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Lori Berenson v. Peru: An Analysis of Selected Holdings by the Inter-American Court of Human Rights

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LORI BERENSON V. PERU: AN ANALYSIS OF SELECTED HOLDINGS BY THE INTER- AMERICAN COURT OF HUMAN RIGHTS

JOSEPH MAY*

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INTRODUCTION

Peruvian authorities arrested Lori Berenson in 1995 for leading the Tupac Amaru Revolutionary Movement ("MRTA") in its thwarted plot to attack Peru's Congress.¹ A "hooded" military tribunal found

1. See Lucien O. Chavin, *Rights Court Ruling Awaited on American Jailed in Peru*, WASH. POST, Sept. 2, 2004, at A19 (characterizing the MRTA as a rebel group), available at 2004 WL 82780814; see also Jonathan Levi & Liz Mineo, *The Lori Berenson Papers*, THE NATION, Aug. 24, 2000 (reporting that Peruvian officials did not just arrest Berenson for her affiliation with MRTA, but for organizing the attempted attack), available at <http://www.thenation.com/doc.mhtml?i=20000904&s=levi> (last visited Feb. 20, 2005).

her guilty of treason and sentenced her to life imprisonment.² Largely in response to international outcry, Peru annulled the life sentence³ and moved the case to a civilian court, which subsequently tried Berenson for the lesser charge of “cooperation with terrorism.”⁴ Despite her claim of innocence, the civilian court convicted Berenson and sentenced her to twenty years in prison.⁵ Since she exhausted all of her domestic remedies, Berenson’s claim that Peru violated her human rights became ripe to go before the Inter-American Court of Human Rights (“Inter-American Court”).⁶

2. See Annual Report 2002, Inter-Am. C.H.R., para. 331 [hereinafter Annual Report 2002] (describing the charge as “treason against the fatherland” before “faceless judges”), available at <http://www.cidh.org/annualrep/2002eng/chap.3m.htm> (last visited Feb. 20, 2005).

3. See Press Release, Supreme Council of Military Justice, Berensons Counter Peru’s Response to Frequently Asked Questions (Sept. 25, 2000) [hereinafter Press Release] (declaring a lack of jurisdiction over Berenson’s case and thus annulling her treason conviction), available at http://www.freelori.org/gov/peruvian/faq_with_rebuttals.html (last visited Feb. 20, 2005).

4. See Harris Whitbeck, *Guilty Verdict in Berenson Case*, CNN LAW CENTER, June 21, 2001 (attributing the annulment of the military court’s judgment to then-president Alberto Fujimori’s desire to clean up his image after the public learned of his rigging the previous presidential election), available at <http://www.cnn.com/2001/LAW/06/20/berenson.bigp/> (last visited Feb. 20, 2005); see also Harris Whitbeck, *Verdict Looming in Berenson Case*, CNN LAW CENTER, June 20, 2001 (indicating that Peru was further compelled to overturn the treason conviction by human rights groups and foreign governments), at <http://archives.cnn.com/2001/LAW/06/20/berenson.context/index.html> (last visited Feb. 20, 2005).

5. See Patricia A. Morisette, Note, *The Lori Berenson Case: Proper Treatment of a Foreign Terrorist Under the Peruvian Criminal Justice System*, 26 SUFFOLK TRANSNAT’L L. REV. 81, 94-95 (2002) (noting that in addition to the prison sentence, the court fined Berenson the equivalent of U.S. \$28,000). The prosecution had requested, but the court denied, the maximum sentence of thirty years. *Id.*

6. See American Convention on Human Rights, July 18, 1978, art. 46(1)(a), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, 155 [hereinafter American Convention] (allowing only those cases in which the alleged victim has exhausted all of his or her domestic remedies in accordance with established international law to come before the Commission). But see Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. J. INT’L L. & POL’Y 333, 344 (1994) (arguing that the Inter-American Court applies the exhaustion of remedies doctrine far less stringently than other human rights systems).

When the Inter-American Court ruled in the *Berenson* case in November 2004, it correctly found that Peru only failed to comply with one article of the American Convention on Human Rights ("American Convention"),⁷ but its reasoning was at times either inconsistent with prior case law or inadequate to justify its conclusions.⁸ Part I of this Note discusses aspects of the American Convention, Peru's legal system, and the Inter-American Court's jurisprudence that pertain to the *Berenson* case.⁹ It also reviews the facts surrounding Berenson's arrest, Peruvian trials, and proceedings before the Inter-American Court.¹⁰ Part II explains how some of the Inter-American Court's reasoning was flawed, incomplete, or both, and provides alternative legal justifications for the conclusions it reached.¹¹ Part III recommends that the Inter-American Court articulate a narrow exclusionary rule,¹² devise a more precise definition of the term "cause" for the purpose of its double jeopardy jurisprudence,¹³ and limit the scope of the prohibition on ex post

7. See *Berenson Case*, Judgment of Nov. 25, 2004, Inter-Am. Ct. H.R. (Ser. C) No. 119, paras. 109, 128, 210 (2004) (ruling Peru only violated Berenson's right to humane treatment under Article 5, but not her right to a fair trial under Article 8 or her right to be free from ex post facto laws under Article 9), available at <http://www1.umn.edu/humanrts/iachr/C/119-esp.html> (last visited Feb. 20, 2005).

8. See discussion *infra* Part II (determining that the Inter-American Court's analysis of the alleged Articles 8 and 9 violations were largely unpersuasive or contradictory).

9. See discussion *infra* Part I (limiting the background information to that which is necessary to follow the arguments and recommendations in Parts II and III).

10. See discussion *infra* Part I (providing the factual and legal background to Berenson's claim as well as Peru's defense).

11. See discussion *infra* Part II (drawing on the Inter-American Court's case law in providing the support for the arguments that were absent in *Berenson*).

12. See discussion *infra* Part III.A (arguing that the Inter-American Court should give the plain meaning to the text of Article 8(3) in order to avoid some of the potentially disastrous consequences of leaving the exclusionary rule wide open in scope).

13. See discussion *infra* Part III.B (pointing out the lack of a clear explanation of what it means to try someone for the same "cause").

facto laws,¹⁴ all in order to better inform States' Parties of their obligations under the American Convention.¹⁵

I. BACKGROUND

A. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

1. History

In 1969, the Organization of American States ("OAS") adopted the American Convention, a legally binding human rights instrument.¹⁶ To ensure the substantive rights that it set forth, the Convention re-established the Inter-American Commission on Human Rights ("Commission") and created the Inter-American Court.¹⁷ The Commission decides petitions, drafts country reports, and until 2001, has been the sole advocate for the alleged victims before the Inter-American Court.¹⁸ The Inter-American Court issues

14. See discussion *infra* Part III.C (suggesting that the Inter-American Court limit the scope of Article 9 to its plain language).

15. See discussion *infra* Parts III.A-C (asking the Inter-American Court to help Peru in its attempt to comply with the American Convention).

16. See American Convention, *supra* note 6, pmbl. (memorializing the desire of the American States signatory to the Convention to bind themselves to the instrument, and thus to recognize the "essential rights of man"). See generally Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 304-06 (1995) (providing historical background on the formation of the OAS and the creation of the American Convention).

17. See American Convention, *supra* note 6, arts. 33-73 (laying out the Inter-American Court and Commission's functions and procedural rules).

18. See Christine M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195, 197-98 (2004) (characterizing the Commission's practical role as a "court of first instance" despite the fact that the two organs are supposed to be equally authoritative). Cerna, as a lawyer for the Inter-American Commission, prepares decisions on petitions and visits countries to produce reports on their human rights situations. *Id.* at 198-99. The Commission's main function has changed in the past several years from providing country reports to deciding petitions and advocating for alleged victims. *Id.*

advisory opinions, as well as binding decisions, on whether State Parties violated the American Convention.¹⁹

2. Relevant Provisions of the American Convention

Article 9 of the American Convention protects individuals from ex post facto laws, but the Inter-American Court has interpreted it to also prohibit State Parties from imposing imprecise laws or laws that are overly similar.²⁰ Article 8 protects the right to a fair trial, including the right to an expeditious trial before an independent and competent court,²¹ the right to a presumption of innocence,²² and the

19. See Shelton, *supra* note 6, at 338 (describing the Inter-American Court's role as interpreting the Convention in contentious cases but also as interpreting other treaties as well as the Convention for disputes arising among countries who have not ratified the Convention). For the States' Parties who have ratified the Convention, the rulings in contentious cases that the Inter-American Court makes are binding and final on all parties to the dispute. *Id.*; see also Cerna, *supra* note 18, at 198-99 (explaining that the Inter-American Court did not start deciding contentious cases until ten years after it came into existence).

20. See American Convention, *supra* note 6, art. 9 (mandating that "no one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed"). Article 9 also precludes countries from imposing greater criminal penalties than those applicable at the time of the crime's commission. *Id.* If, after the commission of a crime, the law reduces the penalty for that crime, the country must apply the lighter punishment to those that the country previously convicted for that crime. *Id.* The Inter-American Court extended Article 9 to bar vague or ambiguous laws. *Id.*; see also Castillo Petruzzi et al. Case, Judgment of May 30, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 121 (1999) (holding that vague laws violate the principle of *nullum crimen nulla poena sine lege praevia*, which means an act is not criminal without there being a previously existing law making it a crime), available at <http://www1.umn.edu/humanrts/iachr/C/52-ing.html> (last visited Feb. 20, 2005).

21. See American Convention, *supra* note 6, art. 8(1) (mandating that State Parties provide speedy trials, before a court that the law has already recognized, for those accused of crimes as well as for individuals engaged in civil litigation); see also Baena Ricardo et al. Case, Judgment of Feb. 2, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 72, para. 125 (2001) (reiterating the fact that the Article 8(1) fair trial requirement applies to criminal, labor, civil, fiscal, or any other type of case), available at <http://www1.umn.edu/humanrts/iachr/C/72-ing.html> (last visited Feb. 20, 2005).

22. See American Convention, *supra* note 6, art. 8(2) (identifying the right to presumption of innocence in the first part of the Article, before listing various subsidiary rights in separate sub-sections).

right to sufficient time and means for a defense.²³ Article 8(4) ensures that after the State acquits an individual, it may not retry that person for the same cause.²⁴

B. PERUVIAN CRIMINAL JUSTICE AND PENAL SYSTEMS

In 1992, responding to the prevalence of terrorism in Peru, most infamously the activities of the Shining Path²⁵ and MRTA, President Alberto Fujimori enacted various decree laws.²⁶ The first of these was Decree Law 25.475, which defined the crime of terrorism and “cooperation with terrorism.”²⁷ Decree Law 25.659 defined the crime of “treason against the fatherland,” an aggravated form of terrorism, over which a military tribunal has jurisdiction.²⁸ Since judges would

23. See *id.* art. 8(2)(c) (ensuring that defendants not only have enough time to prepare a defense but the means as well).

24. See *id.* art. 8(4) (lacking any specific information on what constitutes the “same cause”); see also discussion *infra* Part III.B (suggesting that the “same cause” may be equivalent to the “same facts and a similar crime,” but that the Inter-American Court should further clarify the meaning of the phrase for the benefit of State Parties).

25. See Shawn Choy, *Sendero Luminoso (Shining Path or SL)* (Center for Defense Information, July 1, 2002) (summarizing the history of Shining Path’s activities, including, according to U.S. State Deptment estimates, the killing of 30,000 people since 1980), at http://www.cdi.org/program/document.cfm?DocumentID=877&StartRow=1&ListRows=10&appendURL=&Orderby=D.DateLastUpdated%20deSC&programID=39&IssueID=0&Issue=&Date_From=&Date_To=02/27/2005&Keywords=&ContentType=&Author=79&from_page=documents.cfm (last visited Feb. 27, 2005).

26. See RALPH RUEBNER ET AL., *THE WAR ON TERRORISM: PERU’S PAST AND PRESENT, A LEGAL ANALYSIS* 3 (2004) (explaining that President Fujimori restructured the Peruvian Government in order to enact the decree laws), available at <http://www.jmls.edu/pdf/perureport.pdf> (last visited Feb. 20, 2005).

27. See Decree Law 25.475, arts. 2, 4, May 6, 1992 (Peru) (defining terrorism as creating a state of fear and alarm in the public or performing acts against life, safety, property, security of buildings, roads, and modes of communication by the use of arms, explosives or other means that seriously affect national security). An individual is guilty of cooperation with terrorism when he aids in the acts mentioned in Article 2, or when he takes part in the type of acts listed in the statute. *Id.*; see also *infra* note 144 and accompanying text (listing the categories of activities that constitute cooperation with terrorism).

28. See Decree Law 25.659, art. 1, Aug. 13, 1992 (Peru) (codifying treason as the commission of the acts that constitute terrorism under Decree Law 25.475 which a person commits using car bombs, weapons of war, or explosives, and

often be lenient on terrorism suspects because they feared for their safety,²⁹ the new laws mandated that magistrates presiding over terrorism and treason cases remain anonymous.³⁰ In 1997, Peru discontinued the use of hooded judges in terrorism and treason cases³¹ and in 2003, Peru's Constitutional Court ruled that Decree Law 25.659 was unconstitutional.³²

which causes death, injury, property damage, or poses any other grave dangers to the public).

29. See Working Group on Arbitrary Detention, Civil and Political Rights, Including Question of Torture and Detention [hereinafter Torture and Detention], U.N. ESCOR, 55th Sess., para. 66, U.N. Doc. E/CN.4/1999/63/Add.2 (1999) (discussing the Peruvian Government's claim that terrorists assassinated several judges between 1983 and 1994), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2fbc128ab04eeec1802567320037971f?Opendocument> (last visited Feb. 20, 2005); see also *American Convicted of Terrorist Ties [to] Peruvian Guerillas*, THE DAILY TEXAN, June 21, 2001 (describing Peru's explanation of the anonymity of judges in treason cases to protect them from rebel reprisals), available at http://tspweb02.tsp.utexas.edu/webarchive/06-21-01/2001062103_s03_Lori.html (last visited Feb. 20, 2005).

30. See Decree Law 25.475, art. 15 (allowing the judges' secrecy of identity through all stages of trial and for the opinions to go unsigned to further protect the magistrates' anonymity); see also Torture and Detention, *supra* note 29, paras. 66-67 (explaining that in practice, the judges would not only hide their faces, but would also use voice distorters, which were often hard for defendants to understand). The report gives an anecdote involving Margarita Chiquiere, who could only hear noise coming from the voice distorters during her trial, at the end of which the military tribunal sentenced her to twenty years in prison. *Id.*

31. See Torture and Detention, *supra* note 29, para. 65 (expressing approval at the government's repeal of this practice, which was originally scheduled to expire two years earlier).

32. See Amicus Curiae Brief Before the Inter-American Court of Human Rights, presented by Gil Barragan Romero (unpublished) (discussing the case of Marcelino Tineo Silva, in the Constitutional Court of Peru which led ultimately to the invalidation of the decree law), available at http://www.freelori.org/statements/04may_amicus_curiae.html (last visited Feb. 20, 2005); see also AMNESTY INTERNATIONAL, REPORT 2004: PERU (noting the Constitutional Tribunal's ruling and the executive's response in amending the relevant anti-terrorism decree laws to conform with the ruling), at <http://web.amnesty.org/report2004/per-summary-eng> (last visited Feb. 20, 2005). Amnesty International is still concerned, however, that Decree Law 25.475 is problematic from a human rights perspective because it is too vague. *Id.* It does, however, approve of Peru's reduction in maximum jail sentences from life to thirty years. *Id.* See generally RUEBNER ET AL., *supra* note 26, at 10, 20 (noting that the Constitutional Court also found certain provisions of Decree Law 25.475

C. JURISPRUDENCE OF THE INTER-AMERICAN COURT

1. *The Loayza Tamayo Case*

In 1993, Peru's Counterterrorism Bureau ("DINCOTE") arrested Maria Elena Loayza Tamayo for collaborating with the Shining Path.³³ DINCOTE officials held Tamayo incommunicado for ten days while they physically abused her in an attempt to get her to confess to criminal activity.³⁴ The state prosecuted Tamayo for treason under Decree Law 25.659 and the hooded Special Naval Court Martial convicted her on April 2, 1993.³⁵ In August of that year, the Special Tribunal of the Supreme Council of Military Justice acquitted Tamayo of treason and ordered that civilian courts try her for terrorism under Decree Law 25.475.³⁶

unconstitutional but upheld the admissibility of repentant terrorists' affidavits, enacting new legislation—Decree Law 922—which permits the use of evidence that the state previously used in terrorism trials under the 1992 laws). Ruebner reasoned that the sections of Decree Law 25.475 that the Constitutional Court held unconstitutional either conflicted with the Peruvian Constitution or violated the American Convention. *Id.* at 10. For example, the Constitutional Court held the practice of submitting criminal cases against civilian defendants to military jurisdiction unconstitutional, primarily as a violation of the Peruvian Constitution, although it also conflicted with *Castillo Petrucci et al.* *Id.* at 49. Furthermore, in regard to evidence, the Constitutional Court emphasized that even where evidence may be flawed, it does not necessarily indicate that the basis upon which authorities gathered the evidence was flawed. *Id.* at 20.

33. See *Loayza Tamayo Case*, Judgment of Sept. 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 3(a) (1997) (explaining that her arrest was the result of the accusation of another suspected terrorist who availed herself of Peruvian Decree Law 25.499, known as the "Repentance Law," which allows for leniency against those who help prevent terrorism), available at http://www.corteidh.or.cr/seriec_ing/seriec_33_ing.doc (last visited Nov. 21, 2004).

34. See *id.* paras. 46(c), 58 (establishing as proven, the facts that DINCOTE did not allow the victim to speak with her family from February 6 to February 15, 1993 and that they mistreated her by immersing her in water and threatening her with further violence).

35. See *id.* para. 3(e) (noting that the Special Naval Court had previously acquitted Loayza Tamayo on March 5, 1993, before subsequently convicting her on April 2, 1993); see also Cerna, *supra* note 18, at 206 (stating that both courts tried the victim for the same crime based on identical facts).

36. See *Loayza Tamayo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 3(e) (characterizing the military court's action as an acquittal instead of an annulment).

The Inter-American Court ruled in its judgment of September 17, 1997, that because the military tribunal ordered the civilian courts to try Tamayo for terrorism despite lacking the jurisdiction to do so, Peru violated Tamayo's right to trial by a competent court and her right to a presumption of innocence.³⁷ The Inter-American Court also ordered Tamayo's release, in large part because the state subjected her to double jeopardy, in violation of Article 8(4), by acquitting her of treason and retrying her for the same cause.³⁸

2. *The Castillo Petruzzi et al. Case*

A hooded Peruvian military tribunal convicted Jaime Francisco Sebastian Castillo Petruzzi, and three other Chilean citizens living in Peru, of treason under Decree Law 25.659.³⁹ The Inter-American

The distinction between annulment and acquittal becomes important in the double jeopardy finding in the *Loayza Tamayo* case and the absence of double jeopardy in the *Berenson* case. *Id.*; see also discussion *infra* Part II.D (explaining that the Inter-American Court did not find that Peru subjected Berenson to double jeopardy since the military tribunal annulled her conviction instead of acquitting her).

37. See *Loayza Tamayo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 61 (criticizing the military tribunal's usurpation of power rightfully belonging to the national police and to the civilian courts when the tribunal stated that there was enough evidence to try the victim for terrorism). The Inter-American Court also held that Peru violated Loayza Tamayo's right to humane treatment under Article 5 by unlawfully detaining and torturing her, relying in part on the European Court of Human Rights' determination that psychological disturbance amounts to inhumane treatment. *Id.* paras. 53-54. Additionally, Peru violated her right to personal liberty under Article 7 when the military court detained her for two weeks after her acquittal. *Id.* para. 57.

38. See *id.* para. 84 (granting the Inter-American Commission's request and ordering Peru to release the victim to repair her rights that Peru violated, especially her right to double jeopardy protection); see also Antonio Augusto Trindade, *Thoughts on Recent Developments in the Case-Law of the Inter-American Court of Human Rights: Selected Aspects*, 92 AM. SOC'Y INT'L L. PROC. 192, 199 (1998) (raising the fact that the *Loayza Tamayo* case represented the first time that the Inter-American Court ruled in a contentious case that a country's domestic laws violated the American Convention). The Inter-American Court did not rule that an individual law violated the Convention, however, but rather ruled that Decree Laws 25.475 and 25.659, when taken together, lead to double jeopardy, in violation of Article 8 of the Convention. *Id.*

39. See *Castillo Petruzzi et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 52, paras. 86.9, 86.10 (describing the summary proceedings that the Chileans faced, as a matter of protocol, after DINCOTE made the determination that the state should bring a treason charge instead of a terrorism charge).

Court found that Peru's Decree Laws 25.475 and 25.659 are so similar that the defendants could not have known in advance with which crime the state might charge them, violating Article 9 of the American Convention.⁴⁰

The Inter-American Court also held that Peru violated the civilian victims' right to trial before a competent, independent, and impartial court by trying them before a military tribunal.⁴¹ Furthermore, the Inter-American Court ruled that Peru violated the Chileans' right to notification of the charges against them, adequate time and means for the preparation of a defense, choice of legal counsel, examination of witnesses, appeal to a higher court, and a public trial.⁴²

As a result of its findings, the Inter-American Court ordered Peru to retry the victims before a civilian court in a manner that would ensure their due process.⁴³

40. See *id.* para. 119 (citing by analogy the *Loayza Tamayo* decision, where the Inter-American Court held that the similarity of the two decree laws was a violation of Article 8(4)).

41. See *id.* paras. 128, 130 (asserting that military tribunals do not meet the standard of a "tribunal previously established by law for civilians," which Article 8(1) requires and that military tribunals are inherently impartial since the armed forces are "fully engaged in the counter-insurgency struggle"); see also INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, OAS, SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS IN PERU para. 156 (2000) (pointing out that the Inter-American Court decided to reach the issue of the military tribunal's impartiality in this case despite its failure to do so in *Loayza Tamayo*), available at <http://www.cidh.oas.org/countryrep/Peru2000en/chapter2b.htm> (last visited Nov. 21, 2004).

42. See *Castillo Petruzzi et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 52, paras. 141, 146, 153, 160, 172 (elucidating some of the actions that Peru took that led to the violations, including "shackling" of the defense attorneys by denying them access to evidence, allowing only a "peripheral role" for the victim-chosen attorneys, disallowing cross-examination of witnesses, allowing cassation (appeal) only for death penalty cases, and holding the trial on a military base, which the public could not access). Based on their allegations, the Commission argued that Peru violated the due process rights embodied in Articles 8(1), 8(2)(b), 8(2)(c), 8(2)(d), 8(2)(f), 8(2)(h), and 8(5). *Id.* Additionally, because DINCOTE held the four Chileans incommunicado for an extended period of time, the Inter-American Court declared that Peru violated Article 5. *Id.* para. 197.

43. See *id.* para. 226(13) (finding that the military trial of Jaime Francisco Sebastian Castillo Petruzzi and his three compatriots did not meet the American Convention's requirements). The Inter-American Court therefore ordered Peru to amend its domestic laws that conflicted with the American Convention and to pay

D. THE HISTORY OF THE *BERENSON* CASE

As an anthropology student at MIT, Lori Berenson took an interest in Latin American wealth distribution, visited El Salvador in 1988, and subsequently took a job there in 1993.⁴⁴ She moved to Peru in late 1994 and rented a house in which MRTA members lived, but whether she did so knowing of their involvement in the organization is a matter of contention.⁴⁵ Based on the discovery of automatic rifles, grenades, dynamite, and blueprints of Peru's Congress at her Lima residence, Peruvian police arrested Berenson for organizing an MRTA attack.⁴⁶

A "faceless" military tribunal convicted Berenson of "Treason against the Fatherland," a violation of Decree Law 25.659, during a procedure under which the authorities did not inform Berenson of the charges and did not allow her attorney to examine evidence or cross-examine witnesses.⁴⁷ The tribunal sentenced Berenson to the maximum penalty of life imprisonment and another "faceless" military appellate court dismissed Berenson's subsequent appeal.⁴⁸

U.S. \$10,000 to the victims' next of kin. *Id.* paras. 222-23; *see also* Cerna, *supra* note 18, at 206 (describing how the retrial order led Peru to declare its withdrawal from the Inter-American Court's jurisdiction).

44. *See* William J. Nottingham, *Free Lori*, INDIANAPOLIS PEACE AND JUST. J., Sept. 16, 2004, at 6 (explaining that Berenson's interest in Latin America went as far back as 1988, when she visited El Salvador with a group of Quaker women), *available at* http://www.freelori.org/news/04sep16_peaceandjusticejournal.html (last visited Feb. 23, 2005).

45. *Compare* Morisette, *supra* note 5, at 26-27 (proffering that "the Peruvian government maintains that Berenson knew she was living with MRTA terrorists and she was aware of the nature of terrorist activities which took place in the house"), *with* Chavin, *supra* note 1 (expressing Berenson's belief that the only reason she remains incarcerated is that she is a political pawn and not a terrorist).

46. *See* Jack Gallo, *Human Rights Policy or Hardball Politics? Why the United States Should Press Peru to Extradite Lori Berenson for a Fair Trial*, 25 SUFFOLK TRANSNAT'L L. REV. 91, 97 (2001) (questioning whether the existence of contraband in her home was enough to link Berenson to terrorist acts and the MRTA).

47. *See* Annual Report 2002, *supra* note 2 (describing the facts put forward in the Inter-American Commission's petition before the Inter-American Court).

48. *See* Morisette, *supra* note 5, at 93 (explaining that the military court subjected Berenson to the standard procedures in handing down the sentence of life imprisonment without parole); *see also* Annual Report 1998, Inter-Amer. C.H.R., paras. 3-4 [hereinafter Annual Report 1998] (establishing the fact that the Supreme

Berenson served almost four years of her sentence at Yanamayo Prison, at an elevation of 12,000 feet, causing her severe health problems.⁴⁹

After notable human rights organizations denounced Peru's treatment of Berenson,⁵⁰ an unfavorable Inter-American Commission country report,⁵¹ and strong U.S. pressure, the Fujimori Government annulled the military court's ruling and moved Berenson to a prison with more moderate living conditions.⁵² In 2001, before a public civilian trial, Berenson had the opportunity to examine the evidence before her, cross-examine witnesses and other procedural safeguards that she did not have at her military hearing.⁵³ The court convicted her of cooperation with terrorism, in violation of Article 4 of Decree

Military Court, also with "faceless" judges, upheld the lower military court's sentence). Berenson's attorney filed another appeal, this time for review, but the Court denied it in 1997. *Id.* at 4.

49. See Rancee K. L. Panjabee, *Terror at the Emperor's Birthday Party: An Analysis of the Hostage-Taking Incident at the Japanese Embassy in Lima, Peru*, 16 DICK. J. INT'L L. 1, 37 (1997) (relating the concern Berenson's parents expressed at their daughter's hands turning purple from the freezing temperatures at Yanamayo Prison, which is located over 12,000 feet above sea level); see also Gary Borg, *American Gets Life Sentence as Rebel in Peru*, CHI. TRIB., Jan. 12, 1996, at 12 (referring to Yanamayo as one of the country's roughest prisons), available at 1996 WL 2633297.

50. See, e.g., *Amnesty International Calls on Peru to Give Trial to Lori*, REUTERS, Apr. 10, 1998 (calling the 1996 military trial a "parody of justice"), available at http://www.freelori.org/news/98apr10_reuters.html (last visited Nov. 21, 2004); see also Rhoda Berenson & Mark Berenson, "Human Rights Watch" *Condemns Peru's Anti-Terrorism Laws* (demanding the amendment of Peru's "draconian" decree laws, under which the country convicted Berenson), at <http://www.freelori.org/familyupdates/02mar21.html> (last visited Mar. 10, 2005).

51. See *infra* note 57 and accompanying text (divulging findings from the Commission's confidential ruling against Peru in 2002, but warning that the information is not verified, since the report is not supposed to be available to the public).

52. See Gallo, *supra* note 46, at 96 (raising the possibility that Berenson's retrial was more likely a product of Fujimori's political motives than of any new exculpatory evidence, as the ex-president claimed).

53. See *Measured Support for Berenson*, CBS NEWS, June 27, 2001 (quoting U.S. State Department Spokesman Philip Reeker as saying that the civilian trial did not contain the "most egregious flaws in the military trial"), available at <http://www.cbsnews.com/stories/2001/06/27/world/main298761.shtml> (last visited Mar. 10, 2005).

Law 25.475, and sentenced her to twenty years in prison.⁵⁴ The appellate court affirmed Berenson's conviction, thereby effectively eliminating the last of her domestic remedies.⁵⁵

In December 1998, while Berenson was still serving her sentence for treason, her lawyers filed a petition on her behalf before the Inter-American Commission.⁵⁶ In 2002, even after Peru moved Berenson's case to a civilian court and reduced her sentence, the Commission ruled that Peru violated Articles 8, 9, 5, 2 and 1(1) of the Convention and petitioned the Inter-American Court to issue a ruling to that effect.⁵⁷ The Inter-American Court took the case,⁵⁸ hearing final arguments in May 2004, and publicly issuing its ruling in December.⁵⁹

54. See Annual Report 2002, *supra* note 2, para. 331 (specifying that the civilian court found Berenson guilty of violating Articles 4(a) and (b) of Decree Law 25.475).

55. See Craig Mauro, *Peru Upholds 20-Year Sentence for American*, CHICAGO SUN-TIMES, Feb. 19, 2002, at 27 (suggesting that a presidential pardon would be Berenson's only other hope within Peru), available at 2002 WL 6448278.

56. See Annual Report 1998, *supra* note 48, para. 6 (asking the Inter-American Court to find that Peru violated Articles 5, 7, 8, and 25 of the American Convention).

57. See Rhoda Berenson & Mark Berenson, *News From Lori's Parents: Text of the Ruling of the Inter-American Commission* (summarizing the findings of the Commission, including that both Decree Laws 25.475 and 25.659, under which Peru prosecuted Berenson, are incompatible with the American Convention), at <http://www.freelori.org/familyupdates/02jul17.html#iacruling> (last visited Mar. 10, 2005). It is unknown whether this is what the official report actually says, since it is kept confidential. *Id.*; see also American Convention, *supra* note 6, art. 50(2) (allowing the Commission, in the event that it cannot reach an agreement with the state party, to issue a report of its findings to the country, "which shall not be at liberty to publish it").

58. See Berenson Case, Order of the Court of Sept. 6, 2002, Inter-Am. Ct. H.R. (Ser. E) (2002) (formalizing its intent to hear the case by acknowledging that Peru ratified the Convention on July 28, 1978, and is thus subject to the Court's jurisdiction); see also Berenson Case, Judgment of Nov. 25, 2004, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 6 (2004) (declaring the Inter-American Court's competence to hear the case because Peru has been a signatory to the American Convention since 1978).

59. See Rick Vecchio, *Berenson's Quest to Reverse Conviction Ends, New Yorker Guilty of Collaborating with Marxist Guerillas Resigned to Serving Out Last [Eleven] Years of Term*, S. FLA. SUN-SENTINEL, Dec. 11, 2004, at 28A (reporting that the Inter-American Court upheld Berenson's twenty-year sentence).

The Inter-American Court held that the crime of “cooperation with terrorism” is distinct from terrorism and thus the co-existence of the two laws does not violate Article 9 of the American Convention.⁶⁰ It also held that Berenson did not face double jeopardy since she did not technically face two “trials” and since the military tribunal did not “acquit” her.⁶¹ Despite the Commission’s assertions, the Inter-American Court found that Peru’s civilian court was independent and impartial.⁶² Additionally, it found that the civilian trial respected Berenson’s right to adequate time and means for defense and the presumption of innocence,⁶³ although it did not explain why.⁶⁴ Since the Inter-American Court also held that Peru violated several provisions of Article 8 as a result of Berenson’s trial before a military tribunal, and not resulting from the civilian trial, the Inter-American Court refused to order Berenson’s release.⁶⁵ The Inter-American Court did order Peru to pay damages, however, as a consequence of Berenson’s imprisonment under hazardous conditions and the incommunicado detention she faced.⁶⁶

60. *See Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 127 (characterizing the crime of cooperation with terrorism as an autonomous crime and not a class within the crime of terrorism).

61. *See id.* paras. 206, 208 (denying the existence of the military trial for Article 8(4) purposes, in light of Article 8(1) violations, and asserting that the military court merely declared that it lacked jurisdiction, without re-examining the facts of the case).

62. *See id.* paras. 153-54 (refusing to address the neutrality of the judges because Berenson did not sufficiently pursue the claim in the domestic courts, and avoiding any response to the Commission’s charge that there was an insufficient separation between the civilian and military proceedings, and therefore a biased civilian court).

63. *See id.* paras. 164, 169 (declaring that the evidence generally demonstrates that Peru respected Berenson’s right to presumption of innocence and her right to a neutral judge).

64. *See discussion infra* Part II.B (providing some arguments for the Inter-American Court’s unsupported holdings).

65. *See Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 210 (denying the appeal for freedom because Berenson’s current incarceration is the result of the civilian trial and not the military trial).

66. *See id.* paras. 109, 237-39 (ruling that Peru violated sections 1, 2, and 6 of Article 5 and ordering the cancellation of the fine it imposed on Berenson as well as additional damages to compensate Berenson’s parents for their legal expenses).

II. ANALYSIS

The Inter-American Court's holdings in *Berenson* are correct, although in reaching some of them it employed reasoning that was either flawed or incomplete.⁶⁷ While several of the Inter-American Court's holdings are straightforward and need no expansion,⁶⁸ this section attempts to elucidate those defective holdings in *Berenson* and provide further support, clarification, and explanation, where needed.⁶⁹

A. THE INTER-AMERICAN COURT APPLIED INCORRECT REASONING WHILE REACHING THE PROPER CONCLUSION AS TO PERU'S RESPECT FOR ARTICLE 8(1)

The Inter-American Court found that Peru respected *Berenson's* Article 8(1) right to a neutral and competent judge during her civilian trial, but it incorrectly blamed the military court for an insufficient separation between the military and civilian proceedings.⁷⁰ One of the Commission's attacks against the civilian trial under Article 8(1) was that there was not enough division between the military and civilian jurisdictions' handling of *Berenson's* case.⁷¹ Presumably, the

67. See discussion *infra* Part II (concurring in the judgment but reaching the holdings via alternative routes).

68. See, e.g., *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, paras. 98-109, 182-200, 211-48 (finding that Peru violated *Berenson's* Article 5 right to humane treatment, but respected her Article 8(2)(f) right to interrogate witnesses, her Article 8(2)(h) right to appeal, and her article 8(5) right to a public trial, among other things).

69. See discussion *infra* Part II (observing several weaknesses in certain lines of reasoning that the Inter-American Court employed despite ultimately reaching the correct conclusion).

70. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, paras. 148-49 (holding the military court responsible for 8(1) violations due to the anonymity of its judges but incorrectly finding violations for its usurpation of civilian court jurisdiction).

71. See *id.* para. 129.2(a) (alleging there was no clear distinction between the two trials). The Commission argued that the lack of a distinct separation resulted from the fact that the evidence that the military court gathered had a role not only in *Berenson's* civilian trial and ultimate conviction, but it was also what made the civilian court pursue terrorism charges in the first place. *Id.* Since it was first among the list of the Commission's complaints regarding the civilian trial, it may

idea is that the civilian court could not have truly been neutral if its proceedings were merely a continuation of the decidedly prejudiced military process.⁷² The Inter-American Court agreed that there was an insufficient separation between the proceedings, but that it was a deficiency in the military, not the civilian, process.⁷³

The rationale behind the ruling was similar to that in *Loayza Tamayo*, where the military tribunal acted beyond the scope of its jurisdiction by recommending that the civilian courts pursue terrorism charges.⁷⁴ The Inter-American Court did not, however, address the Commission's argument that the lack of adequate separation also led to the civilian court's bias.⁷⁵ In fact, it could not address the Commission's argument because finding a lack of separation between the systems would seem to necessarily indicate that the civilian court was biased.⁷⁶

be safe to assume that this claim relates to Article 8(1)—the first provision of Article 8 that the Inter-American Court addresses in its analysis. *Id.*

72. See Press Release, Council for Hemispheric Affairs, Peru Fights a Loser's Battle in the Notorious Berenson Case (Aug. 8, 2002) (explaining that one of the Commission's 2002 findings was that Peru unlawfully allowed the use of the military court's evidence in the civilian trial), at http://www.coha.org/NEW_PRESS_RELEASES/New_Press_Releases_2002/02.30_Berenson_Case.htm (last visited Feb. 8, 2005).

73. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, paras. 148-49 (applying the same language to the military tribunal in *Berenson* as it did to the military tribunal in *Loayza Tamayo*, despite the fact that the two cases were factually quite different).

74. See *Loayza Tamayo Case*, Judgment of Sept. 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 61 (1997) (setting forth two ways that the military trial improperly acted beyond its jurisdiction: by sending the case to the civilian jurisdiction to try the defendant for terrorism and ordering that the civilian court detain her).

75. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, paras. 151-56 (finding only that the civilian court respected Berenson's right to have her case before a neutral judge). The Inter-American Court refused to rule on whether the individual judges of the civilian court were neutral and impartial because Berenson failed to raise the issue in Peruvian courts in a timely manner. *Id.* para. 153. The Inter-American Court followed the United Nations Committee on Human Rights, which allows countries a chance to respond to violations domestically before it will rule on them. *Id.* para. 154.

76. See *id.* para. 129.2(a) (showing that the Commission's claim that there was not enough separation between the two trials meant that the civilian trial violated Article 8(1) as well).

The real reason the Commission's claim against the civilian court fails is the sufficient division between the civilian and military courts, contrary to the assertions of the Inter-American Court.⁷⁷ The Inter-American Court decided in *Loayza Tamayo* that Peru's military tribunal violated the victim's Article 8(1) rights by announcing that there was sufficient evidence to send her case to the civilian courts to try her for terrorism after it acquitted her of treason.⁷⁸ The Inter-American Court appeared to stress the fact that the civilian criminal justice system did not conduct an independent investigation in Loayza Tamayo's case; it simply accepted the case file and pursued terrorism charges based solely on the military prosecutors' investigation.⁷⁹ The Inter-American Court noted that in *Berenson*, however, the civilian court conducted its own investigation⁸⁰ and that it was not a violation for it to accept the military court's files.⁸¹

In *Loayza Tamayo*, the Inter-American Court also highlighted the fact that the military court declared in its annulment verdict that there was enough evidence for terrorism charges.⁸² There is no such language in the military court's annulment verdict in *Berenson's*

77. Compare *Loayza Tamayo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 61 (noting that the military court announced that there was enough evidence to charge Loayza Tamayo with terrorism), with Press Release, *supra* note 3 (announcing that the Council nullified Berenson's treason sentence and would refrain from further hearing the case, sending the case file to the civilian court system).

78. See *Loayza Tamayo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 61 (noting the lack of jurisdiction with which the military tribunal declared the existence of evidence for a terrorism charge, a determination that only the regular courts have the authority to make).

79. See *id.* para. 46(i) (attributing the collection of evidence, with which both courts tried Loayza Tamayo, to DINCOTE).

80. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 174 (noting that officials collected enough evidence during the civilian trial to prove the charges against Berenson).

81. See *id.* para. 208 (finding that the military court did not analyze the facts when annulling the treason conviction and merely sent the files to civilian court).

82. See *Loayza Tamayo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 61 (identifying the language that the military court used in its acquittal, which stated there was "evidence of the commission of the crime of terrorism").

case.⁸³ It is likely that Peruvian officials read the *Loayza Tamayo* opinion and specifically avoided “usurping” the civilian court’s jurisdiction once it decided to annul Berenson’s treason conviction.⁸⁴ In *Berenson*, the evidence shows that the military court annulled the verdict and took no further action, instantly allowing the civilian jurisdiction to independently pursue terrorism charges.⁸⁵ For these reasons, the civilian court maintained sufficient separation from the military court and thus survived the Commission’s allegation of partiality.⁸⁶

B. THE INTER-AMERICAN COURT CORRECTLY RULED THAT
BERENSON’S CIVILIAN TRIAL AFFORDED HER AN ADEQUATE
DEFENSE AND A PRESUMPTION OF INNOCENCE, BUT ITS ANALYSIS
FAILED TO RECONCILE SOME APPARENT CONTRADICTIONS

In ruling that Peru respected Berenson’s rights under Article 8(2)(c) during her civilian trial but not during her military trial, the Inter-American Court’s decision failed to adequately distinguish the facts of the two trials.⁸⁷ For example, one of the reasons the military trial violated Article 8(2)(c), according to the Inter-American Court, was that Berenson’s attorney only had access to the case file one day

83. See Press Release, *supra* note 3 (referring specifically to the legal standards in effect—undoubtedly referring to the *Loayza Tamayo Case*—that required it to cease any further action once it found that it lacked jurisdiction).

84. See *id.* (sending the procedural documents to the civilian courts after noting that it only had jurisdiction over treason charges, for which there was insufficient evidence).

85. See Geoffrey Mohan, *A Reversal in Peru, New Yorker Still Jailed But Wins New Trial*, NEWSDAY, Aug. 29, 2000, at A08 (indicating that following the annulment, the military court directed the case to the civilian court without delay), available at 2000 WL 10031066.

86. See discussion *supra* Part II.A (explaining that the Commission’s charge of bias in the civilian court resulting from any lack of a sufficient split between the proceedings is unfounded due to the fact that the military and civilian courts consciously kept their distance).

87. See, e.g., *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, paras. 130.2(n), 167 (identifying the fact that Berenson’s attorney had one day to examine the file before the military trial and four days to do so before the civilian trial).

before the trial and two hours to study it.⁸⁸ Meanwhile, the evidence shows that authorities only notified Berenson of the terrorism charges four days before her civilian trial,⁸⁹ yet this trial complied with 8(2)(c).⁹⁰ If one day is an insufficient amount of time to study a 2,000-page file, four days is not a great improvement, especially since the file had imaginably grown larger by that point.⁹¹

The Inter-American Court likely considered the amount of time to prepare a defense to be a small part of the Article 8(2)(c) calculus, which also involves the means for a defense.⁹² The discrepancy identified above diminishes upon examining the allowances for a defense during the civilian trial as compared with the restrictions on an adequate defense in the military trial.⁹³ At the civilian trial, Berenson and her attorneys presented and examined evidence, cross-examined witnesses, and communicated freely and privately with each other.⁹⁴ Meanwhile, neither Berenson nor her attorney had any

88. See *id.* paras. 129.1(c), 167 (noting the Commission's argument that Berenson's attorney had approximately two hours to study 2000 pages and that he did not have the opportunity to discuss the case with Berenson confidentially).

89. See *id.* para. 130.2(n) (asserting that four days notice prior to the first hearing was not enough time for Berenson and her attorney to prepare their defense, especially considering that they were defending new criminal charges).

90. See Vecchio, *supra* note 59 (reporting that the Inter-American Court upheld the validity of Berenson's civilian trial); see also *U.S. Woman Must Serve Full Sentence in Peru, Human Rights Court Decides*, NAT'L POST, Dec. 4, 2004, at A17 (submitting that the ruling validated the civilian trial as comporting with human rights standards, despite the assertion of several human rights organizations).

91. See Jude Webber, *Lori Berenson Grilled for Fifth Day*, ASSOCIATED PRESS, Apr. 3, 2001 (presenting Berenson's parents' concern about the fairness of the civilian trial in light of the fact that formal charges came only four days before hearings began), available at http://www.freelori.org/news/01apr03_ap.html (last visited Feb. 8, 2005).

92. See American Convention, *supra* note 6, art. 8(2)(c) (requiring that States ensure both adequate time and means for criminal defendants to prepare a defense).

93. See Morissette, *supra* note 5, at 97-98 (explaining that the military trial's lack of due process warranted the criticism it received while the criticism of the civilian trial resulted largely from an expectation of similarity to the adversarial criminal procedural system in place in the U.S.).

94. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, paras. 169-70 (ruling that Berenson's defense attorney was allowed to present evidence and interrogate witnesses during both the investigative and oral phases of the trial).

of these rights during the military trial.⁹⁵ Additionally, while four days may not be enough time for a defense attorney in an adversarial criminal system to prepare for a case, in an inquisitorial system such as Peru's, where the judge has a more active role than the attorneys, four days is far more reasonable.⁹⁶

Another example of apparent contradiction within the Inter-American Court's analysis resulted from its failure to distinguish the activities of the civilian and military courts with respect to Berenson's presumption of innocence.⁹⁷ Specifically, the Inter-American Court found that DINCOTE violated Article 8(2) by presenting Berenson to the press as the perpetrator of treason during the early stages of the military trial, but found no similar violation where officials kept Berenson in a cell located in the courtroom during the first day of her civilian trial.⁹⁸

To reconcile the apparent inconsistency, it again helps to distinguish the U.S. criminal justice system, which utilizes juries in deciding guilt or innocence, from Peru's inquisitorial system.⁹⁹ The former relies heavily on lay jurors to make determinations of fact

95. See *id.* para. 167 (concluding that based on the evidence, Berenson did not have adequate time or means to prepare a defense; her lawyer's role was symbolic more than anything).

96. See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 416-17 (1992) (describing the typical inquisitorial model as one where an active judge or judges are very familiar with the case, control the case file, and ask far more questions of the witnesses than either the prosecutor or defense attorney); see also Russel G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 971 (2004) (contrasting the inquisitorial system—where judges are experts who “conduct investigations, initiate cases, determine the issues, and control the presentation of evidence”—with the adversarial system, where the lawyers are “placed at the center of the search for justice”).

97. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, paras. 162-64 (making no mention of the facts of the civilian trial before holding that the civilian court presumed Berenson innocent in accordance with Article 8(2)).

98. See *id.* paras. 158, 162 (finding that DINCOTE violated Berenson's rights by showing her to the press before her conviction and then referring to the fact that Berenson's representatives claimed that the civilian court also violated her right to a presumption of innocence).

99. See Van Kessel, *supra* note 96, at 406 (stating that the United States conducts ninety percent of the world's criminal jury trials).

based on the parties' presentation of evidence, while the latter generally leaves the fact finding to the judges, who play a very active role throughout the trial.¹⁰⁰ Whereas a jury would likely be biased by seeing a defendant behind bars in the courtroom, there is little reason to fear that civil law judges would be similarly biased, especially when detaining defendants is a matter of protocol.¹⁰¹ Moreover, after Berenson's protests, the court allowed her to stand outside of the cell for the rest of the lengthy proceedings, perhaps demonstrating to the Inter-American Court a lack of any real injury.¹⁰² By comparison, DINCOTE's actions directly affected Berenson's right to a presumption of innocence and did cause injury, by swaying Peruvian public sentiment against her.¹⁰³

C. THE INTER-AMERICAN COURT SHOULD NOT HAVE RULED ON THE VALIDITY OF THE EVIDENCE THAT BERENSON'S CIVILIAN TRIAL USED

The Inter-American Court acted beyond the scope of its jurisdiction by analyzing the evidence in Berenson's civilian trial, and in the process established an overly broad exclusionary rule.¹⁰⁴

100. See Pearce, *supra* note 96, at 971 (comparing the role of the judge in a civil law inquisitorial system with the role of a jury in an adversarial common law system).

101. Cf. Van Kessel, *supra* note 96, at 460-62 (discussing how important *voire dire* and peremptory challenges are in the U.S. adversarial system, where jurors are dismissed—or selected, depending on the case—largely for their potential prejudices).

102. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 130.2(d) (laying out Berenson's argument that being caged for the first day and guarded by four soldiers demonstrated a presumption of guilt). Berenson's representatives also complained that after the cage episode, the press called her the MRTA terrorist or the gringa terrorist. *Id.*

103. See Rick Vecchio, *Peru Prisoner Not Hopeful; World Court Ruling Probably Won't Get Her Out New Yorker Says*, AKRON BEACON J., Oct. 7, 2004, at 13 (recounting that Peruvians saw Berenson on television for the first time after her arrest, where Fujimori referred to her as a terrorist leader of the MRTA), available at 2004 WL 56292853. Vecchio also commented that Berenson's television appearance—where she appeared angry and agitated—left such an indelible image on the minds of Peruvians that Berenson believed it would be the reason Peru would never reduce her prison sentence. *Id.*

104. Compare American Convention, *supra* note 6, art. 8(3) (providing only that coerced confessions shall be invalid), with *Berenson Case*, Inter-Am. Ct. H.R.

Although the American Convention is silent on the issue of evidence,¹⁰⁵ the Inter-American Court chose to discuss the admissibility of evidence that the civilian court received from the military court.¹⁰⁶ It proclaimed that the evidence originating in the military proceedings was not admissible in the civilian trial, presumably because the military court obtained the evidence in a manner that violated a number of Berenson's human rights.¹⁰⁷ However, without specifying which evidence was inadmissible and which American Convention violations rendered the evidence invalid, the Inter-American Court appeared to hold that an investigation that violates any human rights renders all evidence gathered during that investigation invalid.¹⁰⁸

The American Convention only requires the exclusion of coerced confessions,¹⁰⁹ and since Berenson never made a confession, there was no reason to discuss evidence exclusion at all.¹¹⁰ Regardless, the Inter-American Court, whether intentionally or not, created an extremely broad exclusionary rule, which is problematic for two reasons.¹¹¹ First, a strict exclusionary rule is inconsistent with the

(Ser. C) No. 119, para. 174 (declaring the evidence that the military court collected inadmissible in the civilian trial).

105. See American Convention, *supra* note 6, art. 8 (avoiding any mention of evidentiary requirements within the article that ensures the right to a fair trial). The American Convention only uses the term "evidence" once in its entire text, in an article dealing with evidence before the Inter-American Court, not domestic courts. *Id.* art. 48.

106. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 172 (addressing the methods by which the civilian court gathered evidence to use against Berenson).

107. See *id.* paras. 171, 174 (remarking on the military trial's deficiencies regarding its means of proof and discounting the validity of such proof in civilian court).

108. See *id.* (finding that despite the inadmissibility of evidence from the military trial, the civilian court still had ample means of proving Berenson's guilt).

109. See American Convention, *supra* note 6, art. 8(3) (invalidating confessions of guilt that result from "coercion of any kind").

110. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 214 (declining to rule on the allegation that Peru violated Articles 7 and 11 because Berenson's attorneys failed to include it in the complaint and therefore was not properly before the Inter-American Court).

111. See *id.* para. 174 (committing only one sentence of the opinion to the finding that the evidence from the military trial was invalid). Despite the brevity of

principles of an inquisitorial system of criminal justice, which is arguably aimed more at uncovering the truth than adversary systems.¹¹² Second, excluding all evidence originating in military courts could make it extremely difficult for Peru to retry those whom it previously convicted of treason, potentially requiring the release of known terrorists back into society.¹¹³

D. THE INTER-AMERICAN COURT FAILED TO ADEQUATELY JUSTIFY ITS RULING THAT PERU DID NOT COMMIT DOUBLE JEOPARDY

In supporting its ruling that Berenson did not face double jeopardy, the Inter-American Court employed two arguments, the first of which directly conflicted with *Loayza Tamayo*.¹¹⁴ The first

the statement, it may have enormous consequences, potentially opening the flood gates for criminals to suppress a wide range of evidence. *Id.*; see also discussion *infra* Part III.A (warning of the threat that overactive exclusionary rules pose).

112. See Van Kessel, *supra* note 96, at 420 (warning that “a trial system . . . which . . . imposes draconian exclusionary rules of evidence, would not be a great legal engine for discovering the truth”). Van Kessel also discusses how inquisitorial systems place a greater emphasis on discovering the truth than do adversarial systems. *Id.* at 451 n.196. He further notes that the zeal with which the United States employs the exclusionary rule evidences its sacrifice of truth in favor of other objectives. *Id.*

113. See Torture and Detention, *supra* note 29, para. 61 (estimating that Peru tried more than 1200 civilians before military tribunals); see also Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun’s Call to Examine the Rule in Light of Changing Judicial Understanding About its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 50 (1994) (describing a U.S. judge’s characterization of the exclusionary rule’s effect as “punish[ing] vigorous police work while it frees criminals”). But see Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 119, 131-32 (2003) (pointing to the fact that murderers, rapists, and other serious criminals seldom win motions to suppress evidence and thus seldom go free). Kamisar also notes the ability of the judge to find ways around excluding evidence when the evidence strongly supports conviction of a dangerous felon. *Id.* at 132.

114. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 206 (pronouncing that the violation of Berenson’s right to a competent and independent judge meant that the military proceeding was not a genuine process); see also *Loayza Tamayo Case*, Judgment of Sept. 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 77 (1997) (finding double jeopardy in *Loayza Tamayo*’s case, implying that the military tribunal was a genuine process, despite its violation of *Loayza Tamayo*’s right to a competent and independent judge).

argument was presumably that Berenson's proceeding before the military court was so devoid of due process that it was not really a "trial," and so Peru did not commit double jeopardy, which requires two trials.¹¹⁵ The Inter-American Court, however, found virtually the same due process violations in Berenson's military proceedings as it did in Loayza Tamayo's military proceedings.¹¹⁶ Since it found double jeopardy in Loayza Tamayo's case, it must have meant that she faced two "trials"—one in the military court and one in the civilian court.¹¹⁷ If Loayza Tamayo's military proceeding was a "trial," then it must follow that Berenson's military proceeding was also a "trial."¹¹⁸

The Inter-American Court's second argument successfully refuted the Commission's allegation that the military trial ended in an "acquittal," although it should have further supported its conclusion.¹¹⁹ The Commission argued that the military and civilian courts tried Berenson for the same cause, the former having acquitted her of treason based on an examination of the evidence.¹²⁰ Instead, the Inter-American Court explained that the proceedings before the military jurisdiction ended in an annulment due to lack of

115. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 206 (denying military proceedings are genuine processes for Article 8(4) purposes).

116. Compare *id.* para. 150 (borrowing the exact language it used in *Loayza Tamayo*, to declare that the military tribunal "acted ultra vires [and] usurped jurisdiction," in violation of Article 8(1)), with *Loayza Tamayo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 61 (concluding that by performing functions over which the civilian court had exclusive jurisdiction, the military court violated Loayza Tamayo's right to a competent judge).

117. See American Convention, *supra* note 6, art. 8(4) (prohibiting States' Parties from acquitting individuals and then subjecting them to a "new trial," indicating that the acquittal came during the old trial) (emphasis added).

118. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 206 (including no explanation for why Berenson's military process was not genuine while Loayza Tamayo's was, despite the overwhelming similarity between the two).

119. See *id.* para. 208 (stating only that Berenson's proceedings before the military court ended in a ruling declaring that jurisdiction over the case was properly with the civilian courts).

120. See *id.* para. 129.1(k) (arguing that despite using the term 'annulment,' the military court actually acquitted Berenson because it examined the facts of the case).

jurisdiction.¹²¹ This reasoning is consistent with *Loayza Tamayo*, a case that the Inter-American Court could have used to strengthen its holding in *Berenson*.¹²² In *Loayza Tamayo*, the Inter-American Court emphasized the fact that Peru's military tribunal could have, but did not, "relinquish" the case for lack of jurisdiction.¹²³ Instead, the military tribunal used the term "acquittal."¹²⁴ The Inter-American Court made this terminological distinction in 1997 and Peru presumably took note, specifically refraining from using the term "acquit" in annulling the military tribunal conviction and sending Berenson's case to the civilian court system in 2000.¹²⁵ While the distinction is largely semantic, it is one that the Inter-American Court uses, and thus it followed precedent in finding that double jeopardy did not exist in *Berenson*.¹²⁶

Furthermore, unlike in *Loayza Tamayo*, Peru's legal system did not retry Berenson for the same "cause"; the military court convicted

121. See *id.* paras. 208-09 (holding that the military court did not rule on the facts when annulling Berenson's conviction and sending the case to the civilian court).

122. See *Loayza Tamayo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 70 (deciding that if the military court wished to declare a lack of jurisdiction over the case, then it should have stated as much, and not used the term "acquit," which implies a judgment based on the facts).

123. See *id.* para. 71 (emphasizing that the Special Naval Court Martial had used the term "relinquish" in regard to other accused individuals, along with whom it tried Loayza Tamayo, and that "if the judicial intention had been to restrict its ruling to a matter of no jurisdiction, it would have used the same term when referring to Ms. Maria Elena Loayza Tamayo").

124. See *id.* para. 76 (deciding that "the military court, instead of declaring itself to lack jurisdiction, took cognizance of the facts, circumstances and evidence relating to the alleged acts, evaluated them, and ruled to *acquit* her") (emphasis added).

125. See Press Release, *supra* note 3 (declaring the military's limitation of jurisdiction only over treason cases and thus taking no further action after nullifying Berenson's treason conviction); see also Annual Report 2002, *supra* note 2, para. 331 (indicating that the military court "annulled" the treason conviction as opposed to acquitting Berenson).

126. Compare *Loayza Tamayo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 71 (noting that the military tribunal often uses the term "relinquish" to describe its annulment of a decision which it did not have jurisdiction to issue, while the tribunal in Loayza Tamayo's case specifically used the term "acquit"), with Press Release, *supra* note 3 (nullifying Berenson's treason conviction—a move whose motive is more along the lines of relinquishment for lack of jurisdiction).

her of leading the MRTA and the civilian court convicted her of merely assisting it, based on new facts.¹²⁷ In *Loayza Tamayo*, the Inter-American Court was careful to distinguish the use of the term “cause” in the American Convention from the use of the term “crime” in other human rights instruments, the latter being more narrow and encompassing fewer cases.¹²⁸ It found double jeopardy even though Peru technically charged Loayza Tamayo with two different crimes.¹²⁹ This is because the two crimes were very similar and because Peruvian authorities based both charges on the same set of facts.¹³⁰ This is distinguishable from *Berenson* in two ways. First, the two crimes with which Peru charged Berenson were less similar than the two crimes with which Peru charged Loayza Tamayo.¹³¹ Second, while both of Loayza Tamayo’s trials relied on the same facts, the civilian court based Berenson’s conviction on its own investigation, which produced a new set of facts.¹³² Thus, an element

127. See Gallo, *supra* note 46, at 96 (characterizing the new exculpatory evidence announced by the Fujimori government as supporting the claim that Berenson did not actually participate in the plot to attack the Peruvian Congress).

128. See *Loayza Tamayo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 66 (contrasting the United Nations International Covenant on Civil and Political Rights, Art. 14(7), which uses as a standard the “same crime,” with the American Convention’s use of the “same cause” standard).

129. See *id.* paras. 4(a), (e) (noting that after the military court acquitted Loayza Tamayo of treason, she still had not yet exhausted her domestic remedies because the civilian court had not finished prosecuting her for terrorism).

130. See *id.* (indicating that a comparative reading of certain articles of Decree Laws 25.659 and 25.475 demonstrates just how similar the two laws are).

131. See discussion *infra* Part II.E (padding the Inter-American Court’s argument that Peruvian law did not violate the Article 9 prohibition on ex post facto laws because cooperation with terrorism is a distinct crime and not a class within the crime of terrorism).

132. See *Berenson Case*, Judgment of Nov. 25, 2004, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 172 (2004) (identifying the methods of investigation that the civilian court conducted, including the collection of documentary evidence from different organizations, testimony from more than thirty witnesses, and expert reports). The Inter-American Court went on to find that the evidence that the civilian court system collected was enough, in and of itself, to prove Berenson’s guilt. *Id.* para. 174.

necessary for a double jeopardy finding was missing, according to the facts in *Berenson*.¹³³

It was also necessary for the Inter-American Court not to find double jeopardy in *Berenson* in order to maintain consistency with *Castillo Petruzzi et al.*¹³⁴ Because the military trial violated Castillo Petruzzi and the other Chileans' rights under the American Convention, the Inter-American Court ordered that Peru retry the victims before a civilian court.¹³⁵ By ordering this remedy, the Inter-American Court essentially pre-approved the legality of similar retrials in the future.¹³⁶ Finding that there was double jeopardy in *Berenson* would have amounted to punishing Peru for its attempt to comply with the precedent that *Castillo Petruzzi et al.* set.¹³⁷

E. THE INTER-AMERICAN COURT CORRECTLY HELD THAT PERU DID NOT VIOLATE THE ARTICLE 9 PROHIBITION AGAINST EX POST FACTO LAWS, BUT COULD HAVE USED ADDITIONAL ARGUMENTS IN SUPPORT OF ITS CONCLUSION

The Inter-American Court held that the crime of cooperation with terrorism is not similar enough to the crime of terrorism to amount to a violation of Article 9 but did not take advantage of another, equally

133. See American Convention, *supra* note 6, art. 8(4) (requiring two trials for the same "cause" in order to prove that the State committed double jeopardy).

134. See Castillo Petruzzi et al. Case, Judgment of May 30, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 226 (1999) (ordering the victims' retrial after holding that their military trial violated the American Convention).

135. See *id.* para. 221 (rendering the military trial invalid for lack of due process and thus requiring Peru to provide a new trial that will include sufficient rights under the American Convention).

136. See *id.* (holding that military trials of the sort the Chileans underwent necessarily lack due process and that Peru can remedy such a case by sending it to the civilian courts).

137. See Interview by Amy Goodman with Mark Berenson, Co-Director, Committee to Free Lori Berenson (May 10, 2004) (observing Peru's argument before the Court as appealing to the fact that Peru has been "moving towards democracy" by repealing its condemned Treason Decree Law 25.659), available at <http://www.democracynow.org/article.pl?sid=04/05/10/1418209> (last visited May 18, 2005).

forceful argument.¹³⁸ According to the Inter-American Court, a country can violate Article 9 in two different ways.¹³⁹ The most obvious application of Article 9 is to prevent countries from criminally convicting their citizens for acts that the law did not identify as criminal at the time of their commission.¹⁴⁰ The Inter-American Court extended the application of Article 9 to also prevent countries from enacting laws that are overly vague, on the theory that such laws do not allow individuals to know whether their actions are criminal, or the severity of the penalty.¹⁴¹ On this theory, Peru violated Article 9 when it concurrently enforced Decree Laws 25.475 and 25.659, which are so similar that authorities could bring either charge.¹⁴² However, the Inter-American Court reasoned that cooperation with terrorism is not overly similar to terrorism.¹⁴³ This

138. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 127 (relying on the fact that Peruvian law distinguished the crime of cooperation with terrorism from the crime of terrorism enough to make them separate crimes, despite their both being located in the same decree law).

139. See, e.g., Baena Ricardo et al. Case, Judgment of Feb. 2, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 72, para. 115 (2001) (finding that Panama's Law 25 violated Article 9 of the American Convention by allowing the retroactive enforcement of the law against 270 employees that the government arbitrarily dismissed); *Castillo Petruzzi et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 121 (deciding that Article 9 extends to prohibit vague laws and laws that are overly similar to one another).

140. See Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities From Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 679 (2003) (pointing out that the Inter-American Court's finding that implementation of retroactive criminal laws violated Article 9 is not as expected as it might seem at first blush to Americans, considering the fact that such laws are commonplace in much of the world).

141. See *Castillo Petruzzi et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 121 (expounding the rule that in order for the principle of *nullum crimen nulla poena sine lege praevia* to have force, criminal laws must not be vague or ambiguous in their description of what constitutes criminal activity).

142. Compare Decree Law 25.475, art. 2 (defining the crime of terrorism as the creation of a state of public alarm or performing actions against human life, safety, or property, by the use of arms, explosives or other means that threaten national security), with Decree Law 25.659, art. 1 (classifying treason as the use of car bombs, weapons of war, or explosives in the commission of the acts that constitute terrorism, under Article 2 of Decree Law 25.475).

143. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 127 (differentiating the actions of the terrorist from that of the individual who

is analogous to the establishment of laws penalizing conspiracy as a distinct offense, a practice that goes unquestioned in other OAS Member States.¹⁴⁴ Moreover, the Peruvian legislature included in the criminal statute examples of activities that would constitute cooperation with terrorism, allowing individuals to know if their actions fall under terrorism or cooperation with terrorism.¹⁴⁵

Another reason that Peru did not violate Article 9 of the American Convention is that Berenson did not suffer any injury resulting from the existence of allegedly similar laws.¹⁴⁶ In *Castillo Petruzzi et al.*, the Inter-American Court claimed that the similarity between terrorism and treason was prejudicial to the defendants because the State had the discretion to pursue the more serious charge.¹⁴⁷ Specifically, in *Castillo Petruzzi's* case, the more serious charge meant military jurisdiction, a summary trial, and a longer sentence.¹⁴⁸

cooperates with terrorism, the latter performing certain enumerated acts which help the former).

144. See, e.g., 18 U.S.C.A. § 371 (West 2005) (subjecting anyone who conspires to commit any crime against the United States to criminal penalties under this section, regardless of whether the individual actually committed the crime); Criminal Code, R.S.C. ch. C-46 § 465 (1985) (Can.) (establishing in a separate section of the Canadian Federal Statutes the penalties for the various crimes of conspiracy). Although Canada generally imposes the same maximum prison sentence for conspiracy as for the offenses toward which the defendant has conspired, the crime nonetheless appears in a separate section. *Id.*

145. See Decree Law 25,475, art. 4(a)-(f), May 6, 1992 (Peru) (identifying the following six categories of behavior that constitute cooperation with terrorism: (a) providing documents and information about people, buildings, or other things to facilitate terrorist activities; (b) giving away or using housing to hide people or store weapons or other supplies belonging to terrorists; (c) consciously moving people to help facilitate terrorism or to help them escape; (d) training terrorists; (e) acquiring, storing or supplying weapons or explosives; and, (f) funding terrorist activities).

146. See *Castillo Petruzzi et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 119 (claiming that it was injurious to the Chilean defendants for Peru to have similar laws that imposed different penalties and subjected defendants to two different proceedings, one far more fair than the other).

147. See *id.* (noting that both charges referred to actions not strictly defined so that they could be interpreted similarly).

148. See *id.* (pointing out that under Peruvian law in place at the time, if the State chose to charge the defendant with the more serious offense, his case would face a "summary proceeding"). The Inter-American Court also noted that the more serious offense meant "fewer guarantees," referring to the gross lack of due

Even if terrorism and cooperation with terrorism are similar and the State could have charged Berenson with either, she would have faced the same civilian court and the same twenty-year minimum sentence for either charge.¹⁴⁹ This lack of injury should have provided the Inter-American Court with additional grounds for finding that Peru observed Article 9.¹⁵⁰

III. RECOMMENDATIONS

A. THE INTER-AMERICAN COURT SHOULD LIMIT THE APPLICATION OF ITS EXCLUSIONARY RULE TO ONLY PRECLUDE COERCED CONFESSIONS FROM ENTERING INTO EVIDENCE

In *Berenson*, the Inter-American Court effectively established a broad exclusionary rule, but it should narrow its scope to match the ordinary meaning of Article 8(3) of the American Convention.¹⁵¹ The Inter-American Court found that all the evidence that the military investigation produced was inadmissible in the civilian trial, without distinguishing between evidence that authorities collected legally and evidence they collected in violation of the American Convention.¹⁵² It also failed to explain which American Convention violations rendered the evidence invalid.¹⁵³ The Inter-American Court thus

process that the Inter-American Court identified in Peruvian military trials, especially of civilians. *Id.* paras. 127-32.

149. See Decree Law 25.475, arts. 2, 4 (requiring those guilty of either terrorism or cooperation with terrorism to serve “no less than twenty years”). But see *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 111(h) (arguing that the imposition of the same sentence for terrorism and cooperation with terrorism amounts to an over punishment in violation of the principle of proportionality).

150. See discussion *supra* Part III.E (reasoning that injury was a weighty consideration in finding a violation of Article 9 in *Castillo Petruzzi et al.*).

151. See *Berenson Case*, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 174 (declaring the evidence that originated in the military investigation to be inadmissible).

152. See *id.* (leaving out any qualifications to the statement that the military-obtained evidence is inadmissible).

153. See *id.* (failing to explain the precise reason for the inadmissibility of the military trial’s evidence). Elsewhere in the opinion, the Inter-American Court lays out some of the Commission’s arguments about the invalidity of evidence, including the fact that the military judge illegally directed the investigations,

implicitly adopted a broad exclusionary rule, precluding States' Parties from using any evidence that they obtained in a proceeding where they violated any human rights.¹⁵⁴

It is possible that the Inter-American Court did not intend to establish such a broad exclusionary rule. However, having done exactly that, it now needs to re-establish the limits that the American Convention set.¹⁵⁵ The plain language of Article 8(3) requires the exclusion of confessions that the State acquired by means of any kind of coercion.¹⁵⁶ In some respects this is broader and in some respects it is narrower than human rights instruments that require the exclusion of statements resulting from torture.¹⁵⁷ On the one hand, Article 8(3) applies to any form of coercion—not just torture, but on the other hand it does not apply to all statements; it only applies to confessions.¹⁵⁸ By clearly setting these limits on the exclusionary rule, the Inter-American Court will allow States' Parties—most of which use the inquisitorial system—to better discover the truth.¹⁵⁹ This is especially important for Peru, which is attempting to retry

officials illegally searched Berenson's home, and DINCOTE coerced witnesses into giving testimony. *Id.* para. 129.1(d)-(f).

154. *See id.* (stating only that Peru was not allowed to use the evidence that the military court obtained in the civilian trial).

155. *See* American Convention, *supra* note 6, art. 8(3) (requiring only that States' Parties disallow coerced confessions).

156. *See id.* (dictating that "a confession of guilty by the accused shall be valid only if it is made without coercion of any kind"); *see also* discussion *infra* Part III.C (noting that the Inter-American Court abides by certain principles of the Vienna Convention, such as positing the words of a treaty with their ordinary meaning).

157. *See, e.g., United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 15, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984) (requiring States' Parties to ensure that courts do not allow statements into evidence if they establish that the statement was a result of torture); *Inter-American Convention to Prevent and Punish Torture*, Dec. 9, 1985, O.A.S. Treaty Ser. No. 67, 25 I.L.M. 519, art. 10 (using virtually the same language as the UN's torture convention).

158. *See* American Convention, *supra* note 6, art. 8(3) (restricting the American Convention's exclusionary rule to confessions, but expanding it to any form of coercion).

159. *See supra* notes 104-113 and accompanying text (explaining how the exclusionary rule can frustrate the objective of truth, which is why inquisitorial criminal systems use it far more sparingly than adversarial systems do).

civilians whom it unlawfully subjected to military tribunals.¹⁶⁰ If the Inter-American Court intends to require the broad exclusion of evidence, it may force Peru to release a number of potentially dangerous criminals.¹⁶¹

B. THE INTER-AMERICAN SYSTEM SHOULD MAKE ITS DOUBLE JEOPARDY STANDARD MORE PRECISE

The OAS should amend the American Convention's definition of double jeopardy, set forth in Article 8(4) to explicitly define the term "cause," or the Inter-American Court should do so by interpretation.¹⁶² All of the double jeopardy jurisprudence originates from this provision, which reads in its entirety: "an accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause."¹⁶³ The Inter-American Court, in essence, defined "acquittal" as a judgment based on the facts of the case that exculpates the defendant.¹⁶⁴ However, prior rulings do not adequately inform States' Parties what it means to retry someone for the same "cause."¹⁶⁵ The Inter-American Court, in *Loayza Tamayo*, its first double jeopardy ruling, admitted that the term "cause" is very broad and works to the victim's advantage.¹⁶⁶ It may be reasonable to infer, based on the Inter-American Court's jurisprudence, that to retry someone for the same "cause" is to retry someone for a similar

160. See *Torture and Detention*, *supra* note 29, para. 61 (calculating that Peruvian military tribunals tried over 1200 civilians since 1992, many of whom Peru is in the process of retrying).

161. See *supra* notes 104-113 and accompanying text (providing some common critiques and defenses of the exclusionary rule).

162. See American Convention, *supra* note 6, art. 8(4) (defining double jeopardy, in part, as a retrial for the same "cause").

163. *Id.*

164. See, e.g., *Loayza Tamayo Case*, Judgment of Sept. 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 76 (1997) (ruling that *Loayza Tamayo* faced double jeopardy in virtue of the military court's review of the facts, which constituted an acquittal).

165. See *id.* para. 67 (offering only that the crimes with which Peru tried *Loayza Tamayo* were "closely linked" to each other).

166. See *id.* para. 66 (distinguishing the language in the American Convention from the language that the United Nations International Covenant on Civil and Political Rights utilizes).

crime based on the same facts.¹⁶⁷ However, without an explicit standard Peru will have difficulty determining under what circumstances it can retry the hundreds of prisoners it convicted under Decree Law 25.659.¹⁶⁸

C. THE INTER-AMERICAN COURT SHOULD RESTRICT ITS OVERLY BROAD INTERPRETATION OF THE ARTICLE 9 PROHIBITION AGAINST EX POST FACTO LAWS

The Inter-American Court should narrow the interpretation of Article 9, which currently prohibits far more than the American Convention drafters intended. Drawing on Article 31 of the Vienna Convention, the Inter-American Court has tried to give terms their ordinary meaning in the context of the American Convention when interpreting its provisions.¹⁶⁹ The ordinary meaning of the language in Article 9 suggests three principles: (1) the State may not prosecute for acts that were not criminal when the individual committed them; (2) the State may not impose a heavier penalty than the one applicable at the time of the crime's commission; and (3) if the law reduces the penalty for a certain crime, the State must accordingly reduce the sentence of those who it already convicted of that crime.¹⁷⁰ The Inter-American Court, through its case law, has extended the reach of Article 9 to include actions by States' Parties

167. See *id.* paras. 66-67 (holding that Article 8(4) protects "individuals who have been tried for specific facts" from facing retrial of those facts and noting that although Peru charged the defendant with two crimes, they were similar enough to form the same cause).

168. See *Torture and Detention*, *supra* note 29, para. 61 (referring to the military courts' sentencing of 707 civilians since 1992). At the time of the report there were an additional 567 civilians still on trial before the military courts. *Id.*

169. See John Maull, *The Exclusion of Coerced Confessions and the Regulation of Custodial Interrogation Under the American Convention on Human Rights*, 32 AM. CRIM. L. REV. 87, 101 (1994) (explaining that the Vienna Convention standard of giving the ordinary meaning to the terms of the treaty is binding on the Inter-American Court's interpretation of the American Convention).

170. See American Convention, *supra* note 6, art. 9 (lacking any prohibitions on vagueness or similarity among pieces of legislation); see also *supra* note 20 and accompanying text (articulating the three explicit mandates within the text of Article 9).

that clearly do not fall under any of these principles.¹⁷¹ For example, it established in *Castillo Petruzzi et al.*, and affirmed in *Berenson*, the principle that vague laws and similar laws are Article 9 violations.¹⁷² It purported to defend this interpretation on the basis that vague and similar laws allow the government too much discretion in deciding whether to bring charges and which charges to bring.¹⁷³ The problem with its justification is that it is an overly vague requirement of States Parties and therefore undermines their sovereignty by giving the Inter-American Court the discretion over which domestic laws are acceptable and which ones are impermissibly vague or similar.¹⁷⁴ The Inter-American Court should leave domestic legislation in the hands of the States' Parties wherever possible, and restrict its actions to interpreting the ordinary language of the American Convention.¹⁷⁵

CONCLUSION

Lori Berenson's supporters claim that governments should not be able to implement anti-terrorism measures that violate an

171. See, e.g., Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities During 1999 Through October 2000*, 16 AM. U. INT'L L. REV. 315, 322 (2001) (summarizing the Inter-American Court's *Castillo Petruzzi et al.* ruling that terrorism and treason were "not sufficiently distinguishable to satisfy the principle of legality").

172. See *Castillo Petruzzi et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 121 (stretching the protection against ex post facto laws to similarly prohibit ambiguous laws); see also *Berenson Case*, Judgment of Nov. 25, 2004, Inter-Am. Ct. H.R. (Ser. C) No. 119, para. 125 (2004) (repeating that Article 9 requires a clear definition of the illegal conduct—a rule that the Inter-American Court constructed).

173. See *Castillo Petruzzi et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 121 (suggesting that indistinguishable laws will present the "opportunity for abuse of power").

174. Cf. *id.* (cautioning of the dangers of vague domestic laws, but ignoring the possibility of vague international law or of the Inter-American Court's opportunity to abuse its power). This interpretation does find support in other human rights instruments, however, and is commonly referred to as the "principle of legality." *Id.*

175. See Maull, *supra* note 169, at 101 (discussing the Inter-American Court's self-imposed duty to interpret the American Convention in accordance with the Vienna Convention's standards of interpretation, which aim to give the words their usual and ordinary meaning).

individual's guarantees of due process.¹⁷⁶ Peru, by retrying Lori Berenson in a civilian court, and by annulling its unfair anti-terrorism law, has shown that it agrees with Berenson's supporters, at least to some degree.¹⁷⁷ The Inter-American Court recognized this by upholding Berenson's sentence,¹⁷⁸ but it should have taken more care to employ sound reasoning and fully justify all of its conclusions,¹⁷⁹ especially in light of the scrutiny with which a high-profile case such as this one will receive.¹⁸⁰

176. See Annual Report 2002, *supra* note 2, para. 333 (acknowledging the Inter-American Commission's request that the Inter-American Court order Peru to amend the offending Decree Laws to make them compatible with the guarantees in the American Convention, despite their effectiveness at reducing terrorism).

177. See RUEBNER ET AL., *supra* note 26, at 11 (explaining that the Constitutional Court of Peru cited the Inter-American Court's decision in the *Castillo Petrucci et al.* case in finding Decree Law 25.659 unconstitutional).

178. See Vecchio, *supra* note 59 (announcing that the Inter-American Court upheld the sentence that Peru's civilian court handed down).

179. See discussion *supra* Parts II.A-E (criticizing numerous flaws in the Inter-American Court's reasoning, and identifying arguments for which it gave no justification at all).

180. See Chavin, *supra* note 1 (reporting on the anticipation of the Inter-American Court's decision).