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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy

Addendum

Report on the mission to Peru

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Introduction

1. The present report concerns a fact-finding mission to Peru undertaken from 9 to 15 September 1996 by the Special Rapporteur on the independence of judges and lawyers pursuant to resolution 1994/41 of the Commission on Human Rights, adopted at its fiftieth session, which established a three-year mandate that called upon the Special Rapporteur, inter alia, to inquire into any substantial allegations transmitted to him and report his conclusions thereon.

2. In his first annual report to the Commission on Human Rights in 1995, the Special Rapporteur suggested that some standard-setting might be required in the area of anti-terrorism measures affecting judicial independence or the independence of the legal profession, such as the hooding of judges (E/CN.4/1995/39, para. 60). In his second report to the Commission in 1996, the Special Rapporteur elaborated on the issue of the use of "faceless" judges and anonymous witnesses as a means of protecting the judiciary from acts of terrorism (E/CN.4/1996/37, paras. 66-78). The Special Rapporteur indicated that he continued to receive information relating to the situations in Colombia and Peru, where the judiciary had been targeted. In his preliminary conclusions, the Special Rapporteur expressed the view that such tribunals violated the independence and impartiality of the justice system for a variety of reasons. In view of the fact that this issue needed further study and analysis, he expressed the hope that he would be able to carry out a mission to Peru and Colombia to investigate these practices in situ, and do a more exhaustive survey worldwide of similar practices before stating his final conclusion and recommendations.

3. The invitation to visit Peru was extended by the Peruvian Government on 11 July 1996. The mission to Peru was undertaken from 9 to 15 September 1996, followed immediately by a mission to Colombia from 16 to 27 September 1996. In view of the complexity of the issues examined during the visits, it was decided to report to the Commission on Human Rights in two separate reports. The report on the visit to Colombia is contained in E/CN.4/1998/39/Add.2.

4. The primary focus of the mission of the Special Rapporteur was to study the use of "faceless" judges for both civil and military courts to try civilians charged with terrorist-related crimes and treason in light of the accepted international standards concerning the independence and impartiality of the judiciary, and the right to due process. These issues are discussed in chapter II of the present report.

5. The Special Rapporteur also wishes to address ongoing issues of concern which are closely related to the primary focus of his fact-finding mission. These issues are discussed in chapters III and IV of the present report.

6. In addition, the Special Rapporteur studied some aspects of the ongoing judicial reform in the light of international standards concerning the independence and impartiality of the judiciary, including the procedures for appointment of judges, security of tenure, discipline and dismissal, remuneration, and the role of lawyers and the extent of their independence. The jurisdiction and functions of the Ombudsman (Defensor del Pueblo), insofar

as they relate to judicial independence, were also of interest to the Special Rapporteur. These issues are also discussed in chapter IV of the present report.

7. The 1993 Constitution provides in article 55 that international human rights treaties ratified by Peru form part of the domestic legislation. Furthermore, the Fourth Final and Transitory Provision of the 1993 Constitution provides that the norms concerning the rights and freedoms that the Constitution recognizes are to be interpreted in accordance with the treaties and the international agreements concerning corresponding matters ratified by Peru. Peru has ratified, inter alia, the following international human rights instruments: International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Convention on the Rights of the Child, American Convention on Human Rights, Inter-American Convention to Prevent and Punish Torture.

8. The Special Rapporteur also took into consideration the following international instruments: Standard Minimum Rules For the Treatment of Prisoners, Code of Conduct for Law Enforcement Officials, United Nations draft universal declaration on the independence of justice (the Singhvi Principles), 1/ the International Bar Association (IBA) Minimum Standards of Judicial Independence, 2/ Paris Minimum Standards of Human Rights Norms in a State of Emergency, 3/ United Nations Basic Principles on the Independence of the Judiciary, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, United Nations Basic Principles on the Role of Lawyers, United Nations Guidelines on the Role of Prosecutors, Johannesburg Principles on National Security, Freedom of Expression and Access to Information of 1995. 4/

9. Prior to undertaking the visit to Peru, the Special Rapporteur submitted to the Peruvian Government the terms of reference for fact-finding missions by special rapporteurs/representatives of the Commission on Human Rights. Throughout the mission, the Special Rapporteur and the United Nations staff who accompanied him were given freedom of movement in the whole country, freedom of inquiry and appropriate security measures, ensuring the successful accomplishment of the mission. The Special Rapporteur would like to thank the Government of Peru, and in particular the Ministry of Foreign Affairs, for the invitation to visit Peru, as well as for the arrangements for the meetings and visits held during the mission.

10. On the first day of his mission, the Special Rapporteur participated in the seventh International course on "Justice and Human Rights in the Process of Modernization", a seminar organized by the Andean Commission of Jurists concerning reforms of the judiciary in the Andean region. From 10 to 13 September 1996, the Special Rapporteur held consultations in Lima with the following persons: Mr. Carlos Hermoza Moya, Minister of Justice; General Juan Briones Dávila, Minister of Interior; General Guido Guevarra Guerra,

President of the Supreme Council of Military Justice; Mr. Jorge Santistevan de Noriega, National Human Rights Ombudsman (Defensor del Pueblo); Mrs. Blanca Nélida Colán, Attorney-General and Mr. Clodomiro Chávez Valderrama, senior attorney (Fiscal Supremo); Mr. Daniel Espichan Tumay, President of the Pacification and Human Rights Commission of the Congress; Mr. Oscar Medelius Rodríguez, President of the Justice Commission of the Congress; Mr. Ricardo Nugent, President, and Dr. Manuel Aguirre Roca, Dr. Francisco Acosta Sánchez, Dr. José García Marcelo, Dr. Delia Revoredo Marsano, Dr. Guillermo Díaz Valverde and Dr. Guillermo Rey Terry, members, of the Constitutional Court; judges of the Supreme Court; Mr. Victor Raúl Castillo Castillo, Mr. Lino Roncalla Valdivia, Pedro Ibérico Mas and Mr. José Dellepiane of the Executive Commission of the Judiciary; Mr. José Ugaz, Public Prosecutor and Mr. César Martín, former member of the Judicial Branch; Mr. Eduardo Rada, Dean of the Bar Association of Lima (Colegio de Abogados de Lima).

11. In addition, the Special Rapporteur met with members of lawyers associations, individual judges and lawyers, experts in the administration of justice, legal and penitentiary affairs, and members of other non-governmental organizations working in the field of the administration of justice and/or human rights, including representatives of the National Coordinator for Human Rights (Coordinadora Nacional de Derechos Humanos).

12. In Lima, the Special Rapporteur also held consultations with the Permanent Representative of the United Nations Development Programme (UNDP) and UNDP's consultant on the judicial reform programme, Mr. William Davies. On 14 September 1996, the Special Rapporteur visited Ayacucho where he met with judges of the High Court (Corte Superior) of Ayacucho as well as with Justices of the Peace from the region.

13. In view of the considerable media interest on his mission, on 14 September 1996, upon completion of his mission to Peru, the Special Rapporteur met the media and issued a press statement expressing his preliminary observations.

I. GENERAL BACKGROUND

A. Human rights situation prior to the events of 5 April 1992 and subsequent events related to the judiciary

14. Peru is a presidential republic with a population of 24 million. From 1980 to 1992, the country experienced extreme political violence as a result of the actions carried out by a group affiliated with the Peruvian Communist Party (PCP), also known as the Shining Path (Sendero Luminoso), and the Tupac Amaru Revolutionary Movement (MRTA). The death toll from political violence in Peru between 1980 and July 1992 was 24,250 persons, of whom 2,044 were members of the security forces, 10,171 were civilians, 11,773 were suspected subversives, and 262 were allegedly connected with drug trafficking. Congressional Sources have estimated the cost of political violence to Peru during this period at about 20 billion dollars.

15. As a result of this armed conflict, much of the Peruvian territory was under a state of emergency, declared pursuant to powers given under the 1979

Constitution. The state of emergency suspended certain rights recognized in the Peruvian legal system. It is alleged that armed and police forces entrusted with powers to suppress the activities of alleged subversive groups committed serious human rights violations during this period. It was also alleged that these violations were committed either directly or by paramilitary groups acting in concert with the armed forces and police forces or with their acquiescence.

16. The judiciary was widely seen to be corrupt, incompetent, politicized and intimidated by Sendero Luminoso, and not in a position to administer justice independently and impartially in terrorist-related offences.

17. Democratically elected President Alberto Fujimori Fujimori on 5 April 1992 established a Government of Emergency and National Reconstruction pursuant to Decree-Law 25.418 that called for the pacification of the country by providing, a judicial system that guaranteed the application of drastic sanctions against terrorists. To carry out its objectives, the Government of Emergency and National Reconstruction suspended those provisions of the 1979 Constitution considered to be incompatible with the objectives of the Decree-Law and proposed a new Constitution; purged and reorganized the entire judiciary; and subsequently established exceptional procedures to prosecute civilians charged with terrorist-related crimes and treason.

18. The Government dismissed summarily judges and prosecutors at all levels of the judicial branch, including superior court judges, district court judges, juvenile court judges, chief prosecutors and provincial prosecutors. On 24 April 1992, 130 judicial personnel in the Lima and Callao districts were dismissed. Further, members of the National Council of the Magistracy (Consejo Nacional de la Magistratura), established by the 1993 Constitution, and 13 judges of the Supreme Court were dismissed, leaving only 5 Supreme Court judges; and the Constitutional Court was dissolved. The Government also dismissed the Comptroller General of the Nation and, on 10 April 1992, the Attorney-General of Peru.

19. The Government subsequently appointed a new President and members of the Supreme Court, an Attorney-General, chief prosecutors and a Comptroller General. In addition, it authorized a commission of the Supreme Court to fill the vacancies in the superior courts and the Attorney-General to fill vacancies for prosecutors' positions in the various judicial districts. The Supreme Court began to evaluate at the national level all remaining judges and the majority of them, approximately 100 were subsequently dismissed. At the same time, the Attorney-General's Office began a review of the country's prosecutors, resulting in the dismissal of more personnel. By decree-law judges were precluded from availing themselves of amparo to have this measure declared null and void.

20. New judges were appointed on a provisional basis, without prior assessment of their qualifications, by the same commission set up for the removal of the previous magistrates. As a result, by the end of 1993, more than 60 per cent of the judicial posts were occupied by magistrates who had been appointed provisionally.

21. In March 1993 the Government established a Jury of Honour of the Magistracy (Jurado de Honor de la Magistratura) in order to evaluate those judges who had been dismissed and those Supreme Court judges who had been appointed by the Government on a provisional basis for transitional purposes after 5 April 1992. In December 1993, it was decided by law that the Jury of Honour of the Magistracy should continue its task of selection and designation of judges and prosecutors until the National Council of the Magistracy became fully operative.

22. In December 1994, the law regulating the National Council of the Magistracy came into force, and the Council began its work in March 1995. This autonomous institution, made up of seven members, including judges from the Supreme Court, oversees the appointment of judges through competitive examinations, as provided by article 155 of the 1993 Constitution. In addition, the Council is entrusted with the power of disciplining judges and prosecutors at all levels.

23. Between May and November 1992, by way of decree, the Government enacted wide-ranging anti-terrorism legislation amending the existing criminal procedure for the prosecution of civilians charged with treason an/or terrorist-related crimes. This legislation included the use of “faceless” judges on civil and military tribunals to try such offences.

24. On 29 December 1993, the new Constitution came into force, approved by an elected Democratic Constituent Congress. The new Constitution strengthened the executive branch and reduced the Parliament to a unicameral from a bicameral one. It extended the death penalty to crimes of treason and terrorism; it transferred jurisdiction in terrorist related-cases and treason from the civil tribunals to the military tribunals (article 173); and it allowed 15 days of incommunicado police detention (article 2.24 (f) and (g)).

25. The Constitution does provide for the continuation of certain institutions such as the Constitutional Court and the National Council of the Magistracy. It also created a new judicial institution called the National Academy for the Judiciary (Academia Nacional de la Magistratura) and the National Human Rights Ombudsman (Defensor del Pueblo).

B. Current human rights situation as it relates to the judiciary

26. In the course of his mission, the Special Rapporteur learned that there had been considerable improvement in the security situation in Peru and a decline in human rights violations by government officials. However reports of torture and involuntary disappearance had been recorded. Moreover, there was also concern over the impunity enjoyed by those government officials involved in past human rights violations.

27. In presidential elections held on 9 April 1995, President Fujimori was re-elected peacefully by a comfortable margin for a second five-year term.

28. During the period of the hostage-taking, the Special Rapporteur monitored the situation not only because of the several personalities involved but also because of the Supreme Court judge who retired during the period he was held hostage and the fact that the only hostage to die happened to be a

judge. However, it was made clear that there was no evidence that the two judges had been taken hostage because of their judicial functions. The Special Rapporteur did receive allegations regarding the bombardment of the residence of the Japanese Ambassador which resulted in the death of Judge Carlos Ernesto Giusti to the effect that he had been singled out in the shooting incident for certain decisions handed down by him in the past which were not favourable to the executive. The Special Rapporteur at this point is unable to make any observations concerning this allegation.

29. Despite the decrease in terrorist activity, as of 7 March 1997, more than 15 per cent of the national territory of Peru remained under a state of emergency.

30. During 1995, the Government amended several aspects of the anti-terrorist legislation. By October 1997, the deadline provided by Law 26.671 for renewing the use of “faceless” tribunals had elapsed. Subsequently, the Executive Commission of the Judiciary issued administrative resolution No. 510-CME stating that the Permanent Penal Chamber of the Supreme Court would be in charge of dealing with the cases concerning terrorism under Decree-Law 25.475. It is not certain whether “faceless” tribunals have been abolished in the military courts; allegations received from non-governmental organizations indicate that these tribunals are still being used.

C. Brief overview of judicial institutions

Ordinary courts

31. Article 26 of the Organizational Law of the Judicial Power provides for the following organs: the Supreme Court (Corte Suprema de Justicia); High Courts (Cortes Superiores de Justicia) in the different judicial districts; specialized and mixed courts (juzgados especializados y mixtos) in the respective provinces; professional Justices of the Peace (Juzgados de Paz Letrados) in the town or population centre where they are based; and lay Justices of the Peace (Juzgados de Paz).

32. The Supreme Court decides in cassation, or in last instance, cases which have started in a High Court or before the Supreme Court itself, and in cassation on resolutions of the military tribunals. The Supreme Court has jurisdiction over the whole country. The President of the Supreme Court is also the head of the judiciary in Peru. The plenary of the Supreme Court is the highest deliberative organ of the judicial branch according to article 144 of the Constitution.

33. There is a High Court in each of the 24 judicial districts. The High Courts have both appellate and original jurisdiction and, in a majority of cases, are the final courts of appeal.

34. The National Academy of the Judiciary, which is considered to be part of the judicial branch, is the training institution for judges and prosecutors at all levels who are candidates for the judiciary. This institution also conducts continuing legal education for lawyers and prosecutors.

35. The Constitutional Court, provided for in article 201 of the 1993 Constitution, was established on 21 June 1996. The judges are elected by Congress for a term of five years. The Constitutional Court has the competence to rule on the constitutionality of laws but cannot do so on its own motion; only certain persons, specified by law, may request rulings.

36. At the time of the Special Rapporteur's mission, judges of the Constitutional Court expressed concern at the serious lack of financial resources for the administration of the Court. The judges had announced publicly that the Court would soon be forced to go into recess (receso). The Special Rapporteur welcomed the immediate response of the Government that it would make available sufficient resources for the Court.

37. The Constitutional Court began with a backlog of about 1,090 cases which had developed since the dissolution of the previous Constitutional Court in 1992. It was estimated that about 900 cases were de facto (de hecho) resolved. The reasons for the delay in the establishment of the new Constitutional Court were said to relate to the appointment of the judges.

38. The National Council of the Magistracy, as mentioned above, selects judges and prosecutors through competitive examinations in accordance with article 155 of the Constitution.

39. Under the 1993 Constitution, the Public Ministry is autonomous and headed by the Attorney-General of the Nation who is elected on a rotation basis for three years by the Board of Public Prosecutors. Since 6 June 1996, the Office of the Attorney-General has been in the process of an administrative reorganization, which is supervised by the Executive Commission of the Public Ministry.

40. The duties of the Public Ministry are, inter alia, to initiate judicial action in defence of the public interests protected by law; to oversee the independence of the judicial organs and the proper administration of justice; to represent society in the judicial process; and to conduct investigations of criminal offences in accordance with article 159 of the Constitution. The Public Ministry also has legislative initiative and can report to Congress or to the President of the Republic concerning omissions or deficiencies in existing legislation.

41. The backlog of cases of the Public Ministry is enormous. Attorney-General Blanca Nélida Colán, estimated that an additional 1,500 prosecutors would be needed to be able to cope with the backlog of some 2,000 cases. Mrs. Nélida Colán told the Special Rapporteur that the budget for the Public Ministry had recently been cut by 40 per cent and that there were therefore no means to appoint new prosecutors or to fill the existing vacancies. The present priority of the Public Ministry is to try cases of terrorism and reduce the high number of those detained without trial: in 1995 there were 6,000 persons awaiting trial, and about 16,311 in December 1996.

42. Another new institution created by the 1993 Constitution is the Office of the National Human Rights Ombudsman. Articles 161 and 162 of the

Constitution provide for its functions, which are further defined in Law 26.520, the Organizational Law of the Office of the Ombudsman (Ley Orgánica de la Defensoría del Pueblo).

43. The mandate of the Ombudsman is, inter alia, to defend the constitutional and fundamental rights of the individual and the community and to supervise the fulfilment of the obligations of the administration and the provision of public services to the citizenry. The Ombudsman's Office may directly receive complaints from any natural or legal person, individually or collectively, without any restriction, who has been affected by an "inadequate exercise of public functions". The Ombudsman cannot interfere with the exercise of the judicial power.

44. If, as the result of an investigation, the Ombudsman considers that an "abnormal functioning" of the administration of justice has occurred, he must inform the Control Organ of the Judiciary (Organo de Control de la Magistratura), the National Council of the Magistracy or the Public Ministry. In addition, if the circumstances require, the Ombudsman can, at any time and apart from his annual report, inform Congress about his activities with regard to the administration of justice.

Military courts

45. The Military Code establishes that common civil crimes will be tried by regular courts and only those crimes unique to the line-of-duty function (delitos de función) committed by military and police personnel or civilians employed by the military establishment will be tried by the military courts. However, as pointed out earlier, article 173 of the 1993 Constitution grants jurisdiction to military courts to try civilians charged with terrorism and treason.

46. The military judges on active duty are subject to the Code of Military Justice, and except for the prosecutor and the auditor, do not belong to the judicial branch. Police personnel subject to the Code of Military Justice for delitos de función are tried by special police tribunals.

47. The function of the Supreme Court with regard to military justice is limited to resolving conflicts of competence, to ruling on requests for extradition, and to hearing in first instance the competence proceedings of the military courts against, inter alia, the President, government ministers, members of Congress and members of the Supreme Council of Military Justice, in accordance with article 3 of the Organizational Law on Military Justice.

48. The military court system in each of the five military regions is composed of the Permanent Court Martial at first instance and the Supreme Council of Military Justice at second instance. The Permanent Court Martial is presided over by a colonel in the military legal corps (Cuerpo Jurídico Militar); the Secretary is a major and the secretary of the court of investigation, which refers the case, is a captain. Each military zone has two or more courts of investigation. The Supreme Council of Military Justice is composed of 10 officials, including generals and admirals in active service (article 6 of the Organizational Law of Military Justice). In addition, the

law provides that the General Prosecutor (Fiscal General) and the Auditor-General must be members of the military legal corps.

II. EXCEPTIONAL MEASURES IMPLEMENTED BY THE PERUVIAN GOVERNMENT TO PROSECUTE CIVILIANS CHARGED WITH TERRORISM AND TREASON

A. Anti-terrorist legislation enacted by the Emergency and National Reconstruction Government

The crime of terrorism

49. Decree-Law 25.475 of 6 May 1992 expressly abrogated the norms of the Criminal Code that since April 1991 had regulated terrorist-related crimes and defines, in article 2, “terrorism” as an act aimed at

> “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, generating facilities or any goods or service by using arms, explosive materials or devices or any other means capable of inflicting damage or seriously disrupting the public tranquillity or adversely affecting international relations or the security of society and the State”.

50. Unlike in ordinary criminal cases, the investigation is carried out by a division of the police entrusted with the investigation of terrorist-related crimes known as DINCOTE (Dirección Nacional contra el Terrorismo) which is given the power to impose incommunicado detention unilaterally, without consulting a judge, although DINCOTE is required to inform a representative of the Public Ministry and a judge about the detention. Subsequently, this restrictive law was amended to allow access to detainees by relatives and defence lawyers.

51. DINCOTE has the power to decide whether the evidence is sufficient to bring charges and it also determines what charges will be brought and whether the detainee will be charged before a civilian or a military court. Further, DINCOTE continues to have unlimited time in the questioning of suspects and the formalizing of charges.

52. Of particular interest to the Special Rapporteur are the norms concerning the judges hearing these cases. In that regard, articles 14 to 16 of the Decree-Law provide for special protective measures for judicial officers trying cases of terrorism and treason. Article 14 provides that the trials of those charged with terrorism will be held in special places at penitentiary centres. Article 15 provides that the identity of the judges, the members of the Public Ministry, as well as judicial auxiliaries, will be kept secret; that anyone who violates this norm commits an offence and, if convicted, will be sentenced to between five and seven years' imprisonment and that decisions of the tribunals will not be signed by the judges or by the judicial auxiliaries. Article 16 provides that participants in the trial will not be identified.

53. Article 13 of Decree-Law 25.475 provides for judicial proceedings before civilian “faceless courts”. These proceedings comprise three stages: the first stage is before the examining judge, in the second stage a superior court tries and sentences the defendant, and the third stage is the appeal. The maximum time period for each stage is 30 days extendable by 20 days before the examining judge, 15 consecutive days in the trial court and 15 days in the appeals court. Under the civilian procedure, once the defendant is found guilty by the superior court, he can appeal to the Supreme Court of Justice to have the conviction reviewed. The President of the Supreme Court determines which members of the Court will serve in the Special Anti-Terrorist Criminal Chamber that hears these appeals. (In this context, the Special Rapporteur was reminded of the fact that in 1992, the President of the Supreme Court and the majority of the Court's judges were appointed by the executive branch of the Government and thus are not seen by some to be independent.) The “faceless” judges on the civilian “faceless courts” are drawn from all branches of the judicial service, including from specialized courts. As a consequence, they reportedly lack experience in trying cases of terrorism, and allegedly have a tendency to rely completely on the evidence provided by the police. Article 13 also provides that the judges and the judicial auxiliaries taking part in the proceedings are not subject to challenge by the accused and that preliminary motions will be ruled on at the same time as the sentence is pronounced; it also prohibits the appearance as witnesses of police or military personnel who participated in the interrogation.

54. Article 17 provides that any judge in the country has competence to hear these cases. Article 18 prohibits lawyers from representing more than one defendant accused of terrorism at a time (the article was subsequently abrogated) and article 21 modifies article 29 of the Criminal Code by providing life imprisonment as one of the possible sanctions within the penal system.

55. Under the emergency legislation, the judge is obliged to open an investigation and order an arrest once a person has been accused of terrorism, even if the facts do not necessarily support the allegation of a terrorist crime having been committed. Upon completion of the investigation, the person can be released only by the High Court. In the early years of the emergency cases of “terrorism” could be heard by superior judges (vocales) in the judicial districts, irrespective of their specialization.

56. Beginning in November 1993, however, the anti-terrorism legislation was gradually amended. First instance and superior court judges were allowed to order the unconditional release of those accused of terrorist-related crimes if there was insufficient evidence (although in practice this procedure has rarely been applied). The right to a prompt judicial determination of the legality of the detention (habeas corpus) was restored. Further, lawyers were allowed to represent simultaneously more than one defendant accused of terrorism. From 1996, the police were no longer allowed to present detainees charged with terrorist offences to the news media; however, the police were allowed to continue this practice in the case of detainees charged with treason. The right of access to a lawyer from the moment of detention was restored, and the presence of the public prosecutor during the police interrogation was made mandatory.

57. In addition, on 28 March 1996, legislation was passed by Congress to provide for retrials of prisoners acquitted and freed by military or civil courts and whose cases had been reopened on the order of the High Court. The previous year, the Supreme Court was reported to have ordered the retrial of hundreds of prisoners who had been acquitted by lower courts, following judicial reviews mandated by the anti-terrorist laws. In many of the cases, retrials were ordered on the basis of technical procedural errors in the lower courts.

58. The Special Rapporteur learned from the President of the Supreme Court that from 1993 to 29 August 1996, 3,662 cases concerning terrorism were received by the Court, of which 766 were still pending and 2,789 had been resolved.

The crime of treason

59. Under the emergency legislation, military courts in Peru have the competence to hear cases of treason, in accordance with Decree-Law No. 25.659, article 1 of which defines offences of treason as follows: (a) utilization of car bombs or similar vehicles, explosive devices, weapons of war or similar weapons that cause the death of persons or impair their physical or mental health or damage public or private property, or in any other way give rise to serious danger for the population; (b) storage and illegal possession of explosives, ammonium nitrate or elements that serve for the manufacture of that product, or the voluntary detonation of inputs or elements that can be used in the manufacture of explosives or terrorist acts as listed in the previous paragraph.

60. The proceedings under the military system, like the civilian system, are composed of three stages: the first stage is before the examining judge, the second stage is the trial court, or court martial, and the third, the appeal stage, is the Supreme Council of Military Justice. However, under Decree-Law 25.708, 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 tribunal is of 30 years' imprisonment or longer. Persons convicted of treason by military courts have no right of appeal to the Supreme Court. A treason trial is meant to be completed within 10 days, and an appeal before the Supreme Council of Military Justice in 5 days. Lawyers contend that this does not give them adequate time to prepare the defence. A further concern expressed by lawyers is that, unlike in civilian cases, where an accused person is released immediately upon acquittal by civil courts, an accused person acquitted by a military court has to wait until the acquittal has been confirmed by the Supreme Council of Military Justice, which often takes months.

61. The procedure applicable to these cases is a summary procedure laid down in the Code of Military Justice, article 721 of which stipulates in addition that when the offence is flagrant, a special court martial will be held and will receive summary evidence and give a verdict immediately (see CCPR/C/83/Add.1, para. 228). Military courts are conducted in camera.

62. In treason cases, the 15-day period of incommunicado detention can be extended by another 15, according to article 2 (a) of Decree-Law 25.744.

63. The Special Rapporteur was informed that often the defence evidence submitted at trials is not accepted while the evidence provided by DINCOTE is given more credence. The Special Rapporteur was also informed that the judicial decisions are often not based on the evidence submitted at the trials; very often the tribunals rely on police investigations and reports submitted to the tribunal which are not disclosed to defence counsel.

64. On 4 November 1997, the President of the Supreme Council of Military Justice, General Guido Guevarra Guerra, informed the Pacification and Human Rights Commission of the Congress that under the Decree-Law, from August 1992 to November 1997 more than 1,600 civilians had been tried by "faceless" military tribunals for treason; of that number, 1,067 had been sentenced, 29 were under study by "special councils", and 520 were in the investigation stage.

Repentance Law

65. The so-called Repentance Law (Ley de Arrepentimiento), which was in force between May 1992 and November 1994, benefited "repentant" members of the armed opposition groups who provided the Government with information regarding terrorist activities: their sentences were subject to remission, were reduced, or they were exempted from prosecution. Reports from lawyers and non-governmental sources claim that this law resulted in the unjust and arbitrary detention of many persons who were not involved with the armed opposition (see section C below).

"Amnesty laws" of 1995

66. On 14 June 1995, the Peruvian Congress adopted Law 26.479, which granted a general amnesty to military, police or civilian personnel who had been accused, tried or convicted for acts related to the fight against terrorism since 1980. After some judges declared that the law was not applicable in specific cases that were already under investigation, Congress adopted Law 26.492, which prohibited judges from declaring the previous law unconstitutional. The two laws are generally referred to as the "amnesty laws". 5/

67. In meetings with the Special Rapporteur, opponents of the laws reiterated that in their opinion, the two laws provided blanket impunity for those involved in human rights violations, in particular for the military, security forces and the police. The laws were considered to be unconstitutional and incompatible with international human rights instruments to which Peru is a party. In this regard, the Human Rights Committee has stated that the "amnesty laws" prevent appropriate investigations and punishment of past human rights violations. 6/

68. Public authorities informed the Special Rapporteur that the "Amnesty laws" were promulgated as part of the peace process and in conjunction with the reformed terrorist law which, according to the Government, had benefited more than 5,000 persons who had been found guilty or sentenced for terrorist

acts. The Special Rapporteur is concerned, however, that preceding the unexpected introduction of the bill in Congress in June 1995, there had been no public referendum in which the population of Peru could express its views. In addition, the National Coordinator for Human Rights informed him that as a result of the "amnesty laws", about 1,000 victims of human rights violations such as torture, arbitrary detention and enforced or involuntary disappearances would be prevented from having access to justice.

B. The anti-terrorist legislation in light of international standards

69. The Special Rapporteur would like to emphasize his concern with regard to the possible continuation of the use of military "faceless" judges for trying civilians charged with treason. In this regard, the Special Rapporteur would like to analyse the use of such tribunals in light of international standards, in particular in those areas of the country in which the state of emergency is still in effect.

70. The shortcomings of the anti-terrorist legislation enacted by the Government have already been pointed out by different national and international organizations. 7/ The consensus is that Peru did not observe the general conditions provided in international law for a state of emergency; in particular, the Peruvian Government, in vaguely defining the crimes of terrorism and treason and by punishing them with disproportionate penalties, failed to observe the rule of proportionality. In enacting such measures it failed to abide by its international obligations, and it suspended fundamental rights that are non-derogable even during a state of emergency, principally the right to due process and the right to have an independent and impartial judge to hear one's case.

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

72. In the civil "faceless" tribunals, defence attorneys claim that they have restricted access to evidence. Further, they are not allowed to cross-examine police or military witnesses whose identities are not revealed prior to, during or after the trial. In the military "faceless" tribunals, defence lawyers claim that they have serious difficulties in accessing trial documents. In addition, it was reported to the Special Rapporteur that the lawyers of accused persons appearing at the military bases where the trials are being held are subjected to security measures which are regarded as humiliating or intimidating. In particular, the custom of hooding the lawyers before they enter the courtroom is seen as a violation of article 289.8 of the Organizational Law of the Judiciary, which provides that defence lawyers should be granted the facilities and consideration which their function requires. 8/

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

74. The main argument presented by the Government for providing "faceless" judges was to protect the physical integrity of the judges, given the terrorist threat. Based upon the testimony received from the judges themselves, the general impression of the Special Rapporteur was that the judges and prosecutors who are supposed to benefit from the fact that they operate anonymously do not feel protected by the system. In their opinion, it is quite easy to discover who the judges and prosecutors are, in particular in the provinces or small towns; therefore, they consider that the system does not serve the purpose for which it was established (i.e. the protection of the judges and prosecutors), and the majority of those interviewed acknowledged that under this system there is a lack of guarantees for due process. In this respect, international standards provide that derogatory measures shall be implemented only if they are strictly necessary. According to the information received by the Special Rapporteur, from 1992 to 1997, judges were not targets of the terrorist-related violence. Therefore, the use of "faceless" tribunals does not meet the principle of strict necessity. Moreover, even if a real need existed to implement measures to protect the physical integrity of the judges and of judicial auxiliaries, these measures should be consistent with other international obligations of the Government and they should not impair the right of the accused to due process. 9/

75. "Faceless" civil and military tribunals were set up to try cases of terrorism and treason, respectively, and defence attorneys were prevented from filing a motion to challenge judges on grounds of bias or other similar grounds. The use of "faceless" tribunals raised problems regarding standards of independence and impartiality.

76. International standards provide for the right to a competent, independent and impartial tribunal to hear cases during states of emergency. In this respect, principles 3 (c) and 5 of the Paris Minimum Standards, article 27 of the American Convention on Human Rights, principle 5 (b) (c) (d) (e) (f) of the draft universal declaration on the independence of the judiciary and principle 22 of the Johannesburg Principles provide that during a state of emergency the right to have an effective remedy before a competent, independent and impartial tribunal is a non-derogable right. Although the

International Covenant on Civil and Political Rights explicitly states that the guarantees contained in article 14 do not constitute a non-derogable right, implicitly there is a violation of article 14 if the accused is not afforded due process of law which includes the right to a fair hearing by a competent, independent and impartial tribunal.

77. The concealing of the judge's identity erodes public accountability of judges handling terrorist-related crimes or treason. In this respect, principle 6 of the Basic Principles on the Independence of the Judiciary clearly provides that "[t]he 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". One of the basic rights of the accused involved in cases of terrorism and treason is to know who is sitting in judgement of the case. Principle 2 states that the judiciary shall decide matters on the basis of the facts and in accordance with the law, without any improper restriction or interference, direct or indirect. It is impossible to assess whether a judge has improper motives in judging a person accused of involvement with a terrorist organization if he/she is "faceless".

78. In regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice. 10/ In this respect, the Committee on Human Rights, in its General Comment 13 on article 14 of the International Covenant on Civil and Political Rights, stated that while the Covenant does not prohibit military tribunals, the use of such courts for trying civilians should be very exceptional and take place in conditions which genuinely afford the full guarantees of article 14 (HRI/GEN/1/Rev.3, para. 4). The Special Rapporteur has reservations on this particular general comment in the light of the current development of international law which is towards the prohibition of military tribunals trying civilians.

79. Principle 5 of the Basic Principles on the Independence of the Judiciary provides the right of everyone to be tried by ordinary courts or tribunals established by laws. More categorically, principle 5 (f) of the Singhvi Principles provides that the jurisdiction of military tribunals shall be confined to military offences, and that 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. Furthermore, principle 22 (b) of the Johannesburg Principles provides that "[i]n no case may a civilian be tried for a security-related crime by a military court or tribunal". Article 16, paragraph 4, of the Paris Rules also provides that "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".

80. While all judges in civil courts are generally legally qualified, in military courts, only one of the five judges is legally qualified; the other four members are career military officers, invariably without legal training. As a consequence, when these officers assume the role of "judges", they

continue to remain subordinate to their superiors, or are at least perceived to be so. Thus, critics argue that their independence and impartiality are suspect. 11/

81. The Special Rapporteur would like to draw the attention of the Government to additional allegations concerning military courts which he received during his mission. It is alleged that military tribunals have replaced ordinary courts in cases where there have been violations of human rights carried out by the military against civilians. The Special Rapporteur was informed that every time an investigation is initiated against a member of the armed forces for a violation of human rights, the military justice system requests the right to try the case. In only a few cases has military justice convicted those responsible for human rights violations, and in the rare cases where convictions were actually handed down, it has reportedly been due to international pressure. In the case of the "La Cantuta" massacre, where nine university students and a professor were killed by members of a paramilitary group allegedly closely linked to the military, Congress passed Law 26.291 on 8 February 1994 providing a basis to transfer the case to the military jurisdiction. The members of the paramilitary group who were reportedly responsible for the massacre were released in 1995, after the "amnesty laws" were adopted.

C. Ad Hoc Commission for Pardons

82. In view of the international and national criticism of the exceptional procedures set up to try civilians charged with terrorist-related crimes and/or treason, and the obvious problems created by those procedures, the Peruvian Government promulgated Law No. 26.655 on 15 August 1996 creating an ad hoc commission entrusted with the task of evaluating cases and recommending pardons to the President of the Republic when it can reasonably presume that the person indicted or convicted of terrorism actually had no connection to terrorist organizations or activities.

83. The Commission is composed of three members: the Human Rights Ombudsman, who presides over it; the representative of the President of the Republic, Father Hubert Lansier; and the Minister of Justice. On 11 September 1996, the Technical Secretariat notified the public of the procedures for presenting petitions to the Commission. Anyone who has knowledge of an individual indicted for or convicted of terrorism or treason, and who is innocent, can file a petition with the Commission. The investigations of the Commission are not limited to the study of the files, but may include personal interviews with those individuals concerned. As of November 1997, the Ad Hoc Commission had received 2,464 petitions. As of the date on which the present report was finalized, 309 persons had been freed. However, there are still a large number of cases pending: the Commission still has to evaluate 1,742 petitions. The majority of the cases of the unjustly detained involve persons from rural areas of the country (56.2 per cent); 86 per cent are men and 70 per cent are heads of household.

84. The mandate of the Ad Hoc Commission was extended until 28 February 1998 by Law 28.840 of 16 July 1997; subsequently, Law 26.894 of 10 December 1997 extended the mandate for 180 days commencing on 1 March 1998.

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

86. The Special Rapporteur, however, would like to express his concern with regard to the situation of those innocent people who have been pardoned. According to the information received by the Special Rapporteur, the persons who have benefited from pardons are facing a series of difficulties which need to be dealt with by an additional law. For instance, their criminal and penal records need to be expunged and they need to be exonerated from paying the fines that were imposed; where fines had been paid they should be returned, and those persons who were indicted but not tried need to have their cases closed. In addition, given that these persons have suffered serious economic and often psychological damage, they need to be provided compensation.

III. INDEPENDENCE OF JUDGES AND PROSECUTORS: THE ONGOING JUDICIAL REFORM IN PERU

A. The need for judicial reform

87. There is widespread agreement that there is an acute need to reform the judiciary in Peru. The problems include poor remuneration of judges; poor training; lengthy legal procedures; limited access to justice; weak alternative mechanisms for dispute resolution; deficient management systems; weak courtroom management; weak monitoring of the system; poor physical infrastructure; and rampant corruption. As a consequence, it is alleged that the fundamental human rights of the citizens are not protected by the judicial system.

88. The problems with the judiciary have in fact been acknowledged by the different Governments which have held power in Peru and attempts to reform the judiciary have been made by almost every Government during the republican history of the country. The current situation in the country prompted the most recent attempt at reform, which began with the events of 5 April 1992 when President Fujimori cited corruption and lack of efficiency of the judiciary as reasons for interrupting the constitutional order.

89. The current reform process in Peru has been promoted by multilateral banks, such as the Inter-American Development Bank and the World Bank, within the context of the economic reform taking place in the country.

90. The objectives of the World Bank's programme in Peru are set out in a document entitled "World Bank Project Information Document. Peru Administration of Justice Project" dated 12 June 1995. These objectives are as follows: to improve access to the judicial power; to reduce the lengthy administration of justice; to improve the professionalism of lawyers and judges and the quality of human resources, both judicial and administrative; and to strengthen the judicial institutions and other institutions in their

capacity to resolve conflicts. According to the World Bank, the accomplishment of these goals should provide a substantial basis for ensuring greater independence of the judiciary. In this regard, the World Bank has acknowledged that independence of the judiciary is essential to achieve judicial reform in Peru. However, the question of judicial independence was not addressed per se in the study.

91. The Special Rapporteur wishes to emphasize that improving the professionalism of lawyers and judges and strengthening the judicial institutions are essential to ensure judicial independence in Peru; he therefore strongly supports the efforts being made in this regard. Nevertheless, the reform process also requires respect for the independence of the judiciary by the other branches of Government if the judiciary is to be a strong and vibrant institution that protects the rule of law and the rights of Peruvian citizens. In this regard, the Special Rapporteur is concerned that certain aspects of the reform process are perceived by judges and other members of the legal community with whom he spoke during his visit to Peru as interference by the executive branch.

B. The Peruvian judicial reform process in light of international standards

92. The Government's project to reform the judiciary began on 20 November 1995 by Law 26.546 establishing the Executive Commission of the Judiciary, headed by an Executive Secretary, retired naval commander José Dellepiani Massa, and composed of the judges of the Supreme Court. This Commission, inter alia, is responsible for evaluating and classifying the auxiliary and administrative personnel of the judicial branch.

1. Objectives of the judicial reform

93. According to a June 1997 official document concerning developments in the judicial reform, one of the central aspects of the reform is the modernization of the judicial administration. In this regard, "modulos corporativos de apoyo a los juzgados especializados" (corporate modules for support of the specialized courts) have been established. 12/ The main goal of these modules is to use more effectively the assigned logistical and human resources and to obtain optimum administrative management of the court files. An administrative unit is in charge of the distribution of the court files, etc. of different magistrates. 13/

94. Another aspect of the reform is that various measures have been implemented to reduce the caseload and to facilitate access to justice. In this regard, a system of holding trials in detention centres has been implemented with all guarantees and security measures for the administration of justice.

95. Another measure implemented is the recent opening of the High Court of Santa in the city of Chimbote as part of the decentralization process to address the large caseload in the provinces of Pallasca, Corongo, Santa, Huarmey and Casma.

96. The judicial reform includes a considerable investment in new technology, especially in purchasing computers for which it is expected that over US$ 5 million will have been spent by the end of 1998; the judicial power had invested about 12,224,000 new soles in infrastructure as of May 1997.

97. The Special Rapporteur welcomes these measures which are in accordance with the duty of the State to provide adequate resources for the proper functioning of the judiciary. In the case of Peru, the scarcity of resources has hampered the functioning of the administration of justice; it was therefore imperative for the reform process to address this shortcoming.

2. Bodies created for carrying out the judicial reform

98. Law 26.546 establishing the Executive Commission of the Judiciary suspended several important articles of the Organizational Law of the Judicial Power dealing with the competence of the persons who compose the Executive Commission of the Judiciary, 14/ which is composed of the Supreme Court judges who are the Presidents of the Criminal, the Public Law and the Civil Chambers of the Supreme Court.

99. On 18 June 1996, Law 26.623 established the Judicial Coordinating Council (Consejo de Coordinación Judicial) to oversee the judicial reform. This body is in charge of coordinating the policies concerning the development and organization of the institutions related to the justice service. The President of the Supreme Court presides over it. The additional responsibilities given to the Council in the transitory provisions of Law 26.623 raised concerns because there were fears that the Council had been given extraordinary powers that could undermine the independence of judges and prosecutors. Sections of the first, second, third and sixth provisions were in fact subsequently declared unconstitutional by the Constitutional Court in its ruling on 29 October 1996.

100. The Constitutional Court declared that the first transitory provision concerning the establishment of the Judicial Coordinating Council as such does not violate constitutional provisions and the way that the decisions are taken by the Council does not violate any article of the Constitution. It did state that the period within which the reorganization will take place should be legally defined. The Constitutional Court regarded as unconstitutional the provision that gave the Executive Commission of the Public Ministry competence to dismiss prosecutors who do not meet requirements of proper behaviour and suitability for their functions on the grounds that the competence to dismiss a prosecutor is an exclusive prerogative of the National Council of the Magistracy. Concerning the sixth provision, the Constitutional Court considered that the competence for legislative initiative provided for the Executive Commission of the Judiciary was not regulated by article 107 of the Constitution and, thus, was unconstitutional.

3. Concerns regarding the judicial reform

101. The Basic Principles on the Independence of the Judiciary should be carefully considered in any judicial reform, and the mechanisms implemented

should not hamper judicial independence and impartiality. In this regard, the Special Rapporteur would like to comment on some aspects of the judicial reform in Peru in light of these principles.

102. The main characteristic of the judicial reform is the high degree of centralization of the decision-making process and of the management of the budget assigned to the judicial power. Those tasks are administered by the Executive Commission of the Judiciary - more precisely by its Executive Secretary - and the law does not provide for mechanisms to control the actions of the Executive Commission. In this regard, the concentration of power in the single body in charge of the judicial reform, whose Executive Secretary is widely perceived to be closely linked to the executive branch, raises questions as to the independence of this body and, therefore, as to its capacity to carry out the judicial reform independently. In that respect, the establishment of the Executive Commission of the Judiciary has been seen by many as an inappropriate act of interference in the judiciary on the part of the executive branch.

103. The Special Rapporteur has similar concerns about the establishment of the Executive Commission of the Public Ministry, whose Executive Secretary, the former Attorney-General of the Nation, has been given important powers to carry out the reform. The Executive Secretary is also widely seen to have close links to the executive branch.

104. As already noted, the Government has made an effort to provide better resources to the judiciary. For instance, the difficult situation concerning the salaries of judges described to the Special Rapporteur during the course of his visit to Peru has improved. Official sources report that there has been an increase in the salaries of judges in general in 1997. 15/ The Special Rapporteur welcomes this improvement.

105. The provisional appointment of a judge has become standard practice within the judiciary in Peru. According to recent statistics, as of August 1997, there were 16 permanent Supreme Court judges and 16 judges who had been appointed on a provisional basis; 247 High Court judges are permanent and 113 are provisional, with an additional 25 who are alternate judges; 119 first instance judges are permanent, 90 are provisional and 474 are alternate judges; and 10 professional Justices of the Peace are permanent, 8 are provisional and 327 are alternate judges. The situation is of particular concern given that the overwhelming majority of judges are serving on a provisional basis. In addition, it is alleged that outside of Lima, all of Peru's judges and prosecutors serve on a provisional basis, and are thus more vulnerable to government interference.

106. The appointment of provisional judges is contrary to the principle that judges must be guaranteed security of tenure. For an independent judiciary to perform its functions impartially, judges should be guaranteed tenure as a condition of service. Judges who are not guaranteed tenure might be seen to be vulnerable to interference by the executive. Of particular concern to the Special Rapporteur is the use of provisional judges to try cases of terrorist-related crimes. In this regard, the Special Rapporteur would like to refer to principle 22 (a) of the Johannesburg Principles which clearly provides that the trial of persons accused of security-related crimes by

judges without security of tenure constitutes prima facie a violation of the right to be tried by an independent tribunal. In addition, provisional judges are not entitled to the right provided in article 146.2 of the 1993 Constitution that provides for members of the judicial branch stability (inamovilidad) of position, meaning that they may not be transferred without their consent. Provisional judges can be transferred without their consent.

107. In this respect, the Special Rapporteur would like to draw attention to the case of the judges of the Public Law Chamber of the Lima High Court, Judge Sergio Salas, Judge Elizabeth MacRae Rhays and Judge Juan Castillo Vázquez, who were transferred from their positions on the Court by a panel of the Supreme Court on 26 June 1997 after the Supreme Council of Military Justice had filed a formal complaint against the three judges. The Public Law judges had admitted and allowed the habeas corpus petitions of former members of the military forces, such as ex-General Rodolfo Robles and ex-Captain Gustavo Celsi Hurtado, as well as others. The Supreme Council of Military Justice accused the three judges of “dangerous interference” in the military's sphere of jurisdiction. It is alleged that the three judges were transferred on instructions from the Executive Commission of the Judiciary.

108. The transfer of judges from one jurisdiction or function to another without their consent is a violation of principles 11 and 12 of the Basic Principles on the Independence of the Judiciary concerning conditions of service. 16/ It becomes more serious when such transfers are made for improper motives and done at the behest of the executive.

109. Additionally, in regard to the situation of provisional judges, the Special Rapporteur would like to draw attention to a recent allegation received regarding Law 26.898 of 15 December 1997, which is viewed as interfering with the judicial power and the Public Ministry. According to the information, Congress has approved this law in order to provide the same rights, attributions and prerogatives to the magistrates and prosecutors who were appointed on a provisional basis by the Executive Commission of the Judiciary and by the Executive Commission of the Public Ministry, and to make them subject to the same prohibitions and restrictions as are applicable to judges who were appointed by the National Council of the Judiciary.

110. The Special Rapporteur considers that Law 26.898 constitutes a step forward in regularizing the situation of provisional judges, who are seen to be vulnerable to executive intervention due to their precarious situation. As noted above, judges should have guaranteed tenure until a mandatory retirement age or expiry of their legal term in office. However, the Special Rapporteur would like to raise some concerns regarding the motives of this recent legislation, based on the complaints he has received. It is alleged that the reason underlying the adoption of the law is to ensure that the Supreme Court judge who will be elected to chair the National Board of Elections is a person acceptable to the executive branch. 17/ What remains of serious concern to the Special Rapporteur, with reference to this law, is that although provisional judges are given powers equal to those of the permanent judges, they continue to be provisional.

111. According to the source, Supreme Court judges who were appointed provisionally by the executive will participate in the election of the chair

of the National Board of Elections. The allegations raise serious concerns as to the motives for implementing what could be seen to be a positive step. There is a perception that these judges will favour the election of a candidate who is acceptable to the executive power. According to the source, the provisional Supreme Court judges will have 16 votes compared with 14 for the permanent judges. It has also been alleged that Law 26.898 undermines the independence of judges insofar as it extends, without limit, the number of temporary judges, while suspending the nomination of permanent judges by the National Council of the Magistracy.

112. In this respect, the duty of the State under international law is to guarantee an independent judiciary as provided by principle 1 of the Basic Principles on the Independence of the Judiciary. This encompasses not only the obligation to undertake positive steps, but also to refrain from adopting measures based on improper motives. Principle 10, in addition, clearly states that "any method of judicial selection shall safeguard against judicial appointments for improper motives". Therefore, the motivations for this law, which provides equal rights to provisional judges, need to be assessed to ensure that the measure does not in fact undermine the judicial independence of judges. 18/

Recertification procedure

113. The 1993 Constitution provides that judges and prosecutors at all levels should be recertified (ratificar) every seven years by the National Council of the Magistracy. Those not certified may not re-enter either the judicial branch or the Public Ministry. The process of recertification is independent of disciplinary measures (article 154.2). The Human Rights Committee has expressed the view that this requirement could affect the independence of the judiciary. 19/

114. The Special Rapporteur would like to express his concern with regard to the recertification procedure in light of principle 12 of the Basic Principles on the Independence of the Judiciary. A recertification procedure applied to judges every seven years might be seen as an interference in judicial independence. Many judges with whom the Special Rapporteur met expressed the fear that the recertification procedure could be used to punish or censor judges who have rendered decisions that are objectionable to the executive or legislative branches. With the objective of ensuring a high degree of professional competence within the judiciary, persons selected for judicial office should be individuals with appropriate training, as stated in principle 10. In this regard, it is a duty of the Academy of the Magistracy to provide appropriate training to those individuals interested in pursuing a judicial career. Further, sitting judges should be provided with continuing education to improve and update their skills and knowledge of the law. The Special Rapporteur does not object to an evaluation process per se, but stresses that it should not be punitive in nature, but rather a training exercise to improve the skills and knowledge of the judges. A fundamental guarantee for an independent judiciary is tenure, which expires only when the criteria provided for by law has been met: a mandatory retirement age or the expiration of the term of office, or dismissal for cause. The recertification procedure in Peru as currently practised violates this principle.

115. The special mechanism within the judiciary, known as the Office of Internal Affairs (Oficina de Control Interno) is entrusted, in accordance with article 102 of the Organizational Law of the Judiciary, with investigating the official behaviour of judges and other court personnel and with examining their suitability and the way in which they discharge their judicial functions. This mechanism is based in Lima. It is composed of senior judges (vocales superiores) and headed by a Supreme Court judge. The mechanism also deals with complaints against judges and court officials; it can also verify whether disciplinary measures are carried out and notifies the Attorney-General of cases of inappropriate conduct and procedural irregularities in which representatives of the Public Ministry are involved. A public registry is kept of all sanctions imposed. The Attorney-General informs the Office about the official conduct of magistrates and court officials through control mechanisms of the Public Ministry.

116. Articles 206-216 of the Organizational Law of the Judiciary provide for disciplinary measures that can be imposed on members of the judiciary and prosecutors, including warnings, fines, suspension, removal and dismissal.

117. The National Council of the Magistracy has competence to dismiss Supreme Court judges and senior prosecutors and, at the request of the Supreme Court or the Board (Junta) of Senior Prosecutors, in specific cases expressed in the Organizational Law, judge or prosecutor. This procedure begins with a preliminary investigation through which the Council determines whether a disciplinary procedure should be commenced against the judge or prosecutor concerned. Under article 31 of the Organizations Law, the Council can commence investigations on its own motion. In the event that disciplinary procedures are decided, the Council holds a hearing with the judge under investigation, and subsequently decides what sanctions are to be applied.

118. The Special Rapporteur notes that according to Laws 26.546 and 26.623, the Office of Internal Affairs and the National Council of the Magistracy are the only judicial bodies competent to administer such sanctions. In addition, the Special Rapporteur expresses his concern with regard to limitations of the powers of the Office of Internal Affairs to investigate the conduct of provisional judges or provisional prosecutors. Such cases must be referred to the Executive Commission of the Judiciary instead of the National Council of the Magistracy.

Concerns with regard to the Constitutional Court

119. On 19 November 1996 the Special Rapporteur sent a communication to the Government concerning an allegation he had received with regard to an attack against the President of the Constitutional Court, Judge Ricardo Nugent, which took place on 8 November 1996. After a police investigation conducted by DINCOTE, the Government sent two replies to the Special Rapporteur, stating that the attack was not aimed at the President of the Constitutional Court and providing information concerning the protective measures arranged for Mr. Nugent and his family. The Special Rapporteur welcomes the replies of the Government and the measures adopted to ensure the wellbeing of the President of the Constitutional Court. The Special Rapporteur would like to point out

that ensuring the physical integrity of members of the judiciary constitutes an international obligation of the Government which contributes to the goal of an independent judiciary free from intimidation or harassment.

120. On 28 May 1997 Congress impeached and dismissed Constitutional Court Judges Delia Revoredo Marsano de Mur, Manuel Aguirre Roca and Guillermo Rey Terry for violating the Constitution by issuing a legal opinion without having the legal opinion of the other judges of the Court.

121. According to the information received, these judges were alleged to have been sanctioned because of their 27 December 1996 decision concerning the interpretation of article 112 of the 1993 Constitution on the tenure of the President of Peru. On 21 January 1997, the Bar Association of Lima requested clarification of the decision which appeared to have been issued on behalf of the entire Court. The judges dismissed the petition, stating that no clarification was necessary.

122. While the Special Rapporteur does not wish to comment on the constitutional issues raised by this matter, he expresses concern as to the appropriateness of the severe sanction of dismissal of the three judges by Congress, which could be perceived in certain quarters as a reprisal by the legislature for the decision of the Constitutional Court, and in particular the three judges, concerning the controversial constitutional issue which was before the Court. The Special Rapporteur also expresses concern as to whether the action of Congress in this matter has violated the principle of judicial immunity for decisions made in the exercise of judicial functions. 20/

IV. SITUATION OF LAWYERS AND HUMAN RIGHTS DEFENDERS

123. During his mission, the Special Rapporteur was informed of serious allegations concerning the situation of lawyers and human rights defenders in Peru. It is estimated that there are about 45,000 lawyers in the country, 25,000 are said to be based in Lima and 20,000 outside the capital. In addition, many lawyers are reportedly unemployed, and the salaries of those who are employed are very low. Public opinion is said to perceive lawyers as being highly politicized. There is no National Bar Association. However, 23,000 lawyers are members of the Lima Bar Association (Colegio de Abogados), which has its own regulations and procedures for self-discipline and has a reputation for being very influential.

124. The situation of lawyers defending victims of human rights violations or persons accused of terrorist-related activities or treason is reported to be particularly difficult. The Special Rapporteur was informed that in the past, many lawyers have been prosecuted for membership of the Democratic Lawyers' Association, alleged to be an organ of Sendero Luminoso. If true, these prosecutions would be in breach of principle 18 of the Basic Principles on the Role of Lawyers which provides that “lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions”. The Special Rapporteur was furthermore informed about the circulation of lists with the name of lawyers whose backgrounds were being investigated by the military or civilian authorities, merely because they were defending persons accused of the crimes described. The investigation of

lawyers by military or civilian authorities constitutes an act of intimidation forbidden by principle 16 of the Basic Principles on the Role of Lawyers.

125. It has been reported that several lawyers have been subjected to threats and intimidation by civilian and military authorities as a result of their work. Examples include the death threats made against the lawyer of family members of the victims of the Barrios Altos massacre, Gloria Cano Legua, who received threats by telephone and was explicitly told to stay away from the military and their affairs (see E/CN.4/1996/4, para. 383(c)). Heriberto Benítez, lawyer of the families of the victims of La Cantuta, General Robles and Leonor La Rosa, also received several telephone death threats against him and his family and has been harassed in his professional activity in military tribunals. Mr. Benítez also has been arbitrarily suspended from presenting the defence in these cases, allegedly because he gave his opinion of the military justice system to various media outlets (see E/CN.4/1997/32, para. 149).

126. Threats against lawyers in discharging their functions, have been reported, mainly in the south of the country. In recent years, a number of lawyers have had to leave the country due to threats and intimidation. Lawyers' organizations have reported that they are often seen by the authorities as being in opposition to the Government. According to several sources, these threats are not adequately investigated by the appropriate authorities. The alleged threats against lawyers, in particular against human rights lawyers, are of serious concern and call into question the ability of the State to provide the necessary conditions for lawyers to discharge their professional duties. This constitutes a violation of principles 16 and 17 of the Basic Principles on the Role of Lawyers. Further, the facts presented indicate that there is a tendency on the part of the Government, particularly the military and the police, to identify lawyers with their clients' causes as a result of discharging their functions.

V. CONCLUSIONS AND RECOMMENDATIONS

127. The Special Rapporteur considers that an autonomous, independent, impartial and effective judicial system is a prerequisite for a democracy in which respect for and the promotion of human rights are guaranteed. In such a system, the judiciary is a guarantor against any abuse of power and the guardian of the rule of law. An independent judicial system is equally important during a state of emergency. Bearing this in mind, the Special Rapporteur makes the following conclusions and recommendations with respect to the situation in Peru.

Exceptional measures

128. The Special Rapporteur takes note of the fact that Peru has suffered from terrorist activities, internal disorder and violence. He understands the need for the Government to defend the security of the State and to combat terrorism, but remains concerned about the effect these measures have had on the fundamental rights guaranteed to the individual. With regard to the “faceless” tribunals, the Special Rapporteur accepts that the protection of judges in the exercise of their functions is essential for an independent and impartial judiciary. However, such measures should not deprive individuals of

their constitutional rights, nor of their rights under the international treaties to which Peru is a party and which are part of the national law.

129. The measures implemented by the Government of Peru did not observe the general conditions provided by international law for a state of emergency. In particular, the Government, by vaguely defining the crimes of terrorism and treason and by punishing them with disproportionate penalties, failed to observe the rule of proportionality; by enacting legislation and practices in violation of other international obligations of the State, it failed to observe the rule of consistency between these measures and its other international obligations; and finally it suspended fundamental rights that are non-derogable even during a state of emergency, principally the right to due process and the right to have cases heard by an independent and impartial judge.

130. In this respect, the Special Rapporteur welcomes the abolition of "faceless" tribunals as a positive step undertaken by the Peruvian Government in response to the recommendations made by several international as well as national, human rights organizations, including the Special Rapporteur. However, he draws the Government's attention to allegations that these tribunals are still being used within the military courts. If this is true, the Special Rapporteur urges the Government to abolish them forthwith, as the Special Rapporteur does not find any justification for the continuation of these tribunals within the military justice system.

Amnesty laws and impunity

131. The Special Rapporteur considers that Law 26.479 and Law 26.292, the two "amnesty laws" as adopted by the Peruvian Congress in 1995, are in violation of the State's obligations under the international Covenant on Civil and Political Rights. As stated by the Human Rights Committee, it is the obligation of the State to investigate violations of human rights. Furthermore, such laws deprive victims of such violations of their rights of knowing the truth as well as of their right to compensation. In addition, he considers that the adoption of such laws constitutes an interference with the judicial power entrusted in the courts. Pursuant to principle 3 of the Basic Principles on the Independence of the Judiciary, 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. The adoption of legislation which is retroactively applicable to cases which are already under investigation before the courts constitutes direct interference by the legislative branch.

132. Further, article 2.3 (a) of the International Covenant on Civil and Political Rights provides that each State party must "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" and article 2.3 (b) provides that each State party must "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". The "amnesty laws" enacted by the Peruvian Congress violate this provision.

133. In this regard, the Special Rapporteur remains particularly concerned about the practice of referring cases of human rights violations/wrongdoing committed by members of the armed forces to military courts in order to avoid the course of ordinary procedures. This practice should be discontinued. The Special Rapporteur wishes to reiterate the recommendation of the Human Rights Committee that necessary steps need to be taken to restore the authority of the judiciary and to give effect to the right to effective remedy under article 2.3 of the International Covenant on Civil and Political Rights, and thus overcome an atmosphere of impunity.

134. In addition, adequate resources should be made available to the Public Ministry in order to allow it to deal with the enormous backlog, and to allow additional prosecutors to deal with the many outstanding cases.

Judicial reform

135. The Special Rapporteur welcomes the efforts of the Government to undertake judicial reform in Peru. However, the Special Rapporteur would like to emphasize that a reform process of the judiciary that intends to correct such a serious problem as the one affecting the Peruvian judiciary should be based on accepted international standards for ensuring the independence and impartiality of the judiciary. In this regard, principles 1 through 7 of the Basic Principles on the Independence of the Judiciary are necessary elements to achieve the purported objectives of the judicial reform.

136. In the view of the Special Rapporteur, the Executive Commission of the Judiciary has focused almost exclusively on providing adequate resources to the judiciary and improving court management administration without giving enough consideration to the other principles that ensure the independence and the impartiality of the judiciary. The Special Rapporteur is concerned that many of the proposals of the Executive Commission of the Judiciary are inconsistent with principle 2 of the Basic Principles on the Independence of the Judiciary.

137. The establishment of an Executive Commission of the Judiciary entrusted with the power to administer and manage the judicial branch is perceived as making the judiciary subservient to the executive branch of the Government. The appointment by the executive of judges to the Supreme Court who are then appointed to the Council of Judicial Coordination, is again perceived as subservience of the judiciary to the executive.

138. The administrative reform being implemented by the Executive Commission of the Judiciary is being carried out without prior meaningful consultations with all of the actors in the administration of justice. The Special Rapporteur considers that to ensure that the reform process succeeds, it is indispensable that all actors in the administrative of justice, most importantly the judges and lawyers, are consulted.

139. The Special Rapporteur urges Congress to be guided by the Singhvi Principles in exercising its powers to impeach judges. In this regard, the Special Rapporteur calls upon Congress to devise rules which would enable it to be advised by a committee or panel of judges before impeachment procedures

are initiated. Further, the Special Rapporteur urges Congress to ensure that the sanctions imposed on judges are commensurate to the misconduct.

140. The Special Rapporteur once more wishes to emphasize that judges should not only be independent, but must be seen to be so by the people. In this regard, particular attention should be given to the mechanisms to appoint and to discipline judges. The mechanisms established to depoliticize the appointment and dismissal of judges, through the creation of the National Council of the Magistracy, an organ indepedent of the executive branch, are an important step. The selection, appointment and dismissal of judges must be left entirely to the organs provided by law, including the National Council of the Magistracy and the Office of Internal Affairs. No other organs should interfere, either directly or indirectly, with this function. The discipline of judges accused of misconduct should be carried out through regular mechanisms established on a permanent basis within the judicial branch.

141. The practice of retaining and appointing provisional judges is contrary to the principle that judges must be guaranteed security of tenure, as provided under the Basic Principles. Provisional judges should be regularized by making their appointments permanent in order to see to it that the entire judicial system in Peru is free from executive interference. The Special Rapporteur urges the Government to address this serious flaw in the judicial system. As a matter of priority, the Special Rapporteur urges the Supreme Court to immediately rectify the defect in the composition of the Supreme Court, where the majority of judges are currently provisional.

142. In the view of the Special Rapporteur, judges should not be subjected to a process of recertification every seven years. The Special Rapporteur urges the Government to provide judges with continuing legal education during their tenure in office to acquaint them with the latest developments in the law. The continuing legal training of judges should be carried out exclusively by the Academy of the Magistracy.

143. The Special Rapporteur welcomes the reported increase in salaries of judges in general. This salary increase contributes to ensuring the independence and impartiality of the judiciary, as well as to reducing possible vulnerability to attempts at corruption. In addition, the Special Rapporteur welcomes the purchasing of modern equipment to provide adequately for the autonomous functioning of the judicial branch.

144. The Government should ensure that all members of the judiciary, prosecutors attached to the Public Ministry and members of the Ombudsman's office receive adequate training in both national and international human rights standards, and on the means for their protection.

Situations of lawyers and human rights defenders

145. The Special Rapporteur urges the Government and its agencies to provide lawyers with the necessary guarantees to enable them to discharge their professional duties without any intimidation, harassment or threats. The Special Rapporteur also urges the Government to refrain from identifying lawyers with the causes of their clients. Where there is evidence that a lawyer has compromised his or her professional duties and identified with the

cause of the clients, a complaint should be made to the disciplinary body for lawyers for possible disciplinary action. It is not incumbent upon the Government to take actions against lawyers on the grounds that the lawyers have identified themselves with the cause of their clients.

146. The Special Rapporteur wishes to express his concern at the lack of a National Bar Association in Peru. He considers that such a national association might serve the interests of lawyers. At the same time, he wishes to express his appreciation for the work done in that regard by the Colegio de Abogados in Lima. For the unity and well-being of the legal profession in Peru, the Special Rapporteur urges the formation of a National Bar Association in Peru.

Ad Hoc Commission Pardons

147. The Special Rapporteur welcomes the establishment of the Ad Hoc Commission for Pardons to review cases of innocent people who have been tried and sentenced by civil and military “faceless” tribunals. The Special Rapporteur wishes to reiterate that it is important for this process to be carried out expeditiously. The Special Rapporteur also wishes to appeal to lawyers and non-governmental organizations to fully cooperate in this exercise.

148. In spite of this positive step, the Special Rapporteur considers that pardon is not a sufficient remedy for innocent and wrongly convicted and sentenced persons. The Special Rapporteur considers that the conviction and sentence must be removed from the records by a judicial institution, and the innocent victims should be adequately compensated for the injuries suffered through a suitable mechanism.

Notes

1/ By its decision 1980/124, the Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to entrust Mr. L.M. Singhvi with the preparation of a report on the independence and impartiality of judiciary jurors and assessors and the independence of lawyers. The text of the draft universal declaration on the independence of justice was submitted in the Special Rapporteur's final report to the Sub-Commission at its thirty-eight session in 1985 (E/CN.4/Sub.2/1985/18 and Add.1-6) the declaration itself being contained in document E/CN.4/Sub.2/1985/18/Add.5/Rev.1.

2/ Adopted at the IBA’s Nineteenth Biennial Conference held in New Delhi, October 1982.

3/ After six years of study by a special subcommittee chaired by Mr. Subrata Roy Chowdhury of India and two additional years of revision by the full Committee on the Enforcement of Human Rights Law, the 61st Conference of the International Law Association, held in Paris from 26 August to 1 September 1984, approved by consensus a set of minimum standards governing states of emergency. The American Journal of International Law, vol. 79, 1985, pp. 1072-1081.

4/ These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by Article 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersand, South Africa.

5/ The two laws had been questioned in 1995 in a joint letter by the Special Rapporteurs on extrajudicial, summary or arbitrary executions, torture, and the independence of judges and lawyers, as well as the Chairman of the Working Group on Enforced or Involuntary Disappearances. In addition, the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a Chairman's statement relating to the issue (E/CN.4/1996/2-E/CN.4/Sub.2/1995/51, para. 338).

6/ The Human Rights Committee, upon examination of Peru's third periodic report under article 40 of the ICCPR, expressed its deep concern about the amnesty granted by Decree-Law 26.479. The Committee considered that 2 "(...) such an amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations, and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the Covenant". In this connection, the Committee reiterated its view that this type of amnesty is incompatible with the duty of States to investigate human rights violations, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future. Official Records of the General Assembly, Fifty-first session, supplement No. 40 (A/51/40), paras. 37 ff.

7/ For instance, the Human Rights Committee expressed its deepest concern with regard to Decree-Laws 25.475 and 25.659. It considered that the laws "seriously impair the protection of the rights contained in the Covenant for persons accused of terrorism and contradict in many respects the provisions of article 14 of the Covenant. Decree-Law 25.475 contains a very broad definition of terrorism under which innocent persons have been and remain detained. It established a system of trial by 'faceless judges' where the defendants do not know who are the judges trying them and are denied public trials, and which places serious impediments, in law and in fact, to the possibility for defendants to prepare their defence and communicate with their lawyers. Under Decree-Law 25.659, cases of treason are tried by military courts, regardless of whether the defendant is a civilian or a member of the military or security forces. In this connection, the Committee expresses its deep concern that persons accused of treason are being tried by the same military force that detained and charged them, that the members of the military courts are active duty officers, that most of them have not received any legal training and that, moreover, there is no provision for sentence to be reviewed by a higher tribunal. These shortcomings raise serious doubts about the independence and impartiality of the judges of military courts". The Committee emphasized further that the trial of non-military persons should be conducted in civilian courts before an independent and impartial judiciary. Ibid., paragraphs 350 ff.

The Inter-American Commission on Human Rights published a special report on Peru after the 1992 coup d'état. The Commission regarded as "[p]articularly disturbing the new system of 'secret justice' in which the impartiality and independence of judges could not be determined". Along with the suspension of habeas corpus and the summary dismissal of judges, the Commission concluded that "this process is creating the institutional and legal conditions to justify arbitrary rule". Organization of American States, Report on the Situation of Human Rights in Peru, Washington, D.C.,1993, p.200.

In its 1993 annual report, the Inter-American Commission stated that "the lack of an independent judiciary is one of the main reasons for the decline of the enjoyment and exercise of human rights in Peru". Organization of American States, Annual Report of the Inter-American Commission on Human Rights, 1993, Washington, D.C., 1994, pp. 506-507.

Under the auspices of the United States Government, an international commission of jurists composed of Mr. León Carlos Arslanian, Mr. Robert Kogod Goldman, Mr. Ferdinando Imposinato and Mr. José Raffuci visited Peru in September 1993 and, after studying the situation, released a comprehensive study of the anti-terrorist legislation in light of international standards ("The Goldman Report").

International human rights non-governmental organizations such as the Centre for the Independence of Judges and Lawyers, Human Rights Watch and Amnesty International have devoted several issues of their respective publications to studies of the case of Peru and have formulated recommendations addressed to the Peruvian Government.

At the national level, Mr. Ronald Gamarra published a book on the legal treatment of terrorism and the National Human Rights Coordinator proposed changes to the anti-terrorist legislation.

8/ According to lawyers and lawyers' organizations, the right to defence before the "faceless courts" continues to be severely limited. The main complaints brought to the attention of the Special Rapporteur were the lack of adequate access to court files, as well as timely information on sentences and the progress of cases. A rigid limit of 30 days, extendable to 50 days, is provided for the investigation, unlike the four months provided by the Code of Criminal Procedure for ordinary criminal investigations. As a result of these summary proceedings, hearings take place very rapidly, leaving the defence attorney little or no time to prepare. The time and place of hearings is frequently announced only at the last minute. The conditions for interviewing clients are reported to be often improper. Members of the police or army cannot be questioned in court, nor does the defence have the right to adequately and independently cross-examine witnesses for the prosecution. The identity of witnesses, often individuals claiming to be repentant terrorists, is kept from the defence throughout trial. Lawyers testified that they themselves are at times intimidated or harassed during the proceedings. The lawyers with whom the Special Rapporteur met stated that it is impossible for any contradictions or doubtful points in the evidence to be clarified at the trial stage, since only the defendants and their counsel appear.

9/ See the Goldman Report, p. 67.

10/ See the Goldman Report, p. 69.

11/ The Inter-American Court of Human Rights has ruled on a case concerning violations of the right to due process committed by military and civil "faceless tribunals" in trying Ms. María Elena Loayza Tamayo, accused of treason on 17 September 1997 (Corte Interamericana de Derechos Humanos, Caso Loayza Tamayo, Sentencia de 17 de septiembre de 1997). Ms. Loayza was detained on 6 February 1993 by DINCOTE and charged with treason. She was tried by a "faceless" military tribunal and was acquitted on 24 September 1993. However, she continued to be detained at a military installation until her case was transferred to the civil jurisdiction under charges of terrorism on 8 October 1993. Ms. Loayza was found guilty of the crime of terrorism and consequently sentenced by a "faceless" civil tribunal on 10 October 1993 to 20 years' imprisonment. The "faceless" civil tribunal tried and sentenced Ms. Loayza based on the same facts on which she was acquitted by the military "faceless" tribunal.

In submitting this case to the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights considered that military tribunals lack independence and impartiality as required by article 8.1 of the American Convention on Human Rights. The Inter-American Court of Human Rights considered it unnecessary to address this issue because Ms. Loayza was acquitted by the military court and thus the absence of these requirements did not affect her rights (paragraph 60). However, the Inter-American Court did regard as violations of Ms. Loayza's rights her continuation in detention after her acquittal and the ultra vires decision of the military court to classify her case as a terrorist-related crime and to refer it to the civil courts (paragraphs 61 and 62). In addition, the Court held that Ms. Loayza was tried and sentenced under an exceptional procedure in which her fundamental right of due process was severely restricted. The Court considered that these procedures do not meet the standards of due process because they do not recognize the principle of presumption of innocence; they restrict the right of the accused to contradict the evidence and to communicate with the defence attorney (paragraph 62). The Court considered that the military court, and consequently the Government of Peru, violated the right to be presumed innocent provided by article 8.2 of the American Convention by attributing to Ms. Loayza the commission of another crime different from the one she had initially been charged with, without having competence to do so (paragraph 63).

The Court also held that the judicial guarantee of non bis in idem was violated by the Peruvian Government because Ms. Loayza was tried and subsequently sentenced by a civilian court for the same facts for which she had been acquitted by the military tribunal. The Court considered that one contributing factor to that situation was the vague definitions of terrorist-related crimes and treason provided by Decree-Laws 25.475 and 25.659, respectively.

In compliance with the judgement of the Inter-American Court of Human Rights, the Government of Peru freed Ms. Loayza on 16 October 1997.

Judges Antonio A. Cancado Trindade and Oliver Jackman of the Inter-American Court of Human Rights stated in a concurring opinion that

military tribunals do not meet the standards of independence and impartiality required as an essential element of due process as provided by article 8.1 of the American Convention on Human Rights.

12/ Poder Judicial, Avances del Proceso de Reforma y Modernización, Lima, June 1997, p. 11.

13/ The implementation of the corporate modules began on 20 November 1996 in the judicial district of Lambayeque, specifically in the city of Chiclayo, the headquarters of the court. This experience has been applied to the management of files on civil cases.

14/ Law 26.546 suspended the following articles of the Organizational Law of the Judicial Power: articles 81 and 82 that provide for the Executive Commission of the Judiciary and its attributions; articles 83, 84, 85, 86 and 87 that provide for the Management Board of the Judicial Power.

15/ For instance, a Supreme Court judge who used to earn 6,695 soles in 1995 is earning 12,435 in 1997, an increase of 86 per cent. A High Court judge who used to earn 3,005 soles in 1995 is currently earning 4,780, an increase of 57 per cent. A specialized first instance court judge who used to earn 2,005 soles in 1995 is nowadays earning 3,500 soles, an increase of 75 per cent. Poder Judicial, Official Bulletin, September-October 1997, p. 5.

16/ Furthermore, Principle 15 of the draft universal declaration on the independence of justice provides that, “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”.

17/ According to the 1993 Constitution (article 179), the highest organ of the National Board of Elections is a plenary of five members chaired by the representative of the Supreme Court elected by secret ballot of the judges of the Supreme Court.

18/ Furthermore, principle 11 of the draft universal declaration on the independence of justice provides that:

> “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 appointment for improper motives.
>
> “(c) Participation in judicial appointment by the Executive or the Legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the

judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate effectively."

19/ The Human Rights Committee, upon examination of the third periodic report of Peru under article 40 of the ICCPR, stated in that regard that "the Committee notes with concern that the judges retire at the expiration of seven years and require recertification for reappointment, a practice which tends to affect the independence of the judiciary by denying security of tenure". (CCPR/C/79/Add.67, para. 14).

20/ In this connection, the Singhvi Principles provide that the power of removal may be vested in the legislature by impeachment, preferably upon a recommendation of a court or board composed predominantly of members of the judiciary (principle 27 (b)).
