

PERU

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

Peru has a population of around 25 million, made up various ethnic groups, the majority of indigenous groups living in the rural areas.¹

Peru is a unitary, representative, and decentralized state according to Article 43 of the 1993 Constitution. In 1993, this new Constitution was enacted following the suspension of the 1977 Constitution and the dissolution of Congress by the then President Fujimori. The 1993 Constitution guarantees a broad range of civil and political rights, including rights during criminal proceedings. Some of them are, however, subject to derogations in times of emergency.² The right to petition is guaranteed but not the right of access to justice.³

The judiciary is comprised of the Constitutional Court, the Supreme Court, Superior Courts (*Cortes Superiores*), Specialised and Mixed Courts (*Juzgados Especiales y Mixtos*), and Justices of the Peace/Lawyer (*Juzgados de Paz Letrados*), as well as Justices of the Peace (*Juzgados de Paz*) whereby the courts are divided into civil, criminal and special chambers. There are 25 judicial districts, each having a Superior Court.

There is also a system of Military Courts with specific jurisdiction.⁴ The Constitutional Court is, pursuant to Article 202 of the Constitution, vested with jurisdiction "(1) to take cognizance, in first instance and without appeal, of actions of unconstitutionality; (2) to take cognizance, in the last and final instance, of rulings denying motions for habeas corpus, amparo, habeas data, and action for

¹ See Core Document Forming Part of the Report of States Parties, UN Doc. HRI/CORE/1/Add.43/Rev.1, 27 June 1995, paras.1-75 and Inter American Commission on Human Rights, 2000 report on Peru., "Introduction," para 4.

² See Section I, Chapter I, Articles 1 and 2, in particular Article 2 (24) of the Constitution. Economic and social rights are provided for in Chapter II, Articles 4-29 and political rights in Chapter III.

³ Article 2 (20) of the Constitution.

⁴ "Peru's system of military justice recognizes that there are two separate jurisdictions in the judicial system, the military courts and the regular or civilian jurisdiction. The Code of Military Justice establishes that offences (regular) will be judged by the civilian courts, and offences that pertain exclusively to military service (service-related offences) committed by military, police, or civilian personnel employed by the military are to be heard by the military courts (courts of the Armed Forces and the Police)...military courts have jurisdiction, in addition to what is spelled out in the Peruvian Constitution, to take cognizance of common crimes, pursuant to Article 324 of the Code of Military Justice, which provides that the military jurisdiction can be exercised over common crimes committed in service-related acts when the injured persons and accused are members of the military; the law applied is the Criminal Code that applies to civilians generally" Section 1, Chapter 1, para 151 of Inter-American Commission of Human Rights (IACHR) 2000 report. "Article 173 of the 1993 Constitution provides that "in the event of a service-related offence, the members of the Armed Forces and National Police are subject to the respective jurisdiction and the Military Justice Code. Its provisions are not applicable to civilians, except in the case of the offences of treason [*traición a la patria*] and terrorism, as provided by law. The Supreme Court has the power, pursuant to Article 141 of the Constitution, to sit in judgment when the death penalty may be imposed." [para 21:]. Following a ruling by the Inter-American Court in 1999 that the conviction of Jaime Castillo, Laurato Mellado, Maria Concepción Pincheira and Alejandro Astrga in 1994 by a military court had violated the right to fair trial, the case was transferred to the civilian court. Moreover, the Supreme Court of Military Justice had annulled the sentence passed by a military court against Lori Berenson, a US citizen, in 2000 and referred the case to the civilian courts. See AI, Report 2002, Peru, p.195.

enforcement [*acción de cumplimiento*]; (3) to take cognizance of jurisdictional disputes, or of powers assigned by the Constitution, pursuant to the law." Consequently, it is not competent to rule on individual petitions alleging an infringement of fundamental rights.

According to Article 139 of the Peruvian Constitution, the judicial function is characterized by the following principles and rights: "...Independence in the exercise of the judicial function. No authority may take up cases pending before the judicial organ nor interfere in the exercise of its function. Nor may it void resolutions that have become *res judicata*, nor terminate ongoing procedures, nor modify judgments nor delay their enforcement.... The observance of due process and judicial protection.... The principle of not being deprived of the right of defense at any stage of the process.... [and] popular participation in the appointment and removal of judges, in keeping with the law."⁵ Except for the justices of the peace, all other judges, including the members of the Supreme Court, are appointed and removed, according to the Peruvian Constitution, by the National Council of the Judiciary (*Consejo Nacional de la Magistratura*).⁶

1.2. Incorporation and status of international law in domestic law

Peru has become party to the following relevant international treaties:

- The Geneva Conventions (15 February 1956) and the 2 Additional Protocols (14 July 1989)
- Convention on the Prevention and Punishment of the Crime of Genocide (24 February 1960)
- Convention Relating to the Status of Refugees (21 December 1964)
- International Convention on the Elimination of All Forms of Racial Discrimination (29 September 1971)
- International Covenant on Civil and Political Rights (28 April 1978)
- International Covenant on Economic, Social and Cultural Rights (28 April 1978)
- American Convention on Human Rights (28 July 1978)
- Optional Protocol to the International Covenant on Civil and Political Rights, (3 October 1980)
- Convention on the Elimination of All Forms of Discrimination against Women (13 September 1982)
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (7 July 1988)⁷
- Convention on the Rights of the Child (4 September 1990)
- Inter-American Convention to Prevent and Punish Torture (28 March 1991)
- Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women/Convention of Belém do Pará (4 June 1996)
- Rome Statute of the International Criminal Court (10 November 2001).

⁵ Pursuant to the terms at Article 146 of the Constitution of the Republic of Peru, the Peruvian State guarantees the judges: "1. Their independence. They are subject exclusively to the Constitution and the law. 2. Tenure in their posts. They may not be transferred without their consent. 3. Their permanence in the service, so long as their conduct and suitability are in keeping with their function. 4. A level of compensation that ensures them a standard of living worthy of their mission and rank." IACHR, 2000 report on Peru, para 10.

⁶ See on the National Council of Judiciary (*Consejo Nacional de la Magistratura*), Articles 150-162 of the Constitution.

⁷ Congress has not yet recognised the competence of the Committee against Torture provided for in Articles 21 and 22 of the Convention against Torture.

International treaties ratified by the Peruvian State form part of national law pursuant to Article 55 of the Constitution.⁸ Treaties, which are concluded and ratified by the President, are incorporated into Peruvian law depending on the mode of their approval: if approved by Congress, such as human rights treaties,⁹ it will have the status of law, and if approved by the executive, it will have the status of a supreme decree.¹⁰ While the Peruvian Constitution of 1979 granted primacy to international law, and especially to treaties related to human rights, in case of conflict with international legislation,¹¹ no similar provision is contained in the 1993 Constitution. Accordingly, the Constitution prevails in case of conflict pursuant to Article 55 in conjunction with Article 51 of the Constitution. However, the Fourth Final and Transitory Provision of the 1993 Constitution provides that the norms relative to rights and liberties which the Constitution recognises shall be interpreted according to the Universal Declaration of Human Rights, and international treaties on similar matters ratified by Peru.¹²

In spite of the Constitutional provisions requiring the judiciary to interpret domestic law in the light of international human rights treaties, Peruvian courts have often focused on national laws, disregarding international standards.¹³ However, in a recent case involving a group of victims called the *Asociación Nacional de Inocentes Liberados/ANIL* (National Association of Liberated Innocents), the Constitutional Tribunal has interpreted the Constitution so as to provide for a limited right of reparation, invoking international standards. ANIL, with the sponsorship of Congresswoman Anel Townsend, won a favourable judgment from the Constitutional Court on 27 October 2000, which established the right to reparation for all people liberated under law 26.655.¹⁴ The judgment refers to the 416 people pardoned by the *Ad Hoc* Commission and acknowledges that as a result of their arbitrary

⁸ This is also supported by a decision of the Constitutional Tribunal: *Expediente* N° 1277-99-AC/TC, 13 July 2000. Article 55 of the Constitution reads: "The treaties signed by the State and in force form part of domestic law"; Article 51 *ibid.*: "The Constitution prevails over any legal norm; the statute over norms of inferior hierarchy, and so on" (REDRESS translation).

⁹ Article 55 of the Constitution provides that treaties touching upon the subject matter of human rights; sovereignty; national defence or financial obligation of the State are to be approved by Congress.

¹⁰ Article 56 of the Constitution.

¹¹ Chapter V, (On Treaties), 1979: Article 101: "The International Treaties signed by Peru and other states form part of domestic law. In the incidence of conflict between the Treaty and the law, the former prevails"; Article 105: "The precepts in the Treaties relating to Human Rights have constitutional hierarchy. They can only be modified through the procedure which governs reform of the Constitution." (REDRESS translation).

¹² The Inter-American Commission notes that "Peru, paradoxically, is among the States parties whose internal laws explicitly provide for a mechanism that guarantees compliance with the Court's judgments: Paradoxically, Law 23.506 on Habeas Corpus and Amparo, and the Organic Law of the Judiciary, both in force in Peru, suggest that the judgments of the [Inter-American] Honorable Court are valid and have full legal effect in the domestic jurisdiction of the Illustrious State, and are enforceable with no need to review their compatibility with domestic law. Specifically, these rules provide: The resolution of an international organ to whose compulsory jurisdiction the Peruvian State has submitted does not require, for its validity and effect, any recognition, review or prior examination whatsoever. The Supreme Court of Justice of the Republic shall receive the resolutions issued by the international organ and shall order its enforcement and compliance in keeping with the domestic rules and procedures in force on enforcement of judgments. (Article 40 of Law 23.506). The judgments issued by international tribunals, constituted under treaties to which Peru is a party, are transcribed by the Ministry of Foreign Affairs to the President of the Supreme Court, who forwards them to the Chamber in which the domestic jurisdiction was exhausted, and orders enforcement of the supranational judgment by the specialized or mixed judge with jurisdiction. (Article 151 of the Organic Law on the Judiciary)". IACHR 2000 Peru Report, *supra*, Chapter 3, para 22.

¹³ *Amnistía vs. Derechos Humanos - Buscando justicia. Informe N°57, Serie Informes Defensoriales, Defensoría del Pueblo, Lima, mayo de 2002, segunda edición*, p.26.

¹⁴ The law established the Commission that released innocent people as "indultados", i.e those that had been detained during the Fujimori period and been wrongfully accused of crimes related to "terrorism".

imprisonment, they lost jobs, their studies, material goods, their health and many of their scarce resources. The judgment continues: "invoking section clause (6) of Article 14 of the International Covenant on Civil and Political Rights which recognizes the right to indemnification when a person has been pardoned through the act of a judicial error, and forms part of our rights and has the power of law in conformity with Articles 55 and 200, clause 4 of our Constitution, where it results fully enforceable for the present action of compliance."¹⁵

Peru has not adopted any specific legislation implementing the Convention against Torture but has amended its penal code to include an offence of torture.¹⁶

2. Practice of Torture: Context, Occurrence, Responses

2.1. The practice of torture

In 1980, Peru returned to democratic government after 12 years of military rule. Nonetheless, the country faced serious economic problems, and became engulfed in an armed conflict between the Communist Party of Peru¹⁷ and *Movimiento Revolucionario Túpac Amaru* (Túpac Amaru Revolutionary Movement) and the Peruvian army and police forces. This conflict, which was marked by human rights abuses and violations on all sides, began in the early 1980's and lasted until the late 1990's, a period during which several regions of Peru were under a "state of emergency". The conflict worsened after President Fujimori came into power in 1992. He embarked on a neo-liberal policy accompanied by repressive policies against political opponents of the regime. In so doing, his government took away the institutional autonomy of the judiciary.¹⁸ In 1992¹⁹ and 1998,²⁰ the government passed anti-terrorist legislation permitting trial on charges of treason in military courts, which were neither independent nor impartial. Torture and ill-treatment of detainees charged with "terrorism" was subsequently practised systematically facilitated by the lack of safeguards for detainees who were often held incommunicado for long periods.²¹

¹⁵ *Expediente 1277-99-AC/TC*. Translated by REDRESS from original text of judgment, page 2.

¹⁶ See *infra* II. See, for the implementation of international humanitarian law, ICRC, General Comment, Peru, citing Salmón Gárate, Elizabeth, *Encuentros y Desencuentros. El Perú y el Derecho internacional humanitario*; ICRC, Lima, 2001, p. 227.

¹⁷ Also known as *Senderoso Luminoso* (Shining Path).

¹⁸ In 1995 and 1998, the Congressional majority approved, and the Executive promulgated, Laws Nos. 26.546 and 26.933, which give the Executive branch functions that should properly vest in the judiciary and the National Council of the Judiciary. These transitory provisions, which later became permanent, eliminated "the institutional autonomy of the judiciary..." See IACHR 2000 Second Report on Peru, *supra*, Chapter II, para 11-13.

¹⁹ "The wide-ranging anti-terrorism decree laws issued by ex-President Alberto Fujimori and his Council of Ministers following the suspension of constitutional rule in April 1992 included Decree Laws Nº 25.475 of May 1992, Decree Law Nº 25.564 of June 1992, Decree Law Nº 25.659 of August 1992, Decree Law Nº 25.880 of November 1992. These decrees widened the definition of "terrorism"-related offences, introduced incommunicado detention for 10 days during the police investigation, reduced the age of criminal responsibility for "terrorism"-related crimes from 18 to 15, granted the police unlimited pre-trial powers, accelerated trial procedures and significantly lengthened the terms of imprisonment of those convicted. A series of amendments to the anti-terrorism legislation have been made since 1993". Amnesty International, *Peru: Torture and ill-treatment – Time to put words into practice*, June 2002, AI-Index AMR 46/005/2002, p.4, Fn.10.

²⁰ The "Law against aggravated terrorism", "*Ley contra el terrorismo agravado*", Decree Nº 895, came into force in May 1998. It was passed to combat organized crime ("*delincuencia común organizada*"). On 29 November 2001 the Constitutional Tribunal found this law to be unconstitutional. See *ibid*, p.5, Fn.11.

²¹ See generally AI, *Peru: Torture and ill-treatment*, *supra*.

States of exception were routinely used to enact laws that resulted in grave human rights violations during the armed conflict.²² Torture increased during this period and thousands of people “disappeared” and were extra-judicially executed by members of the security forces as well as armed opposition groups.²³ Torture was reportedly practised systematically by police, the military and penitentiary officials.²⁴ Those subjected to torture included peasants, people from marginal urban sectors, political and union activists, university students and people accused of subversive acts. Sexual violence against rural and indigenous women and of teenagers and girls in emergency zones were also reported.²⁵ Children were also subjected to torture and ill-treatment.²⁶ In addition, the Fujimori government imposed a mandatory year of solitary confinement for all convicted terrorists.²⁷

In 2000, President Fujimori escaped to Japan (where he was granted Japanese nationality) among allegations of serious human rights violations and corruption. Valentín Paniagua led a transitional government from November 2000 to July 2001, when Alejandro Toledo took office. In spite of some measures introduced to combat torture, it is still reportedly widespread and can be characterized as frequent.²⁸ Reportedly, it is mainly used against detainees of penitentiary establishments and criminal suspects in order to extract confessions or as a form of punishment. There have been several reported cases of torture applied to young people undergoing military service.²⁹ Moreover, conditions in prisons continue to be extremely poor.³⁰

²² IACHR Peru Report 2000, supra Chapter 2. Decree Law No. 25.475, for example, gave the police the power to hold a detainee incommunicado for up to 15 days, creating conditions that lend themselves to violations of physical integrity. The Inter-American Commission “has received numerous complaints consistently alleging acts of torture committed during this phase. Concretely, the complaints indicate that torture is used to obtain the signing of “confessions” that have later become the main evidentiary basis of the conviction. Such acts constitute violations of Article 5 of the American Convention, which sets forth the right of all persons not to be subjected to torture or to cruel, inhuman, or degrading treatment, and of all detainees to be treated with respect for the inherent dignity of the human person.” [para 95]. “Aggravating the situation of defencelessness and incommunicado detention of the persons investigated for and accused of crimes of terrorism, Article 6 of Decree Law No. 25.659 established that at no stage in the police investigation and in the criminal proceedings could actions to guarantee rights be brought, not even the writ of habeas corpus, found at Articles 295 and 200 of the Peruvian constitutions of 1979 and 1993, respectively” [para. 96]. “In this way, persons who were detained and held incommunicado were deprived of the only legal remedy available to them to challenge, before a judge, the legality and reasonableness of their arrest.” [para 62].

²³ From 1980 to 1992, 24,250 people died due to political violence in Peru; of these, 2,044 were members of the security forces, 10,171 were civilians, 11,773 were persons alleged to be members of armed dissident groups and 262 were allegedly linked to drug-trafficking. PERUPAZ (Special Commission on Violence and Pacification of the Peruvian Senate), July 1992. See for an overview of torture practices in Peru in the mid-1990s, Fuente, *Análisis de la problemática de la tortura en el Perú*, Coordinadora Nacional de Derechos Humanos, Lima, 1999, pp.125.

²⁴ Torture methods that were documented include beatings, positional torture, electro-shock torture (by means of electro batons), sexual abuse including rape, beating, asphyxiation, near-drowning, deprivation of normal sensory stimulation and of water, food and medical care, threats and various means of psychological torture. See petition to and hearings before the Inter-American Commission on Human Rights, Report Nº 43/01, case 11.015 *Hugo Juárez Cruzat et al. (Miguel Castro Castro Prison)*, Peru, 5 March 2001 (on file with REDRESS) concerning allegations of torture and the attack committed by security forces on a wing of the Castro Castro prison in May 1992, killing 86 and injuring 175 people. See also, AI, Peru: Torture and ill-treatment, supra, p.11.

²⁵ Committee on the Discrimination against Women, 19th Session; UN Doc. A53/38 Rev. 1, 8 July 1998, p. 7. See on the large number of victims of sexual violence in Peru, Fuente, *Análisis de la problemática de la tortura en el Perú*, supra.

²⁶ Children were also held in *incommunicado* detention as Peruvian legislation provides for no specific protection of children against such detention. See Report No.44/01, Case 11.016, Emilio Moisés and Rafael Samuel Gómez Paquiyaury, Peru, 5 March 2001.

²⁷ Article 20 of Decree Law No. 25.475, and Article 3 of Decree Law No. 25.744 provide for continuous solitary confinement during the first year of detention.

²⁸ See AI, Peru: Torture and ill-treatment, supra, pp. 11 et seq.

²⁹ See e.g. *El Comercio* (on line), “Comisión de DD.HH. investigará denuncia de torturas en Iquitos.”

2.2. Domestic Responses

On 1 April 1996, Congress appointed the Ombudsman by Legislative Resolution No. 26.584. The Office of the Human Rights Ombudsman is responsible for safeguarding the constitutional and fundamental rights of the individual and the community, for supervising the state administration in the performance of its duties, and the delivery of public services to the community.³¹ "The Office of the Ombudsman has played a significant part in cases involving Peru before the Inter-American Court of Human Rights and before the Inter-American Commission as well, submitting *amicus curiae* briefs on behalf of inhabitants of Peru."³²

The Ministry of the Interior and the National Police have also provided training courses for members of the police.³³

The new Government has taken several steps to address the past and present practice of torture after coming into power. "On September 13 (2001), Supreme Court Justice José Luis Lecaros issued an international warrant to Interpol for Fujimori's arrest, pending the submission to Japan of a formal extradition request".³⁴ However, this order did not include torture, but rather referred to *lesiones graves* (causing grievous bodily harm), murder and forced disappearances.³⁵ On 30 May 2002, the Supreme Court formally requested his extradition, Case No. 19-2001,³⁶ and in June 2002, the Peruvian cabinet approved the Supreme Court's request for the extradition materials to be filed.³⁷ The Supreme Court issued a new extradition request in February 2003.³⁸ The new request added charges of embezzlement and illegal enrichment to the charges listed in the original Interpol warrant.³⁹ It is understood that the Peruvian government is preparing an extended extradition

July 9, 2002.

³⁰ See AI, Peru: Torture and ill-treatment, *supra*, pp.18-20.

³¹ See Articles 161 and 162 of the 1993 Constitution in conjunction with the Ombudsman Organization Act (Act No.26520, published in the Official Journal on 8 August 1995.

³² IACHR 2000 Report on Peru, Chapter 1, paras. 43-46.

³³ Third periodic reports of State Parties due in 1997, UN Doc. CAT/C/39/Add.1, 25 February 1999, para 83: The government established the RENAESPPL system (National Register of Detainees and Persons Sentenced to a Custodial Penalty) comprising "a Committee for the Coordination of the National Register of Detainees, presided over by a representative of the Public Prosecutor's Department and consisting of representatives of the Office of the Ombudsman, the Ministry of Justice, the Ministry of the Interior, the Ministry of Defence, the Judiciary and the Human Rights and Pacification Commission of the Congress of the Republic, in accordance with article 2 of Law No. 26900 of 15 December 1995, which transferred RENAESPPL from the Office of the Ombudsman to the Public Prosecutor's Department." See for further legislative and administrative measures taken by the Government, Inquiry under Article 20: Peru, Summary account concerning the results of the proceedings concerning the inquiry on Peru, UN Doc. A/56/4, paras.144-193, 16 May 2001, para.47.

³⁴ HRW, 2002 World Report: Peru 2001.

³⁵ Amnesty International, "LA CORTE SUPREMA DICTO ORDEN DE CAPTURA NACIONAL E INTERNACIONAL CONTRA FUJIMORI", <http://www.amnistia.org.pe/>.

³⁶ Gaceta Judicial, "Poder Judicial tramitó pedido de extradición de ex presidente Alberto Fujimori", <http://www.pj.gob.pe/paginas/GACETA/GACETA/310502/Principal.htm>.

³⁷ HRW, 2003 World Report: Peru 2002.

³⁸ Véliz, Ana, "Suprema aprueba segundo pedido de extradición de prófugo Fujimori", La República, 22 February 2003.

³⁹ AP, "Peru OKs Charges Against Ex-President", <http://story.news.yahoo.com/news?tmpl=story&u=/ap/20030308/>. "Germany, Costa Rica, Italy, Spain and other countries recently said they would detain Mr Fujimori if he attempted to enter their territories. Peru said last week it would formally ask Japan for Mr Fujimori's extradition by June or July [2003]. BBC, "Japan won't extradite Fujimori", <http://news.bbc.co.uk/2/hi/americas/2835133.stm>.

request adding further crimes against humanity to the charges.⁴⁰ On 26 March 2003, Interpol issued an arrest order against Fujimori for assault, forgery, kidnapping, hostage taking, murder and organised crime. Japan has to date not acted upon the request for Fujimori's arrest, transmitted to it by Interpol and has maintained its position that it will not extradite Fujimori.⁴¹

Prosecution has also been initiated against Vladimiro Montesinos, former chief of the National Intelligence Service (SIN) since the early 1990s and the right hand man of President Fujimori. Montesinos is serving out a sentence of nine years and four months imprisonment for charges of usurping power (*usurpación de funciones*) that was ordered in June 2001.⁴² He also faces charges of murder and other crimes attributed to the death squads he organized during the Fujimori regime.

In June 2001, the transitional government of Valentín Paniagua issued a decree creating a Truth Commission, to establish the circumstances surrounding human rights violations committed by the state and abuses committed by armed opposition groups between May 1980 and November 2000. The government of Alejandro Toledo changed the title of the Commission to the Truth and Reconciliation Commission.⁴³

Moreover, a Special Commission for the Restructuring of the National Police of Peru was officially appointed to carry out an in-depth evaluation of the actions of the police, including the perpetration of human rights violations. The Commission published its report in February 2002, and the Government has reportedly earmarked \$15 million to improve the infrastructure of the nations' police stations.⁴⁴

On 7 May 2002, Congress approved a law that provides, inter alia, for training on the Constitution and fundamental guarantees in the curricula of military and police schools.⁴⁵

Supreme Decree 005-2002-JUS, published on 25 February 2002⁴⁶, created an Inter-Institutional Working Commission to Follow-Up the Recommendations Made by the Inter-American Commission of Human Rights (Working Commission) on 22 February 2001. The subject matter jurisdiction of the Working Commission is limited to the cases included in sections C and D of the Recommendations, which include torture cases.⁴⁷ The task of the Working Commission is also to "design an integral non-monetary reparations program".

There is also a project for the inclusion in the Criminal Code of an offence of cruel, inhuman and degrading treatment. Moreover, a declaration in favour of articles 21 and 22 of the UN Convention Against Torture is being evaluated.

⁴⁰ See for updates on the development in this case www.fujimoriextraditable.com.pe.

⁴¹ See on this, REDRESS' Audit Project Country Report on Japan, VI., 1.2.

⁴² HRW, "Peru: Montesinos Verdict Hailed" <http://hrw.org/press/2002/07/montesinos0701.htm>.

⁴³ Amnesty International, Peru: Annual Report 2002, p.195.

⁴⁴ AI, Peru: Torture and ill-treatment, supra, p. 16.

⁴⁵ Information provided by APRODEH.

⁴⁶ Modified by Supreme Decree No. 006-2002-JUS, published on 1 March 2002.

⁴⁷ A total of 159 cases.

2.3. International Responses

The international treaty bodies have not had occasion to examine the situation in Peru after the change of government. With regard to the practice of torture in the mid 90s, the Committee against Torture, in 1998, while noting that Peru has undertaken some positive steps to combat torture, such as the "introduction into Peruvian legislation of a definition of torture consistent with the provisions of article 1 of the Convention"⁴⁸ expressed its concern about the "frequent and numerous allegations of torture;"⁴⁹ "the apparent lack of effective investigation and prosecution of those who are accused of having committed acts of torture; and "the use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate."⁵⁰ The United Nations Special Rapporteur on Torture also shared the concerns of the Committee with respect to the "frequent and numerous allegations of torture."⁵¹

From 1995 to 1999, Peru was subject to an Inquiry under Article 20 of the Convention against Torture.⁵² The Committee members came to the following conclusion: "In the opinion of the Committee members, the large number of complaints of torture, which have not been refuted by the information provided by the authorities, and the similarity of the cases, in particular the circumstances under which persons are subjected to torture and its objectives and methods, indicate that torture is not an occasional occurrence but has been systematically used as a method of investigation."⁵³ Furthermore, "the Committee expresses the hope that the Government of Peru which is to take office in July 2001 will take energetic and effective steps to rapidly end the practice of torture, in accordance with the provisions of the Convention."⁵⁴

In addition, the Inter-American Court passed several judgments in recent years in which it found Peru responsible for torture and in violation of the right to humane treatment under the American Convention on Human Rights.⁵⁵

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

The 1993 Constitution expressly recognises the right to freedom from torture and ill-treatment. According to Article 2, "Every person has the right: 1. to life, to his identity, to his moral, mental and physical integrity, and to his unrestricted

⁴⁸ Concluding observations of the Committee against Torture: Peru, UN Doc. A/53/44, 21 May 1998, paras.197-205, para. 200 (c)

⁴⁹ Ibid., para. 202 (a)

⁵⁰ Ibid., para. 202 (f) and (g).

⁵¹ Report of the Special Rapporteur Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1998/38, UN Doc. E/CN.4/1999/61, 12 January 1999, para. 580.

⁵² Inquiry under Article 20: Peru, Summary account concerning the results of the proceedings concerning the inquiry on Peru, UN Doc. A/56/4, paras.144-193, 16 May 2001.

⁵³ Ibid., para.20.

⁵⁴ Ibid., para.50.

⁵⁵ See for judgments, *supra*, IV, 2.

development and well-being. Everything conducive to the realization of this principle is a matter of right ...” Article 24 provides for the right: “To personal freedom and security. Consequently: ... (h) No one may be subjected to moral, psychological or physical violence, nor to torture or cruel or degrading treatment. Anyone may request the immediate medical examination of an injured person or of a person unable to petition the authorities himself. Statements obtained through violence are invalid. Whoever resorts to it incurs responsibility therefore.”⁵⁶

Article 137 of the Constitution establishes two states of exception in which torture is not expressly prohibited: a state of emergency and a state of siege. The first one allows for the restriction of “constitutional rights related to freedom and personal security”.⁵⁷ The second one explicitly refers to the non-derogability of “fundamental rights” without mentioning torture, though Article 2 of the Constitution provides for the “right to moral, psychological and physical integrity”.

A specific offence of torture was introduced into Peruvian law by Law No. 26.926 of 1998, in force since 21 February 1998. This law amended various articles of the Penal Code. It partially adopted the definition under CAT in Article 321 of the Penal Code:

“An official or public servant, or any person acting with his consent or acquiescence, who inflicts upon another serious discomfort or suffering, whether physical or mental, even without causing physical pain or mental distress, for the purpose of obtaining a confession or information from the victim or a third party, or of punishing him for any act that he may have committed or is suspected of having committed, or of intimidating or coercing him, shall be punished by a custodial penalty of not less than 5 nor more than 10 years. If the torture results in the injured party's death or causes serious injury and the person inflicting it could have foreseen that outcome, the custodial penalty shall be, respectively, not less than 8 or more than 20 years, and not less than 6 or more than 12 years.”⁵⁸

There are also explicit references to the prohibition of torture in Art. III of the Preliminary Title of the Code of Penal Execution⁵⁹ and Article 4 of the Children and Adolescents Code.⁶⁰

The military code contains no express prohibition of torture but Article 181 (7) reads: “it is considered an abuse of authority to humiliate people, mistreat, injure or illegally oblige them.”

⁵⁶ Translation in Third periodic reports of States Parties due in 1997, Peru, *supra*, para. 1.

⁵⁷ Art. 137(1) of the Constitution.

⁵⁸ Translation *ibid.*, para. 2.

⁵⁹ “Enforcement of penalties and measures depriving accused persons of liberty must not involve torture or cruel or degrading treatment or any other act or procedure injurious to the dignity of the detainee.”

⁶⁰ Article 4 (Decree-Law No. 26102): “Every child or adolescent has a right to respect for his personal integrity. He may not be subjected to torture or to cruel or degrading treatment. Forms of enslavement are deemed to include forced labour and economic exploitation, together with child prostitution and dealing in, selling and trafficking in children and adolescents.”

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The Substantive Law: Criminal offences and Punishment

Since 1998, torture is recognised as a specific offence whose commission is subject to various degrees of punishment, depending on the circumstances and injuries inflicted, ranging from five to twenty years imprisonment.⁶¹ Doctors or any health professionals who cooperate in the perpetration of torture will be punished with the same sentence as the authorities.⁶²

The Code also contain several offences which could be applied in torture cases and are the only applicable provision with regard to torture committed before Article 321 of the Penal Code came into force.⁶³ Such offences are, in particular, those of inflicting injury and abuse of authority.⁶⁴ Moreover, the Code recognises offences such as subjecting detainees to unlawful measures,⁶⁵ using coercive violence,⁶⁶ using cruel treatment during wrongful detention,⁶⁷ exposing others to dangers,⁶⁸ rape⁶⁹ and murder,⁷⁰ which carry varying punishments of short, medium and long-term imprisonment.

⁶¹ See Article 321 Penal Code, *supra*, II.

⁶² Article 322 of the Penal Code.

⁶³ Translation in Third periodic reports of States Parties due in 1997: Peru, *supra*, para. 11.

⁶⁴ According to the Peruvian Government, see Initial Report of States Parties due in 1989: Peru, UN Doc. CAT/C/7/Add.16, 31 May 1994, para.36: Article 121: "Anyone who causes serious harm to the body or health of another shall be liable to deprivation of liberty for not less than three and not more than eight years. The following are considered to be serious injury: 1. Injury placing the victim's life in immediate danger; 2. Injury mutilating a limb or important bodily organ or making it unfit to perform its function, or leaving a person unable to work, or suffering from a permanent psychological disability or disorder, or permanently and seriously disfigured; 3. Injury inflicting any other serious harm to the physical integrity or mental health of a person requiring 30 or more days of care or rest on doctor's orders. When the victim dies as a result of the injury and the perpetrator should have foreseen this result, the sentence shall be not less than 5 and not more than 10 years." Article 376: "Any public official who, abusing his authority, commits or orders the commission of any arbitrary act whatsoever against another shall be liable to deprivation of liberty for not more than two years."

⁶⁵ Article 128 Penal Code: "Who so puts at risk the life or health of a person placed under his authority, dependency, guardianship, custody or supervision, whether by depriving him of essential food or care, forcing him to perform excessive or unsuitable work, or abusive application of corrective or disciplinary measures, shall be punished by deprivation of liberty for not less than one or more than four years."

⁶⁶ Article 151 Penal Code: "Who so by threat or violence forces another to do what the law does not command, or requires him to do what it does not prohibit, shall be punished by a maximum of two years' deprivation of liberty."

⁶⁷ Article 152 Penal Code "Who so wrongfully deprives another of his personal freedom shall be punished by imprisonment for not less than 10 or more than 15 years. The sentence shall be for not less than 20 nor more than 25 years where: 1. The responsible party abuses, corrupts or treats cruelly the injured party or puts his life or health at risk." See also Article 153. "Whoso detains or transfers from one place to another a minor or a person incapable of managing his own affairs, using violence, threats, deception or other fraudulent means, for the purpose of obtaining an economic advantage or exploiting the victim socially or economically, shall be punished by imprisonment for not less than 4 or more than 10 years, with disqualification in accordance with article 36, paragraphs 1, 2, 4 and 5." and Article 153A. "An officer in the public service or responsible staff member of a private body having specific or general links with minors or incompetent persons who, abusing his position, detains them or transfers them arbitrarily from one place to another shall be punished by imprisonment for not less than 5 nor more than 12 years and by disqualification in accordance with article 36, paragraphs 1, 2, 4 and 5 ..."

⁶⁸ Articles 125 and 126 Penal Code: "He who exposes others to the danger of death, or grave or imminent danger, or abandons a minor or any dependent legally or factually under his protection in these circumstances. Also, one who omits to help a person who has been injured, placing his life in danger." The prescribed punishment is a term of imprisonment ranging from one to four years.

⁶⁹ Article 170 Penal Code. Rape is subject to a punishment of four to fifteen years of imprisonment.

⁷⁰ Article 108 Penal Code. Murder carries a minimum punishment of 25 years.

An attempt to commit an offence is considered a crime but will not be punished if the ineffectiveness of the means employed or the inappropriateness of the object used render the commission of the offence impossible.⁷¹ Accomplices are punishable depending on their degree of assistance provided.⁷² There are no specific defences against charges of torture.⁷³

Public officials may be suspended or removed from their positions according to internal norms. The practice of the Armed and Police Forces is to denounce the facts before a military court and to simultaneously initiate administrative disciplinary proceedings. Peruvian legislation allows simultaneous application of disciplinary sanctions, penal sanctions and civil sanctions. The disciplinary sanctions include: removal, suspension, disqualification, fines and detention.⁷⁴

2. The Procedural Law

2.1. Amnesty Laws

Laws No. 26.479, adopted on 15 June 1995, provided an amnesty for offences, such as homicide, forced disappearances of persons, acts of torture, etc., if committed "on the occasion or as a consequence of the struggle against terrorism" to all those members of the security forces and civilians who were the subject of a complaint investigation, indictment, trial or conviction, or who were serving prison sentences, for human rights violations committed between May 1980 and June 1995.⁷⁵ A second amnesty law, Law No. 26.492, which entered into force on 3 July 1995, prohibited the judiciary from ruling on the legality of the first amnesty law.⁷⁶ These two laws were declared unconstitutional and described as "self-amnesty" by the Inter-

⁷¹ Articles 16 and 17 Penal Code. If the perpetrator desists from completing the offence, he or she will, pursuant to Article 18 Penal Code, only be punished if any of the acts already performed constitute offences in themselves. Third periodic reports of States Parties due in 1997: Peru, UN Doc. CAT/C/39/Add.1, 25/02/99, para. 31.

⁷² Article 25 of the Penal Code.

⁷³ According to the Peruvian Government: "With regard to the provision in the Convention that torture does not include pain or suffering arising from, inherent in or incidental to lawful sanctions, it must be noted that in article 28 of the Penal Code the penalties applicable under that Code are defined as: deprivation of liberty, restriction of liberty, limitation of rights, and fine, otherwise lawful sanctions established under Peru's legal system and complemented by the provisions of article III, "Principle of humane treatment" of the Preliminary Section of the Code of Penal Enforcement, where it is stipulated that enforcement of penalties and measures depriving accused persons of liberty must not involve torture or cruel or degrading treatment, or any other kind of proceeding hurtful to the dignity of the detainee." See Third periodic reports of States Parties due in 1997: Peru, UN Doc. CAT/C/39/Add.1, 25/02/99, para. 4.

⁷⁴ See also Article 36 of the Penal Code.

⁷⁵ "Amnesty was granted to the military, police, and civilian personnel involved in "all acts derived from or originating on the occasion of or as a consequence of the struggle against terrorism and which may have been committed individually or by groups from May 1980 to the date of promulgation" of that law, which was enacted into law by the President of the Republic on 14 June 1995. IACHR 2000 Report on Peru, Chapter 2, para. 215.

⁷⁶ The second Amnesty Law established "that the amnesty granted by Law No. 26.479 ... does not constitute interference in the exercise of the judicial function nor does it undermine the State's duty to respect and ensure the full observance of human rights, recognized by Article 44 of the Constitution, and, among other relevant treaties, Article 1(1) of the American Convention on Human Rights." It indicated that the amnesty in question "is not subject to judicial review" and interpreted the amnesty law as being "... of binding application by the Judicial Organs ... independent of whether the military, police, or civilian personnel involved are or are not accused, investigated, subject to criminal proceedings, or convicted; and all judicial cases in process or under way definitively archived, pursuant to Article 6 of the aforementioned Law." IACHR 2000 Report on Peru, Chapter 2, para. 219.

American Court of Human Rights on 14 March 2001.⁷⁷ As a consequence, some cases that had been archived have been re-initiated.

2.2. Statute of Limitations

According to Art. 80 of the Penal Code, a penal action must be initiated within a time equal to the maximum sentence fixed for the offence by the law. Consequently, the time limit for torture would be 20 years and, if the running of the time limit is interrupted by acts of the Public Prosecutor or otherwise, a maximum of 30 years.

2.3. Criminal Investigations

A victim of torture, or family members, may lodge a complaint before the Public Prosecutor or the *Defensoría del Pueblo* (Ombudsman).⁷⁸ A detainee may apply to the prison director or to the Public prosecutor.⁷⁹ There is no special process to assist victims or families in cases of torture. The proceedings are those that correspond to ordinary common offences.⁸⁰

The Public Prosecutor is charged with the prosecution of penal cases. He/She conducts the investigation of the offence with the assistance of the National Police acting under his/her supervision.⁸¹ Until recently, there had not been a special prosecutor for crimes against humanity, including torture. Instead, any one of the 1400 State prosecutors could be involved in investigating a complaint of torture depending on the district where the complaint was made. However, in April 2002, a "*fiscal ad hoc*" prosecutor was appointed to investigate human rights violations such as forced disappearances, extra-judicial executions and clandestine graves. He will work in conjunction with the Truth and Reconciliation Commission and the Ombudsman. He may also be reviving archived cases that could relate to charges of torture. The Ministry of Interior has created a special police team for the investigation of disappearances, extra judicial killings and the exhumation of clandestine graves. This team belongs to the Criminal Investigation Division of the National Police and is headed by Major Marcos Del Aguila.⁸²

It is the duty of the Public Prosecutor's Department to initiate the investigation of an offence.⁸³ The judicial police have to assist in the administration of justice by investigating offences, identifying the offenders and placing them at the disposal of

⁷⁷ IACHR, *Barrios Altos Case*, 41 ILM 93 (2002). See also HRW, Peru: Arrest of former army intelligence chiefs, Historic court decision defeats impunity, 27 March 2001.

⁷⁸ "Article 9, paragraph 1, of No. 26.520, namely, the Ombudsman Organization Act Law states that the Ombudsman is authorized to initiate and pursue, either of his own motion or on the application of a party, any investigation likely to elucidate the acts and decisions of the State administration and its agents which, as a result of the unlawful, defective, irregular, dilatory, abusive or excessive, arbitrary or negligent exercise of their functions, affect the full exercise of the constitutional and fundamental rights of the individual and the community." Third periodic reports of States Parties due in 1997: Peru, *supra*, para. 75.

⁷⁹ "A detainee has the right to submit complaints and petitions to the director of the penal establishment. If the complaint is not attended to, the detainee may apply, through any channel, to the representative of the Public Prosecutor's Department". Article 14 of the Code of Penal Enforcement (Legislative Decree No. 654).

⁸⁰ Article 5, Law No. 26.926.

⁸¹ Article 159 of the Constitution and Article 11 of the Organic Law of the Public Prosecutor.

⁸² Information provided by APRODEH.

⁸³ Article 159 (4) of the Constitution.

magistrates, together with elements of proof.⁸⁴ To initiate a prosecution for torture, the prosecutor has to show that (1) the conduct in question corresponds to the crime of torture as defined by law; (2) that the conduct is attributable to the presumed author of the crime and (3) the statute of limitations has not passed.⁸⁵ An investigation may not proceed when there is insufficient evidence, when the prosecution determines that military courts have jurisdiction over the matter, or because they have not located the accused. It is up to the Public Prosecutor to decide whether to formalise the charge or to file it. If the public prosecutor does not proceed with the investigation, the complainant may present a complaint before the *Superior Jerárquico* (Prosecutor's hierarchical superior) to have it resolved.

A prosecutor can conduct a comprehensive investigation, including taking testimony from the victim, his or her family, and other witnesses. He can also order the exhumation of remains, conduct forensic exams and other examinations of the victim. Anyone may request an immediate medical examination of the person claiming to have been tortured. Doctors shall be made immediately available to examine such a person, without prejudicing the right of the complainant to go to any doctor for verification.⁸⁶ Examinations are to be carried out by the Institute for Legal Medicine (Forensic Institute), which is subject to the authority of the Public Prosecutor, following an order by the Public Prosecutor.⁸⁷ A torture survivor may also consult a private doctor for examination.⁸⁸ The doctor will have to provide a written report which can be used as evidence during trial.

In the course of an investigation, the defendant is commonly not detained pending a final outcome, but Article 135 of the Code of Penal Procedures gives the prosecutor the ability to detain an accused if (1) there is sufficient probatory evidence of the crime and it is a serious crime, and (2) there is sufficient evidence that the accused intends to flee or somehow obstruct the investigation.

If the prosecutor submitted his charges to the judiciary and the judges do not initiate formal proceedings, the prosecutor may appeal this decision to a superior judge. If the superior confirms the initial decision, the investigation will end with no further recourse. The superior judge, however, may instruct the original judge to review the decision. At this point, there is generally not an opportunity to produce new evidence (no law expressly permits or prohibits the admission of new evidence but in practice it is usually not allowed). The complainant does not have any recourse because she or he is not yet considered to be a party to the proceeding, which only occurs after the judge has opened instruction, the second stage of the proceedings.

The judge may dictate preventive detention (article 135 of the Penal Code), restricted movement, prohibit the supposed torturer from leaving the country or

⁸⁴ Article 59 Code of Penal Procedure.

⁸⁵ Article 77 of the Criminal Procedure Code.

⁸⁶ Article 4 (1) of Law 26.926.

⁸⁷ Article 40, paragraphs 4.1 and 4.2, of section III of the Penal Code "specify procedures for the forensic examination of the victim, in connection with which the participation of the forensic surgeon in the examination of the victim of torture makes it necessary to establish criteria for such examinations and to include in the Forensic Procedures approved by Administrative Resolution No. 523-97-SE-TP-CEMP of 16 October 1997 the above forensic examination procedures for the detection of injuries or death resulting from torture, which must be complied with by all departments of Peru's Institute of Forensic Medicine." Third periodic reports of States Parties due in 1997: Peru, supra, para. 92.

⁸⁸ Article 4 (2) Law 26.926.

order imprisonment at home. Pre-trial detention is also possible when applying exceptional procedural measures during investigation proceedings under Law No. 27.379 of 21 December 2000.⁸⁹ A public servant may be suspended from his or her job after a disciplinary hearing, pending criminal investigations.

Victims of torture and their families do not have any specific protection during criminal proceedings. However, in the case that the victims, relatives, defence attorneys, witnesses or others are the object of threats, hostilities or other, they may request protection from the local public authorities.⁹⁰ A torture survivor and relatives of a torture victim who intervene in the case must become part of the proceedings in order to invoke the rights which the law recognizes for them within the case; for example, challenging resolutions, presenting objections, witnesses, legal experts, proof and obtaining damages.⁹¹ No right to initiate a private prosecution exists. Torture survivors are also not entitled to any legal aid to pursue their cases.⁹²

2.4. Role of the Ombudsman

The Ombudsman may investigate human rights violations and has the power to file proceedings for failure to implement decisions in defence of fundamental rights. However, the Ombudsman only has powers to transmit the findings of his or her investigation to the authorities concerned, including his/her recommendations.⁹³

2.5. Trials

The Law establishes the jurisdiction of ordinary courts over the offence of torture.⁹⁴ The Military Court should not have jurisdiction to investigate and prosecute accused of torture because it is a common offence and not a service-related offence (*delito de función*).⁹⁵

The nature of proceedings is inquisitorial, and the Public Prosecutor has the burden of proving guilt beyond doubt. The victim of a crime or family may intervene in the trial as co-prosecution. They may also be represented by an NGO who may only provide them legal counsel. Victims of crime may object to resolutions, provide witnesses, evidence, experts, etc, but their direct participation in the trial is limited

⁸⁹ Measures include preliminary detention, confiscation and prohibition to leave the country. See 2000 IACHR Peru Report chapter 2 para 197.

⁹⁰ The public prosecutor and the judge are called upon to rationally weigh the danger for the person, liberty or property of the spouse, parents, descendants or siblings. The public prosecutor, or in cases, the judge, may take the following steps: Police protection, which may include a change of residence or hidden location; Reserving identity and other personal details on paperwork done, or any other detail which may serve for identification, with a number or other code being used instead.; Use of any other procedure which makes normal, visual identification impossible; Using, as domicile, the public prosecutor's office for any citations of notifications. See Article 22 of Law 27.378.

⁹¹ Articles 54, 57 and 58 Code of Penal Procedure.

⁹² See the Gomez Paquiyauri Case, *supra*.

⁹³ See for an overview of the mandate of the Ombudsman, Peru's 1997 CAT Report, *supra*, paras. 49-57.

⁹⁴ Article 5 of Law 26926.

⁹⁵ Article 173 of the Constitution states that members of the Armed Forces and the Police are subject to military and police tribunals and to the Code of Military Justice for service-related offences.

(victims can only cross-examine the accused through the President of the court⁹⁶ and a witness, if permitted by the President of the court.⁹⁷

Judges have broad sentencing powers and the President has the power to grant pardons and commute sentences.⁹⁸

3. The practice: complaints, investigations, prosecutions

COMISEDH, a Peruvian NGO, has documented acts of torture perpetrated all over the country, and particularly in the interior regions.⁹⁹ There have been cases in 15 departments.¹⁰⁰ They have reported a total number of 82 cases heard and in process (between 1999 and 2002). 16 of these victims reportedly died as a result of the torture, one is considered 'disappeared' and 65 have suffered from various injuries. The cases include multiple offences besides torture, such as abuse of authority, causing bodily harm, etc. Allegations of torture were made public but only a few of the cases triggered a significant public reaction, including the cases of torture applied to a journalist and to a former agent of the intelligence services. There appears to be a general apathy due to the belief that violence is integral to law enforcement practices. Since 2001 until the end of 2002, there have been 33 cases in which proceedings were initiated. Only two of these have reached the investigating judge.

Only a relatively small number of torture victims bring complaints against their perpetrators, mainly before human rights organisations, the Ombudsman or the Public Prosecutor.¹⁰¹ According to sources within Peru, the main reasons for the reluctance to bring complaints appear to be fear of or actual threats and reprisals;¹⁰² lack of knowledge of their rights or not knowing that torture is an offence; lack of funds; no confidence in the impartiality of the investigating authorities, due to the tolerance which exists in society vis-à-vis torture where it is considered a normal part of the procedures of the security forces; and the difficulty of securing a conviction in the absence of sufficient evidence. Until recently, a considerable number of perpetrators of torture were also shielded by amnesty laws, so that the bringing of complaints could not be expected to result in a prosecution.

During the years of Fujimori's regime, prosecutors were discouraged from actually investigating cases of serious human rights violations, leading to hundreds of cases

⁹⁶ Article 247 Code of Penal Procedure.

⁹⁷ Article 251 Code of Penal Procedure.

⁹⁸ Article 118 XXI of the Constitution.

⁹⁹ Information provided by COMISEDH.

¹⁰⁰ Abancay, Ancash, Arequipa, Ayacucho, Cajamarca, Huancavelica, Huanuco, Ica, Junin, La Libertad, Lima, La Moquegua, Pasco, Piura and Tacna.

¹⁰¹ See, for complaints and petitions lodged with the Ombudsman's office, the Fifth Ombudsman Report to Congress, April 2001-April 2002, Executive Summary, pp.10 et seq., available at www.ombudsman.gob.pe which does include a general category of complaints relating to human rights and persons with disabilities but no breakdown as to how many of the complaints relate to torture or ill-treatment.

¹⁰² The IACHR found that during the Fujimori regime "human rights defenders are often victims of all types of attacks and harassment, including legal actions brought to intimidate them... [and]...received information that indicates that some of these legal proceedings have not been initiated to determine rights and responsibilities pursuant to the purposes of the law, but as reprisal against defense counsel for persons accused of the crime of terrorism." IACHR 2000 Report on Peru, *supra*, Chapter 2, para.134. Independent judges were also subject to the same type of pressures during this period.

being archived never to reach a judge. Prosecutors who attempted to diligently investigate human rights complaints were often removed from the case, or in some cases threatened. For the most part, this culture of inertia in which prosecutors do not aggressively or diligently investigate human rights cases continues today.¹⁰³

Some victims of torture have not requested an examination or have not been immediately examined, especially when in detention.¹⁰⁴ The passage of time can mean the loss of evidence, i.e. indicia of torture will literally heal before it can be noted by an examiner. Even when there is a State doctor's report, it often misses signs of torture, especially since doctors may not be trained to recognise injuries inflicted by torture.¹⁰⁵ An exam may even turn up no evidence if public officials purposely inflicted wounds in a way that could not be uncovered by a routine physical exam. Given that there are few experts who are able to determine the psychological evidence and judges are generally reluctant to accept such evidence in the absence of any physical evidence, it is often almost impossible to obtain sufficient evidence to secure a conviction. One of the mechanisms of impunity used has been the delay and lack of impartiality in those investigations undertaken. Moreover, even though it is in contravention of the law, cases against perpetrators of torture are still being transferred to military courts.¹⁰⁶ Moreover, as a general practice, officers accused of torture remained in active service until they have been formally sentenced, and this practice appears to continue.¹⁰⁷

Equally, the independence of the judiciary has been seriously eroded by the Fujimori government.¹⁰⁸ As one of the many consequences of this, confessions extracted through torture or ill-treatment, even though in principle inadmissible,¹⁰⁹ have frequently been admitted as evidence in court, even if the accused has later withdrawn the confession and claimed that it was signed under duress.¹¹⁰ If the accused alleges that he/she was tortured during the trial, the Court may order that an investigation be held to verify what is claimed and may stop the trial. "In more

¹⁰³ See AI, Torture and Ill-treatment, supra, p.13.

¹⁰⁴ Ibid., p.16.

¹⁰⁵ Ibid., p.14.

¹⁰⁶ Ibid., p.11.

¹⁰⁷ Ibid., p. 13.

¹⁰⁸ Judges and prosecutors were "harassed, transferred, removed, or even indicted on criminal charges in those cases in which they have made decisions that affect the interests of the political sector in the Government. The lack of guarantees against removal from the job...made the judges vulnerable to manipulation by the Executive..."The judicial reform initiated by the current Government of Peru has gravely eroded judicial independence. Judges and prosecutors have been and continue to be harassed, transferred, removed, or even indicted on criminal charges in those cases in which they have made decisions that affect the interests of the political sector in the Government. The lack of guarantees against removal from the job has made the judges vulnerable to manipulation by the Executive. After eight years of Executive intervention in the Judiciary, more than 80% of Peru's judges and prosecutors hold their positions on a "provisional" basis. In addition, the National Council of the Judiciary, constitutionally entrusted with designating the judicial officers, has been intervened by the Executive Commissions of the Judiciary and of the Public Ministry. This situation tends to run to the grave detriment of the independence and autonomy of the judiciary in the face of the political departments, and has been the subject of several complaints of improper interference." IACHR 2000 Report on Peru, supra, Chapter 2, paras. 236-7.

¹⁰⁹ See Article 2, section 24 (h) of the Constitution and Article 195 of the Code of Criminal Procedure: "Any item of evidence, in order to be valid, must have been obtained by lawful means and included in the case file according to law."

¹¹⁰ See the report of the Coordinadora Nacional de Derechos Humanos, *Análisis de la Problemática de la Tortura en el Perú*, 1999, p. 57 and AI, Peru: Torture and ill-treatment, supra.

than 180 of the 500 cases of people unfairly convicted of “terrorism”-related offences who were pardoned during the 1990s, the defendants had told the trial court that they had been tortured or ill-treated. In none of these cases were judicial investigations opened to investigate their allegations and in each case the disputed evidence was admitted in court.”¹¹¹

The majority of torture cases have not resulted in a conviction. Cases have frequently been drawn out. Military courts often initiate investigations into allegations of common offences including torture when the accused is a member of the police or the armed forces and the case is already before a civilian court. This creates a dispute regarding jurisdiction between civilian and military courts which has to be solved in the Supreme Court and delays the legal process, which is often resolved in favour of the military court. In cases of military conscripts, military courts reject petitions by public prosecutors to pass cases of torture over to the civilian justice system, contradicting Law No. 26.926 of 1998.¹¹²

Where cases have been heard by ordinary courts, they have often failed on the grounds of a lack of evidence. Most common defences are the use of medical exams which do not reflect the real nature of the injuries, or which indicate that injuries are light or that the person injured themselves or committed suicide. Moreover, there are usually no independent witnesses who would be willing to corroborate the account of the torture survivor in the light of numerous interferences, including threats and hostilities on the part of police and armed forces personnel, against witnesses and lawyers.¹¹³

Against this background, there has been almost complete impunity for serious human rights violations, including torture and “disappearances.”¹¹⁴ To date, two cases resulted in sentences being imposed on the perpetrators of torture.

- In the case of the 16 year-old Huber Méndez Barzola, who was tortured by the police in Huamanga, two police officers were sentenced to six years’ imprisonment each for torture in 1999. The sentence was confirmed by the Supreme Court in August 2000.¹¹⁵
- In the case of Pablo Pascual Espinoza Lome, who died in Yanamilla prison as a result of beatings inflicted by two prison officers, the High Court in Ayachuco sentenced one officer to a term of imprisonment of 12 years and acquitted the other. Following an appeal, the Supreme Court increased the sentence to 15 years and ordered a retrial in the case of the other officer. The latter was subsequently sentenced to six years’ imprisonment by the Supreme Court on appeal in 2001, which increased the sentence of four

¹¹¹ See the Peruvian Ombudsman’s Offices’s report, *La labor de la Comisión Ad-hoc a favor de los inocentes en prisión*, 2000, p. 63 cited in AI, Peru: Torture and ill-treatment, supra, p. 7.

¹¹² See on the lack of independence and impartiality of the Military Courts as held by the InterAmerican Commission on Human Rights, IACHR 2000 Report on Peru, supra, Chapter 2, paras. 209-212.

¹¹³ “Reports of police officers threatening detainees to sign statements saying that they were not subjected to any kind of torture and ill-treatment in police custody have persisted. Amnesty International has also received information about cases where police officers have made false statements claiming that the victims’ injuries were the result of an escape attempt or caused by resistance offered during arrest.” AI, Peru: Torture and ill-treatment, supra, p. 16.

¹¹⁴ See on this also IACHR 2000 Report on Peru, supra, Chapter II, paras. 205 et seq.

¹¹⁵ Ibid., p.53.

years' imprisonment that had been imposed by the Court in Ayachucho in August 2000.¹¹⁶

IV. CLAIMING REPARATION FOR TORTURE

1. Available remedies

1.1. Constitutional Law

The Constitution does not provide a right to a remedy and does not stipulate an express right to reparation.¹¹⁷

1.2. Civil Law

Victims of torture may bring a claim for damages under tort law.¹¹⁸ The individual perpetrator, including the person who inflicted the torture and any person who ordered him/her to do so, are jointly liable, liability being based on fault.¹¹⁹ Compensation may be claimed from the offender or the State.¹²⁰ Damages are awarded for pecuniary and non-pecuniary harm. Moral damages are awarded, taking into account its magnitude and the harm done to the victim and the family.¹²¹ Compensation covers the consequences resulting from the action or omission, including loss of income, damage to the person and moral damage.¹²² Civil actions can be launched by the victim or legal representatives before the courts having jurisdiction over civil matters.¹²³ Actions in tort are subject to a statute of limitations of 2 years,¹²⁴ though civil actions, both against the direct perpetrator and the party jointly liable, i.e. the State, are not extinguished until the criminal action is extinguished.¹²⁵ There is no legal aid for victims wishing to initiate a civil action for non-contractual liability or a wrongful act. As a result, challenging a public official requires being able to afford legal representation and the costs of gathering evidence

¹¹⁶ Ibid., pp.44, 45.

¹¹⁷ However, "the 1993 Peruvian Constitution established, at its Article 139(7), the institution of compensation for arbitrary detention and for judicial error in criminal proceedings, which was regulated by Law No. 24,973, promulgated in 1988 and still in force. Nonetheless, the National Compensation Fund, an institution created pursuant to the standards noted, is not operating and does not receive the corresponding budget, thus the persons affected by judicial errors are not compensated, and this failure to compensate constitutes a violation of their human rights" IACHR 2000 Report on Peru, supra, Chapter 2, para. 128. While torture survivors might be among the persons entitled to compensation for judicial error, there is no comparable specific legislation providing reparation for torture.

¹¹⁸ Article 1969 Civil Code.

¹¹⁹ In the event of death, this obligation is transferred to the heirs to the full extent of the deceased's estate; similarly, the right to damages is acquired by the heirs of the victim. Third periodic reports of States Parties due in 1997: Peru, supra, para. 107.

¹²⁰ See Second Periodic Report of State Parties due in 1993: Peru, UN Doc. CAT/C/20/Add.6, 12 August 1998, para.86, referring to Articles 1969 and 1981 of the Civil Code.

¹²¹ See *ibid.*, para.87: "The Civil Code also establishes the existence of non-material damage, specifying that the victim must be compensated proportionately to the degree of damage and to the harm done to the victim or his family. Compensation must take into account the consequences of the action or omission which caused the personal injury or non-material damage, and there must be a causal relationship between the act and the damage." See on the latter Article 1985 Civil Code. San Martín Castro, Cesar, *Derecho Procesal Penal*, Lima, Grijley, 2000, p. 240.

¹²² Articles 1984 and 1985 Civil Code. *Ejecutoria Suprema (Supreme Court) decisión, 14/01/98. Exp. 6109-97.*

¹²³ Art. VI of the Preliminary Title of the Civil Code and Article 58 of the Code of Civil Procedures.

¹²⁴ Article 2001 of the Civil Code.

¹²⁵ Article 100 of the Penal Code.

such as independent medical reports or witness statements.¹²⁶ The plaintiff has to claim and prove the commission of torture, liability of the defendant, causal connection and the amount of damages. The decision on the civil claim is independent of the outcome of any criminal proceedings.¹²⁷ Costs are paid by the losing party and are determined by the judge.¹²⁸

1.3. Criminal Law

A judge may impose as part of the criminal sanctions the payment of reparation to the victim or the family if they become co-prosecutors.¹²⁹ A victim or his/her relatives may claim reparation in the course of criminal proceedings. The victim, family members or legal representatives can join criminal proceedings and procedures are governed by the Code of Criminal Procedures.¹³⁰ Article 92 of the Criminal Code establishes the concurrent jurisdiction of civil and criminal proceedings. It is the judge's responsibility to set both the sentence and the civil reparation.¹³¹ Such reparation includes compensation of damages sustained as a result of the crime. It is to be determined in accordance with the provisions of the Civil Code.¹³²

A judge may, at his own initiative or upon request by the victim or prosecution, impound the accused's assets, sufficient to cover civil reparations. Such an order becomes mandatory if the accused is found guilty. Upon opening the case, the judge requires of the accused that a list of assets which may be impounded be made. Otherwise, those known goods which are his property are attached, taking into account the assets exempted under the Civil Code. If the accused does not have sufficient assets and a third party is jointly liable, his or her assets will also be impounded. However, the assets of the State may not be seized.

2. Practice

There have only been a few cases where torture survivors successfully brought claims for reparation. Many of them appear to refrain from taking legal action in the first place. The main reason for this reluctance has been the almost complete impunity that was until recently enjoyed by perpetrators of serious human rights violations, making any successful claim for reparation, be it in criminal or civil cases, highly unlikely. Moreover, inadequate legislation providing for legal avenues to claim reparation means that torture survivors do not have an effective remedy. The

¹²⁶ See REDRESS, Effective Remedies for Torture in Peru, Brief Commentary on Second Periodic Report of Peru under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 1998 (on file with REDRESS).

¹²⁷ See Article 99 of the Penal Code.

¹²⁸ Article 412 Code of Civil Procedure.

¹²⁹ Articles 92 et seq. of the Penal Code.

¹³⁰ Articles 55 and 56 of the Code of Criminal Procedure.

¹³¹ See Articles 225, 227 and 285 of the Code of Criminal Procedure.

¹³² "The Penal Code states that responsibility is to be determined in accordance with the provisions of the Civil Code, in accordance with articles 1969 et seq. of which it is applied subjectively, although it is on the basis of those provisions that the objective determination of guilt is established as a criterion and the burden of proof inverted. In other words, the person accused of torture must prove that his act is not connected in any way with the injuries sustained by the victim" See Third periodic reports of States Parties due in 1997: Peru, *supra*, pars. 103. The person suspected of committing torture may be found not guilty of the crime and still be obliged to pay both financial as well as moral compensation.

judiciary has also not been forthcoming in strengthening the rights of torture survivors in its jurisprudence. Finally, most domestic NGOs have refrained from bringing claims for reparation for torture against the State on behalf of torture survivors.

There have been two cases in which perpetrator of torture have been convicted and obliged to pay damages but the money has not been paid yet.¹³³ Reparations for other crimes have been generally low.¹³⁴

APRODEH, a Peruvian NGO, also reports the case of Osorio Anaya, who was subjected to torture while in detention in 1993. In 1998 the Constitutional Tribunal heard a habeas corpus petition presented by Anaya and acknowledged he was tortured and freed him. In 1999 he initiated a tort action for compensation in the Lima civil court. The lawsuit was only admitted in 2001 (after it was originally rejected) and court notice was issued to the policemen who tortured him and the National Police as a third party. No significant developments have occurred since then.¹³⁵ A court notice was used because it was not known where the policemen were and because the police rejected the ordinary notice that had been issued beforehand.

Another case relates to those torture survivors related to the ANIL group that claimed reparation for torture through civil courts.¹³⁶ The judgment obtained by this group was only a declaration that "people liberated as a result of Law 26.555...[see below]...enjoy a right to reparation for judicial errors but [the Law] does not grant actual reparation. Instead, those individuals that fall within this class of people must file separate claims. The barriers to litigation that generally exist for most Peruvians — time, money, knowledge — will probably keep many eligible victims from pursuing this option. ANIL, with the help of lawyers from the National Institute of Society and Human Rights, is trying to organize its constituents to exercise this right.

Although this judgment does not directly refer to compensation for torture, torture might naturally be included in the calculation of damages/injuries, since this suffering would not have occurred "but for" the judicial error.¹³⁷

Other groups of *indultados*, such as the *Grupo de Reflexion* which meets under the auspices of the *Centro de Atencion Psicococial* have begun to file individual

¹³³ See AI, Peru: Torture and ill-treatment, supra, p.11. In the case of Pablo Pascual Espinoza Lome referred to above, III, 3, the Supreme Court awarded 20,000 new soles (\$ 5,807) to be paid as civil compensation. See also IACHR 2000 Report on Peru, supra, Chapter 2, paras 231-4: "One problem that directly concerns the rule of law in Peru is the failure to enforce judgments handed down by the country's courts against several centralized and decentralized State entities. The magnitude and relevance of this problem has been treated in detail by the Office of the Human Rights Ombudsman in a report entitled *Incumplimiento de Sentencias por parte de la Administración Estatal* ["Failure by the State Administration to Enforce Judgments"]. This section is largely based on the considerations set forth in that report. The failure to enforce judgments occurs mainly when an effort is made to enforce a final judgment in which a state organ is ordered to pay a sum of money to the plaintiffs, or to comply with a given obligation, such as, for example, reinstating plaintiffs to their jobs. In these cases, the State organ in question repeatedly ignores the order to enforce the unfavourable judgment, without any determination of criminal liability for the failure to enforce the judicial judgment.

¹³⁴ See e.g. *Corte Suprema de Justicia de la República, Primera Sala Penal Transitoria, Exp. 809-99.*

¹³⁵ Case No. 1982/Year 1999.

¹³⁶ See supra, I, 1.2.

¹³⁷ It is unclear whether torture occurring in the arrest and interrogation stage would be considered as part of a judicial error.

complaints using moral damages and *lucro cesante* standards.¹³⁸ However, the lack of legal assistance, also from lawyers among various NGOs, has presented many challenges to the group.¹³⁹

Even if a case were to result in a judgment in favour of the plaintiff, there are no guidelines on awarding monetary compensation and the measurement for reparations is not well defined. While the law refers to moral damage, such as damage to the person and loss of "*proyecto de vida*" ("project of life", such as loss of ability to work), it does not provide guidance on how to calculate the value of these damages. Thus judges use their own discretion to decide how much to award a plaintiff. Often they end up giving a token amount. The judges could refer to past judicial decisions to guide how much money to award, but not working in a common law system it is not their standard approach. Moreover, where reparation is ordered in a criminal case, the system only assures compliance with the imprisonment ordered, but not the payment of civil reparations. Although payment may be set at the end of a trial, this is often not proportional to the damage done. There are difficulties in putting the payments into effect, for example the refusal of those sentenced to comply with the judge's ruling, lack of assets to effect the payment and lack of funds of the injured party to continue with the trial.

Peru has only paid monetary compensation for torture to victims who brought their cases to the Inter-American Commission and Court on Human Rights. Most cases brought to the Inter-American System refer to issues of torture even if the primary basis for the claim was a disappearance or judicial error, and thus damage calculations included injuries caused by torture. The case of Maria Elena Loayza Tamayo is one of the most well known cases in the Inter-American system where damages for torture were awarded, and is even cited in the Peruvian Criminal Code under the law codifying torture.¹⁴⁰ The government has only taken concrete steps to satisfy survivors of torture in some paradigmatic cases through friendly settlements before the Inter-American Commission. The first two were cases concerned two members of Peru's Intelligence Services, Mariela Barreto and Leonor La Rosa. Peru agreed to a settlement of US\$152,573 to the victim's daughters and her parents.¹⁴¹ In the second case, the victim was awarded US\$120,000.¹⁴² In a third case, the

¹³⁸ Relying on the Loayza Case in the Inter-American System, see *infra*.

¹³⁹ Information provided by contacts in Peru.

¹⁴⁰ See Series C: Decisions and Judgments No. 33, Loayza Tamayo Case (Judgment of 17 September 1997) at http://www.corteidh.or.cr/seriecing/C_33_ENG.html and No. 42 – Loayza Tamayo Case, *Reparations* (Art.63(1) American Convention on Human Rights). *Reparations* at http://www.corteidh.or.cr/seriecing/C_42_ENG.html, also No. 53 and 60 at same site for follow up on reparations; Series C: Decisions and Judgments, No. 34 Castillo Páez Case (Judgment of 3 November 1997) at http://www.corteidh.or.cr/seriecing/C_34_ENG.html and No. 43 – Castillo Páez Case *Reparations* (Art.63(1) American Convention on Human Rights) at http://www.corteidh.or.cr/seriecing/C_43_ENG.html; No. 69 - Cantoral Benavides Case (Judgment of 18 August 2000) at http://www.corteidh.or.cr/seriecing/C_69_ENG.html.

¹⁴¹ The sum was divided equally between the four of them.

¹⁴² The "friendly settlement" between the State and Ms. La Rosa, a former member of the State's secret service who was tortured while an agent of the state was one of the most highly publicized cases. In January 1997, La Rosa was arrested for supposedly leaking confidential state information to the state newspaper "The Republic". For eight days she was held by the SIE ("*Servicio de Inteligencia del Ejército*", Peru's secret service), during which time she was allegedly tortured. She experienced vaginal haemorrhaging that required an operation to the uterus, which in turn caused cardiac arrest. In February, 2002, President Toledo delivered \$ 120,000 from the State to La Rosa for the torture she suffered.

*Barrios Altos*¹⁴³ case, a Peruvian death-squad belonging to the army killed and injured a total of 20 people. The state agreed to pay US \$250,000 to one of the victims and US \$175,000 to each of the other 19 victims. The Congress held an act of recognition for the victims of *Barrios Altos* as well. In the last case, *Durand y Ugarte*,¹⁴⁴ family members of the victims who had died in prison, received a total of US\$125,000. In all these cases, the government of Peru awarded the victims symbolic remedies (i.e. public acknowledgements, monuments) and additional benefits including health, education and life pensions.

V. GOVERNMENT REPARATION MEASURES

The Fujimori government and its predecessors enacted a number of laws which addressed mainly "victims of terrorism", including as beneficiaries local authorities and public officials, and members of the Army Forces and National Police, but no similar legislation was passed for the benefit of victims of torture.

After the change in Government, a Truth and Reconciliation Commission was set up which has jurisdiction to investigate murders and kidnappings, forced disappearances, torture and other gross lesions, violations of the collective rights of the native and Andean communities of Peru and other crimes and graves violations against human rights.¹⁴⁵ While not an organ through which individual claims for reparations may be sought, the Commission has within its scope of work the creation of a National Reparations Program for victims of human rights violations for the victims or relatives of acts that occurred in the designated period between 1980 and 2000. The Commission may recommend reparation for the victims of political violence, including torture at the hands of state organs. Victims or relatives have the right to appear before the Commission and complain about the treatment suffered. The case may then be publicised and investigated by the Truth and Reconciliation Commission.¹⁴⁶

As a result of pressure from ANIL and Congresswoman Townsend,¹⁴⁷ the government created the "*Comisión Especial de Asistencia a los Indultados Inocentes-CEAI*" (Special Commission of Assistance for the Innocent Pardoned¹⁴⁸) by way of a Supreme Decree of the Executive Branch.¹⁴⁹ Established in January 2002, the Special Commission was charged with designing and putting into practice a program of reparations for *Indultados*. The Decree clarifies that reparation will not be monetary but rather, amplified services through the government, such as health, employment, and matriculation in public universities. The Commission was given 180 days to study the situation of the *Indultados* in order to issue a report to the

¹⁴³ Int. Am. Court H.R., *Barrios Altos Case*, Reparations (Art. 63(1) American Convention on Human Rights), Series C/No.87/2001. The Inter-American Court found and Peru accepted, a violation, amongst other rights, of the right to humane treatment (Art. 5 of the American Convention) of the survivors of the massacre.

¹⁴⁴ Int. Am. Court H.R., *Durand y Ugarte Case* (Reparations), Series C/No.88/2001.

¹⁴⁵ See supra, I, 2.2.

¹⁴⁶ <http://www.cverdad.org.pe>.

¹⁴⁷ See supra I, 1.2.

¹⁴⁸ A Presidential Pardon was granted through Laws No 26.655 and 27.234.

¹⁴⁹ Supreme Decree 002-2002-JUS, 15 January 2002. Victims groups were pressuring to change this to include all innocent people subjected to detention pursuant to the anti-terrorism laws.

various Ministers who would be in charge of translating into practice the Special Commissions recommendations. It took approximately two months before the Commission actually met, and it finally concluded its work in September 2002. As a first result, all *Indultados* obtained access to health care. However, by the date of writing, the other recommendations have not yet been approved, either through executive decree or legislation. Although victim groups prepared proposals for the Special Commission and met with its representatives, there was concern that the language of the Decree did not include studying the situation of *Absueltos* (persons who have been pardoned), although this group suffered equally under the anti-terrorism laws.¹⁵⁰

As a result of the sudden change in government and a new openness about human rights violations, victims are starting to come forward to make their complaints and to claim compensation. This campaign to seek reparation has been fuelled primarily by the human rights community (organized primarily by the National Coordinator for Human Rights and an umbrella group of 61 human right groups). For example, FRENTE formed with the help of the NGO APRODEH includes a wide spectrum of people who suffered during the past 20 years of political violence. The membership of FRENTE includes not only *Indultados* and *Absueltos*, but also family of individuals who were disappeared or extra-judicially killed. While innocent persons who were convicted of terrorism received some benefits, they have not received any compensation for the material damages or pain and suffering inflicted on them and their families by the State.

In response to their specific experience, groups of *Indultados* and *Absueltos* (mostly those located in Lima) have also begun to organize themselves to put pressure on the government to address the damages they suffered as a part of their unjust imprisonment. In fact, many members of FRENTE, namely “the innocents” and their families, belong to these smaller lobby groups. In 2002, there were at least four such groups, each with its own proposals of how it believed the government should respond to the current crisis faced by innocent people who were imprisoned under the emergency anti-terrorism laws.¹⁵¹

Comparing two sample proposals, the authors list, among other complaints, torture as part of their suffering.¹⁵² Both seek moral and economic reparation. The language of proposals for moral reparations is designed to ensure that victims are able to regain their dignity,¹⁵³ and monetary compensation include costs for rehabilitation.¹⁵⁴

¹⁵⁰ Information provided by contacts within Peru.

¹⁵¹ *Grupo de Reflexion* (Reflection Group), patients of the *Centro de Atencion Psicosocial*, *Grupo de Liberados* (Group of the Liberated) with CEAS; ANIL as mentioned in text of this report; and *Grupo de Encarceladas y Luchadores* (Group of Imprisoned and Strugglers).

¹⁵² Proposals from the *Grupo de Liberados* and the *Grupo de Reflexion*.

¹⁵³ For instance, the *Grupo de Reflexion* seeks by way of moral reparation: a public apology from the government in a very public forum that will be sufficient for the nation to be fully informed of the State’s “mistake,” Since all people suspected of terrorism were photographed in striped prison uniforms that were published in major newspapers in Peru. Thus many *indultados* and *absueltos* return to their communities and continue to suffer a severe stigma because the public does not necessarily know they were pardoned or may even believe they are guilty although free. They seek an educational campaign to inform the public so that the abuses of the past are never repeated in the future, and annulling of the criminal records that follow the *indultados*. Similarly, the *Grupo de Liberados* requests: a public acknowledgment of violations and the State’s acceptance of responsibility for these acts; a widely publicized awareness campaign on the situation of “the innocents”; a commitment to investigate and sanction—either through judicial or administrative means—those persons responsible for violations of human rights committed during the deprivation of liberty; the formation of a multi-sectoral commission that includes civil society, to revise the anti-terrorism laws in accordance with international treaties and to address the continued presence of innocent people in

In April 2002, the National Coordinator had undertaken the effort to coordinate the various groups of victims so as to consolidate their proposals for reparation and strengthen their power to first, inform the Special Commission studying their situation and then later, to continue to pressure the government for reparations.

There are no rehabilitation programs for victims of torture. The State does not provide any financial or other assistance to this type of program, and the health needs of the victims and their relatives are not taken into account. There are very limited therapeutic options available to torture survivors even in the private sector. The Center for Psychosocial Attention (*Centro de Atención Psicosocial* (CAPS)) is one of the only (perhaps the only) program in Peru that is prepared to offer therapy for torture victims.¹⁵⁵ Although they categorize their clients as those who have suffered from having been unjustly imprisoned, they acknowledge that most of these people suffered some form of torture or cruel, inhumane, degrading treatment or punishment.

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution of acts of torture committed in third countries

1.1. The Law

1.1.1. Criminal Law

Article 2 (5) of the Peruvian Penal Code provides that courts may exercise universal jurisdiction over crimes committed abroad, which Peru is required to punish pursuant to a treaty. The legal basis for the prosecution of torturers concerning torture committed abroad would be found in the Convention against Torture and the Inter-American Convention to Prevent and Punish Torture. Peruvian criminal law also recognises the protective and passive personality principle as well as a limited active personality principle. Consequently, Peruvian law applies for offences which take

prison as a result of this legislation; that the *Defensoría* publish a report regarding the annulling of criminal records still carried by *indultados*; the inclusion in public schools, history on the violation of human rights during this time.

¹⁵⁴ Suggestions for monetary compensation made by the *Grupo de Reflexion* include: a permanent pension and access to employment including continuation of jobs lost due to incarceration; free access to transportation; medical attention; free access to universities (including for children of victims) as well as immediate integration into discontinued studies. Similarly, the *Grupo de Liberados* requests that the State create a system through the Minister of Health that will provide integrated and permanent treatment for victims and their families; that the state create a fund to compensate victims (they suggest it come from taxes, money recovered from corruption investigations, and exchange projects of external debt for social investment and human rights); a life pension; pecuniary compensation for court costs; return of any money or personal goods that was lost or taken at the time of detention or compensation thereof; lost wages; coverage of any costs of medicines, medical services, psychological and social services for mental and physical damage that were produced by the unjust detention; assistance with educational tuition for victims and their families (in total there are 3 suggestions that go towards requesting access to education); Assistance with professional development.

¹⁵⁵ In fact, Doctor Oscar Trelles Monte, one of the psychologists at CAPS conducted this type of psychological examination for the case of Cantorel Benavides, one of the cases brought to the Inter-American Court for Human Rights that resulted in reparation for torture, among other claims.

place within Peruvian territory¹⁵⁶ and outside the territory if the perpetrator is a public official in the course of employment; in case of an attempt against the public security or order, as long as the effects take place in Peruvian territory; if the act harms the State and national defence, state authorities and constitutional or monetary order; if the victim is a Peruvian and it relates to an offence for which the Peruvian State can issue an extradition request, so long as the offence is punishable in the place where it was committed; and if Peru is under a duty to punish under international treaties.¹⁵⁷ There is no express requirement that the suspect be in the territory in order to open an investigation.¹⁵⁸

Diplomatic immunity is granted according to international law. The Penal Code does not apply according to the "exceptions provided by International Law."¹⁵⁹

1.1.2. Extradition Law

Extradition is governed by International Treaties and Law 24.710. Article 1 of Law No. 24.710 formulates as a basic principle that: "...a person prosecuted, accused or sentenced as the perpetrator of, or accessory before or after the fact to, an offence who is in another State may be extradited to stand trial or serve such sentence as was passed on him in his presence."

Extradition is carried out on a reciprocal basis.¹⁶⁰ Torture is recognised as an extraditable crime. A person on trial, accused or condemned as the author, accomplice or having covered-up a crime committed in a third country, or who may be in national territory as a resident, tourist or passing through, may be extradited in order to stand trial or complete his sentence.¹⁶¹

According to Art. 6 of Law 24.710, a request for extradition may be rejected:

1. If the requesting State has no jurisdiction or competence to try the offence;
2. If the person whose extradition is requested has already been acquitted, sentenced, reprieved or amnestied;
3. If the prescription time for the offence or the penalty has elapsed, according to Peruvian law or that of the requesting State, provided that the time limit established in Peruvian legislation must not be exceeded;
4. If the person extradited would have to face a court of special jurisdiction in the requesting State;
5. If the penalty prescribed for the offence is less than one year's imprisonment;
6. If the offence is purely one of anti-religious militancy, politics, press or opinion. If the victim of the punishable act exercises political functions, that fact on its own does not constitute sufficient grounds for designating the

¹⁵⁶ Article 1 Penal Code.

¹⁵⁷ Article 2 Penal Code.

¹⁵⁸ Article 2 (5) Penal Code states: "Peruvian law shall be applicable to any offence committed abroad when: . . . (5) it is an offence which Peru is obliged to punish under the terms of international treaties.". All translations are taken from AI, Universal Jurisdiction: The duty of states to enact and implement legislation, September 2001, AI INDEX: IOR 53/007/2001 , Chapter IV, Part B.

¹⁵⁹ Articles 1 and 10 Penal Code.

¹⁶⁰ Article 3 of Law 24.710.

¹⁶¹ Article 5 of Law 24.710.

- offence as political, and the same applies if the person exercises political functions;
7. For an offence indictable only at the demand of a party, except in cases of rape;
 8. For infringements of monetary and fiscal legislation which do not constitute ordinary crimes;
 9. For petty misdemeanours.

Article 7 of the Act provides that extradition shall not be granted if the offence for which it is requested is considered as a political or related one.¹⁶² Peruvian nationals may be extradited. If Peru rejects the requested extradition, the accused may be brought to trial and Peru shall request the requesting state to furnish the relevant evidence.¹⁶³

1.2. The practice

There have been no cases in which Peru has either exercised universal jurisdiction over perpetrators of torture or extradited or rejected an extradition request from another State or International Tribunal.¹⁶⁴

2. Claiming reparation for acts of torture committed in third countries

Private international law is governed by Book X of the 1984 Civil Code. This provides that the sources of private international law are, in this order, prevailing international treaties, the provisions of Book X of the Civil Code, and the recognised doctrine of private international law.¹⁶⁵ Peruvian courts have jurisdiction over lawsuits initiated against persons whose domicile is in Peru,¹⁶⁶ or when the claim arises from a criminal offences committed, or which consequences occurred in national territory.¹⁶⁷ In both cases Peruvian courts have exclusive jurisdiction. Peruvian courts have also jurisdiction over cases according to the norms of private international law.¹⁶⁸ Where the courts exercise jurisdiction, the law of the place where the tort occurred will be applied.¹⁶⁹

Diplomatic and State immunity is governed by international treaties ratified by Peru, such as the Vienna Convention on Diplomatic Immunity, 1961, and customary international law.

¹⁶² Article 7 of Law 24.710. The same rule applies if there is good reason for supposing that the request for extradition on grounds of an infringement of ordinary law was submitted with the intention of prosecuting or punishing an individual for reasons of race, religion, nationality or political opinion and that that individual's situation is liable to become more difficult for one or another of those reasons. Political crimes are not deemed to include genocide, assassination of prominent persons or terrorism. Third periodic reports of States Parties due in 1997: Peru, *supra*, para. 25.

¹⁶³ Act No. 14.710, article 8.

¹⁶⁴ Peru itself is at the time of writing requesting the extradition of Fujimori, see *supra* I, 2.2. and the country Report on Japan, VI, 1.2.

¹⁶⁵ Article 2047 Civil Code.

¹⁶⁶ Article 2057 Civil Code.

¹⁶⁷ Article 2058 (2) Civil Code.

¹⁶⁸ Articles 2061 and 2062 Civil Code.

¹⁶⁹ Article 2097 Civil Code.

There are no known cases in which victims of torture have claimed reparation against individuals or foreign states for torture suffered abroad.¹⁷⁰

¹⁷⁰ A Peruvian national received compensation from Bolivia in a case of alleged human rights violation. The Bolivian Government paid US\$10,000 to Thalía Chuquillanqui, widow of Peruvian national Carlos Freddy Cano Lopez. Cano suffered third degree burns over 50 % of his body when his Interpol cell in La Paz caught fire under suspicious circumstances in June 1999. Cano was arrested after he refused to pay a disputed taxi fare. The Bolivian authorities "suspended the two policemen involved; one of the policemen was released on 1 March 2001 and the other remained in jail by the end of 2001. Cases against both individuals remained pending at year's end." *La Prensa*, "Viuda de Cano recibió una indemnización de \$US10 mil", <http://www.laprensa-bolivia.com/20010526/politica/politica03.htm> and Country Reports on Human Rights Practices - 2001, Released by the Bureau of Democracy, Human Rights, and Labor March 4, 2002, <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8299.htm>.