REPORT Nº 38/96
CASE 10.506
ARGENTINA[1]
October 15, 1996

1. On December 29, 1989, the Commission received a complaint against the Government of Argentina regarding the situation of Ms. X and her thirteen-year-old daughter Y. [2] The complaint alleges that the Argentine State, and particularly the Federal Government's prison authorities who, routinely performed vaginal inspections on the women visitors of Unit No. 1 of the Federal Penitentiary Service (Unidad No. 1 del Servicio Penitenciario Federal) acted in violation of the rights protected under the American Convention on Human Rights. Ms. X and her thirteen-year-old daughter were submitted to vaginal inspections each time they visited her husband and the father of the child, who at the time was incarcerated in the Defendants' Prison in the federal capital. On April of 1989 Ms. X lodged a writ of amparo ("recurso de amparo") demanding that the inspections cease. The petition alleges that this practice by the Federal Penitentiary Service (SPF) constitutes a violation of the American Convention as it offends the dignity of the persons subjected to such a procedure (Article 11), and is a degrading penal measure which extends beyond the person condemned or on trial (Article 5.3) and, furthermore, discriminates against women (Article 24), in relation to Article 1.1.

I. FACTS

2. The prison authorities of Unit 1 of the SPF of Argentina adopted the practice of performing vaginal inspections on all female visitors who desired to have personal contact with the inmates. Ms. X, whose husband was detained at Unit 1 of the SPF, and their thirteen year old daughter Y were thus routinely submitted to such searches each time they visited Mr. X.

3. According to Major Mario Luis Soto, Chief of Internal Security of the Federal Penitentiary System (Jefe de la Dirección de la Seguridad Interna) in his declaration on the writ of amparo on the present case, because the relatives of inmate sometimes brought drugs or narcotics into the prison in their vaginas, the practice of searching that area had been started some time ago. He added that, at first, gloves were used for frisking that area but, because of the flow of female visitors, approximately 250 women, a lack of surgical gloves and the danger of transmitting AIDS or other diseases to visitors or inspectors, it was decided that visual inspections would be performed.[3]

4. Regarding Ms. X, Major Soto declared that she had been submitted to both types of inspections and had always protested against the procedure, but had been informed by prison personnel that no exception could be made in her case.[4] As to the fact that these inspections were also performed on minors, the Chief of Internal Security affirmed that, in such cases, the inspections were always performed in the presence of one or both of the child's parents and that the search was much less rigorous in order to preserve their sense of modesty (pudor).[5]

5. On March 31 of 1989, during a routine search of the prison cells, a jar containing a yellow liquid and 400 grams of plastic explosives were found in the cell of Ms. X's husband.

6. On April 2, 1989, Ms. X arrived at Unit 1 with her daughter to visit her husband and father of the child, Mr. X. She was once again informed by the prison authorities that, as a necessary condition for authorizing the physical contact visit, both her and her daughter had to undergo a vaginal inspection. (See Government's response of April 27, 1990 para. 6). Ms. X refused to undergo the inspection and also refused the proposed alternative of a visit through a glass divider.

7. Ms. X and her daughter again attempted to visit Mr. X on April 5, 1989 without success. Ms. X once again refused to undergo the vaginal inspection prior to the person-to-person visit and also refused a visit through a glass divider.

II. LEGAL PROCEEDINGS

8. On April 7, 1989, Ms. X and her daughter, Y, filed a writ of amparo before the National Court of First Instance in Criminal Matters No. 17, Secretariat No. 151 of the federal capital, requesting the court to order the SPF to cease the vaginal inspections of her and her daughter. The judge denied the motion on April 14, 1989 on the grounds that the measure in question was appropriate for maintaining the internal security of the prison. Ms. X appealed the decision.

9. On April 26, 1989, the National Court of Appeals in Criminal and Correctional Matters of the federal capital decided to grant the motion for relief and ordered the SPF to stop the protested inspections in this particular case.

10. In the Court's opinion, bodily searches of Ms. X and her daughter constituted an invasion of the right of privacy, which is protected by the Civil Code. The invasion alone constituted a violation of physical integrity, and an act that offended the conscience and honor of the persons searched and was degrading to human dignity.

11. Both the SPF and the Prosecution made special appeals against this judgement. The Supreme Court of Justice of the Nation ruled on the case on November 21, 1989, overturning the ruling of the Court of Appeals. The Supreme Court reasoned that the measures taken by the SPF in respect of Ms. X were not flagrantly arbitrary, in terms of the law of amparo, as there did not appear to be any other existing methods, at least in the case of narcotics, for detecting dangerous objects in the body cavities of visitors who come into physical contact with inmates.

12. The Supreme Court then apprised the Court of Appeals of its decision which accepted it without dispute and finally resolved not to admit the writ of amparo filed by Ms. X.

III. PROCEEDINGS BEFORE THE COMMISSION

13. By letter of January 23, 1990, the Commission received Ms. X's complaint filed by Argentine lawyers in conjunction with Americas Watch. The complaint alleged that the practice by the SPF of performing vaginal inspections on Ms. X and her thirteen-year-old daughter prior to allowing personal contact visits to Mr. X, incarcerated in the Defendants' Prison in the federal capital, was a violation of their rights protected under the Convention, namely Article 11 (attack on dignity); Article 5.3 (the measures were degrading penal treatment which extend beyond the condemned person); and the general principle of nondiscrimination established by Article 1.1 of the Convention (the measures discriminated against women).

14. On January 31, 1990, the Commission transmitted the relevant parts of the complaint to the Government requesting information on the facts or other pertinent information

within 90 days.

15. On April 30, 1990, the Commission received the Government's response, in which it argued that the measure proposed by the penitentiary authorities in the case of Ms. X and her daughter was not flagrantly arbitrary nor was it a widespread practice by the SPF, but rather it was a reasonable preventive measure in light of the specific nature of the events which occurred only 48 hours prior to the attempted visit. Moreover, the search was not effected in this particular instance. The case was therefore not admissible for the Commission.

16. By letter of May 3, 1990, the Commission transmitted the pertinent parts of the Government's communication to the petitioners.

17. On May 31, 1990, the Commission received a note from the petitioners requesting an extension of 30 days. The extension was granted in a note of the same date.

18. By note of June 21, 1990, the petitioners submitted their response to the Government's reply countering the arguments in detail.

19. On June 26, 1990, the Commission transmitted the response to the Government, requesting their comments within 45 days.

20. By note of August 13, 1990, the Government submitted its comments on the petitioner's response to the Commission, reiterating its arguments on the inadmissibility of the case. In particular, the Government indicated that the facts alleged by the petitioners did not coincide with the events that took place. The Government proceeded to differentiate between vaginal inspections and searches, the latter involving touching and frisking. The Government stated that the present case only contemplated inspections.

21. On August 28, 1990, the Commission transmitted the relevant parts of the Government's communication to the petitioners.

22. On October 8, 1990, the Commission received the petitioners' reply contesting the Government's arguments. In particular, they indicated that the difference between vaginal "inspections" and "searches" was immaterial to the subject of human dignity as both were equally humiliating in this particular case.

23. By note of October 19, 1990, the Commission transmitted the pertinent parts of the latter communication to the Government requesting its comments on the matter with 45 days.

24. On October 31, 1990, the Commission received a note from the Government requesting a 45-day extension, which was granted.

25. By letter of November 27, 1990, the Government submitted its comments to the Commission contesting the arguments put forth by the petitioners.

26. By note of March 16, 1994, the Commission requested information on the case from the petitioners. The request was reiterated on May 10, 1994.

27. By note of July 28, 1994, the Center for Justice and International Law joined the complaint as petitioners. In the same note, the petitioners requested that the Commission finish processing the case, issue the report envisaged in Article 50 of the Convention, and send the case to the Inter-American Court of Human Rights.

28. On February 23, 1995, the Commission sent a letter to both parties putting itself at their disposal in order to reach a friendly settlement of the case. In a note dated March 21, 1995, the Government informed the Commission that it was unable to negotiate a settlement.

IV. POSITIONS OF THE PARTIES

A. Petitioners

29. The Government inappropriately attempted to justify the "reasonable" nature of the measure, based on the end sought or the possibility that the vagina could be used to transport arms, explosives, or other objects without justifying the measure itself. For the Government, any restriction on rights in the interest of "public safety" was "reasonable", irrespective of the measure applied.

30. The petitioners countered the arguments put forth by the Government, which attempted to establish the inspections as reasonable by the following arguments:

i. The fact that Mr. X might have, at some time, hidden 400 grams of explosives in his cell had nothing to do with the disputed practice since the explosives could not have been transported in the way the inspections sought to avoid.

ii. There are technical means commonly used in other contexts to quickly and easily detect any attempt to bring in dangerous materials without having to resort to visual inspections of the vagina. Under these circumstances, the only purpose such searches and inspections can serve is to stigmatize, denigrate, and oppress women as such, and because they are relatives of prisoners.

iii. In any event, it would be simpler to search the prisoners after the visit, before returning them to their cells or dormitories.

iv. The proposed alternative of a visit through glass reduces prisoners to the status of infected persons in quarantine, is degrading to their self-esteem, hinders the relationship with their relatives, and is therefore dehumanizing.

31. The procedure complained of is a generalized practice so that almost all women visiting their imprisoned relatives are subjected to the same degrading treatment. The practice is discriminatory since the women are neither the perpetrators nor suspects of any offense. Moreover, it is a discriminatory practice because it targets certain persons. In other contexts, different, less degrading means are utilized to effectuate the same purpose, namely the search of persons to guarantee the security of premises or to prevent illegal acts. None of these other measures constitutes the invasion of privacy nor an attack on dignity, as does the procedure applied to the relatives of prisoners in this case.

32. The complaint in Argentina was not made under Article 92 of the National Penitentiary Law, which prohibits humiliating searches, but refers to the conditions of timely supervision and censorship established in the regulations.[6] The need for general searches is not disputed, but rather those that constitute a degrading treatment.

B. Government

33. The prison regulation allowing the adoption of vaginal inspection measures has its legal grounds in Article 92 of the National Penitentiary Law (Decree Law 412/58 ratified by Law No. 14,467), which reads as follows: "The visits and correspondence received by inmates will be subject to the conditions of timeliness, supervision, and censorship determined by the regulations..." This national standard is consistent with the United Nations minimum standards for the treatment of prisoners.

34. Restrictions on protected rights are necessary given the peculiar nature of the problems that could arise in the complex situation of prisons. The restriction of rights necessary

in a democratic society in the interest of public safety led to Law 14,467. The prison authorities need some flexibility to determine the degree of liberty they grant to a prisoner.

35. Vaginal inspection in the SPF units is performed by female inspectors who conduct a visual examination without introducing anything into the vaginal cavity, as the procedure is not a search.

36. The aim is to prevent women's private parts from being used as a means for illegally bringing arms, explosives, narcotics or other dangerous objects into the prisons. Similar inspections are performed on men's anal areas by male inspectors, for the same purpose.

37. The measure is neither compulsory nor widespread. It is not compulsory because when the visitor, male or female, does not consent to the inspection, the visit may be carried out through glass, without physical contact. It is also not a generalized measure because, among other things, certain conditions, which existed in this case, must arise.

38. Just 48 hours before Ms. X's visit on April 2, two cream-colored pieces of plaster were found in her husband's cell. The chemical expert examination concluded that the substance was a destructive plastic explosive. Being plastic, it also had the following properties: (a) it could keep any shape; (b) it could stick easily to smooth surfaces; (c) it could not be detected by frisking; (d) it was not harmful to the health of an individual.

39. Thus, the reasonableness of the measure in the case under reference was substantiated by the fact that the substance found was malleable, harmless to health, and could not be detected by frisking, thereby supporting the hypothesis that it might have been brought into the jail in the vagina during a woman's visit.

40. In the case of Ms. X, there were indeed grounds for suspicion and moreover the offense was serious enough to justify the decision of the prison authorities not to authorize the visit with physical contact. It was a preventive measure not intended to prohibit communication between the inmate and his family. If the petitioner had made use of her rights, she could have communicated with her husband through a glass.

41. In this particular case, Ms. X and her daughter actually refused to be examined and, consequently, the inspections were not performed.

42. It does not seem acceptable to argue that because there are other less onerous methods, all the rest are arbitrary and, therefore, humiliating, especially since the method in question has scarce and limited use (like the detectors used in VIP lounges in airports).

43. Vaginal inspection is consistent with prison policies in the countries governed by the European Convention on Human Rights and with similar procedures implemented in the United States in cases such as the one under reference.

V. ADMISSIBILITY

44. The complaint meets the formal admissibility requirements established in Article 46.1 of the Convention and Article 32 of the Regulations of the Commission.

i. The Commission has jurisdiction to hear this case as it deals with acts which constitute violations of the rights enshrined in the Convention, namely in Articles 5, 11, 17, in relation to Article 1.1.

ii. As stated in the records, the alleged victim has exhausted the remedies established under Argentine law.

iii. In regard to the friendly settlement procedure present in Article 48(1)(f) of the Convention and Article 45 of the Commission's Regulations, the Commission has set itself at the disposal of the parties but an agreement could not be reached.

iv. The petition is not pending before any other international settlement procedure nor is it a reproduction of a petition already examined by the Commission.

VI. ANALYSIS

A. General Considerations

45. It is alleged that vaginal inspections constitute degrading treatment and was tantamount to an invasion of Ms. X's privacy and physical integrity and an unlawful restriction on her right to family. For its part, the Government argues that vaginal inspection is a preventive measure that is conceivably consistent with the purpose of maintaining the security of the inmates and staff of the SPF and that, furthermore, the inspection did not actually take place because the alleged victim refused to submit to it.

46. As regards the Government's assertion that the inspections never took place, it is demonstrated in the files by the declarations of both the Chief of Internal Security[7] and the Attorney General[8] as well as by the very wording of the rulings of the First Instance Court, the Court of Appeals and the Supreme Court of Justice, that Ms. X, though under protest, submitted to this procedure several times before she filed the writ of amparo demanding that the inspections on both herself and her daughter cease.

47. Therefore, when considering this case the Commission must examine two separate issues:

1) whether the requirement that Ms. X and her daughter undergo a vaginal inspection before each physical contact visit with Mr. X is in compliance with the rights and guarantees present in the American Convention on Human Rights;

2) whether this requirement and the performance of the procedure prevented them from fully exercising their rights protected under the American Convention, particularly those enshrined in Articles 5 (right to humane treatment), 11 (protection of honor and dignity), 17 (protection of the family) and 19 (rights of the child), in relation to Article 1.1, which obliges the States Parties to respect and guarantee the full and free exercise of all the provisions recognized in the Convention without discrimination.

B. The requirement that visitors undergo a vaginal inspection in order to be permitted a physical contact visit

48. The petitioners allege that the requirement that visitors to Unit 1 submit to vaginal searches or inspections in order to be permitted personal contact visits was an illegitimate interference with their exercise of the right to family. Moreover, it is alleged that the measure, by not being in compliance with the Convention, in itself contravened the rights protected by that instrument, and that existence of this requirement and its application violated not only the right to family, guaranteed by Article 17 but also the right to privacy, honor, and dignity, protected by Article 11, and the right to physical integrity guaranteed by Article 5.

49. Although Article 19, which protects the rights of the child, was not invoked by the petitioners, the Commission considers that as one of the alleged victims was a 13-year-old child at the time of the events this provision should also be examined. According to the general principle of international law *iura novit curia* international bodies have the power and even the

duty to apply all pertinent legal provisions, even if these have not been invoked by the parties.[9]

50. The Government of Argentina argued that all of the measures it adopted are acceptable restrictions to the Convention's provisions and were reasonable under the circumstances of the case. The Commission must thus consider what are the State's obligations regarding the provisions of the Convention, and what are the permissible limitations to those rights.

1. State obligations to "respect and ensure" and the imposition of conditions on the rights protected by the Convention

a. Article 1.1, the obligations to respect and guarantee

51. Article 1.1 establishes that States Parties undertake to respect and to ensure the rights of the Convention. These obligations limit the State's authority to impose restrictions on the rights protected by the Convention. The Inter-American Court has stated that:

> The exercise of public authority has some limits which derive from the fact that human rights are inherent attributes of human dignity which are, therefore, superior to the power of the State.[10]

52. Moreover, the Court has declared that the obligation to guarantee "implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[11]

53. The Court has thus established that there are a number of aspects of a person's life, and particularly "certain attributes of human dignity," that fall outside of the State's sphere of action and "cannot be legitimately restricted through the exercise of governmental power." Moreover, States Parties must organize their internal structure so as to ensure the full enjoyment of human rights. The State that proposes measures, the execution of which may lead, either in themselves or because of a lack of adequate guarantees, to a violation of the rights present in the Convention, goes beyond the exercise of legitimate governmental power recognized by the Convention.

b. The imposition of limitations

54. The text of the Convention does not establish explicit restrictions to the enjoyment of any of the rights under consideration and indeed, three of those provisions--the right to humane treatment (Article 5), the rights of the family (Article 17) and the rights of the child (Article 19)--are included in the list, set forth in Article 27.2, of rights that cannot be suspended even in extreme circumstances. The Commission cannot, therefore, examine the legitimacy of the alleged imposition of restrictions to these rights within the parameters of Article 30, which defines the scope of restrictions to the Convention,[12] but only within the broader framework of Article 32.2 which acknowledges the existence of limitations to all rights.

55. Article 32.2 recognizes the existence of certain inherent limitations to the rights of all persons which are a normal consequence of life in society.

56. Article 32.2 reads:

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

57. In examining this article, the Inter-American Court of Human Rights has stated that the impositions of limitations should always be employed strictly. The Court declared that:

> In this respect the Court wishes to emphasize that "public order" or "general welfare" may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content (See Article 29(a) of the Convention). Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the "just demands" of "a democratic society," which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.[13]

58. The Court's jurisprudence establishes that, in order to be compatible with the Convention, restrictions must be justified by collective objectives that are so important that they clearly outweigh the social need to guarantee the full exercise of rights guaranteed in the Convention and are not more limiting than strictly necessary. It is not enough to demonstrate, for example, that the law fulfills a useful and timely purpose.

59. A state does not have absolute discretion to decide what means are adopted to protect the "general welfare" or "public order". Measures that may in any way condition the rights protected by the Convention must always obey certain requirements. In this regard, the Inter-American Court of Human Rights has said that restrictions on the rights protected in the Convention "must meet certain requirements of form which depend upon the manner in which they are expressed. They must also meet certain substantive conditions which depend upon the legitimacy of the ends that such restrictions are designed to accomplish."[14]

60. The Commission considers that in order to be considered in compliance with the Convention such measures should meet three specific conditions. A measure that in any way affects the rights protected by the Convention should necessarily: 1) be prescribed by law; 2) be necessary for the security of all and in accordance with the just demands of a democratic society; 3) and its application must be strictly confined to the specific circumstances present in Article 32.2 and be proportionate and reasonable in order to accomplish those objectives.

1) the lawfulness of the measure

61. The Inter-American Court has stated that:

> In order to guarantee human rights, it is therefore essential that state actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired. Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution. [15]

62. Any action that affects basic rights must therefore be prescribed by a law passed by the Legislature and in compliance with the internal legal order. The Government claims that vaginal inspections on visitors to prisons in Argentina are authorized by the law and internal regulations.

63. Articles 91 and 92 of Decree law 412/58 (National Penitentiary Law) of Argentina establish a number of conditions to which visits are subjected. Similarly, Article 28 of the SPF Public Bulletin No. 1266 stipulates that: "Visitors shall be subjected to the search requirements in force in the Unit if they do not wish to forgo the visit. In any event, the search shall be conducted by staff of the same sex as the person searched." In this regard, Article 325 regulates search teams through Public Bulletin No. 1294, authorizing a thorough and detailed control. However, Public Bulletin No. 1625 provides that "humanitarian treatment should be paramount in

searches, avoiding any procedure that might be humiliating to the inmates...," "the same treatment should be applied in searching inmates' visitors...."

64. By not specifying the conditions or the types of visits applicable, these regulations give prison authorities a very wide latitude for discretion. It is doubtful that such legislation possesses the necessary degree of precision which is essential to determine if an action is prescribed by law.[16] Unquestionably, deference to the authorities in matters of internal security of prisons is in accordance with their experience and knowledge of the specific needs of each penitentiary and the particular case of each inmate. However, a measure as extreme as the vaginal search or inspection of visitors, that involves a threat of violation to a number of the rights guaranteed under the Convention, must be prescribed by a law which clearly specifies the circumstances when such a measure may be imposed and sets forth what conditions must be obeyed by those applying this procedure so that all persons subjected to it are granted as full a guarantee as possible from its arbitrary and abusive application.[17]

2) necessity in a democratic society for the security of all

65. The Government contends that restrictions on protected rights are necessary given the nature of the problems that may arise in a complex prison situation. Regarding the instant case, the Government affirms that the measure in question was a necessary restriction of rights in a democratic society adopted in the interest of public safety.

66. The Commission is aware that all countries have rules regarding the treatment of prisoners and detainees, which also regulate their visitation rights as to time, place, manner, type of contact, etc. It is also recognized that corporal searches, and even corporal probing, of detainees and prisoners may sometimes be necessary.

67. The present case, however, entails the rights of visitors whose rights are not automatically limited by virtue of their contact with the inmates.

68. The Commission does not question the need for general searches prior to entry into prisons. Vaginal searches or inspections are nevertheless an exceptional and very intrusive type of search. The Commission would like to underline the fact that a visitor or a family member who seeks to exercise his or her rights to family life should not be automatically suspected of committing an illegal act and cannot be considered, on principle, to pose a grave threat to security. Although the measure in question may be exceptionally adopted to guarantee security in certain specific cases, it cannot be maintained that its systematic application to all visitors is a necessary measure in order to ensure public safety.

3) reasonableness and proportionality of the measure

69. The Government affirms that the measure is a reasonable restriction of the visitor's rights in order to protect security. The Government further asserts that it was not a compulsory procedure and it was only applied to those persons who desired to have personal contact visits, therefore, anyone was free to reject it.

70. Any restriction to human rights must be proportional and closely tailored to the legitimate governmental objective necessitating it.[18] To justify restricting visitors' rights, it is not sufficient to invoke security reasons. After all, the issue entails balancing the interests on the one hand of family members and prisoners to enjoy visitation rights free from arbitrary and abusive interference, and on the other the state's interest in guaranteeing the security within prisons.

71. The reasonableness and proportionality of a measure can only be ascertained through the examination of a specific case. The Commission notes that a vaginal search is more than a restrictive measure as it involves the invasion of a woman's body. Consequently, the

balancing of interests involved in an analysis of the measure's lawfulness, must necessarily hold the government's interest to a higher standard in the case of vaginal inspections or any corporal probing.

72. The Commission considers that the lawfulness of a vaginal search or inspection, in a particular case, must meet a four-part test: 1) it must be absolutely necessary to achieve the security objective in the particular case; 2) there must not exist an alternative option; 3) it should be determined by judicial order; and 4) it must be carried out by an appropriate health professional.

a) absolute necessity

73. The Commission believes that such a procedure must not be carried out unless it is absolutely necessary to achieve the security objective in the particular case. The requirement of necessity implies that inspections and searches of this kind should only be applied in specific cases where there is reason to believe either in the existence of a real threat to security or that the person in question may be carrying illegal substances. The Government argued that the exceptional circumstances surrounding Mr. X's case justified measures that severely restricted personal liberties, because they were taken for the common good, i.e. preserving security for the prisoners as well as the prison personnel. Nevertheless, according to the Chief of Security the measure was consistently applied to all visitors of Unit 1. Arguably the measure may have been justifiable immediately after Mr. X was found to be in possession of explosives, but the same cannot be said of the numerous times the measure was applied prior to that occasion.

b) non-existence of an alternative option

74. The Commission considers that the practice of vaginal inspections and searches, and the consequent interference with visits, must not only satisfy an imperative public interest, but also that "if there are various options to achieve this objective, that which least restricts the right protected must be selected."[19]

75. The facts of the case suggest that the measure was not the sole and perhaps not even the most efficient means of controlling the entrance of narcotics and/or other dangerous substances to prisons. Ms. X and her daughter were admittedly submitted to this procedure each time they visited Mr. X and, in spite of this fact 400 grams of explosives were found in his possession during a routine search of his cell.

76. It would seem that other and less restrictive procedures, such as the search of inmates and their cells, are a more efficient and reasonable means of guaranteeing internal security. In addition, it should not be ignored that the special legal position of prisoners, by its very nature, results in a number of limitations to the exercise of their rights. The state, which has custody of all of those persons in detention and is responsible for their well-being and safety, has a greater latitude to apply what measures may be necessary to ensure security in the case of inmates. By definition, a detainee's personal liberties are restricted and it may therefore occur that corporal searches, and even corporal probing, of detainees and prisoners are sometimes justifiable, using methods compatible with their human dignity. It would have obviously been a more reasonable and simpler measure to search the inmates after a personal contact visit, than submit all of the women visitors to the prisons to such an extreme procedure. Searches of visitors should be carried out only in very specific circumstances and when there is reasonable cause to believe that they pose a real threat to security or are carrying illegal substances.

77. The Government also contends that the procedure was not obligatory and was only carried out with the consent of the visitors. It would thus appear that because an alternative to the procedure was proposed by the state and the petitioners decided not to avail themselves to it, they could not complain of undue state interference. The Commission would like to note that a state cannot propose or request the consent of persons under its jurisdiction to conditions or

procedures that may constitute an infringement to the rights protected by the Convention. A state's authorities cannot, for example, propose to a person a choice between an arbitrary detention and another more restrictive, if legal, measure because all of a state's actions must observe basic principles of legality and due process.

78. The performance of vaginal searches or inspections may be acceptable under certain circumstances as long as its application is guided by principles of due process and safeguards the rights protected by the Convention. If conditions such as legality, necessity, and proportionality are not observed, however, and the procedure is carried out without respect for certain minimum standards that safeguard the legality of the action and the physical integrity of those persons submitted to it, the procedure cannot be considered to be in compliance with the rights and guarantees of the Convention.

79. Moreover, the Commission would also like to note that in the case of Y no real consent was possible. At the time of the facts Ms. Y was a 13-year-old child who was thus entirely dependent on the decision taken by her mother, Ms. X, and on the protection afforded to her by the state. Because of the child's age, it is evident that the vaginal inspection was an absolutely inadequate and unreasonable method.

80. The Commission thus concludes that in the case under examination, other more reasonable options were available to the authorities in order to ensure security in the prison.

c) existence of a judicial order

81. Even assuming that no other less intrusive means exist, the Commission considers that intrusive corporal probing, that was discontinued because of danger of infection to prison personnel, requires a judicial order. In principle, a judge should evaluate the need of such searches as a necessary requirement for a personal visit without infringing upon the individual's personal dignity and integrity. The Commission considers that exceptions to this rule should be expressly stated in the law.

82. The requirement that of a judicial order authorizing police agents or security personnel to take certain kinds of action, considered to be especially intrusive or potentially liable to abuse, exists in most of the internal legal systems of the continent. A clear example of this is the practice which determines that a person's home is under special protection and cannot be searched without a warrant. By its very nature, a vaginal inspection is such an intimate intrusion into a person's body that it demands special protection. When there is no control and the decision of subjecting a person to this kind of intimate search is left at the entire discretion of police or security personnel, without the existence of any kind of control, this practice is liable to being employed in circumstances when it would be unnecessary, used as a form of intimidation, and/or otherwise abused. The determination that this type of search is a necessary requirement for the personal contact visit ideally should be made by a judicial authority.

83. Even though, in the present case, material explosives were found in Mr. X's cell and his visitors were reasonably suspected, the state had an obligation, derived from its duty under the Convention to organize its internal apparatus so as to guarantee human rights, to request a judicial order to execute the search.

d) The procedure must be carried out by qualified medical personnel

84. In addition, the Commission insists that any type of corporal probing, such as was practiced when the authorities still applied this kind of search, must be performed by a medical practitioner with the strictest observance of safety and hygiene, given the potential of physical and moral injury to individuals.

85. By conditioning the visit with an intrusive measure but not providing appropriate guarantees, the prison officials unduly interfered with Ms. X's and her daughter's rights.

C. The rights protected by the Convention

1. The right to physical integrity: Article 5

86. The petitioners alleged a violation of Article 5, in particular, of its paragraphs 2 and 3, which read:

> 1. Every person has the right to have his physical, mental, and moral integrity respected.
>
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment...
>
> 3. Punishment shall not be extended to any person other than the criminal.

87. The procedure in question is not *per se* illegal. Nevertheless, when the state performs any kind of physical intervention in individuals, it must observe certain conditions in order to ensure that such treatment does not generate a greater degree of anguish and humiliation than that which is inevitable. Such a measure should always be the consequence of a judicial order which assures some control over the decision as to the necessity of its application and that the person subjected to it does not feel defenseless before the authorities. Moreover, the measure should always be performed by qualified personnel exercising the necessary care to ensure that no physical harm results from the procedure and conducting the examination in such manner so as to ensure that those persons submitted to it do not feel that their mental and moral integrity has been affected.

88. Regarding Article 5.3 of the Convention, the Commission does not have any evidence that the vaginal inspection was intended to extend Mr. X's punishment onto his family. Moreover, the Commission has no reason to assume official motives that are not objectively verified.

89. In conclusion, the Commission finds that when the prison authorities of the State of Argentina systematically performed vaginal inspections on Ms. X and Y they violated their rights to physical and moral integrity, in contravention of Article 5 of the Convention.

2. Right to Privacy: Article 11

90. Article 11 of the Convention stipulates that:

> 1. Everyone has the right to have his honor respected and his dignity recognized.
>
> 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
>
> 3. Everyone has the right to the protection of the law against such interference or attacks.

91. The right to privacy guaranteed by this provision covers, in addition to the protection against publicity, the physical and moral integrity of the person.[20] The object of Article 11, as well as of the entire Convention, is essentially to protect the individual against arbitrary interference by public officials. Nevertheless, it also requires the state to adopt all necessary legislation in order to ensure this provision's effectiveness. The right to privacy

guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one's own. In this sense, various guarantees throughout the Convention which protect the sanctity of the person create zones of privacy.

92. Article 11.2 specifically prohibits "arbitrary or abusive" interference with this right. This provision indicates that in addition to the condition of legality, which should always be observed when a restriction is imposed on the rights of the Convention, the state has a special obligation to prevent "arbitrary or abusive" interferences. The notion of "arbitrary interference" refers to elements of injustice, unpredictability and unreasonableness which were already considered by this Commission when it addressed the issues of the necessity, reasonableness, and proportionality of the searches and inspections.

93. Nevertheless, the Commission would like to underscore that the present case involves a particularly intimate aspect of a woman's private life and that the procedure in question, whether its application is justifiable or not, is likely to provoke intense feelings of shame and anguish in almost all persons who are submitted to it. In addition, subjecting a 13 year old child to such a procedure could result in serious psychological damage that is difficult to evaluate. Ms. X and her daughter had a right to have their privacy, dignity and honor respected when they sought to exercise their rights to family, even if a family member was in detention. These rights should have been restricted only in the presence of a particularly serious situation and in very specific circumstances, and then only, with the strict compliance by the authorities with the standards which were outlined above in order to guarantee the legality of the practice.

94. The Commission thus concludes that when the prison authorities of Argentina subjected Ms. X and her daughter to vaginal searches and inspections each time they desired to have a personal contact visit with Mr. X, they acted in violation of the petitioners' rights to honor and dignity, protected by Article 11 of the Convention.

3. Rights of the Family: article 17

95. It is alleged that undue interference with Ms. X's and her child's visit contravened the rights of her family guaranteed in Article 17, which states:

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

96. Article 17 recognizes the central role of the family and family-life in the individual's existence and society, in general. It is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances. In the instant case, the petitioners allege that the exercise of this right suffered an illegitimate restriction and that a number of other rights protected by the Convention, particularly their right to personal integrity and the right to honor and dignity were violated while they sought to exercise this right.

97. The right to family life can suffer certain limitations that are inherent to it. Special circumstances such as incarceration or military service, even though they do not suspend this right, inevitably affect its exercise and complete enjoyment. Though imprisonment necessarily restricts the full enjoyment of the family by forcibly separating a member from it, the state is still obliged to facilitate and regulate contact between detainees and their families and to respect the fundamental rights of all persons against arbitrary and abusive interferences by the state and its public functionaries.[21]

98. The Commission has consistently held that the state is obligated to facilitate contact between the prisoner and his or her family, notwithstanding the restrictions of personal liberty implicit in the condition of the prisoner. In this respect the Commission has repeatedly indicated that visiting rights are a fundamental requirement for ensuring respect of the personal integrity and freedom of the inmate and, as a corollary, the right to protection of the family for all the

affected parties.[22] Indeed, and particularly because of the exceptional circumstances of imprisonment, the state must establish positive provisions to effectively guarantee the right to maintain and develop family relations. Thus, the necessity of any measures restricting this right must adjust themselves to the ordinary and reasonable requirements of imprisonment.

99. Personal contact visits are not a right, and indeed in many countries, this type of visit is not even an option. Usually, the possibility of conducting personal contact visits is largely left to the discretion of the internal prison authorities. Nevertheless, when the state regulates the manner in which the right to family is exercised by prisoners and their families, it cannot impose conditions or carry out procedures that constitute an infringement of any of the other rights protected by the Convention, at least without due process of law. All States Parties to the Convention are obliged to ensure that the action of the state as well as the organization of its internal apparatus and legal system are carried out within certain boundaries of legality.

100. Therefore, the Commission concludes that when the State of Argentina required Ms. X and her daughter to undergo a vaginal search or inspection each time they wished to have a personal contact visit with Mr. X it interfered unduly with the petitioners' rights to family.

4. Rights of the Child: Article 19

101. Article 19 reads:

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

102. Argentina has also ratified the United Nations Convention on the Rights of the Child, which provides that:

> Article 3.1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

103. The text of the American Convention recognizes that children must be the subject of special care and attention, and that the State has a duty to adopt all "measures of protection required by his condition." A child is especially vulnerable to violations to his or her rights because, by virtue of their very status, as children have no legal standing in most cases to make decisions concerning situations that may have grave consequences on their well being. The state has a special duty to protect children and to ensure that, whenever state authorities take actions that may in any way affect a child, special care is taken to guarantee the child's rights and well being.

104. In the instant case the State of Argentina has proposed and performed on a minor, who did not have the legal capacity to consent, a potentially traumatic procedure that potentially could have violated a number of the rights guaranteed by the Convention without observing the requirements of legality, necessity, reasonableness and proportionality which are among the necessary conditions to the imposition of any restriction on the rights of the Convention. Furthermore, the state did not grant Y the minimum protection against abuse or actual physical damage that could have been offered by requiring the proper judicial authority to decide on the propriety of the procedure, and in the event the measure was deemed necessary requiring that it be performed by medical personnel. The Commission does not consider that the existing requirements described by the Chief of Internal Security to protect minors--that the inspections be performed in the presence of one or both of the child's parents, and that the search be less rigorous and seek to preserve a child's sense of modesty (pudor)--accorded the petitioner adequate protection.

105. The Commission thus concludes that when the prison authorities proposed and

performed vaginal inspections upon Y prior to a physical contact visit with her father, the State of Argentina violated Article 19 of the Convention.

VII. GOVERNMENT'S OBSERVATIONS TO THE ARTICLE 50 REPORT

106. On September 14, 1995, during its 90th regular session, the Commission approved Report No. 16/95, based on Article 50 of the Convention. The report was transmitted with reserved status to the Government, according to the above mentioned article's second paragraph.

107. The Government of Argentina sent its observations to the report on December 7, 1995.

108. Report No. 16/95 was transmitted by the Government to the Federal Penitentiary Service.

109. On July 6, 1995, a draft law which sets the standards for the implementation of prison sentences ("Ejecución de la Pena Privativa de Libertad") was presented to the Argentine Congress, with a view to replace the current penitentiary regulations. The initiative is part of an integral penitentiary reform policy, which includes the creation in 1994 of an Office for Penitentiary Policy and Social Readaptation (Secretaría de Política Penitenciaria y de Readaptación Social), as well as the entry into effect of a Master Plan for National Penitentiary Policy in 1995.

110. The document by which the National Executive Power presented the draft states that

> ...this text adopts the constitutional standards on the matter, as well as those included in treaties and international pacts, the recommendations of national and international congresses, particularly those conducted by the United Nations on the Crime Prevention and Treatment of Criminals, the most advanced comparative law, and various national drafts.

111. The pertinent provisions of the draft are transcribed as follows:

> Article 158 - The prisoner has the right to communicate periodically, orally or in writing, with his family, friends, associates, guardians and lawyers, as well as with representatives of official institutions and legally recognized private institutions interested in their social rehabilitation. In all cases the privacy of the communications shall be guaranteed, with no restrictions other than those established by court order.
>
> Article 160 - The visits and mail received or sent by the prisoner, as well as telephone communications, shall be adjusted to the conditions, opportunity and supervision determined by the regulations, which shall not modify the provisions of articles 158 and 159.
>
> Article 161 - The oral or written communications mentioned in Article 160 may be suspended or restricted only on a temporary basis, by resolution of the director of the establishment, who shall immediately inform the competent judge. The inmate shall be notified of the suspension or temporary restriction of this right.
>
> Article 162 - The visitor shall obey the institution's regulations, as well as the instructions given by its personnel, and shall abstain from introducing or attempting to introduce any element that has not been expressly authorized by the Director. If this provision is not observed, or if complicity with the prisoner is

verified, or if the proper conduct is not observed, entry to the establishment shall be suspended, temporarily or permanently, by a Director's resolution.

Article 163 - For security reasons, visitors and their belongings shall be inspected. The inspection will be carried out or directed, with due respect for human dignity, according to the procedure established in the regulations, by personnel of the visitor's same sex. Manual inspection, wherever possible, shall be substituted by non-intrusive sensors or other non-manual techniques deemed appropriate and effective.

VIII. CONCLUSIONS

112. The Commission recognizes the positive measures taken by the Argentine State to modify its penitentiary system, specifically with regard to the violation denounced in the instant case.

113. The Commission considers that the State of Argentina has taken the initiative toward partial compliance of the conclusions and recommendations of Report No. 16/95, especially with respect to the need that restrictions to the rights and guarantees protected in the Convention be prescribed by law.

114. In Report No. 16/95, the Commission concluded that in order to establish the lawfulness of a vaginal search or inspection in a specific case, these requisites must be met:

1) it must be absolutely necessary to achieve the lawful objective in the particular case;

2) there must not exist an alternative measure;

3) it should be determined by judicial order; and

4) it must be carried out by an appropriate health professional.

115. Article 163 of the above mentioned draft law, which refers to the substitution of manual inspections by non-intensive sensors or other appropriate and effective non-tactile techniques, is in principle consistent with the Commission's recommendations. However, the cited Article fails to mention expressly the type of intrusive bodily searches covered in this report. The Commission reiterates that vaginal inspections, or other type of intrusive body searches, must be carried out by an appropriate health professional.

116. The Commission thus concludes that by imposing an unlawful condition for the fulfillment of their prison visits without judicial and appropriate medical guarantees and performing these searches and inspections under these conditions, the State of Argentina violated the rights of Ms. X and her daughter Y guaranteed in Articles 5, 11 and 17 of the Convention, in relation to Article 1.1 which requires the Argentine State to respect and guarantee the full and free exercise of all the provisions recognized in the Convention. In the case of Y, the Commission concludes that the State of Argentina also violated Article 19 of the Convention.

IX. RECOMMENDATIONS

117. Based on these conclusions,

THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS,

118. Recommends that the State of Argentina adopt the necessary legislation in order to adjust its provisions to the obligations established by the Convention as expressed in the instant

conclusions and recommendations.

119. Recommends that the State of Argentina periodically inform the Commission about the process of debate and approval of the above mentioned law, as well as future regulations based on it.

120. Recommends that adequate compensation be granted to the victims.

121. Decides to publish this report in its Annual Report to the General Assembly of the OAS.

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[1] Commissioner Oscar Luján Fappiano, national of Argentina, did not participate in the discussion and voting on this case, in accordance to Article 19 of the Regulations of the Commission.

[2] At the request of petitioners, their identities have not been disclosed because of the minority of one victim and the nature of the violations denounced.

[3] Court of Appeals, 35972-X y otra; s/ writ of amparo-17/151-Int.IIda., Buenos Aires, April 25, 1989, para. IV.

[4] Ibid.

[5] Corte Suprema de Justicia, Ruling on the writ of amparo, Tomo 207 del Libro de Sentencias, Buenos Aires, November 21, 1989, pp. 105, para. 3.

[6] The governing regulation in this case, which was not respected, is Article 28 of the SPF, Public Bulletin No. 1266, which reads as follows: "Visitors must subject themselves to the search method used in the unit, if they do not wish to forgo the visit. In any event, the search will be performed by personnel of the same sex as the searched person." Public Bulletin No. 1625 provides that "humanitarian treatment shall be paramount in searches, avoiding any procedure that might imply an internal indignity..." and that "the same approach should be used in searching visitors of inmates."

[7] Ibid.

[8] In his opinion on the writ of amparo the Attorney General (Procurador General de la Nación) stated that:

> ...the timing of the writ makes it doubtful that she could have used other than the normal administrative remedies available because of the long period of time during which the petitioner was submitted to such searches and her consequent knowledge of the regulations she brought the writ against....." (...la oportunidad del reclamo, luego de largo tiempo de verse sometida la peticionaria a esas revisaciones, lo que importó conocimiento del reglamento que impugnara, torna al menos dudoso que le asistiera en el caso otra posibilidad que la de utilizar los mecanismos administrativos y judiciales comunes...)", Procuración General de la Nación, 24 de julio de 1989, 531, L.XXXII.

[9] Permanent Court of International Justice, Lotus case, Judgement No. 9, 1927, Series A No. 10, pp. 31 and European Court of Human Rights, Handyside Case, Judgement of 7 December 1976, Series A No. 24, para. 41.

[10] Inter-American Court, Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C, No. 4, para. 165.

In its advisory opinion on the Word "Laws", the Court further stated that:

> ...the protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These are individual domains that are beyond the reach of the State to which the State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of restriction of state power.

Inter-American Court of Human Rights, the Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series a, No. 6, para.21.

[11] Ibid. para. 166.

[12] The Court has stated that:

> ....the criteria of Article 30 are applicable to all those situations where the word "laws" or comparable expressions are used in the Convention in respect to the restrictions that the Convention itself authorizes with respect to each of the protected rights. In effect the Convention does not limit itself to setting forth a group of rights and freedoms whose inviolability is assured to each individual, but also refers to the special circumstances in which it is possible to restrict the enjoyment or exercise of such right and freedoms without violating them. Article 30 cannot be regarded as a kind of general authorization to establish new restrictions to the rights protected by the Convention, additional to those permitted under the rules governing each one of these.

Inter-American Court of Human Rights, The Word "Laws" in Article 30 of the American Convention on Human Rights, OC-6 of May 9, 1986, Series A, No. 6, para. 17.

[13] Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 67.

[14] OC-5, paragraph 37.

[15] Inter-American Court of Human Rights, the Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series a, No. 6, para, 22.

[16] In this respect see the Sunday Times Case where the European Court established that:

> ....a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able--if need be with appropriate advise--to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action might entail. Judgement of April 26, 1979, Series A, vol. 30 (1979) pp.31.

[17] In this respect the Court has stated that:

> Within the framework of the protection of human rights, the word "laws" would not make sense without reference to the concept that such rights cannot be restricted at the sole discretion of governmental authorities. To affirm otherwise would be to recognize in those who govern virtually absolute power over their subjects. OC-6, Series A No. 6, para. 27.

[18] OC-5, par. 46, quoting the European Court on Human Rights, Sunday Times Case, decision 26 April 1979, Series A. No. 30, para. 62.

[19] OC-5, par. 46.

[20] In the case of X & Y v. the Netherlands, the European Court made such a connection regarding the parallel provision, Article 8, in the European Convention on Human Rights, Judgment of 26 March 1985, Series A Vol. 91, para. 22.

[21] Article 37 of the United Nations Standard Minimum Rules on the Treatment of Prisoners states:

> Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

Standard Minimum Rules on the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076(LXII) of 13 May 1977.

[22] On this topic, see the following Commission reports: Miskito Case, pp. 31-2; Cuba Case, p. 62 (1983); and Uruguay Case (1983-84), p. 130, paragraph 10.