of organization.[1]

In fact and practice, Article 3 typically applies to low intensity, armed confrontations between a relatively organized, armed dissident group(s) and governmental armed forces which occur exclusively within the territory of a particular state. This accurately depicts the situation that has existed in Peru for at least the past 10 years.

Article 3 is virtually a convention within a convention since it is the only provision of the Geneva Conventions that directly applies to internal armed conflicts. Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1) Persons taking no active part in the hostilities, including members of armed

---

[1] International Committee of the Red Cross, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict: Report Submitted to the XXIst Conference of The Red Cross, Istanbul, 1969, at p. 99.

forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b) taking of hostages;
c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 3's purpose is to have certain minimum legal standards apply during internal armed conflicts for the protection of persons who do not, or no longer, take an active part in the hostilities. Persons entitled to Article 3's mandatory protection include members of both government and dissident forces who surrender, are found *hors de combat*, or otherwise are captured by the other side. Individual civilians are similarly covered by Article 3's safeguards when they are captured by or subjected to the power of a party to the conflict, even if they had fought for the opposing party, or <u>indirectly</u> participated in the hostilities by providing either party with food or other logistical support. Furthermore, each of these persons must be accorded humane treatment without adverse distinction.[2]

Since, as noted, Article 3 is the sole provision in the Geneva Conventions governing internal conflicts, the parties to such conflicts are <u>not</u> legally required to implement, enforce, or comply with the highly developed protections of the conventions' other articles that apply only to international armed conflicts.

Consequently, the government of Peru, for example, is <u>not</u> obliged to accord its armed opponents prisoner of war status. Furthermore, application of Article 3 in no way prevents the Peruvian government from <u>punishing</u> these persons for the commission of crimes under its domestic laws. The government, accordingly, can try captured dissidents who kill government soldiers or civilians for murder, sedition and their other violent acts. Similarly, civilians providing indirect support to dissident forces are subject to prosecution by the government for giving aid and comfort

---

[2] Unlike human rights law, which generally only applies to a government and its agents, the mandatory provisions of Article 3 expressly bind all parties to the conflict, i.e., government and dissident forces. Moreover, the obligation to apply Article 3 is absolute for both parties and independent of the obligation of the other party. Thus, a breach of Article 3 by one party, such as the use of terrorism as a method of combat, cannot be invoked by the other party as grounds for its non-compliance with the mandatory provisions of the article. *See generally*, Vienna Convention on The Laws of Treaties, Art. 60.

to the enemy. However, as we subsequently indicate in this report, the trials of all these persons must be conducted, without exception, in accordance with the non-derogable standards set forth in Article 3 and other applicable rules.

We think it is important to dispel any notion that application of Article 3 to the internal armed conflict in Peru can be interpreted as recognition of the dissident groups' belligerence or otherwise as conferring legitimacy on the "cause" for which these groups have taken up arms. Paragraph 2 of Article 3 unequivocally obviates any such interpretations by stating "the application of the proceeding provisions [of Article 3] shall not affect the legal status of the Parties to the conflict."

It is also worth pointing out that application of Article 3 does not, as a practical matter, impose additional burdens on, or disadvantage the government of Peru vis-à-vis dissident groups. In essence, Article 3 basically requires the government to do, in large measure, what it is already legally obliged to do under other international instruments to which it is a party and whose purpose is to protect human life and dignity.

Finally, since armed conflict is never a permanent state or an end in itself, we believe that compliance with Article 3's humanitarian standards by all the parties to the armed conflict in Peru will facilitate the eventual restoration of peace and help bind up the wounds of the nation.

II. METHODOLOGY

In evaluating the independence of the judiciary and due process rights, we have not held the government of Peru to "idealized" standards, or, for that matter, to our own notions or predilections concerning the proper administration of justice.

On the contrary, our point of reference has been those standards and rules applicable to defendants' rights and judicial independence that are mandated in universal or regional international agreements freely entered into by Peru and, where relevant, other authoritative principles defining the independence and roles of judges and lawyers.

A. INTERNATIONAL AGREEMENTS AND DECLARATIONS

As a United Nations member state, Peru is obliged by Articles 55 and 56 of the United Nations Charter to "promote universal respect for, and observance of, human rights and fundamental freedoms for all. . . ." These clauses mark the modern foundation of the international law of human rights, and their obligatory character has been authoritatively confirmed by the International Court of Justice.[3]

While these articles do not specify or define "human rights and fundamental freedoms," the 1948 Universal Declaration of Human Rights[4] ("Universal Declaration") is today widely recognized as interpreting and being declaratory of a United Nations member state's obligations under the

---

[3] *See* Barcelona Traction, Light & Power Co., Ltd. (New Application) (Belg. v. Spain), 1970 International Court of Justice 4 (Judgment of Feb. 5) (referring to the "basic rights of the human person"); Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 International Court of Justice 16, 57 (Advisory Opinion of June 21) (stating, in an advisory opinion of the Court, that the "denial [by South Africa] of fundamental human rights is a flagrant violation of the purposes and principles of the Charter").

[4] A copy of the Universal Declaration is attached as Appendix 1.

Charter. Importantly, Articles 10[5] and 11[6] of the Universal Declaration enshrine the right to a fair trial by a competent, independent and impartial tribunal established by law as a fundamental right of all persons.

Further, by virtue of its being a member of the Organization of American States (OAS), Peru is also required to uphold the basic individual rights and guarantees proclaimed in the 1948 American Declaration of the Rights and Duties of Man ("American Declaration").[7] The right to a fair trial is similarly guaranteed in Article XXVI of the American Declaration.[8]

In addition to these constitutive instruments and declarations, Peru has ratified the International Covenant on Civil and Political Rights ("International Covenant")[9] and its Optional Protocol and the American Convention on Human Rights ("American Convention").[10] By so doing, Peru assumed a solemn duty toward other State Parties and particularly toward its own inhabitants to respect and to ensure the free exercise of rights guaranteed in both instruments. Article 105 of Peru's 1979

---

[5] Article 10 states: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.

[6] Article 11 states: (1) Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense. (2) No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.

[7] *See* Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, 1989 Inter-Am. Ct. of Human Rights 49, paragraphs 43 & 44 (Advisory Opinion of July 14, OC-10/89) (declaring that the American Declaration ". . . is the text that defines the human rights referred to in the [OAS] Charter" . . . and that ". . . the Charter of the [OAS] . . . cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration".) A copy of the American Declaration is attached as Appendix 2.

[8] Article XXVI declares: Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

[9] A copy of the International Covenant is attached as Appendix 3.

[10] A copy of the American Convention is attached as Appendix 4. Peru ratified this Convention on July 28, 1978 and purportedly "re-ratified" it by virtue of Transitory Provision 16 of its 1979 Constitution which entered into force on July 12, 1979.

Constitution accords both treaties the rank of constitutional law. Article 14[11] and 15[12] of the

---

[11] Article 14 states: (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

(2) Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality;

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

(4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

(6) When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

(7) No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Universal Covenant and Articles 8[13] and 9[14] of the American Convention expand on the more

---

[12] Article 15 provides: (1) No one shall be held guilty of any criminal offense on account of any act of omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

[13] Article 8 states:

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

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

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

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

generally phrased fair trial guarantees in the Universal and American Declarations, respectively, by listing a core of minimum due process rights which must be accorded defendants in criminal proceedings. Apart from trial by an independent and impartial court, these rights include the presumption of innocence, the right to counsel and freedom from *ex post facto* criminal law.

These basic fair trial rights, which are mandated in instruments essentially designed to apply during peacetime, have their counterparts in other conventions, also ratified by Peru, but whose field of application is during situations of armed conflict. In this connection, Paragraph 1(d) of common Article 3 absolutely prohibits the parties to internal armed conflicts from the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees, which are recognized as indispensable by civilized people. (Emphasis supplied).

Any ambiguity concerning common Article 3's allusion to "judicial guarantees . . . recognized as indispensable by civilized people," was effectively laid to rest with the elaboration of the 1977 Protocol additional to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II"),[15] to which Peru is a State Party.

Article 6 of Protocol II lays down judicial guarantees that both interpret and clarify the prohibition against summary conviction without fair trial found in common Article 3, paragraph 1(d). Accordingly, the reference in common Article 3 to indispensable judicial guarantees should be understood to mean courts "offering the essential guarantees of independence and impartiality" as specified in Article 6 of Protocol II. It is also significant that most of the other due process rights enumerated in Article 6 are patterned on or are near verbatim transcriptions of the fair trial provisions in the International Covenant which, in turn, were also the models for the fair trial

---

[14] Article 9 provides: No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

[15] United Nations Document A/32/144, Annex I, II, ratified by Peru only July 14, 1989 (a copy of which is attached as Appendix 5). Article 1, paragraph 1 of Protocol II limits that instrument's application to a non-international armed conflict, "which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

Protocol II's threshold of application, however, is both different from and clearly above that of article 3. Protocol II introduces objective qualifications not found in Article 3, such as the requirements that a state party's armed forces must participate in the conflict and that dissident armed forces or other organized armed groups must exercise control over a part of its territory. These criteria are principally designed to limit the application of Protocol II to serious cases of rebellion. Thus, the objective conditions that must be satisfied to trigger the Protocol's application contemplate a situation of civil war essentially comparable to a state of belligerency under customary international law.

Although Protocol II does not directly govern the armed conflict in Peru, its fair trial provision, as we explain *infra*, is relevant to that conflict.

provisions in the American Convention. Importantly and in sharp contrast to the International Covenant and the American Convention, the fair trial standards in common Article 3 and Article 6 of Protocol II are not subject to derogation, i.e., suspension, in whole or part, under any circumstance.

We think it important to note that it is well settled that a state's international legal obligations are superior to any obligations it may have under its domestic law. Thus, Peru cannot invoke its own contrary domestic law as an excuse for its non-compliance with international law. With regard to international agreements, this principle is codified in Article 27 of the Vienna Convention on the Law of Treaties, which states, in pertinent part: "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . ." This principle has been repeatedly invoked and affirmed in decisions of the Permanent Court of International Justice and of the International Court of Justice, as well as those of other international tribunals.[16]

Another related and basic principle of international law directly binding on Peru is the customary law doctrine of *pacta sunt servanda*, embodied in Article 26 of the Vienna Convention. It states that "every international agreement in force is binding upon the parties to it and must be performed by them in good faith." This principle implicitly reinforces the doctrine that a state's treaty obligations are unaffected by changes, whether by legislation or referendum, in its domestic law.

B. Standards Applicable to the Independence and Protection of Judges and Lawyers

We were also guided in our work by several instruments and documents, all of which were either approved by the United Nations General Assembly, United Nations sponsored conferences and/or by respected organizations of judges and lawyers, that set forth authoritative standards for defining and protecting the independence of judges and other members of the legal profession. These include the United Nations Basic Principles on the Independence of the Judiciary,[17] the United Nations Basic Principles on the Role of Lawyers,[18] the United Nations Draft Universal

---

[16] For example, the Permanent Court of International Justice in its 1930 advisory opinion in the Greco-Bulgarian Communities case stated: "It is a generally accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty." The permanent Court has also ruled that this same principle applies even when a state invokes its constitution "with a view to evading obligations incumbent upon it under international law or treaties in force."

[17] These principles were "endorsed" by the United Nations General Assembly in General Assembly Resolution 40/32, 29 Nov. 1985 (a copy is attached as Appendix 6).

[18] These principles on the role of lawyers were adopted by consensus at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba in September 1990. By General Assembly Resolution 45/66 of 18 Dec. 1990, the General Assembly "welcomed these principles and invited governments to respect them and to take these into account within the framework of their national legislation and practice." (a copy is attached as Appendix 7)

Declaration on the Independence of Justice,[19] and the International Bar Association's[20] Minimum Standards of Judicial Independence.[21]

These documents, whose provisions we cite throughout this report, are relevant sources for interpreting the meaning and practical application of the fair trial rights enumerated in treaties ratified by Peru. The collective thrust of these principles and guidelines is to underscore that the enjoyment and exercise of basic rights in any society are best secured and protected by the existence of a judiciary which is personally, institutionally and functionally independent from the political branches of government. They also confirm that such independence is the best guarantor of impartial justice.

However, they implicitly recognize that basic fair trial rights will be severely jeopardized, if not denied, unless defense counsel are free to perform their functions without external threats, pressure or intimidation. So fundamentally intertwined are these principles and guidelines with basic fair trial safeguards enshrined in universal and regional instruments that the United Nations Rapporteur on the Independence of the Judiciary and the Protection of Practicing Lawyers, Louis Joinet, regards them as declaratory of general principles of international law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.[22]

Given the number of binding international commitments entered into by Peru guaranteeing judicial independence and basic due process rights, we found Article 6 of Decree Law 25.418 of April 5, 1992, which sets out the objectives and goals of the newly created Government of Emergency and National Reconstruction, to be particularly relevant. It declares that the government ". . . ratifies and respects the treaties, covenants, pacts, agreements, contracts and other international commitments in effect and signed by the State of Peru." We have been mindful of this pledge during our conversations with Peruvian officials and in writing this report.

Finally, we would be remiss if we did not clearly state our views on the following subject. During our stay in Peru, virtually all persons, both within and outside of the government, expressed to us their dissatisfaction and frustration with the way justice was being administered by the regular judiciary before April 5, 1992. Their complaints most frequently centered on the long delays in judicial proceedings, the inability of legal professionals to perform efficiently and, especially, rampant corruption among judges and other judicial personnel. President Fujimori clearly seized on this popular discontent and loss of public confidence in the judicial system to justify, in part, his disruption of the nation's constitutional order on April 5, 1992 and his subsequent plans to "reform"

---

[19] The United Nations Commission on Human Rights by Resolution 1989/32 invited governments to take account of the principles in this draft declaration in implementing the United Nations Basic Principles on the Independence of the Judiciary (a copy is attached as Appendix 8).

[20] The International Bar Association ("IBA") is a federation of 124 Bar Associations and Law Societies from 69 countries, representing over 2.5 million lawyers.

[21] Adopted by the IBA at its Nineteenth Biennial Conference, held at New Delhi, India, October 1982 (a copy of which is attached as Appendix 9).

[22] *See* Joinet Report, prepared for the 43d Session of the Subcommission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub. 2/1991/30 of 25 June 1991, at p.5.

that system and its affiliated institutions.

The extraordinary low esteem enjoyed by the judiciary is not a particularly flattering reflection on either Peru's political parties or its legal establishment. The judiciary in Peru, as in many other American nations, has been historically the weakest of the three branches of government both by design and by neglect. The Executive and Legislature have had little interest in fostering a strong, genuinely independent judiciary with the financial resources and other means to effectively check arbitrary exercises of power and to protect individual rights from official abuse. Indeed, past governments rarely allocated to the judicial branch the 2% of the National budget as required by the Constitution.[23] Moreover, judicial appointments frequently have been and continue to be made not on the basis of legal qualifications, but on political affiliations and perceived loyalty to the party in power.

Judicial independence is not only comprised by inappropriate Executive and Legislative actions, but also by the personal corruption of judicial personnel and those who suborn them. As one observer writes "judicial independence ceases to exist when the quality of justice is dependent upon the wealth of the briber."[24]

We believe that Peru's legal establishment, as a whole, and, most particularly, its practicing bar bear a heavy responsibility for the judiciary's loss of prestige in the eyes of the public. As essential agents of the administration of justice, lawyers and their associations have a responsibility to uphold the dignity of the profession by, *inter alia*, investigating, denouncing and sanctioning those lawyers who, through bribery and other illegal and unethical means, have subverted the integrity of legal process. By its manifest omission, the bar itself has aided and abetted the corrupt activities of some of its members.

We therefore commend to Peru's bar and its members for their consideration and reflection the following provisions of Article 99 of the Draft Universal Declaration on the Independence of Justice, which address, *inter alia*, the duties and functions of bar associations:

(a) to promote and uphold the cause of justice, without fear or favor;
(b) to maintain the honor, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession; [and]
(c) to protect and defend the dignity and independence of the judiciary.

We do not think that popularly held perceptions about the administration of justice will be easily dispelled without major changes in Peru's existing legal and political cultures.

---

[23] *See* Article 145 of the 1979 Constitution. As we discuss *infra*, the proposed new Constitution eliminates any assigned allocation altogether.

[24] K. Rosenn, *The Protection of Judicial Independence in Latin America*, 22 BULLETIN OF THE INTERNATIONAL COMMISSION OF JURISTS 13, at 39 (1988).

CHAPTER II
THE CRIMES OF TERRORISM AND TREASON UNDER PERUVIAN LAW

I. INTRODUCTION

Whatever its causes and its ends, terrorism is a form of criminal behavior that demands a response. While experts in criminal policy can agree on this rather banal generality, there is much less agreement among them as to what kind of reaction is called for and how strong it should be, both nationally and internationally. The question of whether, and to what extent, the State should enact emergency laws suspending basic constitutional rights and guarantees to combat terrorism is a particularly contentious point. It is a given that the State must operate within the law. Even so, there are differences of approach. Some suggest a strong response that mobilizes the entire State arsenal, while others prefer a more measured response. This choice puts the lawmaker in a democratic society in a delicate position, since terrorism has increased the public's sense of vulnerability to crime. Moreover, authorities fear that relentless terrorist attacks could shake the very foundation of a democratic state.

The task of policing and suppressing the criminal activities of terrorists and armed dissident groups has tested criminal justice systems throughout Western Europe. Many of these countries were unprepared to deal with an ideology-based form of criminal behavior that was capable of compromising their courts' ability to function normally. The challenge has been how, consistent with the rule of law, to make measures as effective as they are legal and vice versa.

Before addressing Peru's anti-terrorism and treason laws, we think it useful to examine the chief characteristics of the anti-terrorism laws of four Western European countries that have experienced terrorist and/or political violence to illustrate how they have chosen to react to this phenomenon. These countries are Italy, Spain, Germany, and France.

Although we recognize that the socio-economic, political and historical scenarios differ in each of these countries, we believe that their legislative approaches might suggest ways for significantly improving upon Peru's existing anti-terrorism measures. However, we hasten to caution that our selection of these particular countries does not mean that we endorse or approve of all the measures they have adopted in responding to political and terrorist related violence. We are well aware that some of these measures are highly controversial and that others have been the subject of litigation before monitoring bodies established under universal and/or regional human rights instruments.

II. A COMPARISON OF ANTI-TERRORISM LAWS

A. Italian Law

Although Italian law does not make terrorism a crime, *per se*, it does make provision for common crimes committed for purposes of terrorism, such as, assassinating a magistrate or political figure or killing a police officer for terrorist ends. The law also provides for confederative crimes, such as operating as an armed group, subversive association and political conspiracy, and establishes penalties for their leaders, organizers and even members. A person may be tried and convicted for merely belonging to or having had some kind of affiliation with such an armed group, even though he may not have committed any specific criminal act.

The emergency laws in Italy addressing terrorism developed in two phases. In the first phase, from 1974 to 1981, the penalties for terrorist crimes became much more severe, but did not include the death penalty. For example, Law No. 492 of October 14, 1974 sanctioned new rules with

penalties for crimes committed with weapons of war or of a like nature. The law also made arrest obligatory in all cases of violent crimes.

Soon afterward, other laws were enacted which increased the powers of Judicial Police Forces to prevent serious crimes. Specifically, Law No. 152 of May 23, 1975 (Proposals for the Safety of Public Order) denied bail for serious crimes such as homicide, forming or participating in armed bands, and massacres, etc. Moreover, the Judicial Police for the first time were authorized to arrest persons suspected of committing crimes having a penalty of no less than six years. Another provision of this law authorized arrests, even for preventative purposes, without court order during police operations and in cases of violent crime or resistance to authority in general. However, such warrantless arrests must be based on a clear suspicion that the detainee may be in possession of firearms or explosives and are authorized only in those cases where it is impossible to obtain a court order because of the lack of time and the urgency of the matter.

Law No. 152 also prohibited persons while engaging in public demonstrations from using protective headgear which either completely or partially covers the face. The penalty for such an offense was set at one to six months confinement. Finally, the Law legitimated the use of firearms by public officials. Accordingly, such officials cannot be punished for using firearms when suppressing a violent act or overcoming resistance to authority.

By 1978, the taking of hostages for terrorist or subversive purposes was accorded a sentence of 25 to 30 years imprisonment under Law No. 59 (Trial Procedures and Penal Standards for the Repression of Serious Crimes). This law provided for an increase in the sentence if the perpetrator caused the death of the hostage, as well as when the purpose of the hostage taking was extortion.

Perhaps the most significant feature of Law No. 59 was the requirement that landlords notify the proper authorities, within 48 hours, of their renting, leasing, or allowing the use without payment to anyone, for a period of longer than one month, of a building or a part thereof for pleasure or other purposes. Such notification was deemed particularly useful for the identification of rental properties destined for underground purposes.

Article 1 of Law No. 625 of December 15, 1979 (Under Measures for the Defense of the Democratic Order and of the Public Safety) increased by one-half the sentence for a crime committed for the purpose of terrorism or subversion of the democratic order. This law also established incentives for the repentant criminal. It provided that a participant in such terrorist or subversive crimes who either disassociates himself from the crime, attempts to prevent the crime from occurring, or who seriously assists authorities in the capture of other participants could have his sentence reduced from life to 12 to 20 years imprisonment. Other sentences could be reduced by one-third to one-half.

In the second phase, from 1982 to 1986, additional incentives were created for the repentant criminal. New laws enabled a person convicted of a crime, even including homicide, to have his sentence reduced if he cooperates with the authorities in criminal investigations. The advantage derived by the criminal is proportionate to the amount and quality of the cooperation he provides to the police. The law stipulates in this regard:

- Two thirds of the sentence is reduced when the cooperation is especially instrumental in identifying those responsible for the crime or ascertaining the facts;
- One half of the sentence is reduced when the cooperation is average. The law also provides that the charges made by those cooperating or collaborating with the police may not be regarded as evidence unless and until they have been objectively proven.

When the purpose of the crime is terrorism, the preliminary inquiries are conducted by

specialized agencies of the State Police and the *carabineros*, who must have solid evidence against a person, such as his possession of the weapon used in the commission of a murder, before arresting him. The initial stage of the inquiry is conducted by a local prosecutor.

If the evidence of the crime(s) is obvious, the prosecutor refers the bill of indctment to the "Court of Assise" which consists of regular judges and a jury who try the case. It is relevant to note that in Italy there is no special criminal jurisdiction with special judges for terrorism related cases. If the investigation of these crime(s) proves to be particularly difficult, the prosecutor can refer the case to the examining magistrate who has jurisdiction in that territory. The magistrate can order the suspect's arrest if the evidence and clues strongly establish his culpability. During the examining phase, the suspect can be held in custody for up to six months before being remanded to the custody of the "Court of Assise."

During this time, the magistrate must undertake a variety of investigative activities, which almost invariably include expert testimony, ballistics tests, forensic identifications, fingerprint comparisons and identifications, questioning of suspects, inquiries abroad to ascertain the origin of the weapons used, as well as questioning witnesses and suspects.

Since 1988, however, when the accusatorial system was first introduced in Italy, these inquiries have been conducted by local prosecutors who have replaced examining magistrates. The prosecutor's decision to order an arrest is monitored by the judge assigned to the preliminary inquiry.

B. Spanish Law

Political violence, albeit terrorist or antiterrorist, has been one of those distinctive features of Spain's recent history that has profoundly affected its transition to democracy and has contributed to periods of great political instability, such as the *putsch* of February 23, 1981. The origins of this violence can be traced to the political demands (autonomy, self-determination, independence) of a sector of the population within Spain's Basque regions.

Spain's response to their violent activities has been similar to that of most other European countries facing a similar threat: a severe authoritarian reaction coupled with the enactment on December 20, 1983 of a Special Anti-Terrorist Statute. Specifically, this anti-terrorist measures curtailed or suspended fundamental rights relating to arrest and the inviolability of private communications and of the home, introduced new criminal offenses that carried stiffer sentences and made the prison system more rigorous. This statute combines three types of jurisdictional bases which give it a very broad sphere of application. These bases relate to persons, property and territory (Articles 1 and 2).

The 1983 law applies to persons who belong to armed groups or who are associated with terrorist or insurrectionist activities as defined by the list of criminal offenses in Article 1. These offenses include preparing, organizing, executing, cooperating with, provoking, and defending such activities, even when committed outside Spanish territory by Spanish citizens or foreigners who are active in groups outlawed in Spain, or who cooperate or collaborate with such groups.

Although the text of the law is not explicit on this point, it would appear contextually that the concept of terrorism is premised on the existence of some organized structure: a terrorist or subversive association or group with which the author of the crime has some association. Substantively, the 1983 Statute creates specific criminal offenses and establishes special rules or norms for crimes that are terrorism related. These rules abrogate parts of the general criminal law system, such as the extraterritorial application of criminal law and a two year time limitation on the legal effect of certain articles. The general rules on criminal responsibility, including certain mitigating circumstances and of the legal consequences of the crime, have also been similarly

affected by this legislation.

Under the heading "Crimes and Punishments," article 7 *et seq* of the Statute distinguishes several kinds of activities. It specifically criminalizes unlawful association, but, in this case, the crime carries a stiffer sentence than it does under the penal code. The main penalty for membership in a terrorist or insurgent organization or armed group and for aiding and abetting such groups is imprisonment for a period ranging from 6 years and 1 day to 12 years, with a fine of 150,000 to 750,000 pesetas.

This article, however, is not very clear about what constitutes a terrorist association since it speaks only of terrorist and subversive organizations or armed groups. However, the literature and interpretive jurisprudence have quite rightly reasoned that a temporary, unstructured association is not sufficient for Article 7 to apply; instead, it must be an organized, armed group dedicated to terrorist or subversive activities.

Article 9 of the Statute makes it a separate and specific crime to collaborate with terrorist or subversive groups or to aid and abet their activities. The penalties stipulated for the crime of terrorist association also apply to anyone who enlists, solicits or enables acts of collaboration that help a terrorist group or armed subversive group commit crimes of terrorism or accomplish their goals. This provision has been criticized for disregarding a cardinal principle of criminal law which recognizes that a distinction should be made among degrees of participation in the commission of a crime. Consequently, the penalty for aiding and abetting a crime is exactly the same as the penalty for the crime itself.

One of the most controversial provisions of this law is Article 10 makes public apology of proscribed activities a crime punishable with imprisonment and a fine. The provision's application, however, is entrusted to a judge who is authorized to shut down a newspaper, magazine, radio station, television station, etc. that published or disseminated the apology. Among the acts classified as apology are publicly praising or expressing approval of activities criminalized under the Statute, supporting or inciting insurrection or the commission of activities typical of a terrorist organization or armed or subversive group, or the acts of their members.

Article 6 of this Statute also provides that cooperating with the police ". . . in order to rejoin society" is an extenuating circumstance that can reduce the convicted person's sentence. Cooperation means renouncing the organization and confessing to the authorities. This can potentially lessen a sentence (by one or two degrees), while discounting the aggravating circumstances stipulated in the law. In cases of active cooperation, the penalty can be waived entirely (except in the case of those guilty of homicide or other serious crimes) if that active cooperation is especially instrumental in preventing the commission of a crime, identifying the guilty parties and neutralizing the organizations' activities. Spain's 1983 Statute, thus, is consistent with anti-terrorist legislation elsewhere in that it combines measures of increased repression with others that offer incentives to repentant terrorists.

In accordance with Spain's Constitution, the 1983 Statute permits, *inter alia*, the suspension of the right against arbitrary arrest of a person suspected of having committed a terrorist or law and order offense(s). The Parliament and the government must be informed every three months of when and to whom these measures have been applied and the results thereof. Suspects can be arrested and held in custody by Spanish state security forces without a court order. The Statute authorizes, if necessary for the investigation, their detention for as long as 7 days, well beyond the 72 hours stipulated in the Constitution. The security forces, however, must report this extended custody before the 72-hour period has expired to the competent judge who, in turn, must either confirm or deny the detention within the next 24 hours. Articles 14 and 15 elaborate upon this provision and authorize the judge to monitor the suspect's detention. Moreover, Article 16 of this

law permits State security forces without a court order to search a suspect's homes and seize anything that has some bearing on the crime. The Minister of the Interior or the Director of State Security must immediately notify the competent judge that such a search has been conducted. They also must specify the reasons for and the result of the search, as well as what, if anything, was seized.

Apart from the provisions in the 1983 Anti-Terrorist Statute that either restrict or suspend fundamental rights, Chapter III thereof contains provisions on court jurisdiction and procedures applicable to terrorism and law and order cases. Article 11 of the Statute authorizes the trial of such offenses by the Central Lower Court District and the National Court (the jurisdictions that replaced Franco's public law tribunal), which are special courts within the regular civilian court system that are located in Madrid. These courts, which have three magistrates, apply the emergency procedures set forth in the code of criminal procedure which requires them to render a verdict in terrorism cases within ninety days.

C. German Law

For over ten years, controlling terrorism has been a major factor in shaping (West) Germany's policy on crime. Since 1975, a number of laws have been enacted in response to the danger posed by terrorism. The most recent piece of anti-terrorist legislation is the *Gesetz zur Bekampfung des Terrorismus* ("StGE") of December 19, 1986. These laws have changed the face of German substantive criminal law, criminal procedure and the law governing execution of sentences. They also have touched on some aspects of administrative law, particularly police law.

There are now three types of terrorism-related crimes in Germany's substantive criminal law. The first are "traditional" crimes, such as homicide and other crimes against persons. But, when the perpetrator of the crime has a terrorist intent, the penalty is increased accordingly. In fact, the bulk of prosecutions against terrorists has involved these kinds of offenses.

The second type of crime is not directed solely at terrorists, but involves offenses designed to root out the causes of terrorist violence. These are offenses against law and order which criminalize certain conduct in order to suppress "verbal violence" in society. Article 130(a) of the German penal code, which was added with the introduction of 1986 anti-terrorism law, makes it a punishable offense to instigate violence in the printed media or by the spoken word in public demonstrations. It also makes "verbal violence," meaning fostering an atmosphere of violence, a punishable offense.

The third type of crime is a special crime of terrorism. Unlike their French counterparts, German lawmakers have created a specific type of organization-related crime. Under Article 179(a) STGE, an amendment to the 1986 law, it is a punishable offense to create a terrorist association. The association's purpose and activities are the criteria that determine whether or not it will be adjudged a terrorist organization. In other words, the association will be classified as a terrorist organization if it has committed certain crimes or serious offenses. Anyone who establishes or joins such an association can be imprisoned from 1 to 15 years. A lesser sentence is reserved for aiding and abetting or publicly espousing terrorism. Other instigators can be sentenced to no less than 3 years imprisonment.

The crime of creating a terrorist association is essentially an aggravated form of the crime of establishing a criminal organization (Article 129, StGB). An association is created when a group of three or more persons organizes for a certain period of time and pursues a common goal. What distinguishes, for example, co-authors of a crime or a group of criminals in the case of theft from an association is the degree of organization. The 1986 law also established incentives for repentant terrorists that entail reduced sentences, but these incentives are not nearly as generous as those

provided under Italian law.

In Germany the preliminary investigation of terrorism cases is not circumscribed by regional boundaries. Because of their seriousness, terrorist cases are one of few areas assigned to the Federal Bureau of Police in Wiesbaden, and the Federal Prosecutor at Karls-Ruhe is in charge of the inquiry. The Court of Appeals has jurisdiction in the trial itself. In addition, a jury trial is mandatory in all cases.

Many of the guarantees of detainees suspected of having committed terrorist crimes have been modified or weakened. For example, these detainees can be held under preventive arrest. When the crime is one of those listed in Article 129(a) StGB, certain restrictions have been introduced that curtail the right of defense. These restrictions are intended to prevent an alliance between the attorney and the accused and have resulted in changes in the prison system. Under the most far-reaching reform, introduced in 1977 by *Kontaktsperregesetz*, any contact between detainees suspected of or prisoners convicted of terrorist acts with persons outside the prison or jail was prohibited when the terrorist associations were deemed life-threatening. This prohibited contact also included verbal or written reports with defense attorneys. The rule, however, was later changed to enable the individual in custody or the convict to have an attorney appointed *ex officio* so that he would not be kept in complete isolation.

In theory, German policy toward crime has followed the school of thought which holds that terrorism is within the realm of "normal" criminal behavior, which perhaps explains why terrorists are not prosecuted on the specific grounds of crimes against the security of the State. However, the punishments for terrorist acts are more severe than those for ordinary crimes, and the rights of those accused of such acts have been restricted accordingly. Some observers fear that the severity of these measures will unleash a new wave of terrorist violence and argue that a more measured response on the part of the State is needed to prevent terrorists from winning grassroots sympathizers. These critics also believe that the measures selected for controlling terrorism have undermined the basic guarantees of the rule of law.

It is unquestionable that the direction of criminal policy in Germany has been changed by the imperative of controlling terrorism. As early as 1978, criminal policy, which had focused on getting prisoners released, began instead to place the accent on security. In the face of organized crime -- not just terrorists, but drug traffickers as well -- criminal policy began to explore what could be done to improve the tools used for criminal investigations and proceedings, such as undercover police, police plants, etc. Over time, the balance between procedural expediency and the rights of the accused has tipped in favor of the former, although the recent decisions of the Federal Constitutional Court may have slowed the drift in that direction. Surely other factors can explain this new trend in criminal policy. The shift is at least attributable in part to a disillusionment with the concept of rehabilitation. But, whatever the case, no one in Germany would dispute that terrorism has certainly been one of the catalysts for this change.

D. French Law

Under French law, terrorism is any assault upon the security of the State and embraces any action whose purpose is to imperil the stability of the State and the principles of democracy. While assaults upon the security of the State are well defined in the French penal code, the concept of terrorism is, in legal terms, unclear, since French law does not define it.

A terrorist act in French law manifests itself as a relatively serious attack on a person or thing (vandalism, kidnapping, hijacking) and is punishable under specific provisions in the penal code. What distinguishes a terrorist crime from other offenses under French law is that the act committed

is intended to create a climate of terror.[25] The concept of terrorism therefore involves two elements: an objective element, which is the act that can be classified according to some definition (vandalism, kidnapping, homicide, etc.), and a subjective element having to do with the terrorist intent. The criminal act must be part of an individual or collective undertaking of such proportions as to constitute a serious disturbance of the peace effected by means of intimidation and terror.

Given the structure of the French police, the investigation of terrorism crimes is largely the responsibility of a Paris-based specialized police agency. The examining phase of such crimes is undertaken by a specialized court whose jurisdiction is confined to the territory in which the terrorist act was committed. All persons accused of terrorist crimes are tried by a maximum security court in Paris composed of regular judges. The proceedings are scrupulous in their observance of fundamental principles of due process. All the court's decisions can be appealed to the Supreme Court, which is part of the ordinary justice system.

French law provides the following incentives to the repentant terrorist who cooperates with the authorities:

> Anyone who, having organized a crime of terrorism, informs the government or court authorities and thus prevents the commission of the crime and makes it possible to identify the guilty parties shall not be punished.
>
> Anyone who, having been the author of a terrorism crime or an accomplice thereto, informs the government or court authorities in time to prevent someone from being killed or injured and enables the authorities to identify those responsible, shall not be punished. (For example, someone places a time bomb in a public place but informs the authorities in time to save lives.)
>
> The established sentence will be reduced by half if the convicted party helps the police or court authorities ascertain the identity of the authors of crimes. The convicted party can benefit from this provision even if he committed crimes in which individuals have been killed or injured.

* * *

Despite their differences and varying degrees of harshness, the emergency legislation of these four European nations share certain common characteristics. The chief purpose of these laws is to defend and protect, not to destroy or weaken, these countries' democratic institutions. These measures have not otherwise altered these nations' constitutional systems of government nor affected the enjoyment of basic civil and political rights of their citizenry. In none of these countries are persons accused of terrorism tried by military courts or by anonymous judges. Instead, they are subject to the supervisory control of and are tried by competent civilian judges who are personally independent in every respect.

Moreover, despite efforts to guarantee the physical safety of these judges, some, particularly in

---

[25] *See*, Law No. 86-1020 of September 9, 1986, concerning the war on terrorism. Article 1. A title XV, which will follow title XIV of book IV of the Code of Criminal Procedure, is hereby introduced and shall be titled: "Offenses that are an individual or group effort to wreak havoc by means of intimidation or terror." Article 706-716 provides that "[w]hen they are part of an individual or group effort to wreak havoc by means of intimidation and terror, they shall be investigated and prosecuted according to the rules of this code, subject to the provisions of this title."

Italy, have themselves been the victims of terrorist attacks. Yet, even in the face of these despicable acts, none of these governments has placed a higher premium on a judge's life than they have on ensuring a defendant's right to a fair trial by an independent and impartial court. These Western European countries have recognized that a genuinely democratic society at times will have to pay a very high price for securing justice for all persons.

III. Peru's Anti-Terrorism Legislation

A. The Crime of Terrorism

Decree Law 25.475, of May 6, 1992 concerns the crime of terrorism and sets forth the procedures for the investigation and prosecution of terrorist related offenses. Article 2 of this decree defines the crime of terrorism as provoking, creating or maintaining anxiety, alarm and fear in the public or a sector thereof, making attempts against the life, body, health, freedom and safety of the individual or against property, against the security of public buildings, modes and channels of communication and transportation of any kind, electric towers and power lines, engine facilities or any other good or service by using arms, explosive materials or devices or any other means capable of inflicting damage or seriously disrupting the public tranquility or adversely affecting international relations or the security of society and the State.

The minimum punishment for any of these offenses is 20 years imprisonment. This crime is a more serious offense than that provided for in Article 319 of the penal code. This is because the new decree makes provoking, creating or sustaining a state of anxiety, alarm and fear in the public or a sector thereof a separate and discrete crime, whereas under the penal code these are simply the end results of other criminal offenses. Additionally, this Decree Law raises the minimum sentence from 10 to 20 years imprisonment.

Under Article 2 of Decree Law No. 25.475, the crime of terrorism subsumes criminal conduct involving offenses against persons and property which can be listed as follows:

a) unlawful attempts on life and physical safety;
b) unlawful attempts on the liberty and security of the individual;
c) unlawful assaults on property;
d) unlawful assaults on public and private installations;
e) unlawful assaults on modes of transportation and communication;
f) unlawful assaults on electric power facilities;
g) unlawful assaults on the public health; and
h) offenses against public tranquility.

The punishment specified in Peru's penal code for each of the above criminal offenses ranges anywhere from 2 to 4 years for petty theft or larceny (unlawful assault on property) to life imprisonment for homicide (an unlawful assault on life). However, this Decree Law makes the <u>same</u> penalty applicable to all of these offenses -- not less than 20 years imprisonment. By so doing, this measure over penalizes the varied offenses constituting the crime and is inconsistent with the basic due process principle that the punishment should fit the crime. It hardly seems just that the sanction for murder and assault-which under many legal systems, including Peru's, carries a penalty of life imprisonment-should be the same as the punishment for assaults on communications media and/or modes of transportation, a far less grievous offense.

Article 3 of Decree Law 25.475 draws distinctions among the perpetrators of terrorist related offenses with corresponding punishments as follows: a) leaders of terrorist organizations (life

imprisonment); b) members of armed groups, gangs, death squads or other such persons whose job is to kill defenseless persons or groups of persons (life imprisonment); c) members of a terrorist organization (no less than 30 years imprisonment); d) terrorists who inflict damage on property -- be it public or private -- resulting in totally or partially cutting off services vital to the public (not less than 30 years imprisonment); and e) terrorists who use extortion, assault, robbery, kidnapping or who unlawfully appropriate the money, property or services of an authority or private party (not less than 25 years imprisonment). Article 4 of Decree Law 25.475 provides that any person who in any way aids and abets the commission of terrorist crimes will be sentenced to no less than 20 years imprisonment.

Decree Law 25.475 contains some very disturbing substantive anomalies. For example, it makes "terrorism" a crime in its own right. Furthermore, the language and terms used to define terrorist conduct are in places vague, broad and/or sweeping, which can easily lead to a "broadening" of the prohibited acts by judicial interpretation. Defining crimes without precision and certainty contravenes the principle of legality.

Article 2 of this law also uses descriptive elements without semantic precision. Indeed, the criminal conduct proscribed by this provision need not be associated at all with terrorism. For example, an assault against an individual's life, health or freedom may be the work of a terrorist, but, it also could be perpetrated by a common criminal. Similarly, damage caused by explosives capable of seriously disturbing public tranquility could be the work of a dissident group, but it could also be perpetrated by drug traffickers. In both cases the activities are identical, and in both cases the end result might create anxiety, alarm or fear in the public. However, in the former case, the perpetrator's ultimate intention is to undermine the state, while in the later, his purpose may be to take revenge against or intimidate a private enemy. In fact, except for certain confederate offenses (conspiracy, subversive association, etc.), almost any crime may or may not be committed for terrorist purposes, such as the killing of a police officer or a magistrate, robbery, kidnapping, etc. By not linking the proscribed conduct to the subjective element of terrorist intent, this decree law can be interpreted to permit law enforcement officials to regard almost <u>any</u> act of violence as a crime of terrorism (or treason). A criminal statute susceptible to such interpretations invites grave errors that can result in serious miscarriages of justice.

The definition of terrorism in Article 2 of Decree Law 25.475 also does not list activities typical of armed groups as crimes of terrorism. These activities include operating as an armed gang, subversive association, conspiracy or common crimes, such as falsification of identification papers. Furthermore Articles 2, 3, 4, 5 and 9 of Decree Law 25.475 all stipulate the minimum, but <u>not</u> the <u>maximum</u> sentence, which can lead to grave miscarriages in sentencing in violation of the principle "*nulla poena sine lege*."

Moreover, defining the crime of terrorism as "provoking, creating or sustaining a state of anxiety, alarm or fear in the public" significantly broadens the concept of what constitutes terrorism. As written, any instigation or circulation of ideological documents of a "subversive" nature can be regarded as criminal terrorism. Presumably, the lawmaker's intent was that weapons or explosive materials or devices had to be used in the commission of the crime for the offense to qualify as terrorism. If so, the wording should have been as follows: "he who, by the use of arms, explosive materials or devices, 1) provokes, creates or sustains a state of anxiety, 2) assaults the life . . ."

Another problem with this Decree Law concerns the criteria related to the degree of participation in the commission of the crime of terrorism and the punishment. The conduct of the author, co-author, instigators, and aiders and abettors cannot be clearly differentiated. It would have been preferable to have had simpler criteria which would have established the differences and allowed for sentences according to the perpetrator's responsibility in the subversive organization.

Nevertheless, the distinction made between a member of a terrorist organization who commits a terrorist act as defined under Article 2 in order to accomplish its objectives, which carries a sentence of no less than 30 years, and a member of a terrorist organization who engages in extortion, petty theft, kidnapping and so forth, which carries a sentence of 25 years, is not clear. Also, some of the acts of collaboration described in Article 4 are indistinguishable from the crimes of participation as a member of a terrorist organization under Article 3. The crime of membership in a terrorist organization [*pertenencia a una organización terrorista*] in Article 5 of Decree Law 25.475 is similarly indistinguishable from the crime of membership, or being a member of a terrorist organization [*pertenencia, en calidad de miembro de una organización terroristas*] under Article 3.

Under Article 6 of this law inciting the commission of a terrorist act by whatever means is a crime, while Article 7 criminalizes the public defense (apologia) of terrorism or of someone who might have committed such acts. These provisions are very troubling since they pose the clear risk that peaceful political dissidents and others who engage in nonviolent forms of speech could be branded and tried as criminals.

Article 9 is also problematical as it calls for special punishment for recidivists. This provision is at odds with Article 233(11) of Peru's 1979 Constitution, as well as with the views of the drafters of Peru's 1991 Criminal Code who have stated in this regard: "to punish an individual by taking into account his previous crimes, the consequences of which he has already paid, carries with it a violation of the principle *non bis in idem*, [nobody shall be punished twice for the same offense]. . . ."[26]

B. The Crime of Treason

Decree Law 25.659 of August 7, 1992, makes treason against the mother country (*traición de la patria*) an aggravated form of the crime of terrorism. However, unlike terrorism offenses, treason cases are tried by military tribunals applying extraordinarily summary procedures. More specifically, the crime of treason is defined in Decree Law 25.659 as the commission of acts specified in Article 2 of Decree Law 25.475 by means of:

> a) Car bombs or similar explosive devices, weapons of war or similar arms that kill people, do them physical or mental injury or damage public or private property, or any other means that could seriously endanger the population.
>
> b) Storing or unlawfully possessing explosive materials, ammonium nitrate or its ingredients, or voluntarily supplying ingredients or materials that can be used to manufacture explosives that will be used in the commission of the acts cited in subparagraphs a) and b) of the crime of terrorism.
>
> Article 2 also specifies that the perpetrators of this crime are:
>
> a. S/he is one of the leaders of a terrorist organization or group or has any other position of responsibility within a terrorist organization or group; or

---

[26] *See* "Rationale" of the Criminal Code of 1991, promulgated by Legislative Decree No. 635, printed in *DIARIO OFICIAL "EL PERUANO,"* April 1991, Lima, at p. 14.

b. S/he is a member or an armed group, gang, or firing squad, or has a similar position within a terrorist organization which includes being in charge of killing people; or

c. S/he gives data, reports, plans, projects or any other kind of documentation that can help terrorists or which facilitates the entrance of terrorists in buildings which s/he manages, or s/he is part of the security personnel, if this is done in order to generate the kind of damage described in article 1 of Decree Law 25.659

Article 3 makes the penalty for treason life imprisonment. As in the case of Article 3(a) of Decree Law 25.475, this particular provision dictates the same punishment and, hence, ignores the principle of proportionality for a broad range of criminal offenses, from murder to distributing plans or documents.

Apart from the technical defects in this definition of treason, there is the obvious problem that this crime has been denaturalized as formulated in this Decree Law. The concept of the act of treason is universally understood as implying a rupture of the loyalty owed to the Nation by its subjects.[27] Indeed, Article 235 of Peru's 1979 Constitution expressly recognized this meaning by limiting the application of the death penalty to treason in the context of external war.

Moreover, the definition of the crime of treason suffers from the same imprecision and ambiguity as does the crime of terrorism in Decree Law 25.475. Indeed, when compared, both crimes involve virtually identical conduct which can be easily confused and thereby result in interpretive errors extremely prejudicial to the affected party. For example, the use of arms, explosive materials or devices or any other means capable of inflicting damage, as described in the definition of the crime of terrorism (Article 2 of Decree Law 25.475), is almost identical to the language used in the case of treason, i.e., anyone who uses explosive devices that cause death or physical or mental injury or that damage public or private property (Article 1(a) of Decree Law 25.659). It is also difficult to understand the logic of criminalizing "the use of weapons, explosive materials or devices" (Article 2 of Decree Law 25.475) in one law, and proscribing the act of storing or unlawfully possessing explosive materials that can seriously imperil the public (Article 2(b) of Decree Law 25.659) in another law. Since terrorism and treason can be easily confused, it is quite possible that the case will be assigned to the wrong jurisdiction resulting in the imposition of improper sentences.

* * *

We believe that Decree Law 25.475 is seriously flawed in many fundamental respects and should be substantially revised. We also believe that the crime of treason, in accordance with its universal meaning, should be limited, as it presently is in Article 235 of Peru's 1979 Constitution, to situations of external war, and, hence, that Decree Law 25.659 should be repealed.

---

[27] *See ENCICLOPEDIA JURIDICA* OMEBA, Vol. XXVI, at p.335 (Buenos Aires 1968).

CHAPTER III
PROCEDURES APPLICABLE TO THE INVESTIGATION AND TRIAL OF THE CRIME OF TERRORISM

I. PRELIMINARY CONSIDERATIONS

In the introduction to this report, we state our belief that an internal armed conflict within the meaning of common Article 3 is presently underway in Peru. It is also clear to us that the antiterrorist laws promulgated by the government since April 6, 1992 are directly linked to the ongoing hostilities.

These hostilities arguably constitute the kind of public emergency that theoretically could justify Peru's temporarily suspending, i.e., derogating, certain rights under the American Convention and the International Covenant. Both of these treaties contain nearly identical provisions[28] that require a State Party in connection with its suspension of rights under either instrument to "immediately notify" other State Parties of the provisions suspended and the reasons for the(se) suspension(s).

The former President of the Inter-American Court of Human Rights, Thomas Buergenthal, indicated the following regarding the notice requirement in Article 4(3) of the International Covenant: "that provision plainly calls for notice to be dispatched almost simultaneously with the proclamation of the emergency or the taking of derogating measures."[29] He also suggests that this requirement is not a mere formality, but serves an important function. He states:

> One of the purposes of the notice of derogation is to provide information enabling the other State Parties to determine, if only in a very preliminary way, whether the derogation is consistent with the provisions of Article 4(1) and 4(2) of the Covenant. What is called for, therefore, is information that would enable others to determine the nature of the emergency, whether the measures adopted are 'strictly required by the exigencies of the situation' and whether they might be discriminatory in character or inconsistent with the state's other obligations under international law. This information must also be provided 'immediately,' for a notification that is incomplete

---

[28] Article 4(3) of the International Covenant states: "Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

Article 27(3) of the American Convention provides: "Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that give rise to the suspension, and the date set for the termination of such suspension."

[29] T. Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations in* THE INTERNATIONAL BILL OF RIGHTS 73, at 84 (L. Henkin ed. 1981).

in this regard does not comply with the requirements of Article 4(3).[30] (Emphasis supplied).

Professor Claudio Grossman, a newly elected member of the Inter-American Commission on Human Rights, ascribes a similar meaning to the notification requirement in Article 27(3) of the American Convention. He states that "[t]he purpose of these conditions [in Article 27(3)] is to permit relevant OAS organs and other State Parties to execute their supervisory responsibilities in monitoring compliance with the Convention. This is especially important in emergency situations, when respect for human rights is most often in danger."[31]

It is our understanding that, as of November 30, 1993, the government of Peru had not filed any formal notice of derogation as required by both the American Convention and the International Covenant, despite the fact that its key antiterrorist measures, which have effectively curtailed or suspended rights guaranteed in both treaties, entered into force nearly 18 months ago. The Peruvian government's failure to comply with these requirements is inconsistent with the basic purpose of both treaties to safeguard guaranteed rights from official abuse. Therefore, we believe that, despite the present internal situation, Peru is nonetheless required to respect and to ensure the free exercise of all the rights enumerated in the International Covenant and the American Convention.

Moreover, even assuming that Peru had timely filed these notices, the provisions of common Article 3 would still be applicable. Insofar as they overlap provisions in the American Convention and the International Covenant, Article 3's fundamental guarantees block imposition of otherwise permissible derogations under these treaties. The reason is that since Article 3's guarantees cannot be suspended under any circumstance, and Articles 4(1)[32] and 27(1)[33] of the International Covenant and American Convention, respectively, forbid any derogation inconsistent with the State Party's other legal obligations, Article 3's more restrictive provisions govern and determine the extent to

---

[30] *Id.* at p. 85.

[31] C. Grossman, *A Framework for the Examination of States of Emergency under the American Convention on Human Rights,* 1 American Un. Journal of Int'l Law & Policy, 35, 48 (1986).

[32] Article 4(1) of the International Covenant provides: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

[33] Article 27(1) of the American Convention states: "In the time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin."

which Peru may lawfully suspend comparable articles under these two treaties.[34]

Thus, even though the American Convention and the International Covenant authorize during genuine public emergencies the temporary suspension of most fair trial safeguards, Article 3 effectively precludes Peru from derogating these rights, at least in those cases related to the hostilities. Since the crimes of terrorism and treason under Peruvian law are unquestionably linked to the present armed conflict, all persons accused of these crimes must be accorded, at a minimum, the following fair trial guarantees, in full equality and without discrimination, set forth in the American Convention, the International Covenant and/or common Article 3, as interpreted by Article 6 of Protocol II:[35]

1. the right to be tried by a tribunal, which offers the essential guarantees of independence and impartiality;
2. the right not to be convicted of an offense except on the basis of individual penal responsibility;
3. the right to be tried without undue delay;
4. the right to be informed promptly and in detail of the charges against him;
5. the right to be presumed innocent until proved guilty according to law;
6. the right to have adequate time and facilities for the preparation of his defense, before and during his trial;
7. the right to legal counsel of his choice and to communicate freely and privately with his counsel;
8. the right to be tried in his presence;
9. the right not to be compelled to testify against himself or to confess his guilt;
10. the right to examine, or have examined present in court the witnesses against him and

---

[34] *See* Buergenthal, *supra* note 29 at 82 (stating "The Covenant thus prevents a state party from adopting measures that violate the state's obligations under a treaty . . . or under customary international law. Particularly relevant in this connection are humanitarian law treaties because they apply in time of war: a state which purports to derogate from obligations under the Covenant which are required also by such other treaty would be violating both articles. Similarly, a state could not take measures under Article 4 which would violate provisions in other human rights treaties to which it is a party, for example, when such other treaty contains no derogation clause or has a stricter derogation clause forbidding derogation from some rights for which derogation is permitted under Article 4 of the Covenant." (Emphasis supplied.)

[35] Where, as in the case of Peru, a state is a party to more than one treaty and there are differences between legal standards governing similar rights in those instruments, the state should give effect to the provision(s) of that treaty with the highest standard(s) applicable to the right(s) in question under the doctrine of *lex specialis*. Moreover, our interpretation is supported by the two authoritative commentaries on Protocol II. *See* International Committee of the Red Cross, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 8, 1977 TO THE GENEVA CONVENTIONS OF 1949, note 23, at 1397 (Y. Sandoz, C. Swinarski and B. Zimmerman eds. 1987); M. Bothe, K. Partsch and W. Solf, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 651-653 (1982).

to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

11. the right to appeal his sentence and conviction to a higher court;
12. the right not to be convicted of an act or omission that did not constitute a criminal offense, under national or international law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense, the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom; and
13. the right not to be prosecuted or punished for the same offense more than once.

II. Applicable Standards Governing Judicial Independence and Impartiality

As noted, the International Covenant, the American Convention and common Article 3 provide that every person has a right to be tried by an "independent" and "impartial" tribunal. Although these terms are not defined in these instruments, they are not so elusive as to have no general meaning. In fact, these terms have been extensively studied by many international bodies and have been defined and elaborated on by intergovernmental organizations and respected organizations of judges and lawyers.

For example, Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary addresses the requirements of judicial independence and impartiality as follows:

> The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The Draft Universal Declarations on the Independence of Justice, also known as the "Singhvi Declaration," defines the concept of independence similarly, but additionally states that the "judiciary shall be independent of the Executive and the Legislature." (Article 4) It also declares in this regard:

> Art. 5: (h) The Executive shall not have control over the judicial functions of the courts in the administration of justice.
> (i)The Executive shall not have the power to close down or suspend the operations of the courts.
> (j)The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute or frustrates the proper execution of a court decision.

Art. 6: No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision-making.

The International Bar Association in its Minimum Standards of Judicial Independence define judicial independence both in personal and structural terms:

(b) Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.

(c) Substantive independence means that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience.

The common theme of these declarations is that judicial independence requires freedom from interference by the executive or legislative branches in the administration of justice. These standards also recognize the principle of irremovability of the judiciary and duly regulated security of tenure as indispensable conditions for guaranteeing a judge's personal independence and impartiality. We therefore look to these authoritative standards for guidance in interpreting the practical content and meaning of the terms "independent and impartial" tribunals set forth in relevant treaties ratified by Peru.

III. THE INDEPENDENCE OF PERU'S CIVILIAN JUDICIARY AFTER APRIL 5, 1992

When judged against these standards, the events in Peru after April 5, 1992 affecting the judiciary are truly alarming. On April 5, 1992, President Fujimori's Government of Emergency and National Reconstruction issued Decree Law 25.418 which stated that the judicial power and its associated institutions were being "reorganized" and suspended those provisions in the 1979 Constitution that were incompatible with the Decree's objectives.

This measure abrogated the scheme in the 1979 Constitution for nominating, confirming, removing, and promoting judicial personnel and, in effect, ceded to the Executive the virtual unchecked exercise of these prerogatives. It also suspended Article 242 of the 1979 Constitution whose purpose is to ensure the personal independence of judges by guaranteeing them security of tenure until age 70 and the right not to be transferred without their consent. What followed can only be termed a wholesale purge by the Executive of judicial personnel involved in every aspect of the administration of justice.

On April 9, 1992, the government fired thirteen Supreme Court justices (Decree Law 25.423) and all the members of the Tribunal of Constitutional Guarantees (Decree Law 25.422), effectively abolishing this organ. That same day, it also dismissed all the members of the National and District Judiciary Councils (Decree Law 25.424). On April 9, the government fired the Controller General of the Nation (Decree Law 25.420) and, the next day, dismissed the Attorney General of the Nation who heads the Public Ministry. On April 24, 130 judicial personnel in the Lima and Callao District were fired, including superior court judges, chief prosecutors, judges in court districts, provincial prosecutors and juvenile court judges. By Decree Law 25.454 of April 28, the government prevented these and other affected judicial personnel from filing before the courts writs of *amparo* to challenge the legality of their dismissals.

On April 25, the government named the new members and President of the Supreme Court, the Attorney General, chief prosecutors and the Controller General of the Republic to these vacant posts. The government authorized the Supreme Court to fill vacancies on the superior courts and the Attorney General to fill vacant prosecutor positions in the different judicial districts. The Supreme Court, now dominated by members appointed by the government, began to evaluate on the national level all remaining judges, which resulted in the majority thereof being dismissed. In the case of the Judicial District of Loreto (Iquitos), we were told that all superior court judges were removed. The Attorney General's office also began a comparable review of the country's prosecutors which led to the dismissal of additional personnel.

Although the Peruvian government did not formally decree the abolition of the judicial branch's independence, we believe that the practical effect of these measures, when viewed as a whole against applicable standards, has been to grievously erode, if not eliminate, the institutional independence of the civilian judiciary. In our view, these measures also provide a legitimate basis for calling into question the personal independence and objectivity of government designated judicial personnel who have only "provisional" status.

IV. DUE PROCESS ISSUES ASSOCIATED WITH TERRORISM AND RELATED OFFENSES

A. Detention and Pre-Trial Investigation Procedures

In addition to these defects in the independence of the "reorganized" civilian judiciary, we have equally serious concerns about due process problems associated with the pre-trial investigation of and the conduct of trials for terrorism-related offenses.

Under Decree Law 25.475 of April 6, 1992 Peru's National Police were charged with investigating terrorism and related crimes. This measure accords the police extraordinarily broad investigative powers which usurp substantially all the regular functions of the investigating judge and public prosecutor in ordinary criminal cases. The police investigation is carried out by its anti-terrorist branch, the *Direccion Nacional Contra el Terrorismo* ("*DINCOTE*") whose functions are to prevent, investigate, denounce, and combat terrorism (Decree Law 25.744 of September 27, 1992).

The police can arrest a person suspected of a terrorist offense and hold him in preventive detention for 15 days without court order.[36] They are only required to notify a judge and representative of the Public Prosecutors Office within 24 hours of the suspect's detention. Further, the police have absolute discretion during this 15 day period to hold the suspect *incommunicado*, also without the approval of judicial authorities.[37]

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

Moreover, the detainee does not necessarily have a right to have legal counsel present during these interrogation sessions. This is because Article 12(f) of Decree Law 25.475 prohibits the detainee from having access to a lawyer until the police decide that he is prepared to make a declaration before a representative of the Public Prosecutor, which normally takes place days after the suspect is arrested. Informed sources also have advised us that, even at this stage, defense counsel has difficulty ascertaining the reasons for his client's arrest since the police often refuse to divulge this information. In addition, we understand that defense counsel is never allowed to talk privately with his client at any time.

Another very disturbing measure which seriously prejudices a prisoner's basic due process rights is found in Article 18 of Decree Law 25.475 -- which prohibits an attorney from simultaneously representing nationwide more than one client suspected or accused of terrorist

---

[36] *See* Article 12(c) of Decree Law 25.475.

[37] *See Id.* Article 12(d). The police need only notify the judge and Public Ministry of their decision.

offenses. This prohibition, significantly, does not extend to court-appointed counsel, which strikes us as a particularly invidious distinction.

These pre-trial restrictions on and obstacles faced by defense counsel are at odds with the most elemental rights of persons charged with criminal offenses under treaties ratified by Peru. As noted earlier in this chapter, all persons accused of the crime of terrorism must be afforded, *inter alia*, the following minimum fair trial safeguards: the right to be informed in detail of the charges against him; the right to have adequate time and means to prepare his defense, before and during the trial; and the right to legal counsel of his choice and to communicate freely and privately with his counsel.

Since the right to counsel of choice is integral to the prisoner's right to prepare his defense and this right, in turn, must be accorded the prisoner before and during his trial, the prisoner's right to counsel, perforce, must be understood to apply to every stage of the criminal proceedings. We believe that if this right is to be effective, then it should be permitted from the time of the prisoner's arrest. Denying prisoners access to independent counsel until days after their arrest and during police interrogations utterly defeats the basic purposes underlying this most fundamental right.

Article 6 of Decree Law 25.659 also denies persons charged with and tried for terrorism the right to file writs of *amparo* and *habeas corpus* with any court at any stage of the police investigation or trial proceedings. A suspect who is held *incommunicado* during the police investigation is thereby stripped of the only possible legal remedies under Peruvian law to challenge the reasonableness of his arrest and to permit a judge to verify his well being. This restriction contravenes an Advisory Opinion of the Inter-American Court of Human Rights wherein the court explicitly ruled that these remedies are among the essential judicial guarantees that even during emergency situations cannot be suspended under the American Convention.[38]

Once *DINCOTE* finishes its investigation, it technically is required to send its report to the prosecutor who, in theory, independently evaluates it and decides what charges, if any, will be filed against the prisoner. However, we have been repeatedly told by knowledgeable persons both within and outside the government that, in actual practice, *DINCOTE* formalizes the charges which then are invariably endorsed by the prosecutor. Thus, *DINCOTE* ultimately decides whether the prisoner will be tried by a civilian court for terrorism or by a military court for treason.

B. Judicial Procedures for the Crime of Terrorism

If the prisoner is accused of terrorism, he becomes subject to the jurisdiction of civilian courts which have specially appointed personnel. These judicial proceedings comprise three successive stages. The first is before an examining judge; the second is conducted by a superior court which tries and sentences the defendant; and the third is before an appeals court. Article 13 of Decree Law 25.475 stipulates the maximum time periods for each stage as follows: 30 days, extendable by 20 days, before the examining judge; 15 consecutive days in the trial court; and 15 days in the appeals court.

These proceedings are also replete with numerous and serious due process violations. For example, when he finishes his investigation, the examining judge in accordance with the Code of Criminal Procedure is required to submit a report to the Chief Judge of the Superior Court indicating how the investigation was carried out, what evidence was presented by the prosecutor and

---

[38] *See* Inter-American Court of Human Rights, Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, Solicited by the Republic of Uruguay October 6, 1987.

his own assessment of the accused's guilt. We have learned, however, that since Decree Law 25.475 does not expressly mandate the filing of such a report in terrorism case, the vast majority of the examining judges, particularly in the Lima Judicial District, do not do so. Instead, they simply forward the case to the Superior Court with a simple statement replicating the police report.

The passivity of these judges appears to be rooted in part in the rather tenuous nature of their employment situations. As a result of the government's "reorganization" of judicial personnel, approximately 80% of the country's examining judges have "provisional" status. What this means is that the President of the Superior Court who appointed them can also dismiss or transfer them at any time and without any apparent cause. Since most of the specially appointed judges who try terrorism cases also have provisional status, they too find themselves in the same predicament. This absence of tenure tends to breed pliant judges and, therefore, can be seen to compromise their independence and objectivity.

Even assuming the judge wants to conduct a genuinely independent review of the evidence, he is shackled by the terms of Decree Law 25.475. Article 13 of this measure prohibits him from ruling on any preliminary objections or other motions by defense counsel[39] and prevents him from granting the accused any form of conditional release. Furthermore, if the judge finds that there is insufficient or no proof of the accused's guilt, he, nonetheless, must sign an order binding the accused over for trial by the superior court. These procedures are inconsistent with provisions in treaties ratified by Peru in that their effects essentially reverse the required presumption of innocence and shift the burden to defense counsel to prove his client's innocence.[40]

C. Trials Before Faceless Courts

Once the examining phase has been completed, the case file is sent to the office of the chief judge of the local superior court.[41] The trials of persons charged with terrorism-related offenses are conducted by so-called "faceless" courts (*sin rostro*) which are closed to the public and held in specially constructed courtroom located within prisons. The defendant and his lawyer do not know the identities of the judges, prosecutor and other court personnel since they are seated behind a one-way mirror or are hooded, and their voices are distorted by special microphones.

Defense counsel routinely encounter numerous procedural restrictions and practical obstacles that severely hamper and, frequently, preclude them from mounting an effective defense before these courts. We have been told that a constant problem is simply getting hold of a client's case file.[42] For example, clerical personnel at these special courts will not permit lawyers to see case

---

[39] *See* Articles 8(2) and 14(2) of the American Convention and International Covenant, respectively, which mandate the right to be presumed innocent until proven guilty.

[40] Resolution of these motions is deferred until verdict and sentencing by the trial court.

[41] The judge then supposedly turns the case file over to the superior prosecutor who prepares a report with recommended action. Thereafter the court decides whether or not to begin the trial.

[42] Such actions are inconsistent with Article 21 of the United Nations Basic Principles on The Role of Lawyers which states: "It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective assistance to their clients . . ."

files without the approval of the chief judge of the local superior court, who also sets the trial date.

Apparently, this problem is particularly severe in the Lima court district. We were told that an attorney must send written "briefs" to the office of the chief judge of this district requesting access to his client's file. The court may send a timely written reply granting that request. However, the attorney may never receive a reply, or, by the time it arrives, it may be too late to permit the attorney to examine the file before the trial. Then again, even if he receives the reply sufficiently before the trial date, the attorney, when he goes to get the case file, may find that it is no longer there because the chief judge had ordered it sent to the trial court. Moreover, we understand that, as a rule, case files are in total disarray.

We have also been told that defense lawyers occasionally receive court notices that fail to specify the date the trial is scheduled to begin before the faceless courts. This, apparently, is a commonplace occurrence in the Lambayeque Court District,[43] where may persons charged with terrorism-related offenses await trial in the Picsi prison. When notice is given, it arrives only 24 hours before the trial date, supposedly for security reasons. If the lawyer lives in Lima and his client is to be tried within the next 24 hours by the faceless court in the Lambayeque district, which is a two hour plane trip from Lima, the attorney most likely will not be able to arrive on time to represent his client, and, if he does, he will not have had ample time to properly prepare his defense.

Trials before these faceless courts are summary proceedings which are frequently completed in one session lasting three or four hours, although additional four hour sessions may be necessary. In ordinary criminal cases Peruvian law assigns to police statements significant probative value concerning the defendant's guilt. The defense, therefore, can request the court to call police personnel as witnesses for questioning. Yet, even this basic due process right is denied a suspect or defendant at every stage of the terrorism proceedings. Articles 13(c) and 2(b) of Decree Laws 25.475 and 25.744, respectively, prohibit police and military personnel involved in the arrest and questioning of the defendant from appearing as witnesses in both terrorism and treason trials. Defense counsel, accordingly, cannot examine or challenge the credibility or demeanor of *DINCOTE* personnel -- the very persons who gathered the evidence against and effectively accused his client of terrorism. This particular restriction, together with others that effectively force the defendant to prove his client's innocence, makes that task all but futile and relegates defenders of choice to playing a largely symbolic role in the trial proceedings.

D. Appeal Procedures

If the defendant is found guilty by the superior court, he can file an appeal with the Supreme Court of Justice to have his conviction overturned. As previously noted, the President of the Supreme Court and majority of the Court's current judges were appointed by the government after April 5, 1992. Since most of these judges enjoy only provisional status, we do not believe that their personal independence is sufficiently guaranteed.

The President of the Supreme Court determines which members of the Court will serve on the Special Anti-Terrorist Criminal Chamber that hears these appeals. We have been told that defense lawyers handling such appeals face many of the same problems they encounter in the trial courts. Prompt access to case files is a common complaint. Moreover, we understand that the Supreme Court has decided that defense lawyers will not be permitted to make oral arguments on

---

[43] This court district has only two faceless courts to handle all cases from the San Martin, Amazonas, Piura, Tumbes and Cajamarca court districts.

behalf of their clients before these appeal panels, but instead must submit their arguments in writing.[44] The ostensible purpose of this restriction is for security reasons, which we can only assume is to protect the judges who sit on these special panels. This seems rather gratuitous since these judges are clearly authorized to withhold their identities from the public, the appellant and his lawyer.

Our concerns about these serious due process violations are all the more heightened by the use of faceless judges in these proceedings. While we clearly recognize under the prevailing circumstances in Peru the need to protect the physical safety of judges and other court functionaries, as well as the orderly functioning of the trial process, the measures selected by the government to do so cannot, consistent with Peru's international legal obligations, be at the expense of a defendant's fair trial rights.

In our opinion, basic notions of fairness, at a minimum, require that a defendant in <u>any</u> criminal proceeding know who is judging him and that this person is competent to do so, i.e., that he possesses the requisite legal training and experience commensurate with his solemn responsibility. The anonymity of these judges not only robs the defendant of this basic safeguard, but also violates his right to be tried by an impartial court since it is impossible for him to seek the recusal of a judge who is thought to be biased or partial. For this and other reasons previously explained, we cannot conclude that the proceedings in terrorism cases afford suspects and defendants basic due process rights and related fair trial guarantees as required by treaties ratified by Peru.

---

[44] We understand that the Supreme Court has not yet made its decision public or put it in writing.

CHAPTER IV

TREASON TRIALS BEFORE FACELESS MILITARY TRIBUNALS

I. PRELIMINARY CONSIDERATIONS

As part of its counterinsurgency program, the government of Peru issued Decree Law 25.659 on August 12, 1992 which gave the responsibility of administering justice in cases involving treason to its armed forces. Peru's military, which was already entrusted with the destruction of the enemy on the battlefield, thereby became the prosecutors and judges of their adversaries in a very unique legal process.

We believe that the Peruvian government did not sufficiently appreciate the fundamental contradiction posed by its assigning the simultaneous exercise of these dual roles to the same institution. This measure also purports to blend features of Peru's military justice and civil law systems that were not intended to be integrated because of key differences in their objectives and functions.

The military institution, by the nature and the necessity of its mission, is hierarchial and authoritarian. It demands strict and unquestionable obedience, duty and loyalty from its personnel who are held to standards of conduct that are higher than those imposed on and largely unknown to the civilian community. Military law traditionally seeks to promote justice in the armed forces, to assist in maintaining good order and discipline, and to promote efficiency and effectiveness within the military establishment. The essential purpose of military tribunals is to punish military offenses committed by members of the military establishment.

Peru's military justice system, at least on paper, is no exception.[45] Its Military Code of Justice acknowledges that there are two separate jurisdictions in the judicial system, the private or military (*fuero privativo*) and the common or civil (*fuero comun*). The Code establishes that common (civil) crimes will be tried by the regular courts (*fuero comun*), and only those crimes unique to the military function (*delitos de funcion*) committed by military and police personnel or civilians employed by the military establishment will be prosecuted by military and police courts, respectively (*fueros privativos*). The Code prohibits the prosecution of any non-military offenses by military and police courts, even in those cases where the accused wants to submit voluntarily to that forum. It also clearly provides that any member of the armed forces, police or its civilian component who commits a non-military offense could be subject to the jurisdiction of the regular courts. The drafters of Peru's Military Code of Justice were quite clear in their purpose: military justice was designed to apply only to military offenses committed by members of the military and police establishment and not to apply to civilians having no military function, or to oust the civilian judiciary of its natural jurisdiction to administer criminal justice. The framers of Peru's 1979 Constitution expressly sanctioned this arrangement when they prohibited in Article 282, with two narrow exceptions, the trial of civilians by military courts.[46]

---

[45] *See* the preamble to Title Two of and Article 318-321 and 323 of Peru's Military Code of Justice.

[46] Article 235 authorizes military courts to try civilians for the crime of treason in cases of external war and for avoiding military service.

II. Relevant Standards On Judicial Independence And Impartiality

We think it relevant to note that there is an emerging international consensus on the need to severely restrict, if not prohibit, the exercise of military jurisdiction over civilians generally and, especially, during emergency situations. For example, the Human Rights Committee, the body established by the International Covenant to supervise compliance by states parties with that instrument, made the following general observation on the application of military justice to civilians:

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If State Parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situations, and respect the other conditions in paragraph 1 of article 14.[47]

Although phrased in general terms, Principles 3 and 5 of the United Nations Basic Principles on the Independence of Judiciary implicitly suggest that transferring the jurisdiction of ordinary courts to special tribunals undermines the independence of regular judiciary by shattering its natural jurisdictional monopoly. Principle 3 declares, in pertinent part, that "the judiciary shall have jurisdiction over all issues of a judicial nature . . ." Principle 5 states:

> Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

The influential Paris Minimum Standards of Human Rights Norms in A State of Emergency are emphatically categorical in rejecting the application of military justice to civilians during times

---

[47] General Comment 13 of the Human Rights Committee on Article 14 of the ICPR [Covenant], *published in* Centre for the Independence of Judges and Lawyers, BULLETIN, Nos. 25-26, at pp. 121-122 (1982).

of emergency. Article 16, paragraph 4 of the Paris Standards[48] declares:

> Civilian courts shall have and retain jurisdiction over all trials of civilians for security and related offenses; initiation of any such proceedings before or their transfer to a military court or tribunal shall be prohibited. The creation of special courts or tribunals with punitive jurisdiction for trial of offenses which are in substance of a political nature is a contravention of the rule of law in a state of emergency.

In a similar view, the Draft Universal Declaration on The Independence of Justice states that "the jurisdiction of military tribunals shall be confined to military offenses," and that in genuine emergency situations" the State shall endeavor to provide that civilians charged with criminal offenses of any kind shall be tried by ordinary civilian courts. . . ."

The Inter-American Commission on Human Rights ("IACHR") in a variety of reports also has expounded its views on the compatibility of special, particularly, military courts with the fair trial standards in the American Declaration and/or American Convention.[49] Its observations on the independence of and procedures followed by the Special Courts in Guatemala are particularly illuminating.[50]

In this regard, on July 1, 1982 the coupist government of General Efraín Rios Montt, faced with increasing guerilla operations in the countryside, declared a state of siege and created special courts, which he indicated were a complimentary measure to combat subversion. These courts had exclusive jurisdiction to try captured dissidents and civilians charged with a broad category of security related offenses. Defendants found guilty of certain crimes were automatically sentenced to death.

The three members of these courts who, according to the IACHR "may or may not have been active members of the bar or officers of the Guatemalan Army," were appointed by and subject to removal without cause by the Executive.[51] In addition, the courts operated in total

---

[48] The Paris Standards are *reproduced in* R. Lillich, *Current Developments: The Paris Minimum Standards of Human Rights Norms in A State of Emergency,* Vol. 79 American Journal of Int'l Law pp. 651-659 (1985). (A copy of the Paris Standards are attached as Appendix 10.) These standards were approved by the International Law Association at its 61st Congress, held in Paris from August 28 to September 1, 1984. These standards" are intended to help ensure that, even in situations where a bona fide declaration of state of emergency has been made, the state concerned will refrain from suspending those basic human rights which are regarded as non-derogable in universal and regional human rights conventions." *Id.* at 651. (A copy of the Paris Standards are attached as Appendix 10).

[49] *See generally* IACHR, Report on the Situation of Human Rights in Chile, (OEA/Ser. L/V/II. 34), 25 October 1974; Report on the Situation of Human Rights in Uruguay, (OEA/Ser. L/V/II. 43), 31 January 1978; Report on the Situation of Human Rights in Nicaragua, June 30, 1981 (OEA Ser. L/V/II 33).

[50] *See* IACHR, Report on the Situation of Human Rights in the Republic of Guatemala, October 5, 1983 (OEA/Ser. L/V/1161).

[51] *Id.* at 89.

secrecy, and because the judges and prosecutors were "faceless," their identities were unknown by defendants. The IACHR noted the following in this connection:

> Although the secret nature of their activities had no official justification, the explanation was given that the purpose of such secrecy was to defend the personal security of the civilian officials and personnel on the courts in order to protect them from reprisals and other acts of vengeance, both against themselves and their families.[52]

Apart from condemning these courts for their virtual absence of due process safeguards, the Commission essentially concluded that their purpose was not to do justice, but to summarily condemn. It stated:

> The Commission wishes to go on record noting that these procedures, carried out without respect for the minimal guarantees of due process, truly constituted a farce and regardless of where they might occur the practice of appointing unqualified judges, defenders who do not defend, a Public Ministry unconcerned with the prompt, fair and effective administration of justice and Law Courts that really are courts martial, devoid of independence and impartiality, that function in secret under military auspices, in fact impede rather than foster justice.[53]

The conduct of treason trials by Peru's faceless military tribunals have many comparable and equally serious defects.

One of the most significant differences between Peru's military courts and its civilian court system is the qualification of the judges. In the civilian courts, all the judges that try the facts and make a legal determination in the case are members of the legal profession. In the military courts only <u>one</u> of the five judges on the panel is an attorney; the other four members are career military officers who have no legal training.

When these officers assume the role of "judges," they are still subordinate to their superiors in keeping with the established military hierarchy. The manner by which they fulfill their assigned task will play a decisive role in their future promotions, professional rewards, as well as assignments. Their dependence is determined by the very nature of the military institution. Consequently, military justice becomes a derivative of the policies inspired and directed by the military command.

We recognize that Peru's Military Code of Justice, its tribunals and summary procedures may be appropriately structured for punishing disciplinary and other military offenses committed by its uniformed and related personnel. But, it is because of their inherent dependence that we find these tribunals to be ill suited to try civilians for crimes not typically within their normal jurisdiction. And, where, as here, the putative defendants before these tribunals are the military's avowed enemies, then we simply do not believe that these courts can be considered to be objective finders of fact and dispensers of impartial justice, as required by treaties to which Peru is a party.

---

[52] *Id.* at 89.

[53] *Id.* at 96.

III. Pre-Trial Investigation of Treason Suspects

Decree Law 25.659 in effect "militarized" the entire administration of criminal justice in treason cases. In this regard, it is relevant to note that Peru's entire police force, including *DINCOTE*, is in fact a para-military force under the command of a police general whose immediate superior, the Minister of the Interior, is an army general. All police personnel are subject to Peru's Military Code of Justice for line of duty offenses (*delitos de función*) which are not tried by civilian courts, but by special police tribunals. Consequently, personnel, directly or indirectly, under the command or control of the armed forces arrest, interrogate, gather evidence against, accuse, try and sentence persons suspected of treason. We know of no other judicial system where these separate judicial functions are so concentrated in and exclusively exercised by the same institution.

Decree Law 25.744 authorizes *DINCOTE* to detain and investigate persons suspected of treason and merely requires them to give the military courts notice of the suspect's arrest. However, unlike in terrorism cases, *DINCOTE* in theory can hold the suspect *incommunicado* indefinitely since no maximum period of detention is specified in this decree. Decree Law 25.475 also permits the military to capture and detain persons suspected of treason or terrorist offenses in areas where there is no police establishment. The military are not required to notify judicial authorities of the suspect's detention.

Persons investigated on suspicion of treason by *DINCOTE* are subject to the same due process restrictions as are terrorism suspects. They are denied immediate access to counsel of choice, the right to file *habeas corpus* petitions, the possibility of conditional release at any time and the like. Once *DINCOTE* "charges" the detainee with treason, the military prosecutor will file the complaint and the detainee will be referred to the military courts for trial.

IV. Trial and Appeal Procedures Before Military Tribunals

Peru's military justice system ordinarily has a three stage hierarchy of courts -- the first is the investigating judge (*juez de instruccion*); the second is the trial court, or Court Martial (*consejo de guerra*); and the third is the Supreme Council of Military Justice (*Consejo Supremo de Justicia Militar*) which hears appeals. Under Decree Law 25.708, however, persons accused of treason are tried by a single tribunal composed of four active duty military officers who are assisted by a military lawyer. The Supreme Council of Military Justice is precluded from hearing an appeal challenging a conviction unless the sentence imposed by the military trial court is 30 years imprisonment or longer. Moreover, persons convicted of treason by military tribunals have no right of appeal on any grounds to the Supreme Court of Peru. As in the case of terrorism trials, all proceedings before these military tribunals are closed to the public and the identities of the military judges, prosecutors and other functionaries are unknown to the defendant and his lawyers. The fact that these defendants are not tried by their natural judge is indeed abberational. The anonymity of these judges also violates the defendant's most basic fair trial rights.

Decree Law 25.659 stipulates that military tribunals are to apply in treason cases the same procedures applicable to terrorism cases in civilian courts. However, this decree shortened by as much as two-thirds the pre-trial and trial phases which are heard by the single military tribunal. Consequently, a treason trial can be completed within ten days, and an appeal to the Supreme Council of Military Justice in just five days. These already abbreviated time periods were further reduced by Decree Law 25.708 which directed the military tribunals to apply the summary proceeding designed for use in a theater of military operations where hostilities are taking place.

Article 1 of this decree requires that the military tribunal must arrive at a verdict within ten consecutive days.

We have been told that virtually all of the due process violations associated with terrorism trials not only occur, but are considerably exacerbated in trials before these military tribunals. The exceptional shortness of these military trial periods together with other obstacles and *de jure* restrictions routinely faced by defense counsel foreclose any real possibility of preparing an adequate defense. The astoundingly high conviction rate in treason cases, approximately 90%, according to government statistics, tends to confirm our view in this regard.[54]

But, lawyers chosen by defendants to represent them in treason and other terrorism related cases have encountered more than procedural difficulties. We have been told that some lawyers have been harassed by state agents while others have been tried and convicted on terrorism charges apparently as a result of their having discharged their functions on behalf of their clients. By specifically targeting these particular defenders, the government lends credence to the view that its purpose is to remove them as obstacles to prosecutions unimpeded by independent representation.[55] This view, moreover, is not inconsistent with other restrictions and practices under the government's anti-terrorist legislation which manifest a pronounced hostility toward and a general distrust of independent legal counsel. Whatever their purpose, the government's actions have had a clear chilling effect on the willingness of private attorneys to step forward and represent unpopular clients. These actions also contravene universally accepted standards applicable to the professional responsibilities and duties of lawyers set forth in the United Nations Basic Principles on the Role of Lawyers. Article 16 of this authoritative document states pertinently:

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference. . . . (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanction for any action taken in accordance with recognized professional duties, standards and ethics. (Emphasis supplied).

Article 17 appropriately enjoins that "Lawyers shall not be identified with their client or with their client's causes as a result of discharging their functions." (Emphasis supplied).

Based on the foregoing analysis of the composition and functioning of these military tribunals, we find that they *prima facia* do not offer the essential guarantees of independence and impartiality and that their procedures do not permit the effective exercise of minimum due process rights as required by treaties freely ratified by Peru. Consequently, we must ineluctably conclude that persons who have been tried by these military tribunals have *per se* been denied the right to a fair trial. We therefore think their convictions should be reviewed by an independent judicial body.

---

[54] According to government statistics, between August 1992 to January 1993, military tribunals tried 154 persons for treason, 131 of these, or 85% were convicted. All 46 cases tried as of August 1993 resulted in convictions. 79% of those convicted received life sentences, which 16% received 30 year prison sentences.

[55] The principal targets to date have been members of the Association of Democratic Lawyers, whose members have represented well known leaders of the Shining Path. The government has tried some of these lawyers for "apology for crime" and other offenses under its anti-terrorist laws, claiming that their association is an arm of the Shining Path.

V. Other Concerns Related to the Terrorism and Treason Laws

We should note that there are other features of the government's anti-terrorist laws that concern us. For example, Decree Law 25.880 of November 18, 1992 provides that teachers who "influence" their students by "apologizing for terrorism" can be tried for treason and, if convicted, can be sentenced to life imprisonment. The vagueness of the terms "influences" and "apologize," particularly in the context of an academic setting, makes them highly susceptible to judicial manipulation. Since the crime involved is treason, the interpretation of these words and, ultimately, the fate of an academic so accused, are reposed in anonymous military "judges," who are neither independent nor impartial. Further, by proscribing this kind of non-violent conduct, the law effectively creates the crime of opinion. We also believe that there is a clear lack of proportionality between the punishment and the nature of the offense.

Decree Law 25.728 of September 2, 1992 permits persons accused of treason or terrorism related offenses to be tried and convicted *in absencia*. This measure *per se* violates the accused's right to be tried in his presence which is guaranteed in Article 14(3)(d) of the International Covenant and in common Article 3, as interpreted by Article 6(2)(e) of Protocol II. Such trials, moreover, are inconsistent with a defendant's rights to be heard and to defend himself set forth in Article 8 of the American Convention.

Article 7 of Decree Law 25.475 is particularly troubling. It stipulates that any Peruvian who publicly "apologizes" for terrorism while abroad will be stripped of his citizenship. In addition to possibly implicating free speech guarantees, this draconian sanction *prima facia* violates Article 20(3) of the American Convention which prevents a State Party from arbitrarily depriving a national of his citizenship. Importantly, Article 20 is among the rights that a State Party cannot suspend even during emergency situations.

Decree Law 25.564 of June 17, 1992 lowered from 18 to 15 the age when minors can be tried for terrorism related offenses. Under this measure, a 15 year old juvenile can be sentenced to the maximum punishment which is life imprisonment. This measure strikes us as unreasonably harsh and inconsistent with the UN Standard Minimum Rules for the Administration of Juvenile Justice, also known as the "Beijing Rules."[56] Standard 4, paragraph 1, while not specifying a minimum age of criminal responsibility, does admonish "the beginning of that age [of criminal responsibility] shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity." Regarding the terms of juvenile justice, Standard 5 states that "[t]he juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offense."

---

[56] These Standard Minimum Rules were adopted by General Assembly Resolution 40/33 of 29 November 1985.

CHAPTER V
THE RECENTLY APPROVED NEW CONSTITUTION*

In accordance with our mandate, our review of the new Constitution focused on provisions which either directly affect the independence of the judiciary and/or which address basic due process rights. Although this document contains certain favorable provisions, we have identified other provisions whose effects will seriously impair the independence and jurisdiction of the civilian judiciary, as well as curtail the exercise of essential fair trial rights and guarantees.

Certain positive feature of the new Constitution are the enhanced powers and status accorded to the National Judicial Council (*Consejo Nacional de la Magistratura*). Under the 1979 Constitution, the Council merely recommends to the President candidates for appointment to the Supreme Court and the superior courts. The President is free to ignore its recommendations as he alone is constitutionally empowered to name persons to these positions. However, his appointments to the Supreme Court do require the consent of the Senate.

In contrast, the new Constitution vests the Council with sole authority to select and appoint all of the country's judges[57] and prosecutors at every level of the judicial system. Moreover, the Council is declared independent of all three branches of government. The new Constitution also requires the Council to evaluate all judges and prosecutors every six years. However, no criteria for these reviews are specified in the Constitution. We were told by drafters of this provision that what they envisioned is comparable to the kind of periodic peer review of academics that regularly occurs within universities. If conducted in accordance with objective and clearly defined written criteria, these reviews, in themselves, should not pose a threat to the job security and, hence, personal independence of competent sitting judges and prosecutors.

Perhaps most importantly, by precluding the political branches of government a direct role in naming the country's judges at all levels, the new Constitution can contribute to the depolitization of a process that has plagued Peru for years and, thus, could well mark the first step toward the creation of a genuinely independent career judiciary.

The new Constitution also contains other provisions which literally prohibit certain practices criticized in this report. For example, Article 2(21) guarantees the right of a person to and not to be deprived of his nationality. Under Article 7 of Decree Law 25.475, a Peruvian citizen can be stripped of his nationality for publically apologizing for terrorism while abroad. Similarly, Article 139(12) of the new Constitution prohibits trials *in absentia*, which, in turn, are expressly sanctioned by Decree Law 25.880. Furthermore, Article 200 unequivocally states that *habeas corpus* and *amparo* petitions cannot be suspended, even during states of emergency or siege. Existing law presently deprives persons charged with or tried for terrorism or treason the right to file writs of *amparo* or *habeas corpus* at any stage of the police investigation or trial proceedings. We presume that, if the new Constitution does enter into force, these and other provisions in existing Decree Laws that conflict with articles in the new Constitution will be superseded and, hence, rendered null and void.

---

* The proposed new Constitution was approved by Peruvian voters in a referendum on October 31, 1993 and was promulgated and entered into effect on December 3, 1993.

[57] Except for justices of the peace who are to be popularly elected. *See* Article 150 and 152 of the new Constitution.

We also have taken notice of Article 55 of the new Constitution which declares that treaties ratified by Peru and in force are part of its domestic law. This provision apparently is a substitute for Article 105 of the 1979 Constitution which accords human rights treaties ratified by Peru the status of constitutional law. It should be understood that how Peru chooses to rank treaties within its domestic legal system in no way alters its obligations under international law. As we indicated in the Introduction to this report, changes in Peru's domestic law, including its constitution, cannot be invoked as an excuse for its failure to perform its treaty obligations in good faith or to bring its domestic law into conformity with those obligations.

Unlike the 1979 Constitution, the new Constitution does not provide for a mandatory annual allocation of the national budget to the judicial branch. The judiciary is therefore not guaranteed by law a minimum budget essential to ensure the adequacy of its vital operations. Instead, the Executive and the Legislative can establish whatever level of funding they deem "suitable" for the functioning of the judiciary.

The fair trial and other due process rights in the new Constitution largely replicate those guaranteed in the 1979 Constitution. These rights generally are consistent with the requirements of the American Convention and the International Covenant. However, Article 2 of the new Constitution, which purportedly guarantees freedom from arbitrary arrest and *incommunicado* detention, creates exceptions in subparagraphs (f) and (g) which, as noted in Chapter II of this report, are incompatible with the American Convention and the International Covenant. These subsections authorize the police to arrest a person suspected of terrorism, espionage or drug trafficking without court order and to hold him *incommunicado* in preventive detention for up to 15 days. The police are merely required to notify a judge and the Public Prosecutor's Office of the suspect's detention before the expiration of the 15 day period. This is essentially the same procedure utilized by *DINCOTE* under Article 12(c) and (d) of Decree Law 25.475.

The text of the new Constitution is also flagrantly contradictory. On the one hand, Article 139(1) proclaims the unity and exclusivity of the judicial power. On the other, the new Constitution transfers the jurisdiction of ordinary courts over terrorism and treason cases to military tribunals in Article 173. Under Article 235 of Peru's 1979 Constitution, military tribunals can try civilians only for evading compulsory military service and the crime of treason during an external war. In contrast, Article 173 of the new Constitution additionally vests these tribunals with exclusive jurisdiction to prosecute civilians for the crimes of terrorism and treason during internal, as well as interstate, armed conflicts.

Thus, Article 173 goes considerably beyond the legal arrangements provided for in Peru's existing anti-terrorism and treason laws. This provision not only enshrines as constitutional law a key feature of Decree Law 25.659, but also cedes to military tribunals competence over terrorist related crimes, which, under Decree Law 25.475, are presently heard by special civilian courts. If this provision of the new Constitution enters into effect, it will formally bifurcate the normal jurisdiction of the civilian judiciary to adjudicate criminal cases by creating two parallel, but separate, criminal justice systems in Peru. Consequently, civilians accused of the crimes of treason and terrorism will be tried by military tribunals which *prima facie* do not offer the essential guarantees of independence and impartiality required by treaties to which Peru is a state party.

Another provision of the new Constitution grants the Executive, without legislative review or approval, the sole authority to promote members of the armed forces to and within the rank of flag

officer.[58] Since the members of the Supreme Council of Military Justice, as well as the Senior Military Prosecutor and Military Legal Advisor (*Auditor de Guerra*) are flag officers,[59] their future promotions and, hence, career advancement, are placed in presidential hands. Presumably, therefore, the President is in a position to influence their actions.

Article 173 also authorizes military tribunals to impose the death sentence on persons convicted of treason or terrorism. Such persons can appeal their sentence to Peru's Supreme Court. However, lesser sentences, including life imprisonment, cannot be appealed to the Court.

We are particulary troubled by Article 140 of the new Constitution which extends the application of the death penalty to new crimes. Article 140 provides: "the death penalty will be applicable only for crimes of treason in the case of war and of terrorism, in accordance with the laws of the land and those international treaties to which Peru is a party." (Our translation).

In the event this provision of the new Constitution is implemented, we believe that it will *prima facie* violate Peru's international legal obligations despite its qualifying language "in accordance with . . . those international treaties to which Peru is a party."

Although no provision in the International Covenant, the American Convention, or common Article 3 *per se* prohibits application of this sanction, Article 4, paragraph 2 of the American Convention expressly stipulates that the application of the death penalty "shall not be extended to crimes to which it does not presently apply." Paragraph 3 of that same article unequivocally states that the "death penalty . . . shall not be re-established in states that have abolished it." Another provision of this Article also prohibits in absolute terms the application of this sanction to "political offenses and related common crimes." (Article 4, paragraph 4).

It is relevant to note that the Inter-American Court of Human Rights ("Court"), whose jurisdiction Peru has accepted, declared emphatically in its advisory opinion on Restrictions to the Death Penalty under the American Convention that:

> the re-establishment of the death penalty for any type of offense whatsoever is <u>absolutely prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, ipso jure, a final and irrevocable decision</u>. (Emphasis supplied).[60]

In this regard, Peru's 1933 Constitution was in force when it ratified the American Convention on July 28, 1978. Article 54 of that Constitution provided that "[t]he death penalty will be imposed for the crimes of treason, aggravated homicide, and for all other crimes that the law prescribes." (Our translation). Within a year of Peru's ratifying the American Convention, its 1979 Constitution entered into force. Article 235 of this Constitution significantly narrowed the offenses to which this sanction previously had applied by stating that "[t]here is no death penalty except for

---

[58] A flag officer is a member of the armed forces above the rank of colonel and captain (Navy).

[59] *See* Articles 6 and 7 of Peru's Organic Law of Military Justice (Decree Law 23.201) which requires these persons to hold flag officer rank.

[60] Inter-American Court of Human Rights, Restrictions to the Death Penalty (Arts. 4(2) and 4(4)) American Convention on Human Rights), Advisory Opinion OC 3/83 of September 8, 1983. Series A, No. 3, paragraph 56, at page 80.

treason in the context of an external war." (Our translation; emphasis supplied).

We believe that, having effectively abolished the death penalty in its 1979 Constitution, except for treason attending an external, i.e., interstate, war, Peru is precluded from re-establishing and applying this sanction to all other crimes unless and until it denounces the American Convention.

It is clear, however, that the purpose of Article 140 of the new Constitution is to make capital punishment applicable to the crime of terrorism and the crime of treason during either an external, or internal, i.e., non-international, armed conflict. This provision therefore violates Article 4, paragraph 2 of the American Convention as it extends the death penalty to crimes either abolished by or to which that penalty does not expressly apply under the 1979 Constitution. Moreover, inasmuch as the crimes of terrorism and, particularly, treason during internal hostilities (insurgency or rebellion) could possibly be regarded as being politically motivated, this provision in the new Constitution might similarly run afoul of Article 4, paragraph 4 of the American Convention which prohibits capital punishment for political offenses and related common crimes.

The Peruvian government, furthermore, cannot legally avoid complying with the non-derogable provisions of Article 4 of the American Convention by relying on the less restrictive provisions of the International Covenant applicable to the death penalty.[61] Since Article 4 of the American Convention is not subject to derogation and Article 4(1) of the Covenant forbids any derogation inconsistent with the state's other treaty commitments, the more restrictive standard in Article 4 of the American Convention governs the extent to which Peru may lawfully suspend this right under both instruments.

This position is reinforced by Article 5(2) of the Covenant which has been called the "Most Favorable-to-the-Individual clause."[62] It provides that:

> [t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.[63]

Judge Buergenthal states:

> [t]he purpose of this provision is to ensure that the Covenant is not used as a basis for denying or limiting other favorable or more extensive human rights which individuals might otherwise enjoy or be entitled to, whether under international law or national law or practice.[64]

---

[61] *See* Buergenthal, *supra* note 29, at page 82.

[62] *See*, L. Sohn, *The Human Rights Law of the Charter,* 12 Texas International Law Journal 129, 137 (1977).

[63] A similar, but not identical, provision is found in Article 29(b) of the American Convention.

[64] *See* Buergenthal, *supra* note 29 at p. 89.

According to Judge Buergenthal, another purpose of this provision is to ensure that the restrictions and derogations authorized by the Covenant are not used to legalize or justify restrictions on human rights guaranteed under other instruments or laws which do not provide for such limitations. This can serve as an important canon of constructions, preventing domestic courts and governmental agencies from relying on the restrictions of the Covenant to read similar limitations into less restrictive and otherwise applicable guarantees. . . .[65]

Nor can the government of Peru rely on common Article 3 to escape compliance with Article 4 of the American Convention. The following discussion of the interrelationship between the Geneva Conventions and the derogation clause[66] in the European Convention on Human Rights illustrates the reason by analogy:

> The question as to whether the measures taken are . . . consistent with other obligations of international law can be examined without considering the interpretation to these obligations given by the State concerned. It is merely a question of law. What is important in this respect is the relation between Article 15, paragraph 1, of the [European] Convention and Article 3 of the Geneva Convention of 1949. The Convention, as well as the Covenant, establish only a minimum standard. They do not limit or derogate any obligations under internal law, or by other international agreements to which a State Party of the Convention is a party, when these obligations establish a higher standard. Thus, it is not necessary for Article 15 and Article 3 of the Geneva Convention of 1949 to be made consistent. . . . This consistency has already been brought about by the Convention itself, insofar as the rule *lex posterior derogat legi priori* is not applied in their mutual relations. The higher standard prevails.[67]

In our discussions with various Peruvian officials, we indicated that even if Peru took the unprecedented step of denouncing the American Convention, it would not thereby escape scrutiny under the hemisphere's human rights system. As an OAS member state, it would still be bound by the American Declaration of the Rights and Duties of Man and be subject to the supervisory jurisdiction and individual complaint procedures of the Inter-American Commission on Human Rights, acting in its other capacity as an OAS Charter organ. Thus, as a practical and legal matter, the only way Peru could avoid OAS sanctioned review of its human rights practices would be to denounce the OAS Charter and withdraw from that Organization.

Finally, irrespective of whatever steps it may take regarding its hemispheric treaty commitments, Peru, for reasons previously explained, would be in violation of the International Covenant if it applied the death penalty provisions in question of Article 140.

---

[65] *Id.* at p. 90.

[66] Article 15 of this Convention, like Articles 4(1) and 27(1) of the International Covenant and American Convention, respectively, permits derogations only if such measures are, *inter alia*, not inconsistent with the State's other obligations under international law.

[67] K. Partsch, *Experience Regarding the War and Emergency Clause (Art. 15) of the European Convention on Human Rights,* I. ISRAEL YEARBOOK ON HUMAN RIGHTS 327, 333-34 (1971).

CHAPTER VI
EQUAL PROTECTION AND APPLICATION OF THE LAW

We firmly believe that if the Peruvian people are to regain respect for and confidence in the efficacy and fairness of the justice system, the government must ensure that the law protects and applies equally to all Peruvians. This means that all persons must be equal before the law and no one should be above the law.

We are concerned, therefore, that over the years members of the armed forces and other state agents, with few exceptions, have not been tried and punished for their participation in the commission of very serious crimes. One apparent reason for this lack of accountability has been that most, if not all, of the crimes committed by military and police personnel, regardless of the nature of the offense, have been heard by military or police tribunals.

As previously noted, Peru's Military Code of Justice authorizes military courts to try only military offenses (*delitos de función*) committed by members of the military and police establishment. That Code also provides that these uniformed and related personnel who perpetrate common crimes are subject to the jurisdiction of the regular civilian courts (*fuero comun*). The Supreme Court of Peru has the ultimate authority to decide controversies concerning whether a particular case should be heard by military/police or civilian courts. We were surprised and, indeed, puzzled to learn that, when presented with cases manifestly involving common crimes attributable to military and police personnel, the Supreme Court routinely rules in favor of the military and police jurisdictions. Consequently, the armed forces and police investigate their own personnel who are rarely, if ever, convicted and punished.

A recent and somewhat similar case is "*la Cantuta*", which involved the disappearance of a group of students and a professor after they were taken into custody by the armed forces. These disappearances were being investigated by civilian authorities when, without any proper legal justification, the armed forces objected to the assertion of civilian jurisdiction and began their own criminal investigation. This time, however, it was the nation's Attorney General who closed the civilian investigation, thereby ceding exclusive jurisdiction to the military court.

We simply cannot understand how common crimes, such as kidnapping, disappearance and murder, when allegedly committed by military personnel, can possibly be considered under Peruvian law to be military offenses within the exclusive competence of military courts. Nor do we understand how other common crimes, such as misappropriation of funds, apparently end up being heard in these courts.

We think it is important to emphasize that when Peru ratified the American Convention it assumed a duty under Article 1(1) of that instrument to "ensure" the free and full exercise of the rights recognized by the Convention to all its inhabitants.

The Inter-American Court of Human Rights in its decision in the Velazquez-Rodriquez case[68] declared that, as a consequence of its duty under Article 1(1), a state "must . . . prevent, investigate and punish any violation" of Convention based rights.[69] (Emphasis Supplied). The court elaborated on this duty as follows:

"the State has a legal duty to take reasonable steps to prevent human rights violations, and to

---

[68] Inter-American Court of Human Rights, Velásquez-Rodriquez Case, Judgment of July 29, 1988. Ser. C, No. 4.

[69] *Id.* at paragraph 166.

use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and ensure the victim adequate compensation."[70] (Emphasise Supplied).

The Court added that "[i]f the State apparatus acts in such a way that the violation goes unpunished . . . the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."[71] (Emphasis supplied).

Regarding the state's obligation to investigate violations of the Convention, the Court noted that "an investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends on the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government. . . ."[72] (Emphasis Supplied) The Court also opined that a failure to investigate or an investigation not undertaken in "a serious manner" and "as a merely formality preordained to be ineffective," resulting in the violation going unpunished, similarly violates the state's duty under Article 1.1.[73] (Emphasis Supplied).

The Inter-American Commission on Human Rights has relied heavily on and frequently alludes to these passages from the Court's Velazquez-Rodriquez opinion in its own decisions. The Commission did so most recently in two relevant decisions[74] wherein it concluded that amnesty laws for the benefit of security forces in Uruguay and Argentina violated the American Convention because these measures precluded any legal possibility of investigating and sanctioning members of both countries' security forces who committed serious crimes during the *de facto* military regimes.

We believe that the armed forces' self-serving and extravagant interpretations of the term "military offenses" under the Military Code of Justice and the Organic Law of Military Justice, which have been consistently endorsed by Peru's Supreme Court and government law enforcement officials, have been used to shield and protect members of the military establishment from being held accountable for their illicit actions and, as a consequence, have institutionalized impunity. We do not think it possible for the Rule of Law to take hold in Peru unless and until the law can be said and be seen to apply equally to all Peruvians.

---

[70] *Id.* at paragraph 173.

[71] *Id.* at paragraph 174.

[72] *Id.* at paragraph 176.

[73] *Id.* at paragraphs 176 and 177.

[74] *See* Reports 24/92 and 29/92 of October 2, 1992 pertaining to Argentina and Uruguay, respectively.

CHAPTER VII
SUGGESTIONS

We have concluded in this report that the present administration of justice in terrorism and, especially, treason cases is seriously flawed and at odds in many key respects with Peru's international legal obligations. Nevertheless, we are convinced that the government of Peru has both the will and the resources at its disposal to correct the deficiencies we have identified in its justice system. In this regard, Peru's Congress, on the initiative of the Executive Branch, recently passed legislation which eliminated certain due process restrictions found in its current anti-terrorism laws.[75] This measure is indeed welcome and hopefully signals the beginning of a process designed to harmonize Peru's laws with its international obligations.

The approval of the proposed Constitution by the Peruvian electorate in a national referendum on October 31, 1993 will fundamentally change existing legal arrangements when the new Constitution becomes operational. By its terms, the new Constitution will supersede the 1979 Constitution and, presumably, all other existing legal measures inconsistent with its provisions. As noted in Chapter V of this report, the Constitution contains certain provisions, namely articles 140[76], 141[77] and 173[78] which, in our judgement, manifestly contravene Peru's treaty commitments.

---

[75] The Peruvian government announced on September 21, 1993 its intention to submit draft legislation to the Congress modifying certain features of its anti-terrorist legislation. This legislation was enacted by the Congress on November 12, 1993. It authorizes the Supreme Council of Military Justice to review a sentence imposed by a military court in treason cases where there has been some flagrant judicial error; eliminated the restriction barring defense counsel from simultaneously representing more than one client suspected or accused of terrorist/treason offenses; repealed the decree law authorizing *in absentia* trials on terrorism or treason charges; establishes the possibility of unconditional liberty for suspects in terrorism cases (by decision of a special court of "faceless" judges); and ostensibly permits *habeas corpus* petitions during the investigation of treason and terrorism-related crimes.

Since the Commission's inquiry addresses only those legal measures in effect in Peru from April 6, 1992 to November 15, 1993, we are not in a position to determine the extent to which the provisions of this new law, particularly that eliminating restrictions on *habeas corpus* petitions, have been fully and effectively implemented.

[76] Article 140 provides "[t]he death penalty can be invoked only for the crime of treason in a case of war or terrorism, in accordance with the laws and treaties to which Peru is party."

[77] Article 141 states that "[w]hen proceedings are instituted before a superior court or before the Supreme Court in accordance with the law, it shall be the Supreme Court that serves as the court of appeals or court of last instance. The Supreme Court shall also be the court of appeals for decisions of the military courts, with the limitations stipulated in Article 173."

[78] Article 173 declares that "[i]n a service-related crime, members of the Armed Forces and the National Police shall be tried by the respective court and according to the Military Code of Justice. The latter's provisions do not apply to civilians, except when the crimes are

Accordingly, our suggestions to the Peruvian government regarding changes in its laws and practices that limit judicial independence and the exercise of due process rights anticipate the entry into force of the new Constitution. We wish to state our willingness to be of assistance to the Government of Peru in the event it chooses to implement these suggestions.

* * *

I. The first paragraph of Articles 173 of the new Constitution authorizes military courts to try civilians for the crimes of terrorism and treason and denies appeals to the Supreme Court except when the sentence imposed is the death penalty. As explained in Chapter V, we believe that Peru will be in violation of its international obligations if this provision of Article 173 becomes operational as domestic law. Consequently, we suggest that neither the Congress, nor the Executive enact a statute or other legal measure required to implement the authority vested in military courts under the first paragraph of Article 173.

We understand that there are precedents in Peru's constitutional history for not enacting a law necessary for the exercise of a constitutionally sanctioned power. The most recent example was when the Congress did not pass a law implementing the authority of the Supreme Court to serve as an appeals court as envisioned in Article 241 of the 1979 Constitution.[79]

We also suggest that Peru's Congress, in accordance with Article 206 of the new Constitution, amend the first paragraph of Article 173 of the new Constitution to reinstate the principle whereby military courts may not try civilians, except for those offenses specified in Article 235 of the 1979 Constitution, and amend Article 141 by eliminating the words "with the limitations stipulated in Article 173" in the last sentence thereof.

II. With regard to the extension of the death penalty in Article 140 of the new Constitution, we suggest that the government of Peru should immediately request an advisory opinion from the Inter-American Court of Human Rights on the compatibility of Article 140 with Article 4 of the American Convention and with provisions of other treaties concerning the protection of human rights applicable in American States.[80] Pending the Court's handing down its opinion, the Government should refrain from applying the death penalty provisions at issue in Article 140.

---

treason and terrorism as defined by law. The appeal to which Article 141 refers can only be invoked in cases of the death sentence.

The Military Code of Justice also applies to those who violate the rules of Compulsory Military Service."

[79] Article 241, Title IV, Chapter IX, of the 1979 Constitution provides: "The Supreme Court shall be the court of appeal or court of last instance for the matters that the law stipulates." The Supreme Court never challenged the Congress's failure to enact an enabling statue.

[80] We note that Peru has previously invoked the Court's advisory jurisdiction. On April 28, 1982, Peru requested an advisory opinion from the Court concerning the interpretation of Article 64 of the American Convention. *See* Inter-American Court of Human Rights, "Other Treaties" subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC 1/82 of September 24, 1982. Ser. A, No. 1.

III. We believe that it is essential to normalize as soon as possible the situation of the Judiciary and the Public Prosecutor's Office. Therefore, we urge that elections of the seven members of the new National Judicial Council take place with all due speed so that it can begin to evaluate and appoint with permanent status (*titulares*) judges and prosecutors of the very highest caliber.

Because a majority of judges on the Supreme Court and all members of the Board of Senior Prosecutors (*Junta de Fiscales Supremos*) have only provisional status, we suggest that the *Tribunal de Honor's* first priority be to confirm existing or to appoint new Supreme Court judges and Senior Prosecutors in order to ensure that the member elected by each group to sit on the National Judicial Council has permanent status.

Once constituted and operational, the Council should move expeditiously to appoint judges and prosecutors who will try nationwide crimes of rebellion, sedition and crimes against public tranquility constituting terrorism (crimes against democracy). The government should give these judges and prosecutors all the resources and protection they might require in trying these cases.

IV. Regarding the crime of treason against the mother country (*traición a la patria*), we suggest that

1) Decree Law 25.659 should be repealed, as well as any other law or provision thereof presently in force establishing procedures governing the trial of civilians by military courts for this particular crime;
2) the cases of persons who are either being tried or are awaiting trial on treason charges should be immediately transferred to civilian courts; and
3) in accordance with Article 361 of the Code of Criminal Procedure now in force, the Criminal Chamber of the Supreme Court should review convictions of civilians tried for treason by military courts.

V. Regarding the crime of terrorism, we suggest that

1) the definition of terrorism in Article 2 of Decree Law No. 25.475 should be redrafted in language that clearly and precisely defines the unlawful conduct. Such a definition could be patterned on European laws. Moreover, terrorist crimes should be distinguished from common crimes by requiring an intent to create a climate of terror within society.
2) All penalties should be in direct proportion to the gravity of the criminal offense, and the law should specify both a minimum and a maximum sentence for the particular offense; and
3) the punishment for the instigator, author, co-author, accomplice (primary and secondary) and actual perpetrator(s) should be directly proportional to their degree of participation in the commission of the terrorist crime.

VI. So as to comply with Peru's international legal obligations, the Government should repeal any law or provision thereof currently in force which:

1) allows the authorities to hold persons *incommunicado*;
2) allows the authorities to arbitrarily transfer persons held in custody;

3) in any way restricts an individual's right to defense counsel of his choosing from the moment of his arrest or detention and to communicate freely and privately with said defense counsel;
4) in any way limits the defendant's right to examine and cross-examine witnesses and introduce and challenge evidence during trial;
5) in any way prevents the defendant and his defense counsel from knowing the identities of the judges and prosecutors in the trial;
6) limits a defendant's right to be presumed innocent until proved guilty in accordance with the law; and
7) limits an individual's right not to be compelled to testify against himself or to confess his guilt.

VII. While the new constitutional system is being put into place, we suggest that the government consider the following measures:

1) to bring the new Code of Criminal Procedure into effect as soon as possible and to apply it to the prosecution of all crimes without any distinction based on the nature of the act, or the political affiliation or motives of the perpetrator(s);
2) until such time as the new Code of Criminal Procedure takes effect, to authorize the release of detainees in those cases where the Provincial Prosecutor and/or Senior Prosecutor do not find sufficient grounds to bring charges and/or an indictment, or when the judge and/or the Special Chamber believe there are no grounds to take the case to trial or to continue to hold the suspect; and
3) to reconsider the lowering from 18 to 15 the age when minors can be tried for terrorist related offenses.

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1—All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2—Everyone is entitled to all the rights and freedoms set forth in this declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3—Everyone has the right to life, liberty and the security of person.

Article 4—No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5—No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6—Everyone has the right to recognition everywhere as a person before the law.

Article 7—All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8—Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9—No one shall be subjected to arbitrary arrest, detention or exile.

Article 10—Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11—1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12—No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13—1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14—1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15—1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16—1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17—1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18—Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19—Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20—1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 21—1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22—Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23—1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24—Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25—1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26—1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a right to choose the kind of education that shall be given to their children.

Article 27—1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28—Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29—1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30—Nothing in this Declaration may be interpreted as implying for any States, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

PREAMBLE

All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.

The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.

Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.

Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources.

Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.

And, since moral conduct constitutes the noblest flowering of culture, it is the duty of every man always to hold it in high respect.

CHAPTER ONE. RIGHTS

Article I. Every human being has the right to life, liberty and the security of his person.

Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article III. Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.

Article IV. Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

Article V. Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

Article VI. Every person has the right to establish a family, the basic element of society, and to receive protection therefor.

Article VII. All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

Article VIII. Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.

Article IX. Every person has the right to the inviolability of his home.

Article X. Every person has the right to the inviolability and transmission of his correspondence.

Article XI. Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

Article XII. Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.

The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide.

Every person has the right to receive, free, at least a primary education.

Article XIII. Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

Article XIV. Every person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit.

Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.

Article XV. Every person has the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit.

Article XVI. Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.

Article XVII. Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XIX. Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

Article XX. Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Article XXI. Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

Article XXII. Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

Article XXIII. Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

Article XXIV. Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

Article XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Article XXVI. Every accused person is presumed to be innocent until proved guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Article XXVII. Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

Article XXVIII. The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

CHAPTER TWO. DUTIES

Article XXIX. It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality.

Article XXX. It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it.

Article XXXI. It is the duty of every person to acquire at least an elementary education.

Article XXXII. It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.

Article XXXIII. It is the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be.

Article XXXIV. It is the duty of every able-bodied person to render whatever civil and military service his country may require for its defense and preservation, and, in case of public disaster, to render such services as may be in his power.

It is likewise his duty to hold any public office to which he may be elected by popular vote in the state of which he is a national.

Article XXXV. It is the duty of every person to cooperate with the state and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances.

Article XXXVI. It is the duty of every person to pay the taxes established by law for the support of public services.

Article XXXVII. It is the duty of every person to work, as far as his capacity and possibilities permit, in order to obtain the means of livelihood or to benefit his community.

Article XXXVIII. It is the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien.

PART I

Article 1. 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibilities for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2. 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4. 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present

Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5. 1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6. 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8. 1. No one shall be held in slavery: slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in sub-paragraph (b) normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9. 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10. 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11. No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12. 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13. An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14. 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of the children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilty.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15. 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16. Everyone shall have the right to recognition everywhere as a person before the law.

Article 17. 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18. 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19. 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20. 1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22. 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize State Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23. 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and the full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24. 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country;

Article 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

PART IV

Article 28. 1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

• • •

Article 41. 1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.

(c) The Committee shall deal with the matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

(d) The Committee shall hold closed meetings when examining communications under this article.

(e) Subject to the provisions of sub-paragraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b), to supply any relevant information.

(g) The States Parties concerned, referred to in sub-paragraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.

(h) The Committee shall, within twelve months after the date of receipt of notice under sub-paragraph (b), submit a report:

(i) If a solution within the terms of sub-paragraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of sub-paragraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts: the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned had made a new declaration.

Article 42. 1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

PART I. STATE OBLIGATIONS AND RIGHTS PROTECTED

CHAPTER I. GENERAL OBLIGATIONS

Article 1. Obligation to respect rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic legal effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

CHAPTER II. CIVIL AND POLITICAL RIGHTS

Article 3. Right to juridical personality

Every person has the right to recognition as a person before the law.

Article 4. Right to life

1. Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offences or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Article 5. Right to humane treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 6. Freedom from slavery

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.

2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

3. For the purposes of this article the following do not constitute forced or compulsory labor:

a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;

c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or

d. work or service that forms part of normal civil obligations.

Article 7. Right to personal liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the

lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

Article 8. Right to a fair trial

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

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

(a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

(b) prior notification in detail to the accused of the charges against him;

(c) adequate time and means for the preparation of his defense;

(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

(e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

(f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

(g) the right not to be compelled to be a witness against himself or to plead guilty; and

(h) the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

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

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 9. Freedom from ex post facto laws

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the

time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Article 10. Right to compensation

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

Article 11. Right to privacy

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

Article 12. Freedom of conscience and religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Article 13. Freedom of thought and expression

1. Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of his choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 14. Right of reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible, who is not protected by immunities or special privileges.

Article 15. Right of assembly

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety, or public order, or to protect public health, or morals or the rights or freedoms of others.

Article 16. Freedom of association

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.

2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety, or public order, or to protect public health or morals or the rights and freedoms of others.

3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

Article 17. Rights of the family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of

dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

Article 18. Right to a name

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

Article 19. Rights of the child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

Article 20. Right to nationality

1. Every person has the right to a nationality.

2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 21. Right to property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 22. Freedom of movement and residence

1. Every person lawfully in the territory of a State Party has the right to move about in it and to reside in it subject to the provisions of the law.

2. Every person has the right to leave any country freely, including his own.

3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.

5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.

6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

9. The collective expulsion of aliens is prohibited.

Article 23. Right to participate in government

1. Every citizen shall enjoy the following rights and opportunities:

a. To take part in the conduct of public affairs, directly or through freely chosen representatives;

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c. to have access, under general conditions of equality, to the public services of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Article 24. Right to equal protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 25. Right to judicial protection

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

2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.

CHAPTER III. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

Article 26. Progressive development

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

CHAPTER IV. SUSPENSION OF GUARANTEES, INTERPRETATION, AND APPLICATION

Article 27. Suspension of guarantees

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

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right of Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

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

Article 28. Federal clause

1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

Article 29. Restrictions regarding interpretation

No provision of this Convention shall be interpreted as:

(a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

(b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

(c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

(d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Article 30. Scope of restrictions

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

* * *

CHAPTER V. PERSONAL RESPONSIBILITIES

Article 32. Relationship between duties and rights

1. Every person has responsibilities to his family, his community, and mankind.

2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

PART II. MEANS OF PROTECTION

CHAPTER VI. COMPETENT ORGANS

Article 33. The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

a. the Inter-American Commission on Human Rights, referred to as "The Commission"; and

b. the Inter-American Court of Human Rights, referred to as "The Court."

CHAPTER VII. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

SECTION 1. ORGANIZATION

Article 34. The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.

Article 35. The Commission shall represent all the member countries of the Organization of American States.

* * *

SECTION 2. FUNCTIONS

Article 41. The main functions of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate it shall have the following functions and powers:

a. to develop an awareness of human rights among the peoples of America;

b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;

c. to prepare such studies or reports as it considers advisable in the performance of its duties;

d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request.

f. to take action on petitions and other communications pursuant to its authority, under the provisions of Article 44 through 51 of this Convention; and

g. to submit an annual report to the General Assembly of the Organization of American States.

Article 42. The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Article 43. The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention.

SECTION 3. COMPETENCE

Article 44. Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Article 45. 1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.

• • •

Article 46. 1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a. that the remedies under domestic law have been pursued and exhausted, in accordance with generally recognized principles of international law;

b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;

c. that the subject of the petition or communication is not pending before another international procedure for settlement; and

d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

2. The provisions of paragraphs 1a and 1b of this article shall not be applicable when:

a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;

b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Article 47. The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

a. any of the requirements indicated in Article 46 has not been met;

b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;

c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or

d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

SECTION 4. PROCEDURE

Article 48. 1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:

a. If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.

b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.

c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.

d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the

Commission shall carry out an investigation, for the effective conduct of which it shall request, and the state concerned shall furnish to it, all necessary facilities.

e. The Commission may request the states concerned to furnish any pertinent information, and, if so requested, shall hear oral statements or receive written statements from the parties concerned.

f. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.

2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.

Article 49. If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it.

Article 50. 1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.

2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.

3. In transmitting the report, the Committee may make such proposals and recommendations as it sees fit.

Article 51. 1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

CHAPTER VIII. INTER-AMERICAN COURT OF HUMAN RIGHTS

SECTION 1. ORGANIZATION

Article 52. 1. The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among

jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.

2. No two judges may be nationals of the same state.

• • •

SECTION 2. JURISDICTION AND FUNCTIONS

Article 61. 1. Only the States Parties and the Commission shall have the right to submit a case to the Court.

2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed.

Article 62. 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto,* and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

Article 63. 1. If 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 ensured 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.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Article 64. 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American States. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Article 65. To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in

particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

SECTION 3. PROCEDURE

Article 66. 1. Reasons shall be given for the judgment of the Court.

2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

Article 67. The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the requested is made within ninety days from the date of notification of the judgment.

Article 68. 1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

PROTOCOL II

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II)

PREAMBLE

The High Contracting Parties,

Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,

Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person.

Emphasizing the need to ensure a better protection for the victims of those armed conflicts.

Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.

Have agreed on the following:

PART I

SCOPE OF THIS PROTOCOL

Article 1 — Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Article 2 — Personal field of application

1. This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as "adverse distinction") to all persons affected by an armed conflict as defined in Article 1.

2. At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

Article 3 — Non-intervention

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

PART II

HUMANE TREATMENT

Article 4 — Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

   (*a*) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

   (*b*) collective punishments;

   (*c*) taking of hostages;

   (*d*) acts of terrorism;

(*e*) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault:

(*f*) slavery and the slave trade in all their forms:

(*g*) pillage;

(*h*) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(*a*) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(*b*) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(*c*) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(*d*) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (*c*) and are captured;

(*e*) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Article 5 — Persons whose liberty has been restricted

1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained:

(*a*) the wounded and the sick shall be treated in accordance with Article 7;

(*b*) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;

(*c*) they shall be allowed to receive individual or collective relief;

(*d*) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;

(*e*) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

(*a*) except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;

(*b*) they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;

(*c*) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;

(*d*) they shall have the benefit of medical examinations;

(*e*) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (*a*), (*c*) and (*d*), and 2 (*b*) of this Article.

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

Article 6 — Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

   (*a*) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

   (*b*) no one shall be convicted of an offence except on the basis of individual penal responsibility;

   (*c*) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed: if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

   (*d*) anyone charged with an offence is presumed innocent until proved guilty according to law;

   (*e*) anyone charged with an offence shall have the right to be tried in his presence;

   (*f*) no one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

PART III

WOUNDED, SICK AND SHIPWRECKED

Article 7 — Protection and care

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Article 8 — Search

Whenever circumstances permit, and particularly after an engagement, all possible measure shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

Article 9 — Protection of medical and religious personnel

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

2. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

Article 10 — General protection of medical duties

1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.

3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.

4. Subject to national law, no person engaged in medical activities may be penalized in anyway for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

Article 11 — Protection of medical units and transports

1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.

2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

Article 12 — The distinctive emblem

Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

PART IV

CIVILIAN POPULATION

Article 13 — Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Article 14 — Protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Article 15 — Protection of works and installations containing dangerous forces

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not

be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

Article 16 — Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Article 17 — Prohibition of forced movement of civilians

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Article 18 — Relief societies and relief actions

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

PART V

FINAL PROVISIONS

Article 19 — Dissemination

This Protocol shall be disseminated as widely as possible.

Article 20 — Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

Article 21 — Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

Article 22 — Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Article 23 — Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.
2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

Article 24 — Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary which shall decide, after consultation with all the High Contracting Parties and the International

Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.

2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

Article 25 — Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect six months after receipt of the instrument of denunciation. If, however, on the expiry of six months, the denouncing Party is engaged in the situation referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict. Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.

2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

Article 26 — Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

(*a*) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 21 and 22;

(*b*) the date of entry into force of this Protocol under Article 23; and

(*c*) communications and declarations received under Article 24.

Article 27 — Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.

2. The depositary shall also inform the Secretariat of the United Nations of all ratifications and accessions received by it with respect to this Protocol.

Article 28 — Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

Appendix 6 United Nations Basic Principles on the Independence of the Judiciary

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling the Milan Plan of Action, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the General Assembly in its resolution 40/32 of 29 November 1985,

Recalling also resolution 18 of the Seventh Congress, in which the Congress recommended that Member States provide for the protection of practising lawyers against undue restrictions and pressures in the exercise of their functions,

Taking note with appreciation of the work accomplished, in pursuance of Seventh Congress resolution 18, by the Committee on Crime Prevention and Control, by the interregional preparatory meeting for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on United Nations norms and guidelines in crime prevention and criminal justice and implementation and priorities for further standard settling, and by the regional preparatory meetings for the Eighth Congress,

1. Adopts the Basic Principles on the Role of Lawyers contained in the annex to the present resolution;

2. Recommends the Basic Principles for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country;

3. Invites Member States to take into account and to respect the Basic Principles within the framework of their national legislation and practice;

4. Also invites Member States to bring the Basic Principles to the attention of lawyers, judges, members of the executive branch of government and the legislature, and the public in general;

5. Further invites Member States to inform the Secretary-General every five years, beginning in 1992, of the progress achieved in the implementaiton of the Basic Principles, including their dissemination, their incorporation into domestic legislation, practice, procedures and policies, the problems faced in their implementation at the national level and assistance that might be needed from the international community, and requests the Secretary-General to report thereon to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders:

6. Appeals to all Governments to promote seminars and training courses at the national and regional levels on the role of lawyers and on respect for equality of conditions of access to the legal profession;

7. Urges the regional commissions, the regional and interregional institutes on crime prevention and criminal justice, the specialized agencies and other entities within the United Nations system, other intergovernmental organizations concerned and non-governmental organizations in consultative status with the Economic and Social Council to become actively involved in the implementation of the Basic Principles and to inform the Secretary-General of the efforts made to disseminate and implement the Basic Principles and the extent of their implementation, and requests the Secretary-General to include this information in his report to the Ninth Congress;

8. Calls upon the Committee on Crime Prevention and Control to consider, as a matter of priority, ways and means of ensuring the effective implementation of this resolution;

9. Requests the Secretary-General:

(a) To take steps, as appropriate, to bring this resolution to the attention of Governments and all the United Nations bodies concerned and to provide for the widest possible dissemination of the Basic Principles;

(b) To include the Basic Principles in the next edition of the United Nations publication entitled Human Rights: A Compilation of International Instruments;

(c) To provide Governments, at their request, with the services of experts and regional and interregional advisers to assist in implementing the Basic Principles and to report to the Ninth Congress on the technical assistance and training actually provided;

(d) To report to the Committee on Crime Prevention and Control, at its twelfth session, on the steps taken to implement the Basic Principles.

ANNEX

Basic Principles on the Role of Lawyers

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

(c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Professional associations of lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

("SINGHVI DECLARATION")

JUDGES

Objectives and Functions

1. The objectives and functions of the judiciary shall include:

   (a) Administering the law impartially irrespective of parties;
   (b) Promoting, within the proper limits of the judicial function, the observance and the attainment of human rights;
   (c) Ensuring that all peoples are able to live securely under the rule of law.

Independence

2. Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of the judge to pronounce his judgement freely. Judges, on their part, individually and collectively, shall exercise their functions with full responsibility of the discipline of law in their legal system.

4. The Judiciary shall be independent of the Executive and Legislature.

5. (a) The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, including issues of its own jurisdiction and competence.
   (b) No ad hoc tribunals shall be established to displace jurisdiction properly vested in the courts.
   (c) Everyone shall have the right to be tried with all due expedition and without undue delay by the ordinary courts or judicial tribunals under law subject to review by the courts.

(d) Some derogations may be permitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts.

(e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts, and, detention of persons administratively without charge shall be subject to review by courts or other independent authority by way of habeas corpus or similar procedures so as to ensure that the detention is lawful and to inquire into any allegations of ill-treatment.

(f) The jurisdiction of military tribunals shall be confined to military offences. There shall always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or a remedy by way of an application for annulment.

(g) No power shall be so exercised as to interfere with the judicial process.

(h) The Executive shall not have control over the judicial functions of the courts in the administration of justice.

(i) The Executive shall not have the power to close down or suspend the operation of the courts.

(j) The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute or frustrates the proper execution of a court decision.

6. No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision-making.

7. Judges shall be entitled to take collective action to protect their judicial independence.

8. Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement.

Qualifications, Selection and Training

9. Candidates chosen for judicial office shall be individuals of integrity and ability. They shall have equality of access to judicial office; except in case of lay judges, they should be well-trained in the law.

10. In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status, but it may however be subject to citizenship requirements and consideration of suitability for judicial office.

11. a) The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

(b) Any methods of judicial selection shall scrupulously safeguard against judicial appointments for improper motives.

(c) Participation in judicial appointments by the Executive or the Legislature or the general electorate is consistent with judicial independence so far as such participation is not vitiated by and is scrupulously safeguarded against improper motives and methods. To secure the most suitable appointments from the point of view of professional ability and integrity and to safeguard individual independence, integrity and endeavour shall be made, in so far as possible, to provide for consultation with members of the judiciary and the legal profession in making judicial appointments or to provide appointments or recommendations for appointments to be made by a body in which members of the judiciary and the legal profession participate effectively.

12. Continuing education shall be available to judges.

Posting, Promotion and Transfer

13. Where the law provides for the discretionary assignment of a judge to a post on his appointment or election to judicial office such assignment shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist.

14. Promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. No promotions shall be made from an improper motive.

15. Except pursuant to a system of regular rotation or promotion, judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge.

Tenure:

16. (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.

(b) Subject to the provisions relating to discipline and removal set forth herein, judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their legal term of office.

17. There may be probationary periods for judges following their initial appointment but in such cases the probationary tenure and the conferment of permanent tenure shall be substantially under the control of the judiciary or a superior council of the judiciary.

18. (a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

(b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.

(c) Retirement age shall not be altered for judges in office without their consent.

19. The executive authorities shall at all times ensure the security and physical protection of judges and their families.

Immunities and Privileges

20. Judges shall be protected from the harassment of personal litigation against them in respect of their judicial functions and shall not be sued or prosecuted except under an authorization of an appropriate judicial authority.

21. Judges shall be bound by professional secrecy in relation to their deliberations and to confidential information acquired in the course of

their duties other than in public proceedings. Judges shall not be required to testify on such matters.

Disqualifications

22. Judges may not serve in a non-judicial capacity which compromises their judicial independence.

23. Judges and courts shall not render advisory opinions except under an express constitutional or statutory provision.

24. Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property. Judges shall not engage in law practice.

25. A judge shall not sit in a case where a reasonable apprehension of bias on his part or conflict of interest of incompatibility of functions may arise.

Discipline and Removal

26. (a) A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

(b) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board.

27. All disciplinary action shall be based upon established standards of judicial conduct.

28. The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

29. Judgements in disciplinary proceedings instituted against judges, whether held in camera or in public, shall be published.

30. A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

31. In the event a court is abolished, judges serving on that court, except those who are elected for a specified term, shall not be affected, but they may be transferred to another court of the same status.

Court Administration

32. The main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

33. It shall be a priority of the highest order for the State to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency; judicial and administrative personnel; and operating budgets.

34. The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary having regard to the needs and requirements of judicial administration.

35. The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

36. The head of the court may exercise supervisory powers over judges only in administrative matters.

Miscellaneous

37. A judge shall ensure the fair conduct of the trial and inquire fully into any allegations made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

38. Judges shall accord respect to the members of the Bar, as well as to assessors, procurators, public prosecutors and jurors as the case may be.

39. The State shall ensure the due and proper execution of orders and judgements of the Courts; but supervision over the execution of orders and over the service or process shall be vested in the judiciary.

40. Judges shall keep themselves informed about international conventions and other instruments establishing human rights norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws.

41. These principles and standards shall apply to all persons exercising judicial functions, including international judges, assessors, arbitrators, public prosecutors and procurators who perform judicial functions, unless a reference to the context necessarily makes them inapplicable or inappropriate.

Assessors

42. An assessor may either perform the functions of a judge or an associate or auxiliary judge or a consultant or a legal or technical expert. In performing any of these functions the assessors shall discharge their duties and perform their functions impartially and independently. Principles and standards which apply to judges are applicable to assessors unless a reference to the context necessarily make them inapplicable or inappropriate.

43. Assessors or Peoples' Assessors, or Nyaya Panchas, may be elected for specified terms on the basis of such franchise and by such electorates as may be provided by law to participate in the collegiate pro-

cess of adjudication along with elected or appointed judges. There shall be no discrimination by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status among citizens in the matter of their eligibility for election as assessors. On their election, such assessors may be empanelled for short and limited periods to discharge their functions as assessors. Assessors may also be appointed or empanelled for technical advice or assistance on the basis of their specialized knowledge appointed to discharge certain simple adjudicating functions.

44. Assessors shall be duly and adequately compensated with a reasonable allowance for the duration of their service as assessors by the State except when they receive such allowance paid to them in their place of employment.

45. Assessors who are elected to participate in the process of adjudication or are appointed to render technical and other assistance shall be free from any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, except that elected assessors may give periodic explanations to their electorate as a part of the system of citizen participation in the justice system.

46. Assessors shall be independent of the judges and of the Executive and Legislature and shall be entitled to participate in the process of adjudication to the extent and in the manner provided for in the law and practice of the legal system. Peoples' assessors who are elected to participate in the process of adjudication shall also be entitled to record their minutes of dissent which shall form a part of the record.

47. Any method of empanelment of assessors shall scrupulously safeguard against any improper motive in the matter of empanelment.

48. A provision may be made for the orientation and instruction for Peoples' Assessors or Nyaya Panchas elected to participate in the process of adjudication.

49. An assessor may be recalled by the electorate or may be disqualified or removed or his appointment may be terminated, but always strictly in accordance with the procedure established by law.

Selection of Prospective Jurors

50. The opportunity for jury service shall be extended without distinction of any kind by reason of race, colour, sex, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status, but it may, however, be subject to citizenship requirements.

51. The names of prospective jurors shall be drawn from a jury source list compiled from one or more regularly maintained lists of persons residing in the court jurisdiction.

52. The jury source list shall be representative and shall be as inclusive of the adult population in the jurisdiction as is feasible.

53. The Court shall periodically review the jury source list for its representativeness and inclusiveness. Should the Court determine that improvement is needed in the representativeness or inclusiveness of the jury source list, appropriate corrective action shall be taken.

54. Random selection procedures shall be used at all stages throughout the jury selection process except as provided herein.

55. The frequency and the length of time that persons are called upon to perform jury service and to be available therefor, shall be the minimum consistent with the needs of justice.

56. Except as may be expressly provided for by law, all automatic excuses or exemptions from jury service shall be avoided.

57. Eligible persons who are summoned may be excused from jury service only for valid reason by the court, or with its authorization.

Selection of a Particular Jury

58. Examination of prospective jurors shall be limited to matters relevant to determining whether to remove a juror for cause and to exercising peremptory challenges.

59. If the judge determines during the examination of prospective jurors that an individual is unable or unwilling to hear the particular case before the court fairly and impartially, that individual shall be removed from the panel. Such a determination may be made on motion of a party or on the judge's own initiative.

60. In jurisdictions where peremptory challenges are permitted, their number and the procedure for exercising them shall be uniform for the same type of case.

61. Peremptory challenges shall be limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury.

Administration of the Jury System

62. The responsibility for the administration of the jury system shall be under the control of the judiciary.

63. The notice summoning a person to jury service shall be in writing, easily understandable, and delivered sufficiently in advance.

64. Courts shall employ the services of prospective jurors so as to achieve the best possible use of them with a minimum of inconvenience.

65. Courts shall provide adequate protection for jurors from threat and intimidation.

66. Courts shall provide an adequate and suitable environment for jurors, and jury facilities shall be arranged to minimize contact between jurors and parties, counsel and the public.

67. Persons called for jury service shall receive a reasonable allowance from the State except when they receive such allowance in their place of employment.

68. Employers shall be prohibited from penalizing employees who are called for jury service.

Jury Consideration and Deliberation

69. Procedures shall be provided to prevent a trial from being terminated because of unforeseen circumstances which would reduce the number of jurors.

70. Courts shall provide some form of orientation or instruction to persons called for jury service to increase prospective jurors' understanding of the judicial system and prepare them to serve competently as jurors.

71. In simple language the trial judges shall:

(a) Directly following empanelment of the jury, give preliminary explanations of the jury's role and of trial procedures;
(b) Direct the jury on the law.

72. (a) A jury's deliberations shall be held in secrecy. Jurors shall not make public reasons for their decisions.
(b) A jury shall be sequestered only for the purpose of insulating its members from improper information or influence.
(c) Standard procedures shall be promulgated to make certain that the inconvenience and discomfort of the sequestered jurors is minimized.

LAWYERS

Definitions

73. In this chapter:

(a) "Lawyer" means a person qualified and authorized to plead and act on behalf of his clients, to engage in the practice of law and appear before the courts and to advise and represent his clients in legal matters, and shall, for the purposes of this chapter, include agents, assistants, procuradores, paraprofessionals and other persons authorized and permitted to perform one or more of the functions of lawyers, unless a reference to the context makes such inclusion inappropriate or inapplicable;

(b) "Bar Association" means a professional association, guild, faculty, college, bureau, council or any other recognized professional body under any nomenclature within a given jurisdiction, and shall, for the purposes of this chapter, include any association under any nomenclature of agents, assistants, procuradores, paraprofessionals and other persons who are authorized and permitted to perform one or more of the functions of lawyers, unless a reference to the context makes such inclusion inappropriate or inapplicable.

General Principles

74. The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights.

75. There shall be a fair and equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

76. All persons shall have effective access to legal services provided by an independent lawyer of their choice, to protect and establish their economic, social and cultural as well as civil and political rights.

Legal Education and Entry into the Legal Profession

77. Legal education and entry into the legal profession shall be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status.

78. Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

79. Programmes of legal education shall have regard to the social responsibilities of the lawyer, including co-operation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.

80. Every person having the necessary qualifications, integrity and good character shall be entitled to become a lawyer and to continue to practise as a lawyer without discrimination on the ground of race, colour, sex, religion or political or other opinion, national, linguistic, or social origin, property, income, birth or status or for having been convicted of an offence for exercising his internationally recognized civil or political rights. The conditions for the disbarment, disqualification or suspension of a lawyer shall, as far as practicably, be specified in the statutes, rules or precedents applicable to lawyers and others performing the functions of lawyers.

Education of the Public Concerning the Law

81. It shall be the responsibility of the lawyers and Bar Associations to educate the members of the public about the principles of the rule of law,

the importance of the independence of the judiciary and of the legal profession and the important role lawyers, judges, jurors, and assessors play in protecting fundamental rights and liberties and to inform the members of the public about their rights and duties and the relevant and available remedies. In particular, the Bar Associations shall prepare and implement appropriate educational programmes for lawyers as well as for the general public, and shall collaborate with the authorities, non-governmental organizations, bodies of citizens and educational institutions in promoting and co-ordinating such programmes.

Duties and Rights of Lawyers

82. The duties of a lawyer towards his client include:

(a) Advising the client as to his legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the client's legal rights and obligations;
(b) Assisting the client in every appropriate way, and taking legal action to protect him and his interest; and,
(c) Representing him before courts, tribunals or administrative authorities.

83. The lawyer in discharging his duties shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

84. Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law and it is the duty of the lawyer to do so to the best of his ability and with integrity and independence. Consequently, the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

85. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or assisted any client or for having represented any client's cause.

86. Save and except when the right of representation by a lawyer before an administrative department or a domestic forum may have been excluded by law, or when a lawyer is suspended, disqualified or disbarred by an appropriate authority, no court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client, provided, however, that such exclusion, suspension, disqualification or disbarment shall be subject to independent judicial review.

87. It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

88. If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judges or judges who participated in the proceedings which gave rise to the charge against the lawyer, except that the judge or judges concerned may in such a case suspend the proceedings and decline to continue to hear the lawyer concerned.

89. Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his professional appearance before a court, tribunal or other legal or administrative authority.

90. Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including:

(a) Confidentiality of the lawyer-client relationship and the right to refuse to give testimony if it impinges on such confidentiality;
(b) The right to travel and to consult with their clients freely born within their own country and abroad;
(c) The right to visit, to communicate with and to take instructions from their clients;

(d) The right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work;
(e) The right to accept or refuse a client or a brief on reasonable personal or professional grounds.

92. Lawyers shall enjoy freedom of belief, expression, association and assembly; and in particular they shall have the right to:

(a) Take part in public discussion of matters concerning the law and the administration of justice;
(b) Join or form freely local, national and international organizations;
(c) Propose and recommend well considered law reforms in the public interest and inform the public about such matters;
(d) Take full and active part in the political, social and cultural life of their country.

93. Rules and regulations governing the fees and remunerations of lawyers shall be designed to ensure that they earn a fair and adequate income, and legal services are made available to the public on reasonable terms.

Legal Service for the Poor

94. It is a necessary corollary of the concept of an independent bar that its members shall make their services available to all sectors of society and particularly to its weaker sections, so that free legal aid may be given in appropriate cases, no one may be denied justice, and the Bar may promote the cause of justice by protecting economic, social, cultural, civil and political human rights of individuals and groups.

95. Governments shall be responsible for providing sufficient funding for appropriate legal service programmes for those who cannot afford the expenses on their legitimate litigation. Governments shall also be responsible for laying down the criteria and prescribing the procedure for making such legal services available in such cases.

96. Lawyers engaged in legal service programmes and organizations, which are financed wholly or in part from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

(a) The direction of such programmes or organizations being entrusted to Bar Associations or independent boards composed mainly or entirely of members of the profession, with effective control over its policies, allocated budget and staff;
(b) Recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgement.

The Bar Association

97. There may be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists.

98. In order to foster the solidarity and maintain the independence of the legal profession, it shall be the duty of a lawyer to enrol himself as a member of an appropriate Bar Association.

Functions of the Bar Association

99. The functions of a Bar Association in ensuring the independence of the legal professional shall be inter alia:

(a) To promote and uphold the cause of justice, without fear or favour;
(b) To maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;

(c) To defend the role of lawyers in society and preserve the independence of the profession;
(d) To protect and defend the dignity and independence of the judiciary;
(e) To promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;
(f) To promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal and in accordance with proper procedures in all such proceedings;
(g) To promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
(h) To promote a high standard of legal eduction as a prerequisite for entry into the profession;
(i) To ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to giver assistance to new entrants into the profession;
(j) To promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;
(k) To affiliate with and participate in the activities of international organizations of lawyers.

100. Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall, as far as practicable, co-operate in assisting the foreign lawyer to obtain the necessary right of audience.

101. To enable the Bar Association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention of any of its members or any lawyer practising within its jurisdiction; and for the same purpose the Association shall have notice of:

(a) Any search of his person or property;
(b) Any seizure of documents in his possession;

(c) Any decision to take proceedings affecting or calling into question the integrity of a lawyer.

In such cases, the Bar Association shall be entitled to be represented by its president or nominee to follow the proceedings and in particular to ensure that professional secrecy and independence are safeguarded.

Disciplinary Proceedings

102. The Bar Association shall establish and enforce in accordance with the law a code of professional conduct of lawyers. Such a code of conduct may also be established by legislation.

103. The Bar Association or an independent statutory authority consisting mainly of lawyers shall ordinarily have the primary competence to conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant or a public-spirited citizen. A court or a public authority may also report a case to the Bar Association or the statutory authority which may on that basis initiate disciplinary proceedings.

104. Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar Association.

105. An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.

106. Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this Declaration.

A. Judges and the Executive

1. (a) Individual judges should enjoy personal independence and s stantive independence.
   (b) Personal independence means that the terms and condition: judicial service are adequately secured so as to ensure that ir vidual judges are not subject to executive control.
   (c) Substantive independence means that in the discharge of his dicial function a judge is subject to nothing but the law and commands of his conscience.

2. The Judiciary as a whole should enjoy autonomy and collective dependence vis-à-vis the Executive.

3. (a) Participation in judicial appointments and promotions by the ecutive or legislature is not inconsistent with judicial indep dence provided that appointments and promotions of judges vested in a judicial body in which members of judiciary and legal profession form a majority.
   (b) Appointments and promotions by a non-judicial body will be considered inconsistent with judicial independence in co tries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

4. (a) The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.
   (b) The power of removal of a judge should preferably be vested in a judicial tribunal.
   (c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.

5. The Executive shall not have control over judicial functions.

6. Rules of procedure and practice shall be made by legislation or by the Judiciary in co-operation with the legal profession subject to parliamentary approval.

7. The State shall have a duty to provide for the executive of judgements of the Court. The Judiciary shall exercise supervision over the execution process.

8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

9. The central responsibility for judicial administration shall preferably be vested in the Judicial or jointly in the Judiciary and the Executive.

10. It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.

11. (a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

(b) In countries where the power of division of judicial work vested in the Chief Justice, it is not considered inconsistent wi judicial independence to accord to the Chief Justice the power t change the predetermined plan for sound reasons, preferably consultation with the senior judges when practicable.

(c) Subject to (a), the exclusive responsibility for case assignmer should be vested in a responsible judge, preferably tl President of the Court.

12. The power to transfer a judge from one court to another shall l vested in a judicial authority and preferably shall be subject to the judg consent, such consent not to be unreasonably withheld.

13. Court services should be adequately financed by the relevant go ernment.

14. Judicial salaries and pensions shall be adequate and should be reg larly adjusted to account for price increases independent of Executi control.

15. (a) The position of the judges, their independence, their securi and their adequate remuneration shall be secured by law.

(b) Judicial salaries cannot be decreased during the judges' servi except as a coherent part of an overall public econon measure.

16. The ministers of the government shall not exercise any form of pı sure on judges, whether overt or covert, and shall not make stateme which adversely affect the independence of individual judges or of Judiciary as a whole.

17. The power of pardon shall be exercised cautiously so as to avoid use as interference with judicial decisions.

18. (a) The Executive shall refrain from any act or omission which ı empts the judicial resolution of a dispute or frustrates the prc execution of a court judgement.

(b) The Executive shall not have the power to close down or suspend the operation of the court system at any level.

B. Judges and the Legislature

19. The Legislature shall not pass legislation which retroactively reverses specific court decisions.

20. (a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service.

(b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.

21. A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before *ad hoc* tribunals.

C. Terms and Nature of Judicial Appointments

22. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirements at an age fixed by law at the date of appointment.

23. (a) Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment.

(b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

24. The number of the members of the highest court should be rigid and should not be subject to change, except by legislation.

25. Part-time judges should be appointed only with proper saf'

26. Selection of judges shall be based on merit.

D. Discipline and Removal of Judges

27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.

28. The procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgements in disciplinary proceedings, whether held *in camera* or in public, may be published.

29. (a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.

(b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.

30. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.

31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.

32. The head of the court may legitimately have supervisory powers tc control judges on administrative matters.

E. The Press, the Judiciary and the Courts

33. It should be recognized that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.

34. The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.

F. Standards of Conduct

35. Judges may not during their term of office serve in executive functions, such as ministers of the government, not may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.

36. Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking.

37. Judges shall not hold positions in political parties.

38. A judge, other than a temporary judge, may not practice law during his term of office.

39. A judge should refrain from business activities, except his personal investments, or ownership of property.

40. A judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.

41. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.

42. Judges may take collective action to protect their judicial independence and to uphold their position.

G. Securing Impartiality and Independence

43. A judge shall enjoy immunity from legal actions and the obligatio to testify concerning matters arising in the exercise of his officia functions.

44. A judge shall not sit in a case where there is a reasonable suspicio of bias or potential bias.

45. A judge shall avoid any course of conduct which might give rise t an appearance of partiality.

H. The Internal Independence of the Judiciary

46. In the decision-making process, a judge must be independent vis-à vis his judicial colleagues and superiors.

SECTION (A) EMERGENCY: DECLARATION, DURATION AND CONTROL

1. (a) The existence of a public emergency which threatens the life of the nation, and which is officially proclaimed, will justify the declaration of a state of emergency.

(b) The expression "public emergency" means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.

2. The constitution of every state shall define the procedure for declaring a state of emergency; whenever the executive authority is competent to declare a state of emergency, such official declaration shall always be subject to confirmation by the legislature, within the shortest possible time.

3. (a) The declaration of a state of emergency shall never exceed the period strictly required to restore normal conditions.

(b) The duration of emergency (save in the case of war or external aggression) shall be for a period of fixed term established by the constitution.

(c) Every extension of the initial period of emergency shall be supported by a new declaration made before the expiration of each term for another period to be established by the constitution.

(d) Every extension of the period of emergency shall be subject to the prior approval of the legislature.

4. The declaration of a state of emergency may cover the entire territory of the state or any part thereof, depending upon the areas actually affected by the circumstances motivating the declaration. This will not prevent the extension of emergency measures to other parts of the country whenever necessary nor the exclusion of those parts where such circumstances no longer prevail.

5. The legislature shall not be dissolved during the period of emergency but shall continue to function; if dissolution of a particular legislature is warranted, it shall be replaced as soon as practicable by a legislature duly elected in accordance with the requirements of the constitution, which shall ensure that it is freely chosen and representative of the entire nation.

6. (a) The termination of a state of emergency shall be automatic upon the expiration of a given term without prejudice to the right of express revocation before such expiry to be exercised by the executive or the legislature, as the case may be.

(b) Upon the termination of an emergency there shall be automatic restoration of all rights and freedoms which were suspended or restricted during the emergency and no emergency measures shall be maintained thereafter.

7. At the regional or international level, every declaration of emergency by a state party to a regional or international human rights treaty shall be subject to such judicial or other review as the terms of the particular treaty may provide; while, at the national level, such power of review shall be exercised in terms of the constitution and legal tradition of the state concerned, keeping in view the undertaking of the state to adopt legislative or other measures to give effect to the rights recognized by any treaty to which it may be a party.

SECTION (B) EMERGENCY POWERS AND THE PROTECTION OF INDIVIDUALS: GENERAL PRINCIPLES

1. During the period of the existence of a public emergency the state concerned may take measures derogating from its obligations to respect and ensure to all individuals within its territory and subject to its jurisdiction the human rights and fundamental freedoms internationally recognized, but it may not derogate from internationally prescribed rights which are by their own terms "nonsuspendable" and not subject to derogation.

2. The power to take derogatory measures as aforesaid is subject to five general conditions:

(a) Every state which is a party to a regional or international human rights treaty shall comply with the principle of notification as may be prescribed by the particular treaty.

(b) Such measures must be strictly proportionate to the exigencies of the situation.

(c) Such measures must not be inconsistent with the other obligations of the state under international law.

(d) Such measures must not involve any discrimination solely on the ground of race, colour, sex, language, religion, nationality or social origin.

(e) The basic rights and freedoms guaranteed by international law shall remain non-derogable even during emergency. As the minimum, the constitution shall provide that the rights recognized as non-derogable in international law may not be affected by a state of emergency.

3. While assuming or exercising emergency powers every state shall respect the following principles:

(a) The fundamental functions of the legislature shall remain intact despite the relative expansion of the authority of the executive. Thus, the legislature shall provide general guidelines to regulate executive discretion in respect of permissible measures of delegated legislation.

(b) The prerogatives, immunities and privileges of the legislature shall remain intact.

(c) The guarantees of the independence of the judiciary and of the legal profession shall remain intact. In particular, the use of emergency powers to remove judges or to alter the structure of the judicial branch or otherwise to restrict the independence of the judiciary shall be prohibited by the constitution.

4. (a) All emergency measures in derogation of the rights of individuals shall be supported by the authority of law as enacted by the duly elected representatives of the people.

(b) As far as practicable, norms to be applied during an emergency shall be formulated when no emergency exists.

(c) States shall review and, if necessary, revise the emergency measures (legislative or executive) from time to time to ensure reasonable guarantees against any abusive exercises of emergency powers.

5. The judiciary shall have the power and jurisdiction to decide: firstly, whether or not an emergency legislation is in conformity with the constitution of the state; secondly, whether or not any particular exercise of emergency power is in conformity with the emergency legislation; thirdly, to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality; and fourthly, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect. A court of law shall have full powers to declare null and void any emergency measure (legislative or executive) or any act of application of any emergency measure which does not satisfy the aforesaid tests.

Article 1: Right to Legal Personality

1. Everyone shall have the right to recognition everywhere as a person before the law.

2. The inherent dignity of the human person shall be respected.

3. Every person has the right to have his physical, mental and moral integrity respected.

Article 2: Freedom from Slavery or Servitude

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 3: Freedom from Discrimination

1. All persons are equal before the law and are entitled without discrimination to the equal protection of the law.

2. There shall be no discrimination solely on ground of race, colour, sex, language, religion, nationality or social origin.

Article 4: Right to Life

1. Every person has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his right to life.

2. In a country where the death penalty does not exist it shall not be introduced as an emergency measure.

3. In a country where the death penalty exists, it may be imposed, even during emergency, only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and pursuant to a final judgment rendered by a competent court.

4. In no case shall the death penalty be imposed for political offences or related common crimes.

5. The death penalty shall not be imposed upon any person who, at the time of commission of the crime, was under 18 years of age or over 70 years of age. Women when pregnant or mothers of young children shall never be executed.

6. Every person sentenced to death shall have the right to apply for amnesty, pardon or commutation of the sentence which may be granted in all cases. No sentence of death shall be executed while a petition for such relief is pending before the competent court or authority.

7. Every state shall remain fully accountable for every enforced or involuntary disappearance of an individual within its jurisdiction occasioned by an act or omission of the state. With a view to preventing the inhuman and criminal practice of disappearances which may lead to illegal or arbitrary deprivation of the right to life, every state shall:

(a) maintain central registers or records to account for all persons that have been detained, so that their relatives and other interested persons may promptly learn of any arrests that may have been made;
(b) guarantee that such detention shall be made only by competent and duly identified authorities as may be prescribed by law or regulations;
(c) guarantee that the persons so detained shall be kept in premises which afford every possible safeguard as regards hygiene and health.

1. No one shall be deprived of his right to liberty and security of the person except on such grounds and in accordance with such procedures as are established by law.

2. Any law providing for preventive or administrative detention shall secure the following minimum rights of the detainee:

(a) The right to be informed, within seven days, of the grounds of his detention: however, disclosure of such facts in support of the grounds as the detaining authority considers to be prejudicial to the public interest need not be made to the detainee, without prejudice to the power of the reviewing authority in its discretion to examine *in camera* such facts if it considers it necessary in the interests of justice.

(b) The right to communicate with, and consult, a lawyer of his own choice, at any time after detention.

(c) The right to have his case reviewed within 30 days from the date of his detention by a judicial or quasi-judicial body constituted in accordance with the procedures designed to make such guarantees effective.

(d) No person shall be detained for a period longer than 30 days unless the reviewing authority before its expiry has reported that there is in its opinion sufficient cause for such detention.

(e) Even if the reviewing authority reports that in its opinion there is sufficient cause for a person's detention, such detention shall not be continued beyond a period of one year. If, however, circumstances then prevailing warrant detention, the detaining authority may, subject to the same conditions and safeguards, order further detention of such person.

(f) Regular visits by the members of the family of the detainee shall be permitted.

(g) The detainee shall be treated with humanity and respect for the inherent dignity of the human person and, in any event, such treatment, consistent with security, shall not be less favourable than that afforded to convicted prisoners.

(h) The names of the detainees with the dates of their orders of detention shall be published in an official gazette; the names of persons released should be similarly published, with the dates of their release.

3. In every case of detention without trial, during an emergency, the remedy of *habeas corpus* (or *amparo*) must be available to the detainee at least for the limited purpose of ensuring the supervisory jurisdiction of a competent court of law in five respects:

(a) for determination whether the relevant law of preventive or administrative detention is in compliance with the relevant constitutional requirements;

(b) whether the order of detention is in compliance with the law of preventive or administrative detention;

(c) whether the detainee is the person against whom the order of detention was issued and whether the order was made *mala fides* or in violation of natural justice;

(d) for ensuring that every detainee is treated with humanity and with respect by directing, *inter alia*, his medical examination and inspection of the prison or place of detention; and

(e) for ensuring that the minimum rights of the detainee mentioned in the preceding paragraphs are duly implemented by the detaining authority.

Article 6: Freedom from Torture

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

2. Every state shall, in accordance with the provisions of the 1975 United Nations Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction.

3. In particular, in the context of the principles recognized in the said 1975 Declaration, every state shall:

(a) ensure that acts of torture as defined in article 1 are offences under its criminal law as enjoined by article 4;

(b) frame general rules or instructions with regard to the training, functions, duties and requirements of law enforcement personnel and other public officials who are involved in the detention and interrogation of all persons deprived of their liberty (article 5);

(c) review systematically the interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty (article 6);

(d) conduct an impartial investigation by a competent authority whenever there is reason to believe that any act prohibited as aforesaid has been committed, whether or not a formal complaint is received (articles 8 and 10);

(e) institute criminal, disciplinary or other appropriate proceedings against the alleged offender or offenders if investigation establishes that such offence is suspected of having been committed (articles 9 and 10);

(f) afford appropriate compensation to the victim in accordance with national law (article 11) and inflict adequate punishment for the offender or offenders proved guilty;

(g) declare as inadmissible evidence, in any proceedings against the person concerned, any statement obtained as a result of an act prohibited as aforesaid.

4. The law of evidence shall not be amended so as to give additional incentives for obtaining confessions.

5. Every detainee shall be examined by a doctor soon after his arrest and his physical and mental condition duly recorded and signed by the doctor; thereafter periodical medical examinations shall be held and records thereof duly maintained. The detainee shall have the opportunity at all times to consult a doctor of his own choice.

6. With regard to the procedures for interrogation, every person in detention shall be entitled to the following minimum guarantees:

(a) all persons participating in interrogation shall be duly identified;

(b) rules shall be framed limiting the hours during which interrogation may occur and records shall be kept of all periods of interrogation with the names of all persons present;

(c) interrogation shall be subject to direct supervision by superior officers, and shall occur in conditions which permit this control to be exercised.

7. The establishment or infliction of such punishment as summary executions by firing squads, public hangings, floggings, the amputation of limbs and other cruel, inhuman or degrading forms of punishment are gross violations of international standards of humane treatment.

Article 7: Right to Fair Trial

Everyone charged with a penal offence shall be entitled to the following minimum guarantees of fair trial in full equality and without discrimination:—

1. The right to be informed promptly and in detail of the charge against him;

2. The right to have adequate time and facilities for the preparation of one's defence. This right shall include: (a) at least minimum communication with a counsel of one's own choice, and (b) the right of an indigent defendant to have free legal assistance in every case where the interests of justice so require;

3. The right to be present at one's trial, which should be conducted in a language comprehensible to the defendant;

4. Such trial should be held in public but, if attendance at such trial is restricted in any way, such restrictions shall not apply to the members of the family of the defendant;

5. The defendant has the right to be presumed innocent until proved guilty according to law;

6. No one shall be held guilty of any criminal offences on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

7. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations;

8. No person shall be prosecuted and punished for the same offence more than once, or for a similar offence based upon the same facts that has resulted in a conviction or acquittal;

9. No person accused of any offence shall be compelled to be a witness against himself;

10. Any establishment of a criminal offence or infliction of a punishment based on general principles arising out of religious or other sources, which contravene the aforesaid basic norms, shall be considered a gross violation of international law;

11. Every person has a right to be tried by a tribunal which offers the essential guarantees of independence and impartiality;

12. The right to appeal shall always be guaranteed;

13. The right to obtain attendance and examination of defence witnesses shall never be denied; nor shall the right to cross-examine all witnesses who appear at the trial, or to test the veracity of the evidence of those persons who do not attend or appear at the trial, ever be denied.

Article 8: Freedom of Thought, Conscience and Religion

1. Everyone has the right to freedom of thought, conscience and religion; freedom of religion includes the right to hold any religion or belief or none and to change his religion or belief, and freedom, either alone or in community with others, in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair the freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, public order, health or morals or the fundamental rights and freedoms of others.

4. Every state shall respect the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

5. Nothing in this article shall be construed to deny to any person the right to hold no religious beliefs.

Article 9: Freedom from Imprisonment for Inability to fulfil a Contractual Obligation

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 10: Rights of Minorities

1. Persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language.

2. Advocacy of national, racial, religious or linguistic hatred that constitutes an incitement to discrimination or violence, shall be prohibited by law.

Article 11: Rights of the Family

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental unit of society and is entitled to protection by society and the state.

Article 12: Right to a Name

Every person has the right to a given name and the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names, if necessary.

Article 13: Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state.

Article 14: Right to Nationality

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 15: Right to Participate in Government

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 16: Right to a Remedy

1. The institution of an independent and impartial judiciary is essential for ensuring the rule of law, particularly in time of emergency.

2. Judicial guarantees essential for the protection of the rights aforesaid must be secured by every state in its constitution or by law.

3. All ordinary remedies as well as special ones, such as *habeas corpus* or *amparo,* shall remain operative during the period of emergency with a view to affording protection to the individual with respect to his rights and freedoms which are not or could not be affected during the emergency, as well as other rights and freedoms which may have been attenuated by emergency measures.

4. Civil courts shall have and retain jurisdiction over all trials of civilians for security or related offences; initiation of any such proceedings before or their transfer to a military court or tribunal shall be prohibited. The creation of special courts or tribunals with punitive jurisdiction for trial of offences which are in substance of a political nature is a contravention of the rule of law in a state of emergency.