

## **PARTIALLY CURRING AND PARTIALLY DISSENTING OPINION OF JUDGE VIDAL-RAMIREZ**

My partially concurring and partially dissenting vote on this case was for the reasons I explained during the course of the deliberations, which were basically the following:

1. Peru signed the Convention on July 27, 1977, when the Military Government was in the process of preparing the ground for the return of democratic government and had convened the Constitutional Assembly that would eventually pass the 1979 Constitution. In the sixteenth final provision, that Constitution declared that Peru ratified the Convention and accepted the jurisdiction of the Commission and the Court. Peru officially deposited its instrument of ratification on July 28, 1978. On January 21, 1981, once the Government and Congress elected in 1980 had taken office, Peru filed the instrument acknowledging the binding jurisdiction of the Commission and of the Court, without reservation.

2. The first acts of terrorist violence occurred during the Military Government's final months, by which time elections had already been called for the restoration of democratic government. The Sendero Luminoso in the Andean region and the Tupac Amaru Revolutionary Movement [Movimiento Revolucionario Tupac Amaru (MRTA)] in the lowlands made incursions into Lima and other populated areas, where they began to stage dynamite attacks, assaults, kidnappings and other criminal acts.

The Government reacted to the terrorist violence by ordering states of emergency that had to be repeatedly extended, in accordance with Article 27 of the Convention and the 1979 Constitution (Article 231).

3. The terrorist violence took a terrible toll on life in Peru and prompted enactment of laws classifying terrorism as a crime and establishing increasingly more severe penalties. These laws invested the police with the kind of authority and power that made them more effective in the war on terrorism and enabled them to bring terrorists to trial, where they cases were heard in the civil courts by civilian judges.

4. By 1990 terrorism had made significant headway and inflicted considerable damage. It had ravaged the countryside and had infiltrated the cities. Lima, in particular, was in a state of emergency.

The Government had to combat the terrorist violence using a strategy whose legal underpinning was a very stringent and intimidating system of laws that, although intended to protect citizens and institutions, could clash with the Convention by curtailing some of the rights and guarantees recognized therein.

5. For reasons of internal politics, on April 5, 1992, the President of the Republic dissolved Congress and proceeded to call elections for a Constitutional Convention that would give Peru a new constitution. In this way, the Executive Power was called upon to legislate by way of decree-laws.

On May 7, 1992, Decree-Law No. 25,475 was put into effect and established a new legal description of the crime of terrorism and related crimes; the penalties for those crimes, one of which was life imprisonment; rules to govern investigations of terrorist activities, which put such investigations in the hands of the National Police; norms for indicting and trying terrorists in the regular courts, but with the identity of the judges and prosecutors kept confidential; rules for the defense; rules for execution of sentence; and finally, visitation rules.

Shortly thereafter, specifically on May 17, 1992, Decree-Law No. 25,499 called the *Ley de Arrepentimiento* [Repentance Act] was put into effect. It provided for reduced sentences, immunity and even pardons for those who, having engaged in the commission of crimes classified as terrorism, helped to combat it. Once Congress was installed, with Law No. 26,220 of August 19, 1993, other provisions were enacted to supplement the Repentance Act. Under Law No. 26,345, of August 31, 1994, terrorists were given until November 1, 1994, to avail themselves of the Repentance Act.

Although these measures yielded results, terrorism continued to escalate and peaked in July 1992, when a car bomb exploded near an apartment

building on Calle Tarata in the Miraflores district of Lima. Many people died in the fire that consumed the building.

6. Decree No. 25,659, which took effect on August 14, 1992, classified the crime of aggravated terrorism under the *nomen iuris* of treason, with a penalty of life imprisonment. Effective that date, the military courts had jurisdiction in such cases, starting with the examining phase. The new law also provided that judicial guarantees could not be invoked during either the investigation or trial phase. It is important to note that Law No. 26,248, in effect since November 26, 1993, once again made the remedy of *habeas corpus* available to those charged with treason.

Under Decree-Law No. 25,148, in force since September 11, 1992, the crime classified in Decree Law No. 25,659 was to be prosecuted in the summary proceeding established by the Military Code of Justice. The judge of inquiry would have a maximum of 10 days in which to deliver a judgment. It also provided that motions to nullify rulings could be filed with the Supreme Court of Military Justice.

In mid September of 1992, the ideologue and head of the Sendero Luminoso was captured. It was then that the criminal activities of that terrorist organization began to taper off. The same was not true, however, of the MRTA, which stepped up its terrorist activities with assaults and kidnappings. It remained active despite the arrest and trial of a number of its leaders. The MRTA seized the residence of Japan's Ambassador in Lima and held hostage hundreds of people who were there for the reception to celebrate Japan's national holiday in December of 1997.

7. Once the Constitutional Congress had completed its work and a referendum was held on the 1993 Constitution, the latter took effect on December 30, 1993. As with the 1979 Constitution, its fourth final provision reaffirmed Peru's adherence to the provisions of the Convention.

The 1993 Constitution makes a distinction between treason and terrorism, although both carry the death penalty (Article 140). However, it is

careful not to deviate from the treaties to which Peru is party. Under the new Constitution, military courts continue to have jurisdiction over both crimes (Article 173). The distinction between the two crimes makes it possible to classify aggravated terrorism, one form of the more generic crime of terrorism, as treason.

8. In August 1996, Law No. 26,655 created a commission to evaluate and propose to the President the granting of pardons and commutation of sentences for those convicted of treason based on insufficient evidence, where it might be reasonably presumed that they had no association with any terrorist activities or organizations. This commission worked until December 31, 1998 and thanks to its proposals miscarriages of justice in trials that mistakenly ended to convictions have been corrected and those who suffered unduly have been compensated.

With this partially concurring opinion, I have explained what terrorism has meant for the Peruvian people and the extraordinary lengths to which Peru was forced to go to stamp out the terrorist violence and pacify the country.

Nevertheless, given the provisions of the Convention and the fact that they are binding upon the Peruvian State, I have concurred in the Court's finding that the proceedings instituted under the emergency laws against the Chilean citizens who, as members of the MRTA, took up arms to threaten the lives of Peruvians and the safety of the citizenry, were invalid.

But for the same reasons, I cannot concur with the Court's finding to the effect that the Peruvian State violated Article 9 of the Convention:

1. Article 9 of the Convention embodies the principle *nullum crimen sine lege, nulla poena sine lege*, which informs the criminal justice systems of the countries of the inter-American system for the protection of human rights. In Peru, that principle is embodied in Article 2, subparagraph d of paragraph 24 of the 1993 Constitution, just as it was in the 1979 Constitution (Art. 2.20.d).

2. Decree-Law No. 25,659, which classifies aggravated terrorism as treason, describes the distinctive features that distinguish aggravated terrorism from generic terrorism, the legal description of which appears in Article 2 of Decree-Law No. 25,475.

In effect, Decree Law No. 25,659 specifies the aggravating circumstances that make simple terrorism treason: "a) Use of car bombs or similar explosive devices, weapons of war or similar weapons that kill people or inflict physical injury or affect their mental health or damage public or private property, or any other means that pose a serious threat to the public; b) Storage or unlawful possession of explosive materials, ammonium nitrate or the elements used to manufacture it, or willing provision of materials or elements that can be used in the manufacture of explosives, their use in the acts provided for under the previous subparagraph (Article 1)." It adds that "The following shall constitute treason: a) membership in the ranks of the leadership of a terrorist organization, either as leader, chief or the like; b) membership in armed groups, bands, death squads or similar groups in a terrorist organization, and charged with the physical elimination of persons; c) supplying, providing, disseminating reports, data, plans, projects and other documents or facilitating terrorists' access to buildings and premises in one's charge or custody and thus helping to bring about the destruction described in subparagraphs a) and b) of the preceding article (Article 2)."

Having thus described the aggravating circumstances that transform simple terrorism into treason, Decree-Law No. 25,659 stipulates that treason shall carry the penalty of life imprisonment.

The crime described in Article 2 of Decree Law No. 25,475 is terrorism, whereas the crime described in Decree-Law No. 25,659 is aggravated terrorism, whose *nomen iuris* is treason. The military courts have been able to use this distinction to acquit or to decline jurisdiction in the case of persons accused of aggravated terrorism and to remand them to the regular courts, which has jurisdiction to prosecute simple terrorism.

3. Decree-Law No. 25,659 was in force on October 14 and 15, 1993, when the National Police detained the Chilean citizens. Therefore,

the crime of aggravated terrorism with which they were charged was covered in the applicable law, as was the penalty it carried. At the time of their conviction, May 3, 1994, the applicable punishment was life imprisonment.

For the very same reasons I concurred with some of the findings of this judgment, I do not agree with the Court's finding that the State violated Article 8(2)(h) of the Convention. In the *consideranda* of the judgment, which summarizes the facts, it was shown that the Chilean citizens did have recourse to a higher court, even though this was the military justice system.

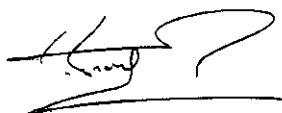
For the same reasons, I must also dissent from the Court's finding that the State violated Article 8(5) of the Convention.

While criminal proceedings should be public, as Peru's Constitution recognizes, proceedings such as those instituted in the case of the Chilean citizens, or those that ought to be instituted, cannot necessarily be public and the circumstances surrounding this case certainly fit the exception allowed under Article 8(5) of the Convention.

Finally, I disagree with the Court's finding that the State violated Article 5 of the Convention, for the following reasons:

1. In addition to the emergency provisions that Peru created to stamp out terrorist violence and further the country's pacification, it also established sentencing guidelines for those convicted of the crime of aggravated terrorism constituting treason. These guidelines and regulations, like any others enacted in Peru, must be published in order to take effect. They thus find their way into the public domain.

2. These are the provisions that, in my judgment, the judgment should have taken into consideration, not the testimony from the attorneys of the two Chilean citizens. Theirs was a purely second-hand account, with no basis in fact, especially since the statement itself acknowledged that their knowledge of the treatment the convicted men received was pure hearsay.

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Fernando Vidal-Ramírez  
Judge *ad hoc*

A handwritten signature in black ink, appearing to read 'Manuel E. Ventura-Robles', with a long horizontal stroke underneath.

Manuel E. Ventura-Robles  
Secretary