

**The Legacy of Truth  
Criminal Justice in the Peruvian Transition**

Lisa Magarrell and Leonardo Filippini / Editors

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*In memory of Father Hubert Lanssiers and of all the victims to whom he  
dedicated his life and work*

*Translated from Spanish by Catherine Jagoe*

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The publication of these essays on truth and criminal justice in Peru is a significant contribution to the much-needed analysis of how to strengthen democracy in our country. The goal of a strong democracy is worthy and feasible but it is not altogether certain at this point, due to the negligence and hostility that still confront the rigorous enforcement of the law that is essential to the democratic life we desire. There is a tendency to fall back on a simplification that has yielded very bad results for us in the past: the belief that to have a democracy, all one need do is hold elections periodically, which neglects the fact that democracy exists only to the extent that the citizens of a country experience it on a daily basis as something meaningful in their lives.

Access to justice remains, for the majority of the population, an unpaid debt of Peru's institutional history. A glaring part of that debt is what remains to be done legally about the massive and atrocious crimes committed during the decades of violence. Extrajudicial executions, massacres, forced disappearance, sexual violence and many other acts prohibited by various international law treaties have gone unpunished or insufficiently investigated, and thus continue to pose one of the most serious obstacles to the advancement of democracy.

There has, however, been some progress in terms of these events and acts. Although justice may not yet have been done, there has been some movement towards finding out what actually happened. The work of the Truth and Reconciliation Commission between 2001 and 2003 —assisted by the International Center for Transitional Justice, among other organizations— brought us one step closer to the truth. I use the phrase “one step closer” instead of the whole way, because the factual truth discovered by the Commission is still in the process of becoming a truth shared by society with practical impact on the actions of the State.

Nevertheless, Peruvian society now knows a lot more about evils caused by the inhumane campaign of the *PCP-Sendero Luminoso*, Communist Party of Peru-Shining Path, and the often-brutal response of the State to that organization. The statistics on the violence are part of the truth that is now accessible. Although numbers and statistics can never accurately convey human suffering, they are relevant nonetheless, because they reveal the magnitude of the collective tragedy and provide useful information for the justice system.

Indeed, one of the Commission's most pertinent contributions to the cause of justice is its conclusion that the abuses committed by both State and non-State combatants constituted patterns of crimes and human rights violations. This disproves the familiar partisan argument that denies the gravity of the crimes by referring to them as excesses or isolated acts. On the contrary, the credible demonstration of the widespread or systematic nature of the crimes committed by various agents, at different locales and times, means that the Peruvian State has a set of very precise obligations. For the legal system, there is the still-unfulfilled task of trying these serious crimes with the rigor they demand, and which is demanded of Peru by virtue of being a sovereign signatory to international human rights conventions. For the executive and legislative branches, acknowledging the gravity of the criminal conduct implies a responsibility to actively prevent its recurrence. This includes carrying out indispensable institutional reforms and making the historical record public, so as to immunize the country against falling once again into violence and to rid society of the habits of discrimination that paved the way for large-scale violence.

Needless to say, accomplishing these tasks, particularly in regard to criminal justice, requires many essential elements besides acknowledging the truth. It requires institutional will, a legal system designed to prosecute human rights cases, changes in legal culture to facilitate that mission, a thorough understanding of international human rights norms, and a willingness to use them. Naturally, it also requires constant research on the limitations, possibilities and needs of our justice system in order to deal with the complicated legacy of the violence. Only through vigilance, analysis and committed but objective debate on these topics will we come up with the necessary strategies for advancing justice in Peru.

This publication is an excellent contribution to that task, thanks to the initiative of the International Center for Transitional Justice and in particular its editors, Lisa Magarrell and Leonardo Filippini. It is due to their interest in and commitment to the process of transition in Peru that we now have this enlightening contribution to a debate that must be continued and expanded.

Salomón Lerner Febres  
President of IDEHPCUP  
Lima, February 2006

## Introduction\*

### 1. Introduction

This book is intended as the latest in a series of contributions by the International Center for Transitional Justice to Peru's struggle to consolidate democracy. For some years, our Center has actively collaborated in promoting different tools for transitional justice in Peru. In particular, we have helped support the work of the *Comisión de la Verdad y Reconciliación*, Truth and Reconciliation Commission (CVR), and we have contributed in various ways to promoting policies aimed at truth, reparations for the victims and trials for those responsible for human rights violations. This anthology is a continuation of those efforts and is inspired by the same goals as our previous work.

The work of the CVR represented a crucial moment in Peru's institutional development and this anthology stems, in both form and substance, from the same principles that engendered the Commission's creation. Truth and justice are two key elements in a robust transition to democracy and this conviction underlies all the essays in this volume, which analyzes the CVR's contributions to criminal justice. The result is a detailed examination of the role that transitional institutions can play in ensuring truth and justice.

Our interest in the CVR's work reaffirms our confidence in the value of democratic dialogue and institutions as a way forward. It also reflects our conviction that truth is indispensable to the foundation of a democratic state and the rule of law. Truth-telling about the violent past must, moreover, be combined with a search for justice, and therefore our Center supports prosecuting perpetrators of violations of human rights and international humanitarian law as an essential task in the transition to democracy.

This book's conception and format also represent the values of the Center. The victims of the abuses feature prominently in all the analyses and we have included a chapter specifically about the criminal prosecution of gender violence in Peru. This focus is not a methodological accident, but rather the consequence of our—and the authors'—conviction that it is necessary to deepen understanding of individual situations using sophisticated conceptual tools. When analyzing large-scale, complex situations, there is a risk of focusing attention on State institutions at the cost of sidelining the effect of the problem on individuals. The authors of the essays in this volume avoid that trap and pay special attention to the interests of the victims.

Thus, the essays devote a fair amount of attention to victims' organizations. They highlight the admirable work of many human rights organizations in Peru, not just in terms of their activism, but also in terms of their ability to analyze their own role. Civil society as a vehicle for individual interests is essential to democracy and the strength of these organizations in Peru augurs well for the future of democracy there. At the same time, we should also pay tribute to the interest and professionalism of State agencies such as

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\* With the collaboration of Lisa Magarrell and Leonardo Filippini.

the *Defensoría del Pueblo*, Ombudsman's Office, which has carried out vital work of monitoring, advocacy and analysis on legal issues in the wake of the CVR. This is not a complete list of acknowledgments. Many other parties have and still do contribute actively to protecting the rights of victims of the conflict in Peru.

International law also plays a central role in this collection. We at the Center believe that the international community can make valuable contributions to the processes of transition and that universally recognized values require universal support. The first essay, therefore, contextualizes Peru's experience by describing the current debate about transitional institutions in other countries. Several subsequent essays analyze the role of international law and particularly the roles of the Inter-American Commission on Human Rights and the regional human rights Court and their impact on various important questions in Peru. We believe in the value of comparing experiences and in standards of international law as opportunities for horizontal collaboration and local reflection on internal conflict, rather than as uniform models to be imposed without examination. Those beliefs are reflected in this work.

Finally, we are proud of the range of authors who agreed to participate in this endeavor. We are happy that the Center can act as a forum for discussions that might contribute to the development of debate on a national level and we are delighted by the variety of points of view we have brought together in this volume. Besides the authors from the Center, we have managed to include various Peruvian authors who have had direct contact with the CVR and the operation of the criminal justice system in Peru. Likewise, even though our interest in criminal justice has tended to privilege the legal aspect of the discussions, we have succeeded in bringing together a group of people of various backgrounds and experience who have presented the different topics in a broad enough manner to be fully comprehensible. Our Center is particularly interested in encouraging diversity of perspectives and informed debate; this work belongs in that framework.

## **2. Transitional Justice**

Transitional justice analyzes ways of addressing the grim legacy of human rights violations while working towards a future of truth, justice and true reconciliation. It's an issue with which we Latin Americans are very familiar.. In fact, this specialist discipline within the international human rights movement grew out of the on-going social and political experiments that Latin American society began over twenty years ago, experiments that must continue until their goals are fully achieved: namely, truth, justice, reparation and institutional reform to guarantee that there will "never again" be a return to the tragedy of illegal repression.

Transitional justice has, however, evolved since it was first attempted. The way it was handled by societies in the Southern Cone, imitated later in Central America and most lately in post-Fujimori Peru, has been echoed in interesting ways in many parts of the world, the most dramatic and well-studied — although often poorly understood— being the extraordinary lesson of South Africa on how to overcome the infamous apartheid regime without resorting to revenge or racial hatred. There are currently many nations that are transitioning to democracy or recovering from armed conflicts, or about to do so in the near future.

The first thing to point out about transitional justice is that the precise mechanisms for its implementation

draw on the wealth of experience of the actual societies in transition. In no way are they a universalist imposition that ignores cultural differences. To the contrary, the international community learns from, publicizes and draws on these experiences when it is called on to help solve political or human rights conflicts.

Thus there has been a rapid evolution in the principles of international law governing States' human rights obligations. There have also been dramatic modifications in the methodology of the organizations that make up the human rights movement, both those that function exclusively within their home countries and the best-known international non-governmental organizations. Twenty years ago, the consensus was that nothing could be done about recent human rights tragedies, and that trying to do so meant risking more coups, or discouraging neighboring countries from transitioning to democracy. In the best-case scenario, demands for justice were seen as ethically admirable, but it was felt that only the democratically elected leaders of each country knew what could be done in their particular case, and the international community had no role to play. The situation is very different now: there is a clear consensus that human rights violations in the recent past require a firm response from the State and, failing that, from the international community. Not only are States expected to comply with these obligations; in cases where the State is unable or unwilling to do so, the international community has established institutions to provide victims the effective recourse that international law demands.

### **3. Emerging Principles of International Law**

International Human Rights Law recognizes the existence of obligations on the part of the State to respond to massive or systematic violations of people's fundamental rights. At least in relation to abuses that constitute what are called "international crimes", there is no doubt that human rights conventions and international humanitarian laws lay out a series of positive obligations for the State involved, which amount to the duty to refuse to let such acts go unpunished. Numerous court decisions, treaty bodies and independent experts have fleshed out this obligation in the context of legacies of gross or systematic violations in the recent past. The prohibition against torture, forced disappearances, extrajudicial executions and attacks on the civilian population would be meaningless if such acts could be validated *ex post facto* by amnesties or go unpunished for lack of investigation or sanctions or because the structures that made such abuses possible are left in place.

The jurisprudence of the Inter-American system has unanimously interpreted human rights treaties as establishing obligations on the part of the State to respond to massive or systematic violations. From *Velásquez Rodríguez* in 1988 to *Barrios Altos* in 2001, the Inter-American Court of Human Rights has been unequivocal. The same is true of the Inter-American Commission on Human Rights, beginning with its declarations opposing Pinochet-style "amnesty" in its country reports at the end of the 70s, culminating with Reports 28 and 29 of 1992 on Uruguay and Argentina, and more recently in cases against El Salvador and Peru. It should be stressed that these decisions were supported in recent years by rulings of the European Court of Human Rights, the oldest and most prestigious court of its kind.<sup>1</sup>

Meanwhile, various treaty bodies, special rapporteurs and other United Nations bodies have contributed to this emergent principle of international law. The report of Theo Van Boven, Special Rapporteur on the

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<sup>1</sup> Kurt v. Turkey, 1998.



Right to Compensation and Reparation, was important in terms of the struggle against impunity, since it laid down the principle that the victims of serious violations have a right not only to monetary reparation but also to truth and justice.<sup>2</sup> Later, the Special Rapporteur on Impunity, Louis Joinet, ratified those concepts and drew up a “Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity”.<sup>3</sup> M. Cherif Bassiouni, the most recent Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation of Victims, has insisted on these positive obligations.<sup>4</sup> At this point, it is important to emphasize that these obligations are not imposed on States from outside but rather that bodies authorized by the international community derive them from the social struggles and experiences of the nations that face these grim legacies in the context of transition to democracy and peace. This is so clear that the most recent United Nations report by an independent expert declares that states around the world with the “best practices” are ratifying the presence of these emergent principles in international law and incorporating them into their own legislation.<sup>5</sup>

The United Nations Committee on Human Rights, the oldest and most prestigious treaty body in the world-wide system, has made similar declarations, on decisions and judgments under its Optional Protocol, in observations in its periodical country reports and in general comments in which it offers authorized interpretations of the content of norms in the International Covenant on Civil and Political Rights.<sup>6</sup> This United Nations “doctrine” is reflected on a practical level in the various decisions by political bodies in the system regarding peace-keeping and law and order maintenance operations on the ground, all of which consistently direct United Nations representatives to insist that agreements reached may not confer impunity for international crimes.<sup>7</sup>

According to all these sources, the State has at least four central obligations to carry out. These apply not only to acts committed by agents of the State but also, in the case of armed conflict, to acts attributable to rebel groups, militias or paramilitary forces acting in support of one side or the other. We will refer to these obligations one by one; the order of presentation does not imply any particular preference.

In the first place, the State must conduct an exhaustive search for the Truth, by investigating and divulging what was hidden by the illegal repression. The truth alluded to in this first component of the State’s international obligations includes not only the truth about the repressive structure but also the individual truth for each of the victims; above all, what can be established about the circumstances in which their rights were violated and the fate and whereabouts of their loved ones.

The second obligation is Justice. It is not permissible for States to allow international crimes to go unpunished. International law, therefore, establishes that sweeping, unrestricted amnesty laws are

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<sup>2</sup> E/CN.4/Sub.2/1993/8 (1993).

<sup>3</sup> E/CN.4/Sub.2/1997/20/Rev.1 (1997).

<sup>4</sup> E/CN.4/2000/62 (2000).

<sup>5</sup> Cfr. ORENTLICHER, Diane. *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*, E/CN.4/2004.88 (2004).

<sup>6</sup> See especially *General Comment No. 3 (art. 2)* and *General Comment No. 20 (art. 7)*, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* 112, U.N. Doc. HRI/GEN/1/Rev.5 (2001).

<sup>7</sup> In Latin America, an early example of that clear position was the report *From Madness to Hope*, by the Commission on Truth for El Salvador, 179 U.N. Doc. S/25500 (1993), and the declarations of the Secretary-General at the time, Boutros Boutros-Ghali, in response to the amnesty of perpetrators in that country. More recently, see the “Report of the UN Secretary-General On the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”; August 3, 2004; S/2004/616.

incompatible with the rules of human rights treaties. Even without impunity laws, a State may violate its obligations passively if it does not bring the apparatus of public power to bear on investigating the facts, trying and sanctioning those responsible and, in general, facilitating victims' access to justice.

Thirdly, victims or groups of victims and their relatives (who are actually indirect victims) have a right to reparation for damage to their rights. The form and nature of that reparation will vary from country to country and will, inevitably, depend in part on the resources available. Nevertheless, it is indisputable that reparations should be comprehensive, that they should not be seen as merely monetary and that they should not be made dependent on the victims' renouncing their rights to truth and justice.

The last component of State obligations involves institutional reform to prevent the tragic circumstances of the repression from re-occurring. This is not limited to disqualifying human rights violators from continuing to serve in the military and police force; it involves "institutional reform" in a wider sense, which does include "vetting" but goes beyond it. It means reorganizing the whole apparatus of State so that it can protect human rights more effectively (to paraphrase the Inter-American Court on *Velásquez Rodríguez*).

The above obligations are separate from one another in the sense that the State cannot opt to fulfill one and ignore the others. They are independent, because even if one of them proves impossible to fulfill, the State is not absolved of its other duties. Furthermore, they are obligations to undertake a process, not to obtain results, since the State can meet them by making a good faith effort to provide truth, justice and comprehensive reparation, but it cannot be required to provide optimal results.

At the same time, a transitional justice program that satisfactorily combines all these components is the most desirable. It is essential, furthermore, that a State policy to meet these obligations be designed and implemented in close consultation and participation with all involved, especially the victims and their associations. The people who have the most stake in a just resolution of these issues must not be kept in the dark about the decisions being made. Consultation and participation must be as extensive and inclusive as possible, involving the whole society in a democratic debate about the methods and mechanisms to use.

Obviously, there is no one universal solution that can be applied everywhere, because decisions about the most appropriate mechanisms must be taken locally so that the mechanisms work, and above all so that the society will feel that it owns both the methods and the results. But there is an exception to this: a democratic decision is necessary to choose the *way* to fulfill these obligations, and it should take place after a free and transparent debate. But the majority cannot dictate *what should be done*, since the rights of the individual, and especially of every vulnerable, powerless person whose human rights have been abused, serve precisely as a concrete limitation on the will of the majority.

In the enumeration of the State's obligations we have referred to four fundamental elements for an adequate policy for confronting the legacy of past violations. We did not mention reconciliation as one of those objectives. Of course, reconciliation is the ultimate goal of the whole exercise.<sup>8</sup> In some cases it

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<sup>8</sup> José Zalaquett states that reconciliation is the ultimate goal (and we agree) and also the *pre-condition for legitimacy* of any policy of reflection upon the past. On this last point, we agree that a methodology that aims to deepen societal divisions is not a legitimate one. But to make reconciliation a pre-condition for legitimacy appears to cast truth, justice, reparations and

will also be necessary to encourage dialogue among communities to eliminate the stigma and resentment that might lead to a new cycle of violence. In most cases, however, a coordinated policy that balances all these mechanisms has the best chance of producing genuine reconciliation and overcoming the deep divisions that gave rise to the human rights violations. However, blindly refusing to revisit the past and decreeing “reconciliation” from above, without demanding any actions from human rights violators to contribute to that reconciliation, is a fallacy that only makes us immediately suspicious of anyone who refers to reconciliation in that way.

#### **4. Ethical and Political Foundations**

In the case of massive or systematic violations of rights, the legal arguments supporting positive obligations for the State are quite clear, even though they are “emerging principles” that arise from jurisprudential decisions rather than the text of treaties. These emerging principles have been enshrined in the Rome Statute of 1998, the international treaty that gave rise to the International Criminal Court and was ratified by over one hundred countries in just a few years.

But it would be irresponsible not to acknowledge that with or without these obligatory norms, the problem of what to do about such violations presents States in the process of democratization or institutional recovery with ethical and political dilemmas. The first is deciding whether it makes sense to insist on Truth and Justice when there are real risks that doing so might interrupt or delay the democratic process. Put more crudely, the question amounts to whether the democratic leader should insist on enforcing these values if the price is a return to the past and possibly to ever more violent abuses. Clearly, this argument against Truth and Justice may be credible when the threat is real and the danger verifiable. However, it is almost always wielded as a pretext for inaction, without offering the slightest proof of any threat. In reality, the threat lies more in passive submission to the status quo by those in power than in any real possibility of intervention on the part of forces in decline. The ruler who is guided by an ethic of responsibility, as Max Weber puts it, must of course weigh the consequences of his acts as governor. But we should be aware of the fact that this can constitute a true blackmailing of democracy by those unwilling to give up their privileges. Assuming the risk is real, it should be treated as an argument for weighing the steps to be taken and for finding the right time to insist on the mechanisms of truth, justice, reparation and institutional reform; we do not believe it is a valid argument for deciding *a priori* that certain things cannot be done.

At times, the ethical argument against demanding accountability for such abuses assumes the garb of religious magnanimity, by suggesting that nothing must be done about the past because it is preferable to seek reconciliation within the Nation, which can be achieved by a policy of forgetting or burying the past and “looking to the future”. We are very familiar with this argument in Latin America, where it has been used to try and justify impunity policies imposed from above, as if reconciliation could be decreed by the government without demanding any demonstration of repentance or will to reconcile with the victims. In fact, this argument is based on a false separation of truth and justice on the one hand and reconciliation on the other, and it falsely attributes a revenge motive to the quest for justice. In fact, insisting on justice by means of law is exactly the opposite of revenge, because legal institutions are created precisely to obviate

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institutional reform as useful *tools* for reconciliation, which tends to negate the intrinsic value of each of them. Furthermore, even if reconciliation (which can never be guaranteed, in any case) is never really achieved, that does not mean an honest exploration of the past is not justified in and of itself.

private revenge. It is also a strange argument for reconciliation that demands everything of the victims by obliging them to renounce truth and justice and demands nothing of the perpetrators.

The political argument against demanding accountability privileges the forms over the content of democracy. It implies that it is enough to have more or less free and honest elections periodically, without paying any attention to the actual quality of the democracy we have to live in. It implies trying to persuade those citizens that they must choose between democracy and justice, because they cannot have both. A democracy that resigns itself to continuing the privileges of dictatorship will have little likelihood of support from its citizens, especially those historically marginalized by the system, who were victimized during the period of dictatorship. A socially and politically exclusionary democracy is an unattractive one, even though it may in the end be a democracy. However, if it maintains the privileges of those who can torture and kill with impunity merely because they wear a uniform, democracy loses an essential feature, which is equality before the law. The persistence of impunity undermines the rule of law because it subverts the effectiveness of institutions. There is only full democracy when accountability mechanisms are both horizontal (via elections and the right to freedom of expression and information) and vertical (when there are checks and balances among powers, and especially a judicial branch that is impartial and independent).<sup>9</sup>

For reasons that are ethical and political, but also eminently practical, a good faith attempt to comply as far as is possible with the four obligations the law imposes makes sense in all cases. This does not mean insisting on all or nothing or trying to push for too much at the beginning of a transition. It does mean not losing sight of the objective of building an efficient, fair democracy on ethical foundations that restore the meaning of politics: lofty goals and noble means. It means insisting on the goals and finding the right means to attain them at each stage.

## **5. The Truth and Reconciliation Commission and Criminal Justice**

This work discusses in detail certain aspects of the relation between the work of the CVR in Peru and the administration of criminal justice. Put another way, it is an examination of how the ethical and political requirements recognized by international law have been put into practice in Peru. As the essays show, implementing the goals of truth and justice leads to a series of really challenging problems for a society in transition.

The first essay, by the volume's editors, Lisa Magarrell and Leonardo Filippini, gives an overview of the main commonalities in post-conflict societies seeking both truth and justice. It covers many of the experiences in which our Center has been involved in various capacities. The conditions for criminal prosecution and truth-seeking after an episode of massive and systematic violations are problematic and the essay offers some concrete examples of how different communities have handled it. The authors analyze the role of criminal justice based on various comparative experiences, especially with regard to truth-seeking mechanisms. Thus, Peru's situation is placed in a global context before proceeding to detailed examinations of particular issues in the Peruvian case. It is very helpful to bear this first

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<sup>9</sup> Cfr. O'DONNELL, Guillermo. "Horizontal Accountability: The Legal Institutionalization of Mistrust", in Mainwaring, Scott and Christopher Welna (eds.), *Accountability, Governance and Political Institutions in Latin America*. Notre Dame: University of Notre Dame Press, 2003.

approach in mind when reading the remaining pieces.

The second essay was written by Gloria Cano and Karim Ninaquispe, two attorneys who have represented many of the victims, in less than favorable circumstances, for the *Asociación Pro Derechos Humanos (APRODEH)*, the Association For Human Rights. APRODEH has done excellent work representing the victims of the conflict in Peru, and, as I mentioned previously, their ability to reflect on their own role in the transition is an extremely valuable contribution to understanding the Peruvian experience. The authors examine the role of civil organizations and human rights organisms over many years of struggle for truth and justice. They also explain how they themselves came to be associated with the CVR and identify ongoing, unresolved lawsuits by many of the victims.

Next, Javier Ciurlizza and Eduardo González offer an interesting insider perspective on the workings of the CVR and the dilemmas it faced regarding criminal prosecution of perpetrators. As the authors explain, the CVR carried out a detailed analysis of the years of violence that plagued the country, applying the norms of international human rights law, international humanitarian law and the specific rules of domestic legislation. It then presented the crimes using the concept of “patterns of violation”. On that basis, the CVR offered the judicial branch documentation to be used in trying the perpetrators, a possible categorization of crimes and an analysis of the extent to which members of the organizations involved were responsible for those crimes. The CVR selected some exemplary cases and created a specialist unit to handle them, and was thus actively involved in the criminal prosecution of violations of human rights and humanitarian law.

This is complemented by the painstaking work of Eduardo Vega Luna and Luis E. Francia Sánchez on the status of criminal prosecution after the CVR. Eduardo Vega Luna describes precisely how far things have come in the wake of the CVR in terms of trials of State agents responsible for human rights violations. In the Peruvian conflict, the extent of violence carried out by non-state combatants seems to have diluted attention to the responsibility of agents of the State. Vega Luna’s work shows the tensions and problems that have arisen and will continue to arise as these crimes are brought to trial. Similarly, the author describes many of the logistical and technical problems of criminal prosecution, which are enormous and often not taken into account.

Luis E. Francia Sánchez, on the other hand, explores the criminal prosecution of non-state perpetrators of human rights and humanitarian law violations and concludes, intriguingly, that while the work of the CVR and its Final Report were not irrelevant to the process, the CVR did not have the same impact on the trials of members of insurgent groups as it did on that of state agents. Another very interesting aspect of Francia’s work is his description of the role of the bodies of the Inter-American system of human rights. He sheds light on the close interaction of the various institutions involved in a transition and underlines the vital role of human rights organizations in Peru. This is clearly a lesson to be shared.

At this point, the book turns to the victims with Katya Salazar’s essay, which analyzes the differential impact of the violence on women. She examines, first, the CVR’s main conclusions on sexual violence against women committed during the armed conflict. Secondly, she looks at cases of sexual violence brought before the *Ministerio Público*, Ministry of Public Prosecution, and discusses their current status, the main challenges they represent for the Peruvian justice system and the prospects for progress and investigation of new cases of sexual violence against women during the internal armed conflict in Peru.

The conclusions of her study provide valuable tools for future challenges.

In the last essay, Ronald Gamarra offers an analysis of the criminal justice issue that goes beyond a merely legal framework to give a more complex, dynamic overview of how difficult it was to get all the institutions of State to work together on the task of truth and justice. His work describes the measures adopted in Peru for criminal prosecution and the implementation of the conclusions of the CVR after the fall of the authoritarian regime of Alberto Fujimori. Based on that description, Gamarra examines the design, approval and execution of measures to complement or facilitate criminal prosecution and, more broadly, the collaboration and support needed for criminal justice agencies to carry out the recommendations in the CVR's Final Report.

## 6. Lessons

Overall, the essays demonstrate that although the workings of the criminal justice system and the CVR's inquiry are directly related, they belong in a broad and complicated scenario, the background to which is the political transformation of the State. It is clear that two years after the publication of the CVR's report, the authorities still need to take concerted action to follow up on its recommendations. The Armed Forces, in particular, still appear to wield considerable control over information and even jurisdiction over trials of their own personnel, a situation that must be reversed. Reinforcing the jurisdiction of the civil authorities and abiding by the decisions of the *Tribunal Constitucional*, the Constitutional Court, remain essential for the consolidation of democracy in Peru.

Despite the difficulties, Peru has made some important and tangible progress that has taken other countries many years. For example, it has succeeded in prosecuting several perpetrators of gross human rights violations and has shown the clear political will to seek the extradition of an ex head of state like Alberto Fujimori.

Various factors have helped pave the way for these achievements. Respect for the jurisprudence of the Inter-American Court of Human Rights, for example, and in particular the *Barrios Altos* case, has helped dissuade further attempts to legislate impunity. The struggle against corruption that began after the fall of Alberto Fujimori's government has also been a positive influence, given the important links between corruption and human rights violations in Peru. The rise of the legal mechanism of effective collaboration has also clearly had positive repercussions for truth and justice when it is combined with adequate security measures. Lastly, the CVR's report coming in this context helped create a window of opportunity and provided tools for pursuing justice.

Undoubtedly, the fact that a group of non-state actors were responsible for a large part of the abuses suffered by the population has modified the scenario in which transitional justice often operates. Social condemnation of Shining Path has been very widespread and the CVR's Final Report generally upheld that. The criminal justice system has faced a series of peculiar challenges as a result. For, while enormous effort was needed to get investigations into the atrocities committed by the police and Armed Forces, the pursuit of Shining Path members was marked, in contrast, by the illegal and abusive use of the legal powers of the State.

The prosecution of State-sponsored abuses remains problematic, in part because of differing sensibilities

among the population towards the various perpetrators. There is also an important time factor at work. The prosecution of actions by non-state groups follows from the nullification of earlier trials and is characterized by the phenomenon of gradual release of those incarcerated. The prosecution of state agents, on the other hand, is only just beginning. This creates an apparent asymmetry, particularly in the eyes of sectors most resistant to prosecuting agents of the state.

The CVR made a crucial contribution to the trials by helping society understand the extent and seriousness of the actions of the State, in addition to those of Shining Path. The CVR itself cannot meet the need for justice. Without the work of the Inter-American Court and Commission, the Constitutional Court, the human rights' and victims' organizations and the autonomy and integrity of the Ombudsman's Office, Peru would not possess the possibilities for change that it now has. The CVR showed how society failed to protect its members and guarantee justice.

At this new juncture, criminal justice strategies cannot be isolated from other tools of transition. Future progress in circulating the CVR's Final Report, issuing reparation for victims of the violence and dismissing members of the military and police involved in grave violations of human rights will help bolster the few trials still in progress. Peru's upcoming election may increase or reduce the opportunities for justice in the country. So far, in many ways, Peru's experience offers encouraging lessons that should be supported and reinforced.

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JUAN E. MÉNDEZ  
President of the ICTJ  
New York, February 2006

Criminal Justice And Truth In The Transition To Democracy



## Introduction

A conflict characterized by massive, systematic human rights violations presents a number of challenges in terms of criminal prosecution and truth-seeking. Many of them are crucially linked to power relations. Even after the conflict is over, perpetrators of fundamental rights violations often maintain a great deal of influence over the drafting of institutional responses, thereby hindering efforts to obtain truth and justice. Augusto Pinochet, for example, retained for a long while not only his lifetime seat on the Senate but also a significant amount of political capital in Chile. In Argentina, in spite of the trial of the Junta leaders in 1985, military groups managed to get the original sentences overturned and prevent the investigation of other perpetrators. It took almost another decade to get back on track towards peace and justice. In Colombia, although paramilitary groups are being dismantled, some of their members still enjoy considerable economic power. The situation in Peru, where there have been threats against witnesses and justice system personnel in the aftermath of the truth commission's work, also demonstrates these tensions.

Another difficulty of transition is that it involves a paradigm shift. Transition to democracy means a fundamental overhaul of values. Democracy condemns abuses that were previously presented as justifiable, and there is a definite price to pay for this in terms of the possibilities for ensuring social stability. At the same time, construction of a new, shared historical record and decisions about criminal prosecutions are thrust front and center by the new moral commitments to society. Criminal justice in transition has its own complications. Decisions must be taken about who should be tried, while taking care to insure adequate democratic integration of groups that were formerly bitter antagonists. These decisions must necessarily involve the legal principles at stake that are very closely linked to the values a democratic society espouses, such as equality, legality, and non-retroactivity in criminal law. Accepting the jurisdiction of international or extraterritorial criminal law and the incorporation of international criminal law within the national context are also critical issues for the process of transition. On the other hand, prosecution of massive abuses normally encounters limited ability on the part of the judiciary and mixed signals in terms of political will, so the victims have little chance of being heard.

In this first essay in the anthology, we discuss the role of criminal justice in the transition to democracy as seen in several comparative experiences. In particular, we examine the relationship between the criminal justice system and truth-seeking mechanisms, and we offer some concrete examples of how different communities have handled conflict or post-conflict situations.<sup>10</sup> In the opening section we describe the mechanisms of transitional justice. In the next, we move to the role of administering justice in a transition, and, in particular, criminal justice. In the third section, we analyze the relationship between criminal justice tools and truth commissions, as well as other mechanisms of transition. In the conclusion, we examine what can and cannot be expected from the criminal justice system in the consolidation of a democracy.

### 1. Mechanisms for Democratic Transition

#### 1.1. Substantive Mechanisms

During a political transition after a period of violence or repression—or a move to strengthen a democracy—societies are often dealing with the painful aftermath of violations of human rights or international humanitarian law.<sup>11</sup> In such settings, the judiciary's work is linked to processes of political change in which the crimes of the previous regime have to be confronted.<sup>12</sup>

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\* The authors would like to thank Juan E. Méndez, Howard Varney and Catalina Díaz for their comments and contributions.

<sup>10</sup> For an analysis of some very different cases, cfr., for example, Carlos NINO, *Juicio al mal absoluto*. Buenos Aires: Emecé, 1997, pp. 3-40.

<sup>11</sup> We refer in this essay to human rights, but much of what we discuss is equally applicable to violations of international humanitarian law.

<sup>12</sup> TEITEL, Ruti. "Genealogía de la justicia transicional"; in the anthology *18 Ensayos: Justicia transicional, Estado de derecho y democracia*. Universidad de Chile y Fundación Sueca para los Derechos Humanos, 2005, p.1. Available in English

Various measures can be taken after a serious conflict but they depend, crucially, on context. However, there have been significant attempts to systematize what steps should be taken so that the process as a whole is easier to understand. A certain level of consensus has been reached about the mechanisms that are central: the trials of perpetrators of serious criminal acts, reparations for the victims, reconstruction and preservation of truth and memory, disqualifying certain people from remaining in or taking up sensitive public positions and reforming institutions so as to guarantee that abuses do not recur.<sup>13</sup>

In general, these procedures have been derived from the unique experiences of each of the communities in post-conflict situations and from judicial precedents that have gradually enshrined the essential duty to demand accountability for massive and systematic human rights violations and to monitor whether that occurs. In each case there are variations in the order and time-frame of events, which means that the different mechanisms can either compete with or complement one another; they may be implemented after decades of complaints or in a more cohesive package.

## 1.2. The International Dimension

The essential features of the transition to democracy are different for each political community. Indeed, there is a strong correlation between how transition plays out and the future of each of the nation-states. However, there is also an international dimension to the problem of democracy-building that has ramifications for all aspects of conflict and conflict-resolution. In the recent history of Latin America, for example, there is no denying the influence of the US administration on the political processes that led to massive episodes of human rights violations in the region.<sup>14</sup> In the case of Sierra Leone or Rwanda, the role of external agents is even clearer, both in the social conditions that led to the conflict and in the mechanisms for criminal justice and truth-seeking that followed.

In recent decades, international law has been focussing on processes of transition. The criteria developed by the international community are summed up in the document on transitional justice and the rule of law that the UN Secretary-General presented to the Security Council in August 2004.<sup>15</sup> For the United Nations, justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing ones.<sup>16</sup> As the report states, “justice” is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs.<sup>17</sup>

As Juan Méndez has explained,<sup>18</sup> the Secretary-General’s report acknowledges that success will depend on the extent to which strategies are tailored to the idiosyncracies and needs of each culture, but it does identify certain common problems and establishes the international community’s duty to cooperate to restore peace and democracy in a constructive way. Similarly, The Inter-American Commission on Human Rights states that “[t]he international community has identified a series of guidelines with respect to truth, justice, and reparations that draw on the experiences of different societies and the principles of law reflected in the obligation of states to administer justice in keeping with international law”.<sup>19</sup> International provisions, their interpretation through case-law and intergovernmental guidelines coincide in “identifying truth, justice, and reparation as fundamental and inescapable challenges in rebuilding a culture of peace, tolerance, respect for the law, and rejection of impunity”.<sup>20</sup>

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as “Transitional Justice Genealogy” at <<http://www.law.harvard.edu/students/orgs/hrj/iss16/teitel.pdf>>.

<sup>13</sup> For a general overview and discussion of the many problems involved, cfr. TEITEL, Ruti. *Transitional Justice*, Oxford: Oxford University Press, 2000 and MINOW, Martha. *Between Vengeance and Forgiveness*. Boston: Beacon Press, 1998.

<sup>14</sup> Cfr. SIKKINK, Kathryn. *Mixed Signals: U.S. Human Rights Policy and Latin America*; Ithaca, N.Y.: Cornell University Press, 2004 on US foreign policy on human rights in the region.

<sup>15</sup> “Report of the UN Secretary-General On the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”. 3 August 2004, S/2004/616.

<sup>16</sup> *Ib.*, summary of paragraph 2.

<sup>17</sup> *Ib.*, paragraph 7.

<sup>18</sup> Cfr. MÉNDEZ, Juan. *La justicia de transición y el derecho internacional*, presentation at the Universidad del Salvador, Buenos Aires, 7 December 2004.

<sup>19</sup> Report by the Inter-American Commission on Human Rights On the Demobilization Process in Colombia; published 13 December 2004, OEA/Ser.L/V/II.120 Doc. 60, Part II, para 10.

<sup>20</sup> *Ib.*; paragraph 14.

Within this overall framework, there have been some notable developments regarding the need to prosecute certain behaviors, as stipulated by international law. Thus one could point, for example, to the set of human rights principles drawn up by Louis Joinet,<sup>21</sup> updated in Diane Orentlicher's report.<sup>22</sup> In the Americas, the strong position taken by the Inter-American Court on Human Rights is well known. The Court has consistently held that no law or internal provision can prevent a State from obeying its obligation to investigate and punish those responsible for human rights violations. The Inter-American Court has ruled inadmissible, in particular, all provisions on amnesty, statutory limitations or exclusion from responsibility that attempt to impede the investigation and punishment of perpetrators of grave human rights violations such as executions and forced disappearances. The State must diligently seek to carry out adequate investigations and to punish the perpetrators, where appropriate, in order to prevent impunity and the repetition of such actions.<sup>23</sup>

The International Criminal Tribunal for the former Yugoslavia,<sup>24</sup> the Special Court for Sierra Leone,<sup>25</sup> and various national courts applying the principles of international law have also ruled against amnesties for certain crimes. Thus, although there has been some resistance, the general trend in the international arena overwhelmingly supports the effective application of criminal law and truth-seeking as important for the consolidation of democracy.<sup>26</sup>

Meeting those objectives under national jurisdiction has an additional benefit, in that it strengthens local capacity in the realm of criminal justice and makes for a solution that is tailored to the specific needs of each community. In the above-mentioned report by the UN Secretary- General, this belief is expressed as follows:

34. While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, in the long term, no ad hoc, temporary or external measures can ever replace a functioning national justice system. [ . . . ]

37. Recent national experience suggests that achieving these complex objectives is best served by the definition of a national process, guided by a national justice plan and monitored by specially appointed independent national institutions, such as judicial or law commissions.<sup>27</sup>

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<sup>21</sup> "Question of the impunity of perpetrators of human rights violations (civil and political); Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119", UN Commission on Human Rights, 49<sup>th</sup> Session, Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997), Annex II.

<sup>22</sup> *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*, E/CN.4/2004.88 (2004).

<sup>23</sup> Cfr., among many others, *Barríos Altos Case. Interpretation of the Judgment on its Merits*. Sentence of 3 September 2001. Series C No. 83, para. 15.

<sup>24</sup> ICTY, Trial Chamber, *Furundzija Case*, 10 December 1998, para. 155.

<sup>25</sup> Special Court for Sierra Leone Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, March 13, 2004.

<sup>26</sup> For example, the Argentinian Supreme Court of Justice in the case *Simón, Julio Héctor y otros sin privación ilegítima de la libertad, etc. (Poblete) -causa N° 17,768-*. S. 1767. XXXVIII. (14 June 2005).

<sup>27</sup> Article 17 of the Rome Statute reads as follows: "Issues of admissibility. 1. [ . . . T]he Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".

## 2. The Role of Criminal Justice in the Transition to Democracy

### 2.1. Criminal Justice and State Perpetrators

The judiciary's role in transition to democracy is a central one. After a period of abuses, it functions as a democratic counterweight; judicial control to guarantee access to rights is essential, since periods of abuse are usually characterized by an executive branch out of control and a system indifferent to the victims' rights. The voice of a state institution whose main goal is to ensure and guarantee individual rights in the face of abuse is crucial to rebuilding confidence in democratic institutions.

Without referees, a transition faces many dangers, as Miguel Carbonell demonstrates in his speculations about what might have happened to the transition in Germany if the constitutional court had not curbed the neo-Nazi parties early in the fifties.<sup>28</sup> In the Latin-American context it is worth reflecting on the value of the Colombian Constitutional Court's decisions on *tutela*, guardianship,<sup>29</sup> or that of the Guatemalan judiciary at the time of the president's self-coup in 1993.<sup>30</sup>

The justice system has a special role to play in the transition to democracy. Under the rule of law, criminal justice is one of the most important bulwarks against the powers of the state. The monopoly of force is not only designed to mediate violence among individuals, but also to rationalize its use by the officials responsible for ensuring the law is obeyed. Just as with the justice system in general vis à vis other branches of government, the criminal justice system's quintessential mission is to administer and control state violence and it is essential to effectively rebuild confidence in the existence of limits to State power. In any conflict in which abuses have been committed or allowed by State authorities, expectations are naturally placed on the criminal justice system, because it is expected to exercise violence rationally. Without judges, there are no limits, and without criminal judges in particular, there are no clear limits to the powers of the punitive agencies of the State.

### 2.2. Criminal Justice and Non-State Perpetrators

A situation where there have been serious violations by state agents is not the only scenario for criminal justice in a transition. Peru is an obvious example where violence and crimes have also been committed by private individuals. In these cases, the justice system also plays an important role, because society expects and hopes that the State's monopoly of force will minimize the violence, or will at least administer it in a relatively rational way.

No simple parallel can be drawn between violations committed by individuals and those committed under state auspices. State-sponsored terror betrays the trust of citizens who delegate to the State the exclusive right to the use of force. The formal apparatus of the State means that government agents exercise institutional powers and therefore also have certain duties that others do not. However, even when non-state perpetrators are involved, violent acts lead to problems if the state fails to

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<sup>28</sup> Cfr. CARBONELL, Miguel. "El nuevo papel del Poder Judicial y la transición a la democracia en México"; in the anthology *Estudios sobre federalismo, justicia, democracia y derechos humanos / Homenaje a Pedro J. Frías*, HERNÁNDEZ, Antonio and María VALADÉS (eds.), México: IJ-UNAM, 2003, p. 46. Available at <<http://www.juridicas.unam.mx/publica/librev/rev/derhum/cont/63/pr/pr19.pdf>>. There is also a very interesting founding document for the *Asociación Jueces para la Democracia*, Association of Judges for Democracy, which reflects the point of view of some of the Spanish judges in post-Franco Spain.

<[http://www.juecesdemocracia.es/pdf/documento\\_constituyente.pdf](http://www.juecesdemocracia.es/pdf/documento_constituyente.pdf)>.

<sup>29</sup> The Political Constitution of Colombia, adopted in 1991, establishes the role of guardianship as a preferential, summary proceeding to request protection of fundamental rights before any judge in the Republic. There is no need for the applicant to have legal representation (article 86). According to the Constitution, the Constitutional Court reviews all guardianship verdicts in the country and rules on those it considers necessary to correct the interpretation of constitutional norms or to unify jurisprudence. Through its rulings, the Constitutional Court has built up a record of progressive jurisprudence not only on civil and political rights, but also economic, social and cultural ones.

<sup>30</sup> In 1993, three years before peace negotiations were concluded, former president Serrano Elías of Guatemala dissolved Congress, dismissed the Supreme Court Justices and awarded himself absolute legislative power. The Constitutional Court declared the president's decree null and void. Cfr. PÁSARA, Luis and Karin WAGNER, *La justicia en Guatemala: bibliografía y documentos básicos*, United Nations Verification Mission in Guatemala (MINUGUA), 2000, paras 2,773 and 2,774.

respond effectively and clarify what has happened. Impunity for grave offenses erodes the legitimacy of the very public authority whose role it is to rationalize the use of force.

Argentina is a case in point. Raúl Alfonsín, the first constitutional president after the dictatorship, proceeded to prosecute leaders of the armed forces who had taken part in human rights violations, as well as various members of guerrilla groups. This approach had been urged by Carlos Nino, among others. Critics argued that this policy of the Alfonsín government lent weight to what was known as the *theory of the two devils*, a notion that attributed equal responsibility for the conflict to the military and the guerrillas, without drawing any relevant distinctions between them. They also contended that the Alfonsín administration's interpretation of events<sup>31</sup> cast the rest of society in the role of innocent victims of the struggle between two demonic forces, which was also inaccurate.

Groups close to the military generally agreed with the idea of classifying guerrilla groups as combatants. Empirical proof of this is found in their frequent references to the number of members of the main guerrilla organizations —among them the *Ejército Revolucionario del Pueblo*, People's Revolutionary Army, and the *Montoneros* —, their military training, and especially their lavish funding after the successful kidnapping of businessman Jorge Born, which gave some organizations a great deal of influence. The pro-military groups also disputed the neutral role attributed to society by Alfonsín. For them, society was victimized by the guerrilla groups and thus supported military action by the State to annihilate them.<sup>32</sup>

Groups associated with human rights victims also attacked the Alfonsín government's stance. Mainly, they challenged the absurdity of equating the situation of those who used the repressive apparatus of State with those who acted outside the law during the dictatorship. There are endless variations on this position. A small segment of opinion, for example, most committed to the guerrillas' armed struggle —a minority as small as those who still defend the illegal repression by the military —claims that the rebels' actions were in no way criminal, and should instead be seen as exemplary struggle and resistance against the oppressive power of the dictatorship. Interestingly, this sector also disputes the innocence of those in society who did not participate directly in violent action, believing that anyone who did not support the armed struggle was complicit with the repressive State. After years of passionate debate, the broad majority in Argentina nowadays acknowledges and condemns the "dirty war" of the repression, but they do not legitimize nor give historical weight to the cause of the armed groups.

As we can see, there are many tensions that may arise.<sup>33</sup> Needless to say, in each case the precise scenario depends on specific variables, such as: who has effective control of territory in a given zone, how long the actions went on, their severity, and how the non-state groups related to the population not directly involved in armed combat. Actions like those of Peru's Shining Path, in particular, are hard to compare to any others in the region.

Bearing all this in mind, especially when focusing on building democratic institutions, it is important to provide a strict definition of human rights in some of them, and thus facilitate a separate discussion of violations that fall under the purview of

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<sup>31</sup> Incidentally, the same interpretation underlies the Truth Commission (CONADEP)'s description of history in its report *Nunca Más*. On this point, see the book by VEZZETTI, Hugo. *Pasado y Presente - Guerra, dictadura y sociedad en la Argentina*. Buenos Aires: Siglo XXI, 2002.

<sup>32</sup> We use the term "annihilate", because that was the word used in presidential decrees by Isabel Martínez de Perón when she ordered the Armed Forces to quash guerrilla action. Months after her decrees were issued, the Armed Forces overthrew Mrs Perón. On 24 March 24 1976 the military dictatorship began, calling itself a "Process of National Reorganization".

<sup>33</sup> Argentina's case, however, does not allow us to see what Alfonsín's policies would have accomplished had they been carried out fully, because shortly after the trials of the guerrillas and the regime leaders began, pressure from the military led to the laws of *Punto final* [Full stop] and *Obediencia debida* [due obedience] being passed. Even though these statutes were at some level part of Alfonsín's plan, they were a direct consequence of military pressure, and were seen by the majority as reneging on his campaign promises. As a *coup de grâce*, the following president, Carlos Menem, pardoned the high-ranking officers who had been convicted during Alfonsín's presidency and the guerrilla leaders who were being prosecuted. Menem's policy did not prevent prosecutions of military personnel for very long. From 1995 to the present, prosecution cases have gradually been re-opened, a process which was recently validated by the Supreme Court, which declared the amnesty laws null and void. Cfr. the *Simón* case, note 18. As regards the guerrilla groups, however, apart from a few sporadic attempts, there has been no serious or sustained move to reopen the cases that were closed by Menem's pardons.

public authorities. One characteristic of wide-ranging conflicts is that the duties of public institutions are unclear. To set up a rule of law, therefore, requires some sophistication in addressing this issue. Even when there have been massive violations of human rights, it helps to have a strict definition of what human rights are in order to discuss the state's actions. The concept of human rights has to do with the dignity of a person, but the responsibilities of the State towards the individual are also crucial and must not be overlooked.

The Inter-American Commission on Human Rights in its *Report on Terrorism*<sup>34</sup> very clearly states that governments have a duty to take the necessary steps to prevent terrorism and other forms of violence and to guarantee the security of their peoples. Terrorism cannot go unpunished. States have the right and indeed the duty to defend themselves against this international crime within the framework of international treaties that require domestic laws and regulations to conform with international commitments.<sup>35</sup> As the Inter-American Convention Against Terrorism declares, terrorism is a serious criminal phenomenon of deep concern to all member states, for it attacks democracy and impedes the enjoyment of human rights and fundamental freedoms.<sup>36</sup>

However, the *Report on Terrorism* also indicates that even when States are carrying out their duty to prevent terrorist actions, they remain at all times bound to respect human rights, subject to suspensions and restrictions defined under international law when the life of the nation is in danger.<sup>37</sup> As the *Inter-American Convention on Terrorism* declares, no anti-terrorist legislation may be interpreted "as affecting other rights and obligations of states and individuals under international law, in particular the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law".<sup>38</sup>

Issuing blanket convictions regardless of the specific nature of each perpetrator's involvement in a conflict is not an effective strategy for transition. The case of El Salvador is a good illustration of the tricky issues involved. During the conflict, many people were jailed for suspected involvement in the guerrilla movement *Frente Farabundo Martí para la Liberación Nacional (FMLN)*, the Farabundo Martí National Liberation Front. However, this amounted to the arrest and incarceration of the opposition, rather than a viable judicial response to abuses. According to Americas Watch (now Human Rights Watch), in January 1984 there were roughly 500 political detainees in Mariona (the men's prison) and Ilopango (the women's prison). At the end of 1986 there were 1,174. Many were detained and then released: some 340 per month in 1986.<sup>39</sup> Convictions were rare: "[c]ases generally bogged down in the instruction phase, and prisoners awaited extrajudicial resolutions".<sup>40</sup> In contrast, at the same time, State agents went scot-free. This imbalance and the fact that the perpetrators remained in power, meant that far from being remedied, the imbalance was in fact deepened. The case of El Salvador "combined the disadvantages of a peace process that did not involve a change in government with a compromised judiciary".<sup>41</sup>

### **3. Criminal Justice and Other Mechanisms for Transition**

#### **3.1. Constraints and Capabilities of Criminal Justice**

Criminal justice differs in some respects from other mechanisms of transition. It represents one of the most violent responses that a community can bring to bear within the framework of the rule of law; this substantially restricts its application to truly exceptional situations. On the other hand, its own formal mechanisms also limit its scope of action. The type of evidence that

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<sup>34</sup> Cfr. Inter-American Commission On Human Rights. *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr.; 22 October 2002.

<sup>35</sup> *Ib.*

<sup>36</sup> Cfr. Inter-American Convention On Terrorism, AG/RES. 1840 (XXXII-O/02). Approved in the first plenary session, held on 3 June 2002.

<sup>37</sup> Presentation by Juan E. Méndez, President of the Inter-American Commission on Human Rights, in the Third Regular Session of the International Committee Against Terrorism (CICTE); San Salvador, El Salvador, 23 January 2003.

<sup>38</sup> Inter-American Convention Against Terrorism, article 15.2.

<sup>39</sup> Cfr. Americas Watch, "El Salvador's Decade of Terror". New Haven: Yale University Press, 1991, p. 76, quoted in Margaret POPKIN, *Peace Without Justice: Obstacles to Building The Rule of Law in El Salvador*, Pennsylvania: Penn State Press, 2000, p. 41, footnote 99.

<sup>40</sup> POPKIN, Margaret. *Ob. Cit.*, p. 41.

<sup>41</sup> *Id.*, p. 148.

is valid for use in a trial, for example, is limited. That can hinder the development of attempts to reconstruct history. Likewise, sentencing only applies to an individual person, which impedes attempts to assign collective responsibility.

Despite the constraints on the criminal justice system, it is extremely valuable to societies in transition. Public policy makers tend to use the same logic that underpins ordinary criminal law to justify the need for criminal justice in the face of serious violations of rights; for example, retribution, dissuasion, strengthening legal principles and re-validation of the victims. Criminal trials during processes of political change have additional value in terms of consolidating democracy, since they strengthen the power of the judicial branch as a counter-weight to the majority in constructing historical truth and reinforcing collective ideals. These effects deserve special recognition for certain periods in politics, since they do not necessarily correspond to the ordinary role of criminal law.<sup>42</sup>

On this point, it is worth returning to the example of Argentina, where the trial of the military juntas had powerful symbolic value that transcended the actual punishment. This case is a very good illustration of some of the possible roles for justice in transition. The trial involved public hearings before a judge that went on for months. Even though it was not televised live, there were daily updates of the main developments in the media. Thus, as the days went by, the public was able to share the victims' experience and listen to testimony after testimony of people who had suffered State terrorism. The trial combined with the report of the *Comisión Nacional sobre la Desaparición de Personas*, the National Commission on the Disappeared (CONADEP), led to widespread social recognition of the enormity of the horrors of the dictatorship. In his closing argument, the national prosecutor, Julio César Strassera, concluded that the trial should stand as institutional reassurance that Argentina would never again go through such dark times. "*Nunca más*", "Never Again" was also the title of CONADEP's final report, and a deep commitment to that idea is part of Argentina's democratic identity today.

The interesting thing about the Argentine transition is that the sentences passed in the trial of the juntas in 1985 were very soon revoked. In 1986 and 1987 two laws were passed: *Punto Final*, Full Stop, which set an extremely short time limit for bringing criminal charges against perpetrators, and *Obediencia Debida*, Due Obedience, which established that lower-ranking officers had been acting under orders they could not refuse to carry out. In the early nineties, the president at the time, Carlos Menem, completed the panorama of impunity by pardoning the officers convicted in 1985 and others, some of whom were still being tried. Despite this negation of justice, the essential impact of the trial of the generals was not reversed. Eliminating the sentences could not prevent the trial from becoming a historic chapter in the rise of democracy in Argentina. Ever since then, despite the pardons, only a few marginal sectors of society have continued to support the actions of the armed forces during the military dictatorship.

Turning once again to the general features of criminal justice in transitions, it should be pointed out that international law tends to encourage prosecution as a means of enhancing democracy. Cases like *Barrios Altos* in the Inter-American Court of Human Rights<sup>43</sup> have defined the way forward in this hemisphere, and international *ad-hoc* courts and the International Criminal Court have done so on a global scale. Sustainable institutional systems can only be reached through dialogue based on rules shared with other nations; a community that seeks to consolidate the rule of law cannot ignore its international responsibilities.

Needless to say, a criminal justice system cannot provide all the necessary elements of a successful transition. Reconstructing the historical truth through a criminal trial is not by itself sufficient to understand the scope and systematic nature of the violations committed. Even though it establishes that the victims have rights that must be protected by judicial institutions, it offers them no direct recognition of the pain and suffering they endured.

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<sup>42</sup> Rodrigo Uprimny and María Paula Saffon, for example, state that in transitional justice processes in general "punishment for atrocious crimes plays a crucial role, which reinforces (instead of contradicting) the goal of national reconciliation"; Cfr. "Justicia transicional y justicia restaurativa: tensiones y complementariedades". In RETTBERG, Angelika (ed.). *Entre el perdón y el paredón: preguntas y dilemas de la justicia transicional* Ediciones UNIANDES/IDRC, 2005. Available at <[http://www.idrc.ca/en/ev-83747-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-83747-201-1-DO_TOPIC.html)>.

<sup>43</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS. *Barrios Altos* case, cit. On the reception of the *Barrios Altos* ruling by the Argentinian Supreme Court of Justice, Cfr. FERNÁNDEZ BLANCO, Carolina. "La relación entre derecho internacional y derecho interno en el caso 'Poblete'". In *Nueva Doctrina Penal 2005/B*, del Puerto, Buenos Aires and GUEMBE, María José. "La reapertura de los juicios por los crímenes de la dictadura militar argentina". In the journal *Sur*.

Law theorists have also begun debating the possible conflict of interests between the defense and promotion of human rights and the relaxation of certain standards in liberal criminal law so as to end impunity. The discussion is not a new one, and in fact evokes echoes of the many critiques of the Nuremberg trials.<sup>44</sup> Some of the objections seem to be hold-overs from a narrowly nationalistic view of political processes, but others merit attention, such as the criticisms of prolonged preventive detention before a trial—a situation which has in fact already happened in Rwandan cases before the International Criminal Tribunal for Rwanda; convictions based on fuzzy standards of proof; lack of proper access to defense; or the relaxation of legal standards regarding the description of prohibited conduct.<sup>45</sup>

In addition, criminal law has a natural tendency to be selective. Several authors have pointed out that, like national law in general, international criminal law might tend to concentrate on the most vulnerable sectors of the population. As Julio Maier puts it, the International Criminal Court could lead to an expansion of criminal law on the global scene, which would be politically dangerous if it amounted to a judicial power asserting existing economic, social or political powers.<sup>46</sup>

Despite the difficulties we have outlined, prosecution during transitions has moved ahead and several courts such as those of Argentina and Peru have declared their respective amnesty laws null and void. The *Tribunal Constitucional*, Constitutional Court of Spain, has accepted universal jurisdiction<sup>47</sup> and the International Criminal Court seems to be gaining ground after issuing its first arrest warrants.<sup>48</sup> This is a tricky moment, where the benefits of bringing criminal trials have to be weighed against the possible damage of judicial activities that are not strictly regulated.

There are also other specific challenges for criminal justice, such as weak institutions or a delay in the progress of the transition. Criminal trials undertaken prematurely face formidable challenges. Almost inevitably, the sector formerly in power still has control over the judicial body, state prosecutors, and police investigation units; transforming those institutions takes several years. A good example of the problems involved can be seen in the acquittal of the former Defense Minister Magnus Malan in South Africa. Malan and various other South African generals and military officers were charged with murder and conspiracy to commit murder less than two years after South Africa set up its democracy. But while the new government created an independent investigation unit, the prosecutors and judges were hold-outs from the former regime, which led, quite simply, to the failure of the trial against Malan.<sup>49</sup>

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<sup>44</sup> Among others, ZOLO, Danilo. “The Iraqi Special Tribunal - Back to the Nuremberg Paradigm?”. In *Journal of International Criminal Justice*. Oxford: Oxford University Press, June, 2004, p. 313.

<sup>45</sup> Among others who have expressed concern, Cfr. DENKER, Friedrich. “Crímenes de lesa humanidad y derecho penal internacional”; ZIFFER, Patricia. “El principio de legalidad y la imprescriptibilidad de los delitos de lesa humanidad” and PASTOR, Daniel. “El sistema penal internacional del Estatuto de Roma. Aproximaciones jurídicas críticas”, all three in the anthology *Estudios sobre justicia penal. Homenaje al Profesor Julio. B. J. Maier*. Buenos Aires: Del Puerto, 2005. Also Daniel PASTOR. “La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos”. In *Nueva Doctrina Penal*. Buenos Aires: Del Puerto, 2005/A, pp. 73-114 and Alicia GIL GIL. “La sentencia de la Audiencia Nacional en el caso Scilingo”. In *Jueces para la democracia*, No. 53, 2005, pp. 7-16, among others. All these studies offer critiques of the current situation for deviating from the canons and principles of liberal criminal law, with the result of possibly affecting the rights of defendants.

<sup>46</sup> Cfr. MAIER, Julio. “Derecho Penal Internacional. Crímenes contra la humanidad. Extraterritorialidad de la ley Penal aplicable y competencia de juzgamiento”. In *Revista Jurídica de Buenos Aires*, 1998 I-II. Also the interview in the journal *Lecciones y Ensayos* from the Universidad de Buenos Aires:

<[http://www.derecho.uba.ar/publicaciones/lye/pub\\_lye\\_entrevista\\_maier.php#\\_Toc40712225](http://www.derecho.uba.ar/publicaciones/lye/pub_lye_entrevista_maier.php#_Toc40712225)>.

<sup>47</sup> 2nd Chamber of the Spanish Constitutional Court, *recursos de amparo* (appeals for legal protection) nos. 1744/2003, 1755/2003 y 1773/2003, brought by Rigoberta Menchú Tum and others ( 26 September 2005).

<sup>48</sup> Cfr. the address by the President of the International Criminal Court before the General Assembly on 8 November 2005.

<[http://www.icc-cpi.int/library/organs/presidency/PK\\_20051108\\_En.pdf](http://www.icc-cpi.int/library/organs/presidency/PK_20051108_En.pdf)>.

<sup>49</sup> VARNEY, Howard & J. SARKIN, “Failing to Pierce the Hit Squad Veil: A Critique of the Malan Trial”. In *South African Journal of Criminal Justice*, 1997, p. 2. The ex-Minister of Defense, Magnus Malan, and 10 others were tried for alleged participation in the murder of 13 members of the African National Congress in 1987, in the region of Kwazulu Natal. The trial began 11 March 1996. The Truth and Reconciliation Commission (CVR) began its work on 15 April 1996. Its mission was to investigate the human rights violations committed between 1 March 1960 and 5 December 1993.



Given these challenges, there should be serious strategizing about case selection, and how to deal with other constraints like obtaining proof, statutes of limitations, or double jeopardy. In a transition, the criminal justice system, both because of its constraints and also because of its possible contributions to non-legal processes, should be evaluated in terms of its relationship to other mechanisms that have grown up in the course of events.

### 3.2. Criminal Justice and Truth Commissions

The relationship of criminal justice and truth commissions varies according to the different comparative experiences of societies. Broadly speaking, criminal justice and truth have been seen as mutually exclusive, as in El Salvador, and to some extent South Africa; or, on the contrary, as complementary and necessary to find out what happened in the past, as in Argentina or Peru. The Truth Commission for El Salvador articulated that tension as follows in its report *From Madness to Hope*:<sup>50</sup>

[. . .] we must pause and weigh certain consequences which can be inferred from knowledge of the truth about the serious acts described in this report. One such consequence, perhaps the most difficult to address in the country's current situation, is that of fulfilling the twofold requirements of justice [. . .].

The Commission has already referred [. . .] to the insurmountable difficulties it has encountered in this regard. Such difficulties, which it is beyond its power to resolve directly, can be attributed to the glaring deficiencies of the judicial system.

[. . .] the Commission would simply add that, since it is not possible to guarantee a proper trial for all those responsible for the crimes described here, it is unfair to keep some of them in prison while others who planned the crimes or also took part in them remain at liberty. It is not within the Commission's power to address this situation, which can only be resolved through a pardon after justice has been served [. . .]

The Truth Commission recommended that all the judges on the Supreme Court of Justice resign, but refrained from recommending any trials. A few days after the report was issued, the Assembly approved a general amnesty law which prevented prosecution for serious crimes committed during the conflict. It was not until years later (after normal turn-over of judges) that a new Supreme Court reconsidered the general amnesty law and found it could be unconstitutional in its application.<sup>51</sup>

The case of South Africa tends to be quoted as a relatively successful experiment in renouncing prosecution, since the CVR established a *quid pro quo* in that it only conferred amnesty if there was a full confession of political crimes, in the name of truth. The Commission saw amnesty as a means of accessing the truth. Justice Ismail Mahomed, in the case of the *Azanian Peoples Organization (AZAPO) and others v. President of the Republic of South Africa* defined the issue thus:<sup>52</sup>

18. The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order by a menacing combination of confused fear, guilt, uncertainty and sometimes even trepidation. Both

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<sup>50</sup> TRUTH COMMISSION FOR EL SALVADOR. *From Madness to Hope: The 12-Year War in El Salvador: Report by the Truth Commission for El Salvador*. Part V, Recommendations, Section IV. San Salvador: Editorial Universitaria, Universidad de El Salvador, May 1993. Available in English at <[http://www.usip.org/library/tc/doc/reports/el\\_salvador/tc\\_es\\_03151993\\_toc.html](http://www.usip.org/library/tc/doc/reports/el_salvador/tc_es_03151993_toc.html)>.

<sup>51</sup> Cases 24-97 and 21-98, Resolución de la Cámara Constitucional de la Corte Suprema de Justicia de El Salvador, 26 September 2000.

<sup>52</sup> Constitutional Court of South Africa, Case CCT 17/96, Decided 25 July 1996. Full text of the judgment can be downloaded from <<http://www.constitutionalcourt.org.za/site/home.htm>>.

the victims and the culprits who walk on the “historic bridge” [ . . . ] will hobble more than walk to the future with heavy and dragged steps delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge [ . . . ]

17. [ . . . ] The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the reconciliation and reconstruction which informs the very difficult and sometimes painful objectives of the amnesty [ . . . ]

The South African model assumed that perpetrators would feel compelled to declare themselves to the Commission rather than face criminal prosecution. However, prosecution of those who did not comply with the Commission’s mechanism has not been successful. Thus the system’s incentive failed and those who did not hand themselves in to the Commission completely avoided any sort of consequence. Critics of the South African Commission have questioned the mechanism’s usefulness in terms of producing reconciliation. In its defense, Alex Boraine argues essentially that without truth, no form of reconciliation is possible.<sup>53</sup> Horacio Verbitsky takes another line altogether, pointing out that reconciliation is actually a religious concept and is therefore unnecessary in a state under the rule of law, so that defending amnesty on the basis that it helps promote reconciliation is untenable.<sup>54</sup>

Recently, almost ten years after the South African Commission’s work, there have been renewed attempts to prosecute some of the most notorious perpetrators of the apartheid regime. This in turn has led to attempts to sue members of the African National Congress. However, since November 2004, all cases dealing with former abuses have been temporarily suspended while a new prosecutions policy is developed. In reference to that, in December 2005, Archbishop Desmond Tutu, former head of the Truth and Reconciliation Commission in South Africa, declared that perhaps South Africans should have done what the legislation required and really prosecuted perpetrators.<sup>55</sup>

Finally, in January 2006, the National Director of Public Prosecutions made changes to the prosecutions policy for violations of human rights in the apartheid era. According to the new regulations, announced by the Minister of Justice, the Director of Public Prosecutions may exercise his discretion and decide not to prosecute a person for a crime during that period, if the person provides certain information about the underlying facts of the crime. This policy restores the amnesty criteria in place while the CVR was functioning.<sup>56</sup> The change was made without consulting any victims’ or civil society organizations. According to Howard Varney, South African human rights lawyer, “[T]he amended policy stands as a shameful postscript to South Africa’s ground breaking truth and reconciliation process. In promoting impunity it represents a dangerous precedent for Africa”.<sup>57</sup>

In other cases such as Argentina or Peru, in contrast, the work of the truth commissions did not impede prosecution. In Argentina, the report by CONADEP<sup>58</sup> was used to bring charges. Some people feel that as a result of this, the

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<sup>53</sup> BORAINÉ, Alex. “Reconciliación. ¿A qué costo? Los logros de la Comisión de Verdad y Reconciliación”, in the anthology *18 Ensayos*, p. 27, (Cfr. full cite in note 4 above).

<sup>54</sup> Cfr. VERBITSKY, Horacio. Presentation entitled “Domestic Prosecutions and Justice in Transitional Democracies,” at a conference organized by the ICTJ and the Foundation for Human Rights, 16-19 May 2005, Johannesburg, South Africa.

<sup>55</sup> BBC News, 16 December 2005.

<sup>56</sup> It should be pointed out that this policy differs from offering criminal benefits, such as reduction of sentence; on the contrary, there would be no trial and in effect an amnesty is offered in exchange for information.

<sup>57</sup> Howard Varney, e-mail message to the authors, 14 February 2006.

<sup>58</sup> *COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS*, Argentina, National Commission on the Disappeared (CONADEP); *Nunca Más, Never Again*, September 1984. Published in English with an introduction by Ronald Dworkin, as a book under the name *Nunca Mas (Never Again)*, Farrar Straus Giroux, New York. Also published in London by Faber and Faber Ltd, 1986. ISBN 0374223505.

military did not participate with the truth commission in piecing together the historical record, and many of the victims were described in an extremely restrained way that failed to encompass their full social and political role.<sup>59</sup>

One might think that giving the criminal justice system and truth commissions independent mandates and prerogatives would help prevent possible conflicts. However, it is not logically possible to separate their mandates, and experience in places where the two systems have worked alongside one another has tended not to justify taking that approach.

In Sierra Leone, for example, the absence of any theory or practice in coordinating the work of the justice system and the truth commission generated only confusion, duplication of tasks, and probably no significant benefit in terms of truth and justice.<sup>60</sup> The Special Court and the Truth and Reconciliation Commission were created independently with few specifications about how they were supposed to coordinate. When they were first set up, debate centered on whether the Special Court could demand information from the CVR. However, the Chief Prosecutor publicly declared his decision not to seek information from the Commission. Later, when the CVR tried to obtain testimony from a Court-indicted detainee for the historical record, tension flared up again between the two bodies. In order to avoid the accused testifying in a public hearing, the Court invoked his right to defense and the possibility that his testimony could jeopardize the integrity of its proceedings. The CVR, on the other hand, felt that offering a written affidavit did not meet its requirements for guaranteeing confidentiality in interviews.<sup>61</sup>

In Timor-Leste, more consideration was given to the relationship between the Serious Crimes Unit (SCU) and the *Comissao de Acolhimento, Verdade, e Reconciliação* (CAVR), the Commission for Reception, Truth and Reconciliation. The CAVR, which was established after the SCU was created, was required to refer cases involving serious criminal offenses to the Office of the Deputy General Prosecutor for Serious Crimes. For minor offenders, there was an attempt to coordinate traditional reconciliation procedures under the auspices of the CAVR with the work of the Special Panels for Serious Crimes. If the perpetrator of a minor crime was sentenced via the traditional procedure to undertake some act of reconciliation (for example, community service in the area where he committed his crime), he received immunity from prosecution.<sup>62</sup> However, there was an “impunity gap” that included the lowest-level perpetrators of serious crimes and, as in the case of South Africa, the fact that a number of serious crimes were never prosecuted.<sup>63</sup> The case of Peru offers a new opportunity to evaluate the possibilities and challenges that arise when there are coexisting initiatives for justice and truth.

### **3.3. Other Mechanisms for Transitional Justice**

#### **3.3.1. Vetting, Institutional Reforms and Criminal Justice**

Disqualifying individuals responsible for abuses from serving in sensitive posts can be a consequence of conviction, but also in some cases an alternative to prosecution. In general, administrative sanctions require a less rigorous standard of proof and may possibly be more efficient than prosecution.<sup>64</sup> However, in order to protect the rights of

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<sup>59</sup> On Argentina’s historical narrative, cfr., for example, VEZZETTI, Hugo; *Pasado y Presente: Guerra, dictadura y sociedad en la Argentina*. Buenos Aires Siglo XXI, 2002 and SARLO, Beatriz. *Tiempo Pasado: Cultura de la memoria y giro subjetivo / Una discusión*. Buenos Aires: Siglo XXI, 2005.

<sup>60</sup> Cfr. COTE, Cote. Presentation in “Domestic Prosecutions and Justice in Transitional Democracies,” a conference organized by ICTJ and the Foundation for Human Rights, 16-19 May 2005, Johannesburg, South Africa.

<sup>61</sup> ICTJ, “The Special Court for Sierra Leone: the First Eighteen Months”, March 2004, by Thierry Cruvellier and Marieke Wierda, pp. 11-13.

<sup>62</sup> According to data supplied by an officer on the Serious Crimes Unit in May, 2005, the unit reviewed 1,542 statements of deponents wishing to participate in the reconciliation process and of these, decided to exercise its jurisdiction in respect of 90 suspects, of whom eighteen were eventually indicted. ICTJ, “Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor”, by Megan Hirst and Howard Varney, June 2005, p. 13, footnote 92 and accompanying text.

<sup>63</sup> *Ib.* pp. 12-15.

<sup>64</sup> Cfr. The Secretary-General’s Report, UN Doc. S/2004/616, p. 17, which states that vetting usually entails a formal process for the identification and removal of individuals responsible for abuses, especially from police,

parties under investigation, the vetting process has to be done on a case by case basis and it must respect basic rights to due process.<sup>65</sup> The lessons drawn from different experiences in this area indicate that group vetting procedures have been either too arbitrary or inefficient to replace criminal sanctions, but a fair and individualized vetting procedure can indeed contribute to filling the impunity gap that arises when it is impossible to prosecute all the possible perpetrators for all the crimes committed.<sup>66</sup> Some analysts have argued that, despite the appeal of preventing human rights violators and repressors from running for election to public office, or from serving in the armed forces or public administration, “care must be exercised that these and other alternatives to criminal justice are not used simply to improve the image of the process and leave things the way they are”.<sup>67</sup>

However, setting up a vetting process can contribute to transitional justice by preventing future abuses and helping the judiciary and security services to work more effectively, factors that are crucial for efficient prosecution of offenses. In Argentina, for example, information from CONADEP and other private archives was often used by NGOs and different political groups to oppose promotion of members of the armed forces and civil servants, which required approval by the Senate. Recently there has been some progress in terms of access to information about legislative deliberations on promotions and hiring, although the rules governing the situation are still far from satisfactory.

It is also obvious that after a serious conflict, the judiciary should probably be reformed before it can be expected to make any substantial contribution to the transition process. There is a close link between the need to overhaul the judiciary and ensuring access to the truth via the justice system, patently demonstrated by judges who remain in position after their role has been deformed by an abusive regime or by the weakness of State institutions after a serious conflict. At times, reforms must extend to the legislative arena, as certain crimes need to be specified in penal codes. Creating or strengthening offices of Human Rights Ombudsmen (or in the case of Peru, the Ombudsman’s Office) to defend human rights, is also necessary for oversight of the State’s duty to guarantee and protect human rights.

### 3.3.2. Reparations and Criminal Justice

The relationship between justice and reparations is necessarily complementary. As has been expressed elsewhere in an essay, even if criminal justice “were completely successful in terms of the numbers of defendants sentenced (which is far from the case in the transitions studied) and in terms of results (which are affected by factors such as insufficient proof and persistent weaknesses in the judicial system), it really involves a struggle *against those responsible* rather than an effort *for the victims’ benefit*”. It is worth stressing that, for the victims, reparations play a special role, because these are the most tangible manifestation of the State’s efforts to remedy the damage they have suffered. However, prosecution, because of its effect on the victims, is no less important: “In this sense, from the victims’ point of view, especially after an initial moment of possible satisfaction, convicting a few perpetrators without an effective effort to compensate the victims in some positive way could be viewed as an example of more or less inconsequential ‘vengeance’. But reparations with no attempt to obtain justice could equally be viewed as tainted hand-outs”.<sup>68</sup>

Many judicial systems, especially those inspired by European continental law, make the case for civil financial reparations dependent on the result of a criminal trial — known in some systems as the doctrine of “prejudiciality.”

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prison services, the army and the judiciary.

<sup>65</sup> Cfr. “Vetting, Institutional Reform and Transitional Justice: An Operational Framework,” ICTJ and PNUD. December 2004, pp. 3-4.

<sup>66</sup> *Ib.*, p. 4.

<sup>67</sup> Inter-American Institute of Human Rights (IIDH) And The International Institute For Democracy And Electoral Assistance (IDEA). *Verdad, justicia y reparación: Desafíos para la democracia y la convivencia social*, 2005, p. 36.

<sup>68</sup> Cfr. “Parameters for Designing a Reparations Program in Peru,” Joint Report by the International Center for Transitional Justice (ICTJ) and the Asociación Pro Derechos Humanos (APRODEH), September 2002, p. 8., available at <[www.ictj.org](http://www.ictj.org)>.

This seems to have led in part to the lack of efficacy of traditional mechanisms for judicial reparations, especially when those mechanisms operate in contexts where impunity exists.

However, even if one puts aside the problem of impunity, the very nature of civil procedural and substantive law also occasionally hinders adequate reparation to victims of massive human rights violations. Among the procedural problems that often come up, are the absence of recognition for collective legal action,<sup>69</sup> the cost of litigation and the lack of access to free legal services, the difficulty of evaluating the circumstances according to ordinary parameters of proof, strict interpretation of civil standards, and the application of statutes of limitation without tolling the period when the victim was unable to seek justice due to his or her special situation of vulnerability. This leads to great disparities and inconsistencies in the rulings, which exacerbates the sense of inequality.

In substantive law, the narrowness of passive liability, which depends on how damage, causality and elements of responsibility are defined, sometimes conspires against the victim's right to obtain adequate reparation. With the exception of a handful of successful civil suits, administrative reparations programs are demonstrably the better option, since they have dealt with some of these problems. In general, they have done so by loosening the procedural requirements in terms of formalities, time limits for filing suits, standards of proof demanded and, in substantive law, by recognizing that states have certain obligations in the event of abuses by their own agents or third parties.

Truth is even more interdependent on criminal justice than reparations, since reparations without truth can easily be interpreted as "buying silence". However, it is not acceptable to offer truth and reparations in exchange for impunity. In some cases, it was felt that compensation for suffering was inextricably linked to uncovering the truth and that in order to reach the truth it was necessary to forego prosecution. Thus Indonesia, for example, came up with a perverse mechanism that made the right to reparation dependent on the victim forgiving the offender and thus allowing amnesty for his crimes.<sup>70</sup> Reparations should never be made conditional on the conduct of the victims, apart from the obvious exception of renouncing compensation.

All told, criminal justice does have a powerful reparative effect on victims. Many of the elements that constitute entitlement to reparations for victims and are thought of as the province of truth commissions can also be found within a criminal trial. The reparative aspect of the criminal justice system is not merely symbolic.<sup>71</sup> The criminal trial offers a privileged forum for publicly exposing the conflict and demonstrating the state's interest in it. The solemnities that are sometimes a hindrance to the work of the courts can even have a certain value when what is needed is precisely to highlight the importance of a situation. For many reasons, criminal courts attract public attention and, at times, they already have an established image as an organ of the State. Courts, and particularly criminal courts, possess natural visibility that in a sense offers a better backdrop for developing symbolic mechanisms.<sup>72</sup>

#### **4. Contributions of Criminal Justice in Transition**

This brief overview of the debate on transitional justice demonstrates, firstly, the permanent relevance of classic arguments about the duty to prosecute crimes, such as those of Carlos Nino and Diane Orentlicher on Argentina,<sup>73</sup>

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<sup>69</sup> This means allowing a third party, or one member of a group to represent the others. When this kind of mechanism is properly regulated, it simplifies the process and cuts down on litigation costs.

<sup>70</sup> Cfr. the commentary by the ICTJ written by Eduardo González, *Comment by the ICTJ on the Bill Establishing a Truth and Reconciliation Commission in Indonesia*. Available at [www.ictj.org](http://www.ictj.org).

<sup>71</sup> Cfr. FEINBERG, Joel. *Doing and Deserving*, Princeton, N. J.: Princeton University Press, 1970. Partially reprinted in "The Expressive Function of Punishment". In FREINBERG, J. and J. L. COLEMAN (eds.). *Philosophy of Law*. Wartworth, 2000.

<sup>72</sup> Cfr. OSSIÉL, Mark. *Mass Atrocity, Ordinary Evil and Ana Arendt — Criminal Consciousness in Argentina's Dirty War*. New Haven and London Yale University Press, 2001, p. 145.

<sup>73</sup> ORENTLICHER, Diane F. "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime". In *Yale Law Journal* 100, 1991, pp. 2548-9. NINO, Carlos S. "The Duty to Punish Past Abuses of Human Rights Put into Context", in *Yale Law Journal*, 100 June, 1991, pp. 2537-2615 and ORENTLICHER, Diane

or the intense discussions about South Africa. Clearly, the objectives of punishment and prosecution must be in line with the objectives of the transition. The latter is not a mechanical task that can be carried out in the absence of proper consideration of the context where it takes place.

Criminal justice cannot solve everything, but taking prosecution of crimes seriously has been proven to be necessary and important for societies in transition. The challenges that this involves, especially when reform of judicial institutions is not on the agenda or has not been completed, are considerable. For, during the early years of a transition, as the Malan case shows, the remnants of the former regime can thwart the effectiveness of the process, even with all the information revealed by a truth commission. In addition, as the years go by, it becomes more difficult to establish elements of proof and overcome the tendency of some groups to want to close the book on the past once and for all. As a result, we are seeing new initiatives to exculpate perpetrators of serious human rights violations, or simple inactivity on the part of prosecutors about such cases.

Between the extent of criminality revealed by a truth commission and the reach of the law in practice, there is a gap which is rarely bridged. Applying vetting policies, using information from a truth commission in decisions on promotions, and community reconciliation processes are some possible ways to overcome that “impunity gap”. But perhaps the most effective way to obtain justice and truth is to work on coordinating the two in a transition, and making sure they are accompanied by fair and equitable reparation measures and institutional changes that will begin to build confidence and security in the enjoyment of human rights.

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F. “A Reply to Professor Nino”, *Yale Law Journal*, Vol. 100, No. 8 June 1991, pp. 2641-2643. Also NINO, Carlos S. *Juicio al mal absoluto. Los fundamentos y la historia del juicio a las Juntas del Proceso*. Buenos Aires: Emecé, 1997 and ORENTLICHER, Diane. “Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity”, E/CN.4/2004.88 (2004).

## The Role of Civil Society in Demanding and Promoting Justice

Gloria Cano and Karim Ninasquipe

### 1. Civil Society Organizations: Reporting Crimes, Monitoring and Demanding Justice

The beginning of the internal armed conflict in Peru led not only to repression by the forces of law and order and insurgent groups, but also to the growth of human rights organizations.<sup>74</sup> Together with individuals affected by the violence, these organizations began a long battle for human rights, truth and justice that would lead many years later to the formation of the *Comisión de la Verdad y Reconciliación*, Truth and Reconciliation Commission (CVR) during the transitional government.

From the outset, the main locale of armed conflict was the department of Ayacucho,<sup>75</sup> which suffered the greatest number of victims throughout the entire period of violence. The government at the time, faced with the inability of the police to contain the growth of insurgent activity, authorized the Armed Forces to take over political, military and territorial control of the zones where a state of emergency had been declared. Thus, on 23 December 1982 the first *Comando Político Militar*, Political-Military Command (CPM), was installed with absolute authority over the population. The CPM acted with complete impunity in the face of calls for justice by family members and human rights organizations.

In this context, human rights violations reached alarming levels in zones under emergency rule. Despite this, none of the three governments democratically elected during the course of the conflict ever acknowledged the extent of the violations or attempted to curb the indiscriminate repression by the military. Few cases ended up being reviewed by state authorities. Those in power tended to legitimize and support impunity as a necessary evil, in the service of public safety and economic stability.<sup>76</sup>

Because of this, the fledgling human rights movement openly challenged the government of Fernando Belaúnde (1980-1985), demanding unconditional respect for fundamental rights, a change in counter-insurgency strategy, investigation of human rights violations and punishment for perpetrators. It also demanded that the rebels obey international humanitarian law. However, the human rights movement was labeled “pro-terrorist” by the government and sectors of society unconcerned about the victims, while the insurgent groups accused it of

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<sup>74</sup> For example, the *Asociación Pro Derechos Humanos*, Association for Human Rights (APRODEH) was formed in 1983 as a support group for parliamentary investigations on human rights. Its director, Francisco Soberón, subsequently acted as advisor to the parliamentary group investigating the crimes in Accomarca (1985). Likewise, members of APRODEH were called on to advise various commissions investigating human rights violations. Complaints from human rights organizations and from civil society groups led to investigations of cases in Accomarca (1985), Frontón (1986) and Cayara (1988), among others, through parliamentary investigation commissions.

<sup>75</sup> On 17 May 1980, the Shining Path movement launched its campaign of “armed struggle” by burning ballot boxes in the district of Chuschi (Ayacucho), which set off the internal armed conflict.

<sup>76</sup> The internal armed conflict in Peru lasted twenty years, during which time three presidents were elected in turn: Fernando Belaúnde Terry (1980-1985); Alan García Pérez (1985-1990) and Alberto Fujimori Fujimori (1990-2000), whose downfall marked the close of the violence.

belonging to the “structures of the old State”. Along these lines, on 18 August 1983, General Clemente Noel Moral, political and military head of Ayacucho, declared to the media that “those newspapers, human rights organizations and politicians [are] voluntarily or involuntarily collaborating with the *PCP-SL* (Communist Party of Peru-Shining Path)”.<sup>77</sup> The CVR’s *Final Report* documents President Belaúnde’s reaction to receiving a letter from Amnesty International reporting the excesses and human rights violations that were being committed in the war on subversion. He remarked that he would toss that report “right into the garbage can”.<sup>78</sup>

The struggle against impunity launched by human rights workers during the first decade of the armed conflict was inspired by the courage and perseverance of the victims’ families, who never wavered in their demands for truth and justice. In spite of the repression, family members risked their lives by going public with their demands, which were taken up by human rights organizations. However, given the nature of the conflict, there was nothing they could do, since their allegations went unheeded by the State institutions that should have responded. The combination of indifference and complicity allowed impunity to flourish.

Even when more information became available, thanks to constant reports in certain papers and by the victims’ families about the human rights violations being committed by State forces, conservative politicians both in the government and the opposition continued to perceive human rights as an obstacle to winning the war on subversion. In their public statements, they repeatedly attacked human rights activists—and political figures on the left—for directly or indirectly supporting terrorism, often insisting that it was only the terrorists who were violating human rights and denying any State responsibility.<sup>79</sup>

Faced with this, human rights organizations, who had documented cases of fundamental rights abuses and failed to find justice in the national system, asked international organizations—including Amnesty International—<sup>80</sup> and United Nations working groups to intervene in the dramatic situation in Ayacucho. In addition, more than two hundred petitions were filed before the Inter-American Commission on Human Rights (IACHR), involving more than five hundred victims of the armed conflict in the previous two decades. The documentation of these cases was helpful later to the CVR, since it provided an important data base that the Commission systematized.

However, large sectors of urban society—mostly in Lima—remained indifferent and did not protest during the first decade of the armed conflict. This is explained principally by the centralism and exclusion that have characterized our country ever since its beginning as a Republic. Thus, most of the victims of the conflict were *campesinos*. The situation might have been different if Lima society had appreciated the scale of the conflict and human rights violations in the early years, and not just in the nineties when the conflict moved to the capital and the abuses by the rebels and security forces gained more visibility.

Beginning in the nineties, the human rights movement expanded its agenda to include not just the struggle against impunity but also defense of the rule of law, which was violated by the self-coup of 5 April 1992. Human rights organizations carried out a public awareness campaign and initiated legal actions for thousands of innocent detainees held in Peruvian jails for over a decade.

With the new Fujimori government, the counter-insurgency campaign underwent a geographical and strategic shift.

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<sup>77</sup> Cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, *Informe Final*, vol. II, ch. 1, p. 267, Lima: CVR, 2003. This statement is from General Noel Moral’s response to charges of murder in the death of eight journalists in Uchuraccay.

<sup>78</sup> Document entitled *Amnesty International’s Letter to President Fernando Belaúnde Terry. August 1983*, AI Index: AMR 46/29/83. Cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, ob. cit., vol. II, ch. 1., p. 267.

<sup>79</sup> YOUNGERS, Coletta. *Violencia política y sociedad civil en el Perú*. Historia de la Coordinadora Nacional de Derechos Humanos. Lima: Instituto de Estudios Peruanos, 2000, p.79.

<sup>80</sup> Amnesty International, after receiving information and huge numbers of reports of human rights violations carried out by state agents in the zones under emergency rule, asked the president to take appropriate action and measures to stop the indiscriminate repression being perpetrated by the Armed Forces and police in the so-called war on subversion.



During the eighties, the repression was indiscriminate, and most of the victims were Quechua speakers.<sup>81</sup> The CVR's *Final Report* shows that three out of every four victims were *campesinos* whose native language was not Spanish—a clear indicator of which sector was most harmed by the armed conflict.

During this new phase, disappearances, executions and torture became selective, repression was institutionalized in the justice system, trials with hooded judges were instituted, military tribunals began trying people, sentences for terrorism were made harsher, and constitutional guarantees were relegated to empty statements, as “important sectors at every level of society showed themselves willing to exchange democracy for security and tolerate human rights violations as the necessary cost of ending subversion”.<sup>82</sup>

Although it is true that during his first term Alberto Fujimori achieved popular support thanks to a certain level of economic stability and the capture of the insurgency's main leaders, the price that society as a whole had to pay was very high. The human rights movement faced not only impunity and dictatorship imposed by the government, but also widespread social indifference to, and failure to understand, the new context that was emerging:<sup>83</sup> the consolidation of impunity with the promulgation of the amnesty laws of 1995, which openly favored the paramilitary squad known as the “Colina Group”, identified as responsible for the killings in Barrios Altos and La Cantuta.

The amnesty laws created a new challenge for the human rights movement. They thwarted the demands for truth and justice that thousands of family members of victims of political violence have been making since the eighties. As a result, human rights organizations—under the umbrella of the National Human Rights Coordinating Committee—turned once again to the Inter-American human rights system. In 2001, after the fall of Alberto Fujimori, the Inter-American Court ruled that the amnesty laws 26.479 and 26.492 were null and void because they were incompatible with the American Convention on Human Rights; and, later, it specified that the ruling was applicable to all Peruvian cases.<sup>84</sup>

While it is true that human rights groups managed to overcome this first barrier to ending impunity in 2001, during the nineties they were plagued by persecution, harassment and death threats against their leaders.<sup>85</sup> All of this from a government determined to frighten and intimidate those calling for what human rights groups had supported ever since the beginning of the armed conflict: unconditional respect for human rights that would translate into truth, justice and respect for democracy.

## **2. The Transitional Government: The Truth and Reconciliation Commission**

Public allegations of flagrant human rights violations were politically damaging to the Fujimori administration.

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<sup>81</sup> By Quechua speakers, we are referring to those people whose native language is Quechua. Most of these people live in the Andes and work in agriculture and livestock.

<sup>82</sup> COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Ob. cit.*, vol. VIII, conclusion No. 99, p. 371.

<sup>83</sup> After the self-coup of 5 April 1992, the government introduced a series of measures that impacted the main social organizations' ability to protest. These measures included arbitrary dismissals, intervention in the universities, harassment of public figures, etc.

<sup>84</sup> “Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.” Inter-American Court of Human Rights: Barrios Altos Case (Chumbipuma Aguirre *et al. versus* Peru), judgment of March 14, 2001, para 44.

<sup>85</sup> In 1989 Coqui Huamani was murdered in Cerro de Pasco; Ángel Escobar was detained and disappeared in 1990 in Huancavelica; that same year, Augusto Zúñiga lost an arm when he was assaulted in Lima; Guadalupe Ccallocunto Olano was arrested and disappeared in Ayacucho. These violations are typical of innumerable attacks suffered by human rights workers, mostly at the hands of the Armed Forces.

Despite adamant opposition by human rights organizations and part of civil society to the amnesty laws,<sup>86</sup> Peruvian society had no real understanding of the extent of the violence and the legacy of serious breaches of rights that successive governments were carrying with them. The situation later changed, with Fujimori encountering resistance when he announced he was running for president for the third time. His candidacy was based on law 26.657, passed by a Democratic Constituent Congress (CCD), which flew in the face of elementary legal logic by offering an “authentic interpretation” that allowed Fujimori to sidestep legal prohibitions on a third term. Subsequently, the Kouri-Montesinos video—which showed an elected congressman being bribed to support the government—revealed the depth of endemic corruption in the country’s main institutions, as well as in much of its political class.

It can be argued that it was the lack of economic growth,<sup>87</sup> the rise of anti-authoritarian sentiment and the revelations of corruption that brought the Fujimori regime down, rather than its obvious human rights violations. This interpretation helps explain Peruvian society’s lack of comprehension, commitment and support for the thousands of victims of political violence.

After the transitional government headed by President Valentín Paniagua took over, the nation had to deal with an emotionally damaged society whose tragic and painful past needed to be faced. On 4 June 2001, the CVR was created by Supreme Decree No. 065/2001-PCM. The CVR’s main objective was to establish the causes of the armed conflict, and to investigate and present the truth about the preceding twenty years of political violence.<sup>88</sup> The Commission’s inquiry lasted over two years and was supported by human rights organizations, people affected by the violence and civil society. It was subjected to systematic verbal attacks by some political groups, business sectors and members of the Armed Forces. These groups constantly tried to discredit the CVR’s work, in some cases with the intention of maintaining the shield of impunity and minimizing the impact of the *Final Report*, which was to become a historic tool for examining the roles played by various social groups during the internal armed conflict.

When its inquiry was complete, the CVR published its *Final Report* on 28 August 2003, in an unfavorable political climate, since the new government of Alejandro Toledo was facing allegations of corruption and there were ongoing social protests in different parts of the country, so that democratic institutions were in danger. Nevertheless, the report was received with great hope by those who had suffered from the violence. In the public ceremony marking the presentation of the *Final Report*, President Alejandro Toledo acknowledged the CVR’s work and promised to follow its recommendations, oversee reparations for the victims and strengthen human rights through democratic institutions.

During the process of transition, there was great hope that the truth would be revealed and justice done. Human rights organizations and people affected by political violence saw the creation of the CVR as a chance for truth and justice, which had been denied them for more than twenty years. This hope was based on the fact that the CVR was not only supposed to explain the circumstances that led to the conflict, but was also mandated to collaborate with the justice system to shed light on human rights violations carried out both by militant groups and state agents and identify the perpetrators and the whereabouts of the victims. This generated a climate of high expectation among thousands of families and victims of the violence, who had long suffered uncertainty about their cases. These

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<sup>86</sup> Sectors of civil society led by the Civic Movement Against Impunity protested at the national level against the “self-amnesty laws”. Their principal spokesperson was the well-known painter Víctor Delfín.

<sup>87</sup> From 1997 on, there was an economic recession that lasted practically until 2000.

<sup>88</sup> The goals mandated by the Supreme Decree are: a) to analyze the political, social and cultural conditions and behaviors in society and in State institutions that contributed to the tragic violence Peru experienced; b) where appropriate, to help the respective jurisdictional bodies shed light on the human rights crimes and violations by terrorist organizations or by State agents, through attempting to determine the whereabouts and circumstances of the victims and, where possible, the identity of the perpetrators; c) to draw up proposals for reparation and for honoring the victims and their families; d) to recommend institutional, legal, educational and other reforms as preventive measures, to be processed and carried out via legislative, political and administrative initiatives; and e) establish mechanisms for monitoring compliance with its recommendations.

expectations had repercussions for human rights organizations, which were overwhelmed by appeals for truth and justice after the publication of the *Final Report*.

Sadly, these demands were lost in the transition process. The majority of those affected by the violence failed to understand the nature of the CVR and mistook it for a court with jurisdiction where they would find justice, which they interpreted as a criminal sentence. This misunderstanding was due in part to the fact that there was no clear public education campaign by the State to explain the CVR's role, and also to the fact that human rights organizations, in most cases, rushed to support the CVR's work. The high expectations generated among the victims' families—or at least, many of them—prevented people from really understanding that it was only the beginning of a long process of searching for truth and justice.

Despite this, the quest for truth and justice was always present throughout the work of the CVR, and after the presentation of the *Final Report*, human rights groups felt a moral imperative to advertise its recommendations and monitor whether they were being carried out. But because of the nature of their work they also had to channel and handle the demands for truth and justice revealed by the CVR in the forty-seven cases presented to the justice system for prosecution, representing the three principal phases and locales of the internal conflict.

The human rights movement was an important link between the CVR and those affected by the violence. Firstly, because of the documentation carefully built up over twenty years by human rights groups, which later served as a basis for the CVR's Document Center. The movement was also important because it had nationwide affiliations, which made it possible to hold successful public hearings in all the principal regions of Peru. It provided support and legal advice to those wishing to testify, publicized the CVR's work around the nation, and provided active support to the Commission during the two years it functioned.

The day that CVR President Salomón Lerner delivered the *Final Report* to the President of the Republic, Alejandro Toledo, marked the end of one phase and the beginning of another.<sup>89</sup> It also constituted a public demonstration of the pain and horror of the twenty long years of internal conflict. During his speech on the occasion, Lerner's choked voice expressed a mixture of anguish and revulsion at the number of victims of the "irrational" violence that devastated Peru.<sup>90</sup> Indeed, the probable number of victims exceeded 69,000 Peruvians who died or were disappeared by insurgent organizations (55.5% of the victims) or State agents (44.5%). Most of those victims were Quechua speakers. This figure rules out the military's claim that the deaths attributed to its agents were mere errors or excesses. Rather, it points to the responsibility of civil authorities and senior members of the Armed Forces for authorizing, in certain areas and at certain times, widespread and/or systematic violations of human rights that constitute crimes against humanity, as well as breaches of International Humanitarian Law.

The behavior of civilian governments who ignored the reports of human rights violations or, in many cases, excused the perpetrators from prosecution,<sup>91</sup> and favored a military solution with no civilian oversight, met with approval from many Peruvians. This approval came mainly from urban groups who had some education and access to State services, and who lived far from the epicenter of the conflict. This sector was largely indifferent or else supported a rapid solution, and was willing to tolerate the "social cost" paid by citizens of poorer, rural areas.<sup>92</sup>

Successive governments do indeed, as the CVR has pointed out, bear political responsibility for what happened. However, the human rights movement and organizations of people affected by the political violence maintain that accountability does not stop at the political level. There is evidence of criminal responsibility for the serious human rights violations committed over the last twenty years, principally among senior civil and military officials who legitimized violence as the only strategy in the war on subversion.

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<sup>89</sup> The presentation of the *Final Report* in the *Casa de Gobierno*, Presidential Palace, on 28 August 2003, was broadcast live by Peruvian television nationwide.

<sup>90</sup> Cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, Ob. cit., vol. VIII, conclusion No. 55, p. 362.

<sup>91</sup> Ib. Conclusion No. 73, p. 365.

<sup>92</sup> Ib. Conclusion No. 77, p. 366.

The CVR's important legal contribution is not only identifying criminal responsibility—a matter to be resolved by the Judicial Branch—but pointing out that the crimes against humanity were the product of a systematic and widespread policy at certain times and in certain areas of the country. This allows the revival of pending cases and the formulation of charges against senior military and civilian officials who not only turned a blind eye or allowed this policy but planned, approved and implemented it. Thus responsibility of those in power does not, as stated earlier, stop at the political level; there should be enquiries to establish the level of criminal responsibility they bear. It will be a long and torturous process because there are various procedural and political obstacles; however, the first steps are clear.

The foundations for restarting judicial investigations and responding to calls for truth and justice were laid in 2001. By that time, the Peruvian state had assumed responsibility before the Inter-American Commission for 159 cases of human rights violations committed during the internal armed conflict.<sup>93</sup> Secondly, the Inter-American Court of Human Rights had ruled on the Barrios Altos case that Peru's amnesty laws were incompatible with the American Convention on Human Rights and were therefore null and void. There was also the CVR's *Final Report*, which came to important conclusions about political and criminal responsibility, validating what the human rights movement and victims' groups had been arguing from the beginning of the armed conflict.

Currently, the challenge facing Peruvian society—a challenge which fundamentally involves the institutions of State—is how to deal with the legitimate demands for truth and justice for the 69,000 victims of the internal armed conflict. It is worrying that despite the wealth of evidence in the CVR's *Final Report*—and its favorable reception by 48% of the people of Peru—<sup>94</sup>, the Commission's conclusions about truth and justice have not led to serious and profound debate due to a lack of political will on the part of the government and due to a failure of ethical responsibility on the part of those involved. This is basically due to the lack of dissemination of the CVR's work and conclusions, as well as to the fact that the origin of victims of the internal conflict reveals that there are still great divisions in our society due to discrimination and exclusion.

All of this has meant putting off, once again, the hopes of the poor and marginalized sectors of society who were victims of the conflict and who saw the CVR's work as a chance for recognition as citizens by the State, a recognition that has already been postponed for twenty years. We must not forget that the CVR is a landmark in the country's history that all Peruvians should have the responsibility to acknowledge. The pursuit of truth and justice should be renewed, in a way that involves all participants in society. As a nation, we have a moral duty to face up to our past and lay the basis for a true re-founding of the State.

### **3. Criminal Justice After the Truth and Reconciliation Commission**

During this period, some of the CVR's recommendations regarding criminal prosecutions were carried out. This can be seen in rulings by the *Tribunal Constitucional*, Constitutional Court, as in the ruling of 24 August 2004, on case No. 0017-2003-AI/TC, which outlines what constitutes a *delito de función*, military crime, and challenges the permanence of military jurisdiction.<sup>95</sup> Similarly, the ruling of 22 March 2004 on case No. 2488-2002-HC/TC, which declares that forced disappearance is a continuing crime—and therefore cannot be subject to statutes of limitation—recognizes the right to truth and therefore allows it to be included in our legal code.

Progress on human rights at the present time is being led by the Constitutional Court, which has issued

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<sup>93</sup> Cfr. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Report No. 101/01. Case 10.247 et al. Extrajudicial Executions and Forced Disappearances of Persons. 11 October 2001.

<sup>94</sup> Source: Apoyo, 13 September 2004.

<sup>95</sup> Military jurisdiction is not a privilege that attaches to the person, conferred on members of the military or police because of their affiliation, but a limited privilege that applies to violation of Armed Forces and National Police legally protected interests. Thus, not every criminal act committed by a member of the military or police can or must be judged by a military tribunal, since if it is a common crime, it should be judged by the civilian Judicial Branch, regardless of any military affiliation the individual may have (Foundation 129). Constitutional Court, File No. 0017-2003-AI/TC.

approximately 220 rulings in the last four years based on case-law from the Inter-American Court, as well as recommendations by the Inter-American Commission. These have found legal expression in the verdicts issued by the Supreme Court of Justice on cases of disputes over jurisdiction brought by military courts. Specifically, the decisions in files No. 29-2004 (Chuschi Case) and No. 18-2004 (Indalecio Pomatanta) finally ended the intrusion of military courts in prosecuting human rights violations.

In addition, the development of a judicial subsystem based on the CVR's recommendations and the creation of specialized prosecutors for human rights violations has improved the outlook for truth and justice, but the situation will have to be closely monitored by citizens, who must be the chief custodians of justice in our times.

For human rights groups, this period following the work of the CVR has been a crucial one. The demands for justice from organizations of family members —such as the mothers of the National Association of Families of People Kidnapped, Detained and Disappeared in Emergency Zones (ANFASEP)— have been too numerous for any one organization to cope with them. Therefore —with constant consultation and coordination— there has been an attempt to respond to the demand through investigations of patterns of abuse, aggregating cases for prosecution around those patterns.

The CVR took a step in this direction by grouping together cases of forced disappearance and extrajudicial execution in 1983 and 1984 in Huamanga, Ayacucho,<sup>96</sup> where victims were sent —after arrest— to the military barracks known as Los Cabitos. The CVR presented the facts as a pattern of systematic and widespread violations. The human rights movement, particularly APRODEH with the support of the International Center for Transitional Justice (ICTJ), contributed to this investigation, adding other victims from this period, as well as cases of citizens who suffered illegal detention at the base and who were victims or witnesses of the torture inflicted there. This approach has been adopted by the rest of the human rights movement, centralized in the *Coordinadora Nacional de Derechos Humanos*, National Human Rights Coordinating Committee (CNDDHH) which is currently working on investigating two more pattern cases (the University of the Center and Operation Aries),<sup>97</sup> which were investigated previously by the CVR.

#### 4. Criminal Justice Objectives in the Period Following the Truth and Reconciliation Commission

##### 4.1 Criminal Justice as a Form of Reparation

It has often been said that the best way to “cure the wounds of the past” is a financial settlement, or that family members who press charges are only looking for compensation from the State. These arguments are almost always made by sectors of society who fear the truth and have consistently turned their backs on attempts to reach true, legitimate justice. Most people do not know —or prefer, for various reasons, not to know— that over the last twenty years the common denominator among those affected by the internal conflict is that they want their loved ones back, they want to know what happened to them, where their remains are, why they were taken away, why they were killed, who was tortured and killed and what the legal system is going to do about the perpetrators. Thus, we are absolutely convinced that to make amends to the victims, one cannot start with a program of monetary or symbolic reparations. These would be meaningless without first pursuing truth and justice; in other words, without honoring the victims and punishing the perpetrators.

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<sup>96</sup> As a result of its investigations, the CVR was able to establish that the Domingo Ayarza Military Base in Ayacucho, better known as Los Cabitos, was one of the main centers for detention, torture, extrajudicial execution and forced disappearance during 1983 and 1984. Approximately 120 people were detained at the base and are still missing. (Los Cabitos Case).

<sup>97</sup> University of the Centre case: between 1990 and 1992, the Armed Forces countersubversive campaign applied a systematic and widespread policy of disappearances and extrajudicial executions against some 74 students of the National University of the Center in Huancayo. Operation Aries: in April 1994, the Armed Forces in the department of Huánuco carried out an indiscriminate countersubversive operation in various areas on the left bank of the Huánuco River, leaving 39 civilians dead.

We are aware that no monetary sum can compensate for the loss of a loved one. Therefore, the role of the criminal justice system must be not only to punish, but also to make amends and restore dignity. Thus, the purpose of the justice system has been interpreted in two ways: preventive and restorative. The latter is the more interesting interpretation to those affected by political violence: obtaining justice, understood as an effective criminal penalty, has a restorative effect for those affected by the violence, because it fulfils their need — fueled by a desire for justice rather than revenge— for recognition of the damage they have suffered in losing a loved one. However, we are aware that for various reasons, not all human rights cases will reach a trial or an effective verdict. Moderating victims' expectations and modifying their desire for criminal justice is a difficult task that should be faced by the State, which should plan and implement alternatives to criminal penalties that would meet the needs of the sufferers without neglecting their right to truth.

In particular, we believe that prosecution for violations of the human rights of the thousands of victims of the conflict would be optimal, but that it is not a realistic goal. Nevertheless, we must press for criminal penalties by all possible means as an important way of making amends and also to prevent these tragic events from happening again in the future. From this perspective, if there is to be effective prosecution of human rights violations, they should not be tried as if they were ordinary violations of criminal law. Rather, the nature of these crimes should be taken into account. Trying human rights violations as common crimes underestimates the gravity of the offense and negates the restorative and preventive purpose. Not only must international human rights law and international humanitarian law be applied in these cases; justice system personnel need also to bear in mind that the crimes were committed in the context of an internal armed conflict and in many cases in response to systematic and widespread policies. Thus, the historical context is relevant, as is the encounter with justice and upholding the democratic system, two sides of the same coin.

Furthermore, the right to truth must be an explicit goal of these trials, especially when we remember that in most cases the families are living in uncertainty about what happened to their loved ones, especially in cases of forced disappearance. Fortunately, the Peruvian Constitutional Court, in its ruling on file No. 2488-2002-HC/TC, established that: “The right to truth is, in this sense, an inalienable collective interest protected by law”.<sup>98</sup> The right to truth has both individual and collective dimensions in terms of the victims, their families and loved ones. It is essential that they know the circumstances under which the human rights violations were committed, and, in cases of death or disappearance, the fate of the victim. Even if much time has passed since the abuse occurred, people directly or indirectly affected by a crime of this magnitude always have a right to know the identity of the perpetrator, the date and time, how it happened and where the remains are, among other things. As the Court has stated, the right to truth:

[. . .] derives not only from the international obligations by which the Peruvian State is contractually bound, but also from the Political Constitution itself, which, in article 44, establishes the state's obligation to protect all rights and especially those which [if infringed] affect the dignity of man, since this is a historic circumstance that, if not properly clarified, could affect the life of our institutions.<sup>99</sup>

The right to truth and to effective prosecution of human rights violations began to make headway with the work begun by the CVR. The task is a difficult one, not only for the human rights movement, but also for the Peruvian state and its criminal justice system. We can only hope that this time there will be justice for the thousands of victims.

#### **4.2 Criminal Justice and Dignity**

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<sup>98</sup> Constitutional Court, ruling on the Piura Genaro Villegas Namuche case, 18 March 2004, file No. 2488-2002-HC/TC, eighth premise.

<sup>99</sup> Ob. cit., ninth premise.

Hopefully in ten or fifteen years' time  
we too will be seen as Peruvians ...  
ABRAHAM FERNÁNDEZ

This remark by Abraham Fernández, who was affected by the political violence, was made during a public hearing in the city of Huanta in May 2002. It sums up the feelings of the majority of the families and victims.

Peru's Political Constitutions of 1979 and 1993 both hold that the supreme goal of the Peruvian State is the human person and his or her wellbeing and holistic development in a context of unconditional respect for human rights. Obviously, this formality in the constitution contrasts dramatically with the number of people disappeared, executed without trial, tortured, arbitrarily detained, etc.

It is interesting to note that according to the 1981 census (when the armed conflict was beginning) there was a 20% discrepancy between the number of adults in the country and the number of adults listed on the *Jurado Nacional de Elecciones*, National Electoral Roll of the time. In other words, one fifth of the adult population simply did not exist as far as the State was concerned. That figure shows that a percentage of the population was prevented from exercising their rights because they did not possess a document that showed them to be citizens. Likewise, according to the CVR's *Final Report*, 75% of those who lost their lives in the conflict were native speakers of Quechua, Aymara or other languages. Furthermore, 40% of the crimes took place in the department of Ayacucho, one of the poorest in Peru.

From the facts outlined above, it is clear which sectors of society were most affected by the internal armed conflict. Thus, honoring the victims must start with a sincere desire on the part of the Peruvian state to meet the families' demands for truth and justice. It is imperative to restore confidence in democratic institutions, especially among those citizens affected by the conflict. This is even more urgent when we bear in mind that during the conflict the armed forces and police provoked terror among civilians similar to that caused by the militant groups, rather than guaranteeing safety and the rule of law. Likewise, the Judicial Branch and the Ministry of Public Prosecution became true "impunity cloaks"; a conclusion reached when one sees the number of guilty verdicts against human rights perpetrators in the civilian courts.

## **5. Access to Prosecution for Affected Persons**

The victims' families' movement in Peru dates from the early days of the internal armed conflict, when a group of mothers in Ayacucho began protesting the disappearance of their children. This led, shortly thereafter, to the formation of the first family members' association —ANFASEP— along with the first human rights groups. Victims' relatives were always intimately involved in the process. Throughout the first phase of the conflict, victims' and families' groups started emerging, with the common goal of seeking truth and justice. Together with human rights organizations, they began a long battle to create adequate conditions to meet these demands.

This process culminated in the presentation of the CVR's *Final Report* and the implementation of its recommendations. The most important of these are: the creation of a legal subsystem to handle human rights complaints and trials, with judges whose independence and integrity is guaranteed; the reform of antiterrorist legislation; and the definition of military crimes in the military justice code, among others.

All of these basic conditions are being implemented, which is encouraging, since they allow us to move on to the process of prosecution after a long debate about the principal obstacles that had to be surmounted. The protagonists of the process are the people who were affected during the violence. They are the ones who should have direct access to the justice system, and they have every right to participate in judicial hearings, present evidence and have a role in the localities where the events happened.

Even though the State seemed determined to rise to this historic task, the *Consejo Ejecutivo*, Executive Council of

the Judicial Branch, has issued two questionable administrative rulings: No. 060-2005-CE-PJ and No. 075-2005-CE-PJ. The first granted jurisdiction at the national level to the *Juzgados Penales Supra Provinciales*, Supra-Provincial Criminal Courts of Lima and Ayacucho, and the second removes jurisdiction from the Supra-Provincial Criminal Court of Ayacucho. On 13 April 2005, the *Sala Penal Nacional*, National Criminal Court<sup>100</sup> approved Directive No. 01-2005-P-SPN which states in Article 1 that the Criminal Courts, the Supra-Provincial Criminal Court of Ayacucho and Courts of mixed jurisdiction from various judicial districts in the country must refer any further charges of crimes against humanity filed by the Ministry of Public Prosecution as well as any that are “pending classification” if there are three or more complainants involved, to the *Mesa de Partes Única* of the Lima court system (the Central Registry for all human rights filings for courts in the Lima area). We believe this ruling by the National Criminal Court to be arbitrary and devoid of any technical or legal basis.

As the CVR pointed out in its *Final Report*, the political violence the country endured centered principally on the department of Ayacucho, which records the highest incidence of disappearances, executions and torture in the twenty years of armed conflict. In light of that fact, human rights cases should be investigated, tried and brought to conclusion in the place where the abuses occurred. The implementation of this ruling violates the victims’ families’ right to due process, access to justice and effective protection of the law, and the search for truth and justice involving the justice system is being hindered. The National Criminal Court’s ruling will result in delays in judicial proceedings, since in most cases witnesses and relatives of victims live in the area where the events occurred. Sending magistrates to the provinces would involve significant expenditure of resources, which we know the Judicial Branch does not possess.

Criminal justice must not be distanced from the victims, relatives and society where the events took place. Once again, we cannot deny those affected by the political violence or society as a whole the right to know the truth and to strengthen the collective memory of the groups worst hit by the violence. The National Criminal Court’s administrative ruling must be seen as a serious reversal in the search for justice, with considerable impact on constitutional principles such as the right of victims and their families to access the justice system.

## **6. Victims’ Participation in Criminal Trials**

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

AMERICAN CONVENTION ON HUMAN RIGHTS, Article 25.1

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<sup>100</sup> The *Sala Penal Nacional*, National Criminal Court, is the court that specializes in trying human rights violations committed during Peru’s internal armed conflict, with the exception of cases related to the Colina Group, Vladimiro Montesinos and Alberto Fujimori, which are being handled by the Anticorruption System.



The justice system in Peru has not fulfilled its mission to investigate and punish crimes; people who appealed to the system to end the gross human rights violations being committed by agents of the state received no protection whatsoever, and the crimes went completely unpunished. The CVR states that “crimes went unreported, investigations were carried out in a half-hearted way and forensic work was totally inadequate, which contributed to a situation of lawlessness and impunity”.<sup>101</sup> The *Final Report* also stated, in regard to the role of the Judicial Branch during the internal armed conflict that:

[. . .] the abdication of democratic authority extended to the administration of justice. The judicial system failed to adequately fulfill its mission, whether in connection with legal penalties for the actions of subversive groups, protecting the rights of detained persons, or putting an end to the impunity of State agents who committed grave human rights violations. First, the judiciary acquired the image of an inefficient “sieve” that freed guilty suspects and imprisoned innocents; secondly, its agents failed to guarantee the rights of detainees, thus contributing to grave violations of the right to life and physical integrity; and finally, they abstained from bringing members of the armed forces accused of serious crimes to justice, systematically ruling in every case of contested jurisdiction in favor of military jurisdiction, where impunity held sway.<sup>102</sup>

The victims found themselves utterly defenseless because under Peruvian law, only the Ministry of Public Prosecution can initiate criminal proceedings, except in crimes listed in section two of the Penal Code as crimes against honor (defamation, slander and libel). Thus, someone affected by a crime has to sit back and let the prosecution handle the case. He can only appear in the criminal case as a civil party, with many limitations since legislation decrees that he may only “pursue civil reparation”.

In Peru there is opposition to the notion of a victim actively pursuing sanctions for crimes of a public nature. For many people, victims who actively and legitimately intervene in a criminal action could be interpreted as acting only out of a desire for personal revenge.

In our opinion, current legal provisions for victims’ participation in human rights trials are inadequate. Restrictions on victims include not being able to press for indictment, classify the crime or contest the penalties. They are only allowed to present their version of events and pursue civil reparations. This goes against advances in international human rights law, which assigns a more active role to the victim. The Inter-American human rights system has altered its own rules along these lines. Now the Rules of Procedure of the Inter-American Commission of Human Rights stipulate that the Commission will consult the victim about whether he wishes the case to be referred to the Inter-American Court and the basis for doing so. If the case is referred to the Inter-American Court, the victim has the option of independent legal representation from the Commission, and may offer testimony, request expert witnesses and enter pleas.

The figure of the adjunct complainant —or joint or private prosecutor— should be incorporated as a party to criminal trials in which a crime of public action is under investigation. This would allow victims’ families to bring charges in conjunction with the Prosecutor’s Office.

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<sup>101</sup> COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, Ob. cit., vol. III, ch. 2, p. xx.

<sup>102</sup> COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, Ob. cit., vol VIII, Conclusion No. 123, p. 375.

Argentina's legislation provides for private individuals to act as potential parties in criminal proceedings.<sup>103</sup> Even though private individuals cannot bring charges on their own, they are granted the power to help the Prosecutor's Office and intervene in oral proceedings. They are also granted the right to generate motions and appeal certain rulings. They can request intervention by the Chamber of Appeals if the prosecutor does not issue an indictment, so they have some input in the prosecutor's decision. It bears mentioning that the Center for Legal and Social Studies (CELS) was acting as an individual prosecutor in the Simón case<sup>104</sup> when it moved for nullification of the *Punto Final*, Full Stop and *Obediencia Debida*, Due Obedience laws.

In Guatemala, the law permits victims to pursue criminal prosecution, and if the Prosecutor's Office has already done so, to bring charges jointly. Under this legislation, the Ministry of Public Prosecution is in charge of investigating the alleged offense, but the parties authorized to participate in the proceedings have access to any documentation obtained. The law permits private parties to be present at inquiries and to propose methods of investigation. If the Ministry of Public Prosecution and the private party cannot agree, the latter can see the judge, who must pronounce on the legal basis for the petition. The active role of the private prosecutor has been decisive in Guatemala, and without it many human rights cases would not have advanced. In the case of the murder of Bishop Juan Gerardi, which occurred in April 1999, the Archbishop's Human Rights Office acted as joint private prosecutor. Similarly, in the case of the Río Negro massacre in Pakoxon in 1982, the Association for Holistic Development of Victims of the Violence in las Verapaces, Maya Achi (ADIVIMA) is a party to the case as a joint private prosecutor. In the case of the murder of Myrna Mack Change, the victim's sister, Helen Mack, is fighting for justice as a private prosecutor.

In Peru, the figure of the joint private prosecutor was taken into account by the Commission which came up with a draft proposal for the Criminal Procedural Code. However, because of fierce opposition from the Ministry of Public Prosecution, this figure was left out, even though the civil party was given more weight in the process. Despite this, as a report from the Ombudsman's Office shows, the majority of victims and their families are defenseless since they lack legal representation: the percentage of victims who have no lawyer (75.9%) is higher than those who do (24.1%).<sup>105</sup> Therefore, allowing joint private prosecutors would contribute to the efficacy of investigations in an average of 25% of cases; however, the large majority of victims cannot count on this option to reach the truth and obtain justice.

The experience of our country shows that lobbying by victims' organizations has been effective in getting authorities to investigate crimes. In Peru, given the scale and nature of the human rights violations described in this essay, it is also necessary for civil society to lobby justice system personnel, and for judges and prosecutors to receive information and training about human rights legislation. Initiatives of this type would help to improve (and restore) Peruvian citizens' confidence in the justice system, and would help support the State's established policy of reparations for those affected by political violence.

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<sup>103</sup> Cfr. Criminal Procedural Code (1992), article 82, in the Special High-Level Commission on the Modification of the Criminal Procedural Code, <[www.pucp.edu.pe/escgrad/penal/cod\\_proc\\_penal\\_2003.pdf](http://www.pucp.edu.pe/escgrad/penal/cod_proc_penal_2003.pdf)>.

<sup>104</sup> Supreme Court of Justice of the Nation (Argentina); appeal for review of facts by the defense for Julio Héctor Simón in the case Simón, Julio Héctor and others on illegitimate deprivation of liberty, etc. Case No. 17.768, S. 1767. XXVIII (14/6/2005). This case was brought against Carlos Guillermo Suárez Mason, José Montes, Andrés Aníbal Ferrero, Bernardo José Menéndez and others for the crime of forced disappearance of José Liborio Poblete Roa and Gertrudis Marta Hlaczik, who were arrested on 28 November 1978 and held illegally in the clandestine detention center known as El Olimpo, and who remain disappeared.

<sup>105</sup> "A dos años de la Comisión de la Verdad y Reconciliación", "Two Years After the Truth and Reconciliation Commission". Ombudsman's Report, No. 97, Lima 2005, p. 57.

## Truth and Justice from the Perspective of the Truth and Reconciliation Commission

Javier Ciurlizza and Eduardo González\*

### 1. Introduction: A Multidisciplinary Approach to Human Rights Crimes and Violations

On 28 August 2003, the Truth and Reconciliation Commission (CVR) released its *Final Report*, thereby completing its mandate, which was conferred by a presidential decree issued by the transitional government headed by Valentín Paniagua and later expanded by the government of economist Alejandro Toledo.<sup>106</sup> In that report, the CVR presented a broad analysis of the causes, facts and consequences of the internal armed conflict and of the behavior of the armed and political participants. Based on its inquiry, the CVR drew up a series of recommendations designed to preserve the country's historical memory, advance justice, promote a comprehensive reparations process for victims of the violence and lay the foundations for national reconciliation.<sup>107</sup>

The CVR concluded that roughly 69,000 people had died or disappeared as a direct consequence of human rights crimes and violations. 75% of them were native speakers of Quechua or other indigenous languages.<sup>108</sup> Although the violence affected the whole country, the Andean population and indigenous communities in the Peruvian jungle were especially hard hit. Most of the victims belong to an ethnic group that has traditionally been the poorest and most discriminated in the country, which—in the CVR's opinion—partly explains the indifference felt by many Peruvians even today towards these people, who have been treated as second class citizens and pawns for different

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\* For Javier Ciurlizza, part of this essay is based on an article of his: “Aproximación al enfoque jurídico del Informe Final de la Comisión de la Verdad y Reconciliación”, published in *Derecho*, Revista de la Facultad de Derecho de la Pontificia Universidad Católica del Perú, No. 57, 2005. For Eduardo González, part of this essay is based on his text: “The Contribution of the Peruvian Truth and Reconciliation Commission to Justice”. In ROHT-ARRIAZA, Naomi (ed). *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. Forthcoming from Cambridge University Press, 2006.

<sup>106</sup> DS 065-2001-PCM and 101-2001-PCM. DS 078-2003-PCM set the administrative deadline for concluding the work of the CVR and laid the groundwork for the process of transferral of the CVR archive and other property.

<sup>107</sup> The report is available on the web page: <[www.cverdad.org.pe](http://www.cverdad.org.pe)>. There are two official versions of the *Final Report*: nine volumes and a CD Rom with annexes, presented by the commissioners on 31 August 2003, and a shorter version entitled: *Hatun Willakuy (El gran relato)*, written by the Transfer Commission, with authorization from the CVR.

<sup>108</sup> Cfr. Volume I, chapter 3 of the *Final Report*: “Rostros y perfiles de la violencia” (Faces and profiles of the violence).

political agendas.

The CVR consistently criticized the deep and persistent socio-cultural and economic divisions that contributed to the armed conflict. Acknowledging such divisions among Peruvians was essential to the mission of contributing to “national reconciliation” as stipulated in the Commission’s mandate. In the CVR’s view, the reconciliation required had very little to do with a settlement between two sides in conflict; rather, it required bringing society, the State and different communities together, to foster a greater sense of citizenship among all Peruvians.<sup>109</sup> Fully realized citizenship within a democracy denotes a decision-making process in which all citizens enjoy effective protection of human rights. The absence or suppression of rights is a permanent source of tension that does not contribute to a reconciled or peaceful society; this was true in 1980, at the start of the violence, and remains true today.

Assessing the relationship between the violence and the rifts in society posed a huge analytical task for the CVR; it could not be done by people from a single discipline or professional background. In the first few months, commissioners and professionals in the CVR discussed methodological approaches for examining such a complex set of issues, and how the CVR would arrive at findings and recommendations.

It should be added that the Commission’s mandate (which referred explicitly to the violence and its political context) was extremely broad, which led to debate about what the CVR’s priorities should be. Although this is something of an over-simplification, discussion centered broadly on two possible approaches to studying the violence:<sup>110</sup>

1. The violence that took place in Peru could only be understood and analyzed by taking into account the nation’s history. The CVR was ideally placed to understand the context in which a crime was committed and should focus on that instead of the facts of the crime itself. Thus, the CVR should follow the example of commissions that prioritized the clarification of the “historical truth,” such as the Commission for Historical Clarification in Guatemala.
2. The events the CVR had to investigate constituted human rights crimes and violations, so it was appropriate and crucial to gather probative material in connection with “cases”, reconstructing them sufficiently to identify victims and alleged perpetrators. The historical context —while important— should only be reconstructed if relevant to demonstrate the criminal responsibility of the suspects. According to this approach, the CVR should follow the example of the Chilean Truth and Reconciliation Commission, which concentrated on “judicial truth”.

It is debatable whether the CVR ever resolved this initial theoretical argument. What is clear is that, in practice, the tension between the two viewpoints led to a productive synthesis between different ways of looking at a complex phenomenon. As time went by, it became clear that no single discipline could offer a complete and satisfactory approach. One of the most important discoveries was that simply aggregating disciplines was not enough to create a multidisciplinary approach; it was necessary to create concepts and categories that allowed lawyers, sociologists, anthropologists, historians, political scientists and philosophers to engage in dialogue with each other.

In the end, the Commission’s work was not guided by any of the perspectives examined at the outset, but rather by the conviction that the violence was first and foremost a fact that ruled out ethical neutrality: it was the result of a serious moral failure by Peruvian society, which obliged the Commission to search for an ethically motivated and emotionally committed truth. All the forms of analysis practiced by the CVR —historical, legal, psychological, statistical, etc. — should form the theoretical foundation for an ethical message of justice.<sup>111</sup>

The integration of various disciplines proved highly productive for many of the areas the CVR was to study. In this

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<sup>109</sup> This view of reconciliation finds expression as proposals in the institutional reforms proposed by the CVR.

<sup>110</sup> The discussions on methodological approaches to the CVR’s investigation took place between October 2001 and February 2002. The distinction between the two approaches was referenced in an internal working document of the CVR, drawn up by the Executive Secretary’s office for a workshop on 5 January 2002.

<sup>111</sup> On the concept of “truth” adopted by the CVR, cfr. Volume I, Introduction.

essay we will address the legal focus of the Commission on events that took place during the violence, and the Commission's mandate to ". . . where appropriate, contribute to the clarification by the appropriate entities of human rights crimes and violations committed by terrorist organizations or certain State agents".<sup>112</sup> In particular, we will discuss the need to construct a concept of a "systematic pattern" of human rights violations, the criteria used for assigning responsibilities, the proposals put forward for reforming the justice system, and the preparation of certain cases for prosecution.

## 2. Systematic Patterns of Violations

In general, the law functions to assign rights and duties to individuals and to structure relations between them in certain ways. The articulation of subjects gives meaning to a legal system both for organization of substantive and procedural norms and for construction of institutions. Thus, while it may appear redundant, the function of the law is strictly normative; the law's role is to prescribe, whereas the social sciences engage in analytical description.

However, law does have analytical tools for classifying and ordering. The technical work of legal classification identifies what kinds of individuals have which obligations and rights. By classifying acts, the law confers a coherent narrative to events that, if considered in isolation, could be seen as self-sufficient, with no logical connection to other events. The process of aggregating acts into a typology is most developed in criminal law, where "criminal classifications" allow various acts committed in different ways to be grouped together when they affect a similar norm. This classificatory role of law paradoxically allows prescription to be descriptive, although in a strictly functional way (to fit acts into specific legal categories). Normative description allows us to integrate reality into analytically differentiated categories.

This process can be seen in the creation of the CVR's *Final Report*. The commission received 16,985 testimonies from victims or witnesses of crimes or human rights violations, held over 18 public hearings, conducted in-depth research, and reconstructed the history of specific regions. All this information was processed into a system, of which the database was a central element, but not the only one. To transform the "data" into a "system" the CVR had to adopt categories and classifying mechanisms. Otherwise, it would have merely presented the country with an open-ended list of facts, without any organizing framework. The work of systematizing the information was carried out by professionals trained in handling large quantities of data. However, the classifications or "types" were largely designed by lawyers. In order to group together crimes and violations, the CVR turned to the law not just as a prescription but as a source of descriptive categories. This "description" performed by the CVR, in its most intense phase, involved "patterns of human rights crimes and violations".

This category was not invented by the CVR. It has been widely used in international human rights law, particularly in decisions by United Nations bodies.<sup>113</sup> It is also used as a yardstick for crimes against humanity: the Statute of the International Criminal Court defines crimes against humanity as a part of a "systematic or widespread" attack on a civilian population. In this case, the concept is clearly being used in the same way that criminal law describes types of offenses: grouping apparently unrelated facts to demonstrate a certain method or intensity that gives them a different "quality" than an isolated event. Demonstrating a "type" of crime against humanity, therefore, requires demonstrating the existence of patterns.

The *Final Report* focused on nine patterns of human rights crimes and violations, consistent with its legal mandate: 1) murders and massacres; 2) forced disappearances; 3) arbitrary executions; 4) torture and cruel, inhuman or degrading treatment; 5) sexual violence against women; 6) violations of due process; 7) kidnapping and hostage-taking; 8) violence against children; and 9) violation of collective rights.

Using these categories, the CVR's report offers a detailed description of the events within the scope of its mandate,

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<sup>112</sup> Supreme Decree 065-2001-PCM, article 2a.

<sup>113</sup> United Nations Commission on Human Rights, Resolution 8 (XXIII) of 16 March 1967; Economic and Social Council, Resolutions 1235 and 1503 of 6 June 1967 and 27 May 1970. Likewise, the Inter-American Commission on Human Rights refers to the concept of a "systematic pattern" in its report 56/99 of 13 April 1999, paragraphs 65 and 68.

a presentation of the applicable legal framework, a description of the crimes committed and a series of conclusions. Not all crimes or violations fit the “types”, but the framework makes it possible to state whether or not there has been a crime against humanity, and to hold commanders and superiors responsible.

### 3. Human Rights Violations

International procedures for protecting human rights were founded on the still common presumption that States are the only bodies authorized to undertake international obligations regarding human rights. But that presumption does not hold for the concept of human rights. Peces Barba refers to the “humanization of the Law or normative order”, asserting that the individual becomes the ultimate goal of social organization.<sup>114</sup> Of course the individual is the objective of the State, but also of society and other people. From the perspective of the subject in law, the relevance of the concept of human rights derives from the possession of those rights, not from who might infringe upon them.

Thus, the CVR’s report specifies that human rights violations may be committed by anyone, including other individuals or non-state groups. It is not valid, says the *Final Report*, to use legal reasoning applicable before certain bodies or proceeding, to make distinctions about what *nomen iuris* corresponds to an act that infringes individual rights. Even though the Commission’s mandate states that it must contribute to clarifying grave “human rights crimes and violations”, the CVR takes both concepts and melds them into one. The consequence is not just a rhetorical or grammatical exercise, since every victim has a right to justice, truth and reparation regardless of who violated their human rights.

In Peru, where over half these acts were perpetrated by members of the Communist Party of Peru – Shining Path (PCP-SL), this is a particularly significant claim. Without detracting from the State’s responsibility in any way, the CVR also holds the national leadership of the PCP-SL accountable, as we will now examine.

### 4. Attributing Responsibility

The “contribution to justice” referred to in the CVR’s mandate implied using criminal offense categories, along with concepts from general international law. In particular, the CVR was to identify, wherever possible, the alleged perpetrators of serious human rights crimes and violations which, as we stated earlier, formed part of a consistent pattern or repeated practice.

Criminal law establishes offenses on the basis of individual responsibility. One cannot, in other words, hold institutions or organizations criminally liable. By law, criminal responsibility for specific acts is always confined to the person of the alleged perpetrator. However, the CVR also considered the political and moral responsibilities of public institutions and, naturally, of insurgent groups. These responsibilities are spelled out in the CVR’s evaluation of the institutional conduct of public organizations that had specific duties in regard to the violence studied.

Having said this, liability for specific cases had to be assessed according to the criminal offenses classified in existing national legislation. According to the principle of legality established in our Constitution and international human rights treaties, no one can be prosecuted for events that were not criminalized at the time they were committed; criminal law can only be applied retroactively if doing so favors the defendant.

Thus, one of the first problems the CVR faced in terms of criminal responsibility was the fact that the Penal Code had undergone successive legal modifications which gradually introduced offenses described in international agreements signed and ratified by Peru. The offense of forced disappearance, for example, was introduced in 1991, repealed in 1992 and reinstated a few months later. A strict application of the principle of legality would mean that no act committed before the offense was named in the Code, and even those committed during the months when it was removed, could be considered forced disappearance. Such actions could only be classed as kidnapping.

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<sup>114</sup> Cfr. PECES BARBA, Gregorio. *Curso de derechos fundamentales. Teoría general*. Madrid: Universidad Carlos III y Boletín Oficial del Estado, 1999.

Nevertheless, the CVR reasoned that forced disappearance is a continuing crime, since its effects are prolonged until the victim's whereabouts are established. The Constitutional Court issued a similar opinion in its judgment on the right to truth, which states that statutes of limitation cannot prevent the State from carrying out its duty to investigate events that constitute a continuing crime.<sup>115</sup> The CVR's conclusion was that classing an offense as forced disappearance should not necessarily depend on the law in force when the person was detained, but rather the one in force at the time of the accusation and investigation. It is neither legally nor morally valid to reduce the phenomenon of forced disappearance to simple kidnapping.

In order to identify the responsibility of alleged suspects, the CVR noted the particular characteristics of the crimes committed in the context of the internal armed conflict, namely:

- a. Most of the crimes committed belong in the category of complex crimes, because of the number of victims, the number of perpetrators or the number of transgressions.
- b. The complex nature of the crimes is due, also, to the fact that they were committed within certain hierarchical organizations. The alleged perpetrators have repeatedly argued either that they were acting under orders from their superiors, or that their subordinates were disobedient, with the end result that nobody accepts responsibility.
- c. The organizations the alleged perpetrators belong or belonged to are not identical in nature. On the one hand there are illegal subversive organizations, while on the other are public institutions recognized by the Constitution.

This last characteristic also stems from the CVR's legal mandate. It was not, nor could it be, a neutral party investigating an armed conflict waged between two legally equivalent parties. The State that Shining Path sought to destroy was neither a dictatorship nor an intrinsically illegal regime. On the contrary, the first acts of violence by the insurgents were deliberately timed to coincide with Peru's return to democratic rule. Despite the many flaws in its democratic system, Peru was governed by democratic institutions, with freedom of expression, regular elections and other features of a constitutional democracy.

The CVR felt that the only exception to this was the period between 5 April 1992 and the end of that year. During those seven months, the government (which had been elected legitimately) decided to dissolve and take over other branches of the State and rule by decree during the so-called emergency and national reconstruction regime. By putting itself above constitutional legality, the leaders of that regime assumed full and unquestionably direct responsibility for all human rights abuses perpetrated during that period.

That said, the important thing was not merely to analyze individual criminal responsibility in supposedly isolated cases, or even patterns of cases. The CVR had to engage in a sociological analysis of the organizations within which crimes were committed and of the social and political context that explains —although it does not justify— the events.<sup>116</sup> In this the CVR was simply following in the footsteps of legal scholars who have faced similar challenges in determining how the nature of an organization might affect the extent of criminal responsibility. Claus Roxin, who pioneered the theory in the sixties, was part of a number of famous trials, such as the Eichmann trial in Israel and the trial of the Argentine Military Juntas in 1983.

The consequences of the nature of the offenses and of the organizations within which they are committed are

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<sup>115</sup> Judgment on file 2488-2002-HC/TC (Piura). Genaro Villegas Namuche, 18 March 2004: "The guarantee of pre-existing law necessarily entails that, at the time of commission of a crime, there is a criminal norm in force that establishes a specific punishment. Thus, in the case of instantaneous crimes, the applicable criminal law will always be the one in force prior to the criminal act. On the other hand, in continuing crimes, new legal norms may be established, which are applicable at that time to those who committed a crime, without constituting retroactive application of criminal law. This is true in the case of forced disappearance, which, according to article III of the Inter-American Convention on Forced Disappearance of Persons, *should be considered a continuing crime as long as the fate and whereabouts of the victim are not established*" (our italics).

<sup>116</sup> The CVR explains in greater detail the international legal framework and its criteria for assigning responsibility in volume I, chapter 4 of the *Final Report*.

addressed by the criminal law theory of authorship and participation. The range of possible relationships between an individual person and a criminal act has given rise to numerous studies of legal dogma.

The distinction between the author and the participant is relatively straightforward in simple crimes. The author is objectively and subjectively dominant and the participant is the one who is induced to commit or cooperates in committing the crime, which is always performed at the demand of an author. However, in complex crimes committed within an organization, the distinction becomes more difficult to draw because the events are planned and carried out by different people. Roxin<sup>117</sup> offers an answer in his theory of criminal responsibility via organized power structures. This theory posits the necessity of four converging features: 1) an organized power apparatus with a rigid hierarchical structure; 2) verification that the immediate author could effectively be replaced by another, which implies that the organization has a consistent and durable structure; 3) the interchangeability of the person who actually commits the act implies automatic control by his superior in the structure, the “man behind the scene”; and 4) the power apparatus has deviated from the law and opted for criminal behavior.

The CVR applied these theoretical assumptions to the organizations they were investigating and arrived at the following conclusions:

- a. Any act committed by a member of an insurgent organization, if it constitutes a crime and forms part of a systematic pattern, can be attributed to the leadership of that organization.
- b. Not necessarily every crime committed by a member of the security forces can be attributed to each and every one of the links in the chain of command, since the Peruvian State cannot be understood as a criminal organization.
- c. Nevertheless, in circumstances and times when agents of the State committed crimes in a repeated and systematic way, and if those crimes were committed within a closed organization that was set up in a particular area to commit those crimes, criminal liability lies with the head of that area organization.
- d. Another exception must be made for crimes committed by National Intelligence Service operational squads, which, at least between 1991 and 1994, carried out crimes with open complicity from the highest spheres of power.<sup>118</sup>

These four conclusions summarize the approach taken in each of the 47 cases referred to the *Fiscalía de la Nación*, Attorney General’s Office, on 1 September 2003, as well as in the 18 cases sent directly to the *Sala Nacional de Terrorismo*, National Terrorism Court.<sup>119</sup>

## 5. Interpretation of the CVR’s Mandate in Terms of Criminal Prosecution and Organization of its Work

According to article 2 of its mandate, the Commission was supposed to “contribute to the clarification by the appropriate entities of human rights crimes and violations committed by terrorist organizations or certain State agents, by attempting to determine the whereabouts and situation of the victims, and identifying, wherever possible, alleged responsibility”. At the same time, the mandate (article 3) made it clear that “the Commission has no jurisdictional powers, and does not therefore substitute for the role of the Judicial Branch and the *Ministerio Público*, Ministry of Public Prosecution”.

One of the developments that helped the CVR carry out its mandate was the decision of the Inter-American Court of Human Rights in the *Barrios Altos* case<sup>120</sup> two months before the Commission was convened. This decision established that amnesty decrees preventing investigation of grave human rights violations were void and contravened the State’s obligations as Party to the American Convention on Human Rights (San José Pact). Also, at

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<sup>117</sup> Cfr. ROXIN, Claus. *Autoría y dominio del hecho en derecho penal*. Madrid: Marcial Pons, Madrid, 1998.

<sup>118</sup> The Statute of the International Criminal Court systematizes doctrine on liability by attributing criminal responsibility to commanders and superiors (articles 25 to 28).

<sup>119</sup> The process leading up to the referral of these cases is explained in the next section.

<sup>120</sup> IACtHR, Judgment (*Chumbipuma Aguirre et al vs. Perú*). 14 March 2001.



the request of the Peruvian State, the Court specified that its ruling applied not only to the massacre in Barrios Altos, but to all cases. The existence of that decision, subsequently declared binding by Peru's Supreme Court of Justice, gave the CVR more confidence to carry out the injunction in the Preamble to its foundational Presidential Decree, to create "[. . .] the necessary conditions for national reconciliation based on justice [. . .]."

However, the CVR was facing the aftermath of two decades of uneven work by the judicial branch during the period covered by its mandate. By that time a sizeable number of prisoners had been convicted of belonging to subversive groups, under charges of terrorism and treachery that were defined in decrees passed during Fujimori's time. Besides the clear violations of due process in these cases, it was obvious that justice had only been pursued for perpetrators on one side of the conflict, while perpetrators belonging to State organizations enjoyed total impunity.

Initially, Shining Path and MRTA prisoners tried to persuade the CVR to recommend a general amnesty for their members, since they considered themselves "prisoners of war" or "political prisoners". They even agreed to give testimony in the interests of establishing the truth, which meant it was possible to obtain long interviews and public statements from their leaders. However, this policy of cooperation changed later on, when the Constitutional Court suggested reforms in the antiterrorism laws, opening the door for new trials for persons accused of terrorism and treason.<sup>121</sup> Since it was clear the Commission would not recommend a general amnesty and since they hoped for new trials, members of the subversive organizations kept their testimony on safe ground, avoiding self-incrimination and justifying the crimes as "errors, excesses and shortcomings" for which few of them would accept direct responsibility.

From the beginning, some commissioners declared to the media that the CVR would identify the perpetrators by name to help end impunity. However, it was not until late in the process that they came up with criteria for doing so. Also, at the outset, the Commission had a very tentative investigation strategy, which was focused on high-visibility cases. One of the first tasks of the Legal Research Team was to come up with a list of some one hundred "cases that cannot be forgotten." Another research team was simultaneously working on establishing the applicable law and the patterns of abuse that should be investigated. The two teams worked separately until the very last stage of the Commission's mandate, as the *Final Report* was being drafted.

The decree that founded the CVR gave it modest powers to carry out its investigative work. It could interview anyone and compile any information it considered relevant, but it could not oblige people to give testimony. It could request the cooperation of civil servants and government officials in order to access documentation or other State information; it could carry out visits, inspections or other appropriate investigative steps, but it could not subpoena institutions to provide evidence. It was able to conduct public hearings and make confidential inquiries as it deemed necessary. It was entitled to withhold the identity of persons providing important information, but it had no power to resist a subpoena from the State to hand over information.

The Commission had to use its moral stature and its negotiating skills to obtain testimonies and information, and it did in fact achieve significant levels of cooperation from institutions and individuals. Its visibility and popularity made it politically risky to oppose or obstruct it publicly. High-level military officers, including some who had been commanders of the "emergency zones" in charge of counter-insurgency operations, came forward voluntarily. With the exception of Alberto Fujimori, the former presidents of the Republic all received the Commission, which also succeeded in obtaining a large quantity of documentation from the security forces.

The Commission took advantage of its power to carry out inspections to take the initiative with the Ministry of Public Prosecution and propose exhumations in the presence of CVR experts. Similarly, it obtained permission from the Justice Ministry to visit all the jails holding prisoners sentenced for terrorism or treason, in order to compile information.

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<sup>121</sup> Constitutional Court of Peru. File 010-2002-AI/TCLIMA, a class action suit brought by Marcelino Tineo Silva and more than 5,000 citizens.

## 6. The Special Investigations Unit and “Explanatory” Cases

Even though the CVR had set up a special team at the end of 2001 to draw up a list of cases that “cannot be forgotten”, it did not make much progress on a strategy for dealing with individual cases. This only came after the first public hearings, held in Ayacucho and Huanta in April 2002, when the CVR discovered that justice was the main expectation of the victims who participated. Shortly after the hearings, the full body of commissioners decided to create a special team to work on cases, in addition to the legal team that was investigating patterns of human rights violations.

Before going ahead, however, the CVR had to confront one of the typical strategic problems for transitional justice: the impunity gap. The impossibility of prosecuting all the cases meant that some had to be prioritized over others. By the middle of 2002, it was clear that—for most of the allegations of abuse—information was scant and evidence hard to come by. Most of the testimonies received did not constitute solid enough cases to stand up in court; they simply shed some light on individual cases. Such testimony would have to be used to prove the existence of the widespread and systematic nature of the crimes.

Only in a few cases did it look possible for the CVR—or some other investigative body—to compile sufficiently solid evidence to constitute elements of proof.

It should be clear that the CVR’s approach was initially political: it chose cases that “cannot be forgotten”, in other words, cases that had been given a lot of national coverage. But when it came to the reality of preparing cases that the Ministry of Public Prosecution could successfully prosecute, the CVR had to partly abandon its initial approach and adopt legal standards such as availability of proof, solid testimony and the applicability of Peruvian law to the alleged crimes.

However, even after prioritizing legal standards, the CVR had to select a limited number of cases in order to prioritize the use of resources. Again, the Commission used a legal rather than a political rule of thumb: cases chosen would be ones that exemplified the patterns the Commission had focused on. This strategy was similar to the selection of cases by the Guatemalan truth commissions, except that instead of calling the cases “paradigmatic” in the sense of providing models of criminal behavior, they were called “explanatory”.

In practice, however, case selection ran into a variety of problems. On the one hand, the full body of the CVR tended to keep giving extra cases to the Special Investigations Unit, as new episodes of especially intense or dramatic violence emerged. This was inevitable, since the CVR did not know ahead of time what it was going to discover and, as its work proceeded in some regions, it encountered new, unsuspected cases. This happened in the northeast jungle region (the departments of San Martín and Huánuco) where local investigation teams and public hearings brought to light atrocities that were previously unknown in the official history of the violence.

Furthermore, the CVR—armed with a legal guideline for choosing cases—found that its final selection included many cases involving the Armed Forces and few involving Shining Path or MRTA. The reason was simple: most of the perpetrators from insurgent groups were already in prison and furthermore, their operational style of not establishing permanent bases in the places they attacked made it difficult to identify individual suspects. Naturally, some retired officers and their supporters saw the list of cases the CVR sent to the Ministry of Public Prosecution as an opportunity to demonize the CVR as hostile to the Armed Forces.

But the major flaw in the CVR’s strategy was the fact that the Special Investigations Unit and the Legal Team investigating patterns were effectively working independently of one another. In practice, there was little coordination between them, and what coordination there was only occurred toward the end of the Commission’s work. As a result, some discoveries of cases of massive violations, like the enormous number of extrajudicial executions at the Los Cabitos army base, got labeled “pattern cases”, but were not investigated further.

An additional issue, which mirrors the problem of lack of collaboration between the study of patterns and cases, was how to come up with a unified theory for criminal responsibility. In principle, the Commission could have established patterns of violations and then established the criminal responsibility of commanders and superiors by

applying the principle of responsibility for an action or omission. According to this logic, it should be possible to attribute responsibility not only to the person who gave the order, but to someone who was aware of what was going on but failed to put a stop to the atrocities. However, by focusing on individual cases, the Commission chose the less demanding route of establishing responsibility for active authors, in other words, those who participated in the crimes either directly or through another person. This led to the adoption of the theory of criminal responsibility by acting through another, which we summarized earlier. The adoption of this theory, which demanded stringent standards of proof, was probably the most conservative option, but was consistent with the priority given to legal rather than political standards in choosing cases.

## 7. The Relationship between the CVR and the Ministry of Public Prosecution

In the first few months of its mandate, the CVR formally agreed to cooperate with the Ministry of Public Prosecution regarding access to information, exhumations and witness protection. But the criteria for when and how information was to be shared were never spelled out, particularly with regard to investigations the Commission considered confidential. It was informally assumed that the CVR would initiate investigations, with the understanding that after it had put together a solid case, it would hand the file over to the Ministry to start judicial proceedings.

The agreement assumed that the two institutions shared a common strategy and that there would be no friction. This was not realistic. Firstly, there was no consensus about strategy, only about the need to have one. In fact, after the *Barrios Altos* judgment, all human rights cases could theoretically be prosecuted in criminal court. There was no attempt by the key players (the judicial branch, the Ministry of Public Prosecution, the Ombudsman's Office, the CVR, victims, human rights organizations) to come up with shared priorities, allocate resources, or develop lines of investigation.

No allowance was made either for the waning of the “democratic spring” enjoyed after Fujimori's departure. As time went on, Fujimori supporters and the far right became bolder and it became politically profitable to attack the CVR as being hostile to the Armed Forces. Support for the CVR from the Ministry of Public Prosecution—traditionally an institution sensitive to outside pressure—gradually eroded.

In some cases, the Ministry of Public Prosecution and the CVR ended up conducting competing investigations, which created tension between the institutions, especially when the media reported on high profile cases investigated by the CVR. Other clashes occurred because of the imbalance in resources between the CVR and the Ministry of Public Prosecution. The Commission, as an extraordinary *ad hoc* body, unlike the Ministry of Public Prosecution, was able to obtain considerable resources and hire experts for specialist work, such as exhumations.

Public awareness of the CVR's work and the victims' repeated demands for justice were the Commission's best forms of leverage in pushing for criminal prosecutions. According to a survey done in Lima in September 2002, 60.1% of respondents felt that “punishing the criminals” was the policy that would contribute most to national reconciliation.<sup>122</sup>

Conscious of its standing, the CVR decided to transfer case reports to the Ministry of Public Prosecution before the conclusion of its mandate, in the hope of stimulating criminal investigations. The first case, which the CVR considered relatively simple, was sent in December 2002, over eight months before the CVR released its *Final Report*. The case report prepared for the Ministry of Public Prosecution included a reconstruction of the case, evidence from exhumations and witness testimony. It identified the suspects and their possible whereabouts and recommended that the Ministry of Public Prosecution take action to bring the alleged perpetrators to trial and protect the witnesses.

Later, the Special Investigations Unit forwarded a more complex case to the Ministry of Public Prosecution,

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<sup>122</sup> Public Opinion Group of the University of Lima. Study 165; survey of September 2002. Metropolitan Lima and Callao.

involving hundreds of cases of forced disappearance in Huanta Stadium,<sup>123</sup> which the Navy had turned into a detention center. The file sent to the MP attributed responsibility to the army general in charge of the emergency zone during the year when the majority of the forced disappearances occurred.

Both experiments demonstrated the limitations of the Ministry of Public Prosecution, whose slow response showed little willingness to prioritize CVR cases. This reluctance only increased with time and became actual hostility after the CVR released its *Final Report*.

In volume VII of the *Final Report*—which reviewed cases forwarded to the Ministry of Public Prosecution—the CVR indicated that it expected prompt action by the Ministry of Public Prosecution and that if it saw no evidence of forthcoming criminal prosecutions for the cases it had presented it would request that the Ombudsman’s Office initiate a complaint. This ultimatum, however, was an empty one, since the CVR did not have the power to carry it out; the only effect was to expose the level of strain between the CVR—which had just finished investigations on hideous atrocities—and the Ministry of Public Prosecution, which had not prioritized the task. Shortly after the release of the *Final Report*, the Ministry of Public Prosecution reminded the public and the media that it could not be given deadlines and that the CVR’s recommendation to start investigations by a certain date was not constitutionally valid: at that point, the cases sent to the Ministry of Public Prosecution began what, by all indications, will be a long and torturous passage through the Peruvian justice system.

## 8. The CVR’s Recommendations and the Law

The tragedy experienced by Peru from 1980 to 2000 is not limited to the enumeration of the victims or the social diagnosis of a complex situation. The crimes and violations committed, the terrible aftermath we face now and some Peruvians’ tendency toward denial are wounds that will take many years to begin to heal over; however, it is possible to predict that we will pay an even heavier price in the future if we treat the CVR’s recommendations with indifference.

The judicial system and the institutions that apply the law play an important and wide-ranging role in this task. The violence had multiple origins, but the rule of law provides a democracy with all the tools it needs to respond.

The agenda is a complex and, of course, long-term one. First of all, it is crucial that justice system personnel be familiar with the CVR’s *Final Report* and its multidisciplinary analysis and use it to construct legal hypotheses. Secondly, they should allow some leeway in the application of normative categories in order to prevent legal obstacles being placed in the way of justice. Naturally, this assumes they will strictly adhere to legal principles that affect human rights. Nevertheless, the Constitutional Court has given us an example of how to assert that protecting the human person is the ultimate goal of judicial investigations (as well as of State activities), while respecting legal guarantees contained in the Constitution and the rule of law.

Finally, in the field of law, attempts to integrate international human rights and humanitarian law into domestic legislation must go beyond merely ratifying new international agreements, and make creative use of the latest doctrines in those areas, as well as of advances in the case-law and practice of international systems for protecting human rights.

In terms of society, the CVR’s report can only be understood as a first step towards strengthening and, in some cases, building a democratic system in Peru. Lawyers and justice system personnel have a special role in this process. Failure to move forward will only further erode the legitimacy of our political system.

### **Criminal Responsibility of State Agents**

**Eduardo Vega Luna\***

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<sup>123</sup> Cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Report to the Attorney General on the Huanta case*. 10 March 2003.

\* The author wishes to thank his colleagues at the *Defensoría del Pueblo*, Ombudsman’s Office, for allowing him to

Between 1980 and 2000, Peru underwent a period of serious violence triggered by the actions of the insurgent groups Shining Path and MRTA. They murdered thousands of citizens and officials, damaged public and private infrastructure and created a climate of instability and terror in the country. The State tried to suppress these groups by various means and, starting in 1992, managed to arrest the insurgents' leaders and thereby thwart their political agendas. During the course of the armed conflict, many grave human rights violations were committed, both by the insurgents and by State agents. A democratic society based on respect for people's rights cannot tolerate such abuses nor allow them to go unpunished.

The mission of the Peruvian Truth and Reconciliation Commission (CVR), which was set up in 2001, was to analyze the causes of the violence and to come up with proposals for Peruvian society to deal with the situation. It was also charged with the task of helping the justice system identify who was responsible for the serious human rights violations committed during the period.

At the end of its work, in August 2003, the CVR presented its *Final Report* to the country and also announced 47 cases of human rights violations in which it recommended criminal investigations be undertaken. It gathered information, testimonies and documents that constitute essential evidence for prosecutions in those cases and restore the victims' hope in the justice system.

Consequently, the Peruvian justice system is once again confronting the huge challenge of investigating and punishing those responsible for the gross human rights violations committed in the past. During the years of violence, Peru's judiciary was unable to efficiently bring these cases to trial. The lackadaisical way the investigations were carried out, the transfer of jurisdiction to military courts and later the amnesty laws passed in 1995, generated a climate of widespread impunity.

This is not an attempt to promote or endorse acts of revenge or indiscriminate persecution of innocent people, as some political and military figures have charged. We must allow the justice system to act normally so that it may determine specific responsibilities free from external pressures.

What would indeed be unacceptable would be to attempt to prevent any criminal investigation, as happened in the past under the amnesty laws. The verdict of the Inter-American Court of Human Rights in the Barrios Altos case makes it inappropriate to hinder the work of justice.

This chapter presents an overview of the progress and shortcomings observed in the prosecution of the cases investigated by the CVR, two years after the Commission finished its work. It is based on a report that I helped research and write, Ombudsman's Report No. 97, "*A dos años de la CVR, Two Years After the CVR*", issued by the *Defensoría del Pueblo del Perú*, Office of the Ombudsman of Peru.

### **1. Progress in Prosecution of Human Rights-Related Crimes in Peru**

Until December 2005, when this essay was written, the most significant event has been the arrest of the former president Fujimori in Chile after his surprise arrival in the city of Santiago. This left Peruvian authorities scrambling to initiate extradition proceedings. The former president is wanted on 22 criminal counts in Peru. Extradition requests have been lodged with the Chilean authorities for 12 of these, mostly in connection with allegations of corruption.

However, one of the most serious charges facing Fujimori involves alleged human rights crimes in the La Cantuta and Barrios Altos cases. The Peruvian judiciary has been conducting a lengthy trial of the members of the Colina Group, and has gathered substantive evidence of the group's existence, command structure and membership, and of Mr Fujimori's awareness of its illegal activities. The next step, therefore, is to lay out in precise detail in the

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explain the main ideas in this work devoted to the period following the CVR in Peru.

extradition files the evidence linking the former president to the crimes in La Cantuta and Barrios Altos,<sup>124</sup> in order for him to return to Peru to face trial. The results of the extradition request have yet to be seen, and the work of the Judicial Branch and the *ad hoc* Prosecutor will be essential for its success.

Clearly, the extradition of Alberto Fujimori will dominate the national agenda in the next few months, especially given that presidential elections are scheduled for April 2006. However, besides the Fujimori case there are others in which progress has been made by the Peruvian legal system in prosecuting human rights violations. I will now turn to those other cases.

### 1.1. Criminal Proceedings Underway in Twenty-Two Human Rights Cases Investigated By the CVR

One of the most significant advances in the 28 months since the CVR finished its inquiry is the large number of cases that have been opened. Of the 47 cases investigated by the CVR, 22 are in criminal proceedings in different courts at the national level and 24 others are still in preliminary investigation at the Ministry for Public Prosecution. Those investigations needed to be speeded up. Lastly, in one case—the killing of *campesinos* in Socos—sentencing had already occurred before the CVR began.

Of the 22 cases at the trial stage, 21 allege that State agents were responsible, and 1 the terrorist group Shining Path (the case of the Lucanamarca massacre).

#### *CVR referrals being prosecuted as of September 2005*

	Case	Stage	Status (Sep.2005)
1	Case of Rafael Salgado Castilla	2 <sup>nd</sup> Criminal Court of Lima	Acquitted by court of first instance
2	Abduction and forced disappearance of Ernesto Castillo Páez	<i>Sala Penal Nacional</i> , National Criminal Court	Oral proceedings
3	Colina Group	<i>Sala Penal Especial Anticorrupción</i> , Special Anticorruption Court	Oral proceedings
4	Quispillacta community murders (mass grave in Sillaccasa)	National Criminal Court	Oral proceedings
5	Totos Case (mass grave in Ccarpaccasa)	National Criminal Court	Oral proceedings
6	Chavín de Huántar Operation and extrajudicial execution of MRTA members	Special Anticorruption Court	Oral proceedings
7	Forced disappearance of officials in Chuschi	National Criminal Court	Oral proceedings
8	Lucanamarca massacre	National Criminal Court	Oral proceedings
9	Human rights violations in Countersubversive Battalion No. 313 of Tingo María	Criminal Court of Tingo María	Preliminary investigation complete
10	Massacre of <i>campesinos</i> in Santa Bárbara	Mixed Chamber of the	Oral proceedings

<sup>124</sup> On the nature of the extradition process, see the illuminating article by GAMARRA, Ronald. “La extradición del fujitivo Fujimori”. *Ideele*, N.º 174, diciembre de 2005, pp. 14-17.

		High Court of Huancavelica	
11	Assassination of Hugo Bustíos and attempted murder of Eduardo Rojas	2 <sup>nd</sup> Criminal Court of Huamanga	
12	Disappearance of candidates in Huancapi	2 <sup>nd</sup> Criminal Court of Huamanga	
13	Arbitrary execution of residents of Cayara	4 <sup>th</sup> Supra-Provincial Criminal Court	
14	Human Rights Violations in Los Cabitos Military Base No. 51	2 <sup>nd</sup> Criminal Court of Huamanga	
15	Arbitrary executions in Accomarca	3 <sup>rd</sup> Supra-Provincial Criminal Court	
16	Events in the prisons in 1986	1 <sup>st</sup> Supra-Provincial Criminal Court	
17	Arbitrary executions in Pucará	3 <sup>rd</sup> Criminal Court of Huancayo	
18	Murder of villagers by <i>campesino</i> patrols (Pichanaki Delta)	3 <sup>rd</sup> Criminal Court of Huancayo	
19	Killing of 34 campesinos in Lucmahuayco	2 <sup>nd</sup> Criminal Court of La Convención	
20	Murder of Indalecio Pomatanta Albarrán	Criminal Court of Ucayali	
21	Forced disappearance of Pedro Haro y César Mautino	Criminal Court of Huaraz	
22	Events in the “Miguel Castro Castro” Prison	2 <sup>nd</sup> Supra-Provincial Criminal Court	

Source: Ombudsman’s Office

The 22 criminal cases underway represent an undeniable and significant advance in the prosecution of human rights-related crimes. Until September 2005, 9 of these cases were in oral proceedings before the *Sala Penal Nacional*, National Criminal Court and 12 were at the judicial investigation stage with various criminal judges. In one case, the trial court has issued a verdict of acquittal, which is, of course, a worrying precedent.

All of these cases require impartial and thorough investigations, with no interference of any kind. The truth about the facts must be established, there must be legal due process for the accused, and the victims —especially those who have been threatened— must be guaranteed proper legal protection of their rights.

The Ministry for Public Prosecution plays a crucial role in these cases, since it has to corroborate the allegations with evidence, preserve the integrity of the victims and witnesses and refer the results of its investigations to the justice system.

## 1.2. Identification and Prosecution of Alleged Human Rights Violators

According to the Ombudsman’s Office, in the 21 cases involving State agents, 368 people have been indicted. Of those, 273 belong to the Army, 64 to the National Police and 15 to the Navy. There are 12 civilians and in the case of 4 defendants there is no data on their status.<sup>125</sup>

Of the defendants, 96 are serving in the Armed Forces or the National Police, 133 are retired and for 123 there is no data on their current situation. In this last group, the majority were doing military service when the events occurred.

<sup>125</sup> Ombudsman’s Office: “A dos años de la Comisión de la Verdad y Reconciliación”. Ombudsman’s Report No. 97. Lima, September 2005, p. 306.

The prosecution of these individuals has caused unease among some members of the Armed Forces and police who believe that criminal indictments are arbitrary and unwarranted since they do not take into account the nature of the war on terrorism. In a public statement, former Army commanders<sup>126</sup> declared:

Calls to condemn the commands at all levels are increasing, and now people are demanding incarceration not just for the commanders but across the board for all officers, technicians, non-commissioned officers and troops doing their military service in the units that participated in the war on terrorist crime.

Initiating criminal proceedings against a citizen cannot be considered an arbitrary action, especially if it is done in a way that respects legal due process. The statement then goes on to say that the commanders are not against the investigations, but they want them to be carried out according to the rules of due process:

...we are not asking for impunity or exoneration of those who may have committed excesses, and we demand:  
A. Fair, transparent, balanced treatment, without abuse or arbitrariness. B. That the context in which the actions occurred be taken into account. C. That the selfless, silent, altruistic, dignified behavior of the soldiers of this nation who carried out their duty to the letter not be confused with that of a few bad apples unworthy to be called Peruvian soldiers . . .

In fact, there has been no wholesale campaign of revenge against members of the security forces. Rather, we are trying to let the justice system carry out its work of assigning responsibilities where due. It should be pointed out that 252 arrest warrants have been issued against the accused, but, as we shall see later, few of these have been served. Only 43 people have been detained, in spite of the warrants.

### 1.3. Judges Have Rejected Defendants' Pleas of Amnesty, Prescription and Double Jeopardy, Citing the Judgment by the Inter-American Court of Human Rights

One of the most significant advances in the wake of the CVR is Peruvian judges' rejection of procedural challenges by the defense, intended to prevent criminal investigations. At least 32 defendants have filed various procedural objections, alleging that they were covered by the amnesty laws, that the statute of limitations had expired, or that they had already been tried for the offenses.<sup>127</sup>

Thus, the defense for the accused has tried to invoke various forms of impunity used in the past in order to cover up the crimes, rather than allowing them to go to trial.

In the face of these procedural defense motions (18 on the grounds of amnesty, 7 on statute of limitations grounds, 13 based on double jeopardy and 4 on the grounds that the acts committed were not criminalized at the time), the judges' decision has been to declare them groundless, citing the Inter-American Court of Human Rights' judgment in the Barrios Altos case:

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>128</sup>

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<sup>126</sup> Statement by the former senior Army officers, 14 March 2005. Published in the newspaper *El Comercio* the following day.

<sup>127</sup> The Ombudsman's Office, has reported at least 32 objections raised by the defendants with the aim of "opposing prosecution in the belief that it lacks legal basis in procedural law [. . .]". SAN MARTÍN, César. *Derecho Procesal Penal*. Volume I. Lima: Grijley, 1999, pp. 267-268.

<sup>128</sup> Inter-American Court of Human Rights. Barrios Altos case. Judgment of 14 March 2001. Paragraph 41.



The denial of these motions sets important precedents for similar situations and confirms an increasingly common and widespread criterion among the justices. The Peruvian Constitutional Court has also established the State's duty to investigate and sanction human rights violations and the inadmissibility of using procedural mechanisms to impede investigation and punishment of serious violations. In the ruling of 18 March 2004 on the Villegas Namuche case (File No. 2488-2002-HC/TC), the Court declared that:

23. [...] it is the State's responsibility to try those accused of crimes against humanity, and, if necessary, to adopt restrictive rules to avoid, for example, exemption from prosecution for serious human rights crimes. Applying these rules allows the legal system to work effectively and is justified by the overriding interest in combating impunity. The goal, obviously, is to prevent certain legal mechanisms from being used with the repugnant intent of achieving impunity. This must always be prevented and avoided, since it encourages criminals to repeat offenses, acts as a breeding ground for revenge and erodes the fundamental values of democratic society: truth and justice.

It is particularly revealing that a large number of procedural challenges have been made by defendants in the Colina Group. In this case there have been procedural motions by the defense claiming amnesty, double jeopardy and prescription. The *Quinto Juzgado Penal Especial*, 5<sup>th</sup> Special Criminal Court, in its resolution of 2 July 2003, declared defendant Santiago Martín Rivas' motions for dismissal due to amnesty and double jeopardy groundless, stating that:

The [Inter-American] Court [of Human Rights] felt it necessary to stress that, in light of the general obligations laid out in articles 1.1 and 2 of the American Convention, States who are Parties to the Convention have a duty to take all possible measures to ensure that nobody is deprived of legal protection and the right to simple and effective recourse, as described in articles 8 and 25 of the Convention. Therefore, State Parties to the Convention who adopt laws that have such an effect, such as self-amnesty laws, are violating articles 8 and 25 according to articles 1.1 and 2 of the Convention [...] and therefore amnesty laws were declared incompatible with the American Convention on Human Rights [...] as a result, the defendant's motions for amnesty and double jeopardy are declared without merit [...].<sup>129</sup>

In the case dealing with the events in the prisons in June 1986 in El Frontón, 5 of the 9 defendants filed procedural motions for dismissal on the grounds of amnesty, citing the amnesty laws of 1995 passed by the government of Alberto Fujimori. The *Primer Juzgado Penal Supraprovincial de Lima*, 1<sup>st</sup> Supra-Provincial Criminal Court of Lima, declared the motions without merit in a ruling on 19 May 2005, for the following reasons:

given the manifest incompatibility between the amnesty laws and the American Convention on Human Rights, said laws lack legal effect and cannot continue to hinder investigations [...] the State has a specific obligation to investigate and to provide information, which means that it must not only must facilitate families' access to documentation under official control, but also assume the task of investigating and corroborating reported crimes [...]

Motions for dismissal by virtue of prescription were filed in cases involving the Colina Group, human rights violations in Los Cabitos Base No. 51, forced disappearance of Pedro Haro and César Mautino, and human rights violations in Countersubversive Battalion No. 313 in Tingo María. As an example, in one of these cases—that of the Colina Group—the Criminal Court denied the defense motion to bar the case from proceeding on prescription grounds. The motion was filed by the defendant in response to indictments for *homicidio calificado*, aggravated homicide, grievous bodily harm and conspiracy to commit a crime against Placentina Marcela Chumbipuma Aguirre and others.<sup>130</sup> The ruling stated that:

THREE.- Having established the nature of the crimes (violation of fundamental rights) for which the

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<sup>129</sup> The motion for dismissal on double jeopardy grounds was based on a ruling that was, in turn, judicially nullified because it was one of the files that had been closed through the application of the amnesty laws.

<sup>130</sup> *Sala Superior Anticorrupción "A" de la Corte Superior de Justicia de Lima*, High Chamber "A" on Anticorruption of the High Court of Justice of Lima, File No. 028-01. Ruling of 09 May 2005.

defendant was indicted, [. . .] this Court declares that prescription does not apply to this criminal action, since the Inter-American Court states in its above-mentioned benchmark judgment [on the Barrios Altos case] that: *This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations* [. . .]

**SEVEN.**- Given that the prescription of a crime does not involve any modification in the penalties that attach to it, but merely to the ability to prosecute it, the statute of limitation may, if it has not expired, be extended without violating the prohibition on retroactivity [. . .] from which it follows that even though the legal construct of prescription fundamentally privileges the value of legal certainty over that of justice, in the case of crimes like those alleged in this case (because of their particular gravity and nature) justice take precedence instead and thus the State is obliged to enforce the mechanisms and legal proceedings that lead to the investigation and punishment of whoever is responsible for such crimes [. . .]

This resolution establishes an important precedent for human rights trials, because it upholds the principle of imprescriptibility of crimes involving human rights violations.

Regarding “double jeopardy” arguments, pleas of no cause have been filed by 9 defendants in the case on events in the prisons in June 1986, 2 defendants in the Colina Group case, 1 defendant in the case on disappearance of candidates in Huancapi and another in the case of human rights violations in Countersubversive Battalion No. 313 in Tingo María. The arguments put forward by the courts to deny these motions refer, basically, to the lack of a final ruling, the lack of a ruling issued by a competent court or the non-identical nature of the crimes in the previous trial and the current one.

In the case on events in the prisons in June 1986 (El Frontón), the criminal court judge disallowed the motion of no cause on grounds of double jeopardy, pointing out that the ruling issued by the *Sala de Guerra del Consejo Supremo de Justicia Militar*, War Chamber of the Supreme Council of Military Justice, does not count as double jeopardy because it was not competent to rule on the case:

it must be considered whether the War Chamber of the Supreme Council of Military Justice that issued the verdict of dismissal [. . .] was competent to do so [. . .] thus we find that article 173 in the same body of legislation [the Political Constitution] regulates military jurisdiction; and that in one of the stipulations concerning crimes committed by members of the Armed Forces and the National Police [. . .] the ruling issued by the Constitutional Court —on the Constitutional challenge brought by the Ombudsman’s Office with respect to various articles of Law No. 24150 [. . .]— defines a *delito de función*, military crime as a) one that affects the legally protected interests of the Armed Forces or the National Police [. . .]; b) the person committing the criminal-military offense must be a member of the military or police on active duty [. . .]; c) the criminal act is committed against property or interests protected by the military or police authorities [. . .]; consequently, since the grounds for dismissal are not met, as stipulated in article 5 of the Code of Criminal Proceedings, be it resolved: to deny as without merit the motion to dismiss on grounds of double jeopardy [. . .] (Resolution of 19 May 2005).

Lastly, a challenge to the underlying crime charged has been advanced in the cases of forced disappearance of Pedro Haro and César Mautino and violations of human rights in Countersubversive Battalion No. 313 in Tingo María. In both cases the defense alleged that the crime of forced disappearance for which the defendants had been indicted did not exist in the criminal code at the time the events took place.

On this point, it should be said that applying the criminal justice definition of forced disappearance to acts that were not legally prohibited at the time they were committed is consonant with the law, since forced disappearance constitutes a continuing crime recognized as such in international treaties on the subject by the Inter-American Court of Human Rights and in the Peruvian Constitutional Court in its ruling of 14 March 2004 on the Villegas Namuche case.

#### 1.4. The Gradual Development of a Justice System for Human Rights Cases and the Need to Strengthen It

A further positive development as regards human rights trials is that there has been a gradual move to designate specialized courts and prosecutors to investigate and try this type of offense. After two years, the justice system now has a National Criminal Court designated for trying these crimes and the Ministry for Public Prosecution has a *Fiscalía Superior*, Senior Prosecutor's Office in charge of coordinating investigations and indictments in each of the cases. Various specialized courts and prosecutors have also been designated in Lima, Ayacucho and other judicial districts in the country.

It is worth stressing that there are now courts and prosecutors specializing in these cases, because it demonstrates the willingness of authorities in the justice system and Ministry for Public Prosecution to set up a special subsystem for investigating and prosecuting human rights violations.

However, as the Ombudsman's Office has outlined,<sup>131</sup> there are a number of difficulties and shortcomings in the new subsystem of justice that must be overcome if it is to be effective in terms of investigation and prosecution.

The most significant difficulties are:

- Lack of specialization and ongoing training for the judges appointed to these courts.
- Over-centralization of the specialized courts in the city of Lima, when a large proportion of the cases occurred in the interior of the country. This situation could seriously impact defendants' and victims' right to effective legal protection.
- Most of the judges involved do not work exclusively on human rights cases, but also have to work on cases involving other types of crimes.
- 18 of the 47 cases investigated by the CVR have been assigned to regular judges and prosecutors. In other words, they are outside the specialized system.
- Lack of communication between courts and prosecutors, since there has been no coordination between the judiciary and the Ministry of Public Prosecution in assigning specialized courts. One example of this is the transfer of the Ayacucho (Cayara) cases to a criminal court in Lima.

In short, we need to survey the state of the specialized human rights system in order to make with the necessary adjustments. It is particularly important that the system's essential features include decentralized courts, especially in the places that suffered the most violence; well-trained, full-time judges dedicated solely to these cases; adequate coordination; and sufficient logistical support for its substantive work. In the short term, we need specialized courts in the departments of Junín, Huanuco, Apurímac and Huancavelica.

## **2. Difficulties in Prosecuting Human Rights Crimes in Peru**

### **2.1. Lack of a Victim Protection System**

One of the main problems of the post-CVR period has been the failure to create an efficient system to protect victims, witnesses and family members. Although current legislation mandates the implementation of protection mechanisms in human rights cases, this has not been done, mostly for lack of resources, but also because of the authorities' reluctance to take action on this sensitive issue.

In 11 of the 22 cases litigated, the CVR recommended providing protection for the victims and witnesses or their families and collaborators. However, such measures were only taken in two cases, and they proved inadequate, since people's safety was compromised. This situation has led to some threats against some of the victims in the trials.

### **2.2. Military Courts Insist on Trying Human Rights Cases**

Regardless of the judgments issued by the Inter-American Court of Human Rights, the Peruvian Constitutional Court and Supreme Court, military tribunals insist that they are competent to try human rights cases. Thus, at the date of writing, they are trying more than 17 high-ranking military officers for crimes that were investigated by the CVR. Even on these cases, they claim competence, ignoring the various judgments that exist on the subject.

In the period after the CVR there have been two cases, the murder of Indalecio Pomatanta Albarrán and the forced

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<sup>131</sup> The first chapter of Report No. 97 by the Ombudsman's Office, "A dos años de la Comisión de la Verdad y Reconciliación", contains a detailed analysis of the newly-designated courts.

disappearances of officials in Chuschi, in which the Supreme Court has resolved the question of jurisdiction in favor of the civilian courts, in accordance with the Inter-American Court of Human Rights and the Peruvian Constitutional Court.

In the case of Indalecio Pomatanta Albarrán (Contested jurisdiction No. 18-2004), the Supreme Court decided in favor of the civilian court, stating in its ruling published on 23 November 2004, that:

in the present case there was an attack on the bodily integrity of a person in particularly serious and incriminating conditions, namely, exploiting one's position as a public official [ . . . ] by taking advantage of the fact that a state of emergency had been declared in the area and that a military operation was under way; that the gist or essence of the alleged conduct violated a legally protected interest for individuals (the right to physical integrity and to life), not an institutional interest of the Armed Forces; that if we analyze the three factors that must be simultaneously present to define a *delito de función*, military crime, it is obvious that only the second is present: that of being a serviceman on active duty, as in the case of the individuals indicted for the alleged offense, [ . . . ] therefore, the events considered as a whole fall under the jurisdiction of the criminal court system.

Despite this ruling and despite its binding nature, military courts have insisted they are competent to try 11 other cases of human rights violations, which will no doubt give rise to further disputes over jurisdiction. However, the insistence by military courts could itself constitute a criminal offense. Accordingly, various human rights organizations have recently filed allegations that the Judges of the Supreme Council of Military Justice have committed crimes against the judicial function (Article 404 of the Peruvian Penal Code) insofar as this refers to "obstruction as to the jurisdiction over the individual accused" for inappropriately taking over a case involving a common and not a military crime and for trying the soldiers involved in the arbitrary executions in Pucará.

### **2.3 Information Withheld by the Ministry of Defense**

The Ministry of Defense, which handles all requests for information from the Armed Forces by judicial authorities, has not been sufficiently forthcoming with information for prosecutorial and judicial investigations. In many cases it has withheld information requested, arguing that it does not exist or has been destroyed in accordance with administrative directives.

However, according to the rules on archive management, information of "permanent value" cannot be eliminated or destroyed by public officials. Among the types of information that cannot be destroyed are military personnel files, data on the installation and running of military bases and the planning and execution of operations.

The Ministry of Defense has only furnished the information requested for judicial cases in a very few instances. However, that demonstrates that information does indeed exist, especially personnel files, which could help identify alleged perpetrators. The military authorities need to be reminded that they have an obligation to cooperate with civilian courts and prosecutors.

### **2.4. Difficulties in Getting Judicial Warrants Carried Out**

In terms of cautionary measures taken against the suspects, our data indicate there have been 131 orders to appear in court and 252 arrest warrants. There have been difficulties getting the arrest warrants carried out. Only 43 members of the security forces have actually been arrested, including defendants from the following cases: Colina Group (24 people), arbitrary executions of residents in Cayara (7 people), murder of villagers by *campesino* patrols (Pichanaki Delta) (3 people), Chavín de Huántar Operation (3 people), arbitrary executions in Accomarca (2 people) and forced disappearance of officials in Chuschi (1 person). In the remaining cases, there have been no arrests, despite the warrants issued.

Overall, 209 arrest orders have not been carried out, even though 109 of them are still in force. The other 100 have expired because, in most cases, the judicial authority did not meet the requirements for issuing the warrants or because there were delays in carrying them out.

One example of what has been happening is the case of the extrajudicial execution of the residents of Cayara, which has the largest number of arrest warrants against suspects (118), of whom 7 are actually detained and 62 are still at large because the judicial authority failed to provide adequate information about them; the warrants lack personal

particulars, an indispensable requirement for filing an arrest warrant with the Division of Warrants of the Peruvian National Police, as stipulated by Law No. 27411, the law that covers procedures in case of identical names and Administrative Directive No. 003-2004-CE-PF, approved by Administrative Resolution No. 081-2004-CE-PJ.<sup>132</sup>

A similar situation exists in the case of arbitrary executions in Accomarca, in which of the 27 arrest warrants issued against defendants, only 2 have been carried out.

Under the rule of law, arrest warrants issued by a judicial authority must be carried out. The defendants have the legal means to appeal the warrant. It is inexplicable that Ministry of Defense officials have not acted on the arrest warrants and taken the appropriate steps to hand over service members to the courts.

Meanwhile, other members of the security forces who have been ordered to appear in court are continuing to work in the same place where they allegedly committed human rights violations. For example, in Quillabamba, families of the victims in the case of 34 campesinos killed in Lucmahuayco claim that one of the police officers investigated in connection with the events—who is still working in La Convención-Cuscc—threatened relatives and witnesses not to give testimony against him to the judge and tried to induce them to sign an affidavit in his favor. This situation clearly puts the victims and witnesses at risk, as well as the judicial investigation itself.

## **2.5. Large Number of Victims Without Legal Assistance**

The investigations by the Ministry for Public Prosecution and the Judicial Branch in the 47 cases investigated by the CVR cover 1,569 victims, of whom only 27% have legal assistance, provided mainly by human rights organizations. This shows that most of the victims and their families do not have the wherewithal to access the justice system and ensure an adequate defense of their rights.

One of the cases in which prosecution was pursued led to an acquittal by the court of first instance. In the case of Rafael Salgado Castilla, on 12 July 2005, the 2<sup>nd</sup> Criminal Court of Lima acquitted one of the defendants even though, according to the CVR's report, there was sufficient proof that Rafael Salgado "suffered multiple tortures during his detention and this caused his death in the offices of the DIVISE (anti-kidnapping division); responsibility can be attributed to the police officers who took the detainee to that police station, interrogated him and kept him in custody".<sup>133</sup>

Rafael Salgado Castilla's relatives had no defense lawyer at this stage, which shows how difficult it is for families of human rights victims to obtain legal representation and participate in the proceedings as "civil parties" to the case. This meant they could not appeal the verdict of acquittal or exercise the rights that procedural law grants to victims.<sup>134</sup>

Lawyers for human rights organizations have expressed concern about the difficulties they encounter in trying to defend victims. Gloria Cano, a lawyer for the Association for Human Rights (APRODEH), believes that the State should offer victims some sort of legal advice. She also points out that due to cuts in international funding, human rights organizations do not have sufficient resources to be able to help the victims. Carlos Rivera, a lawyer for the *Instituto de Defensa Legal*, Legal Defense Institute (IDL), has said that the lack of legal representation of victims can not only delay criminal proceedings and can also mean that some cases are never even opened.<sup>135</sup>

The significance of the problem of victims' lack of legal representation is even greater when we think of the 9 cases currently in or awaiting oral proceedings and the 12 cases in preliminary criminal proceedings. The same difficulty comes up in the 24 cases still under preliminary investigation and the one in which sentencing occurred in 1986 (the murder of 32 campesinos in Socos).

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<sup>132</sup> Directive No. 003-2004-CE-PJ establishes the measures that criminal or mixed jurisdiction judges must take when issuing an arrest warrant to avoid cases of mistaken identity due to similar names.

<sup>133</sup> COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Final Report*. Lima: CVR, 2003. Volume VII, p. 714.

<sup>134</sup> According to article 57 of the Criminal Procedures Code, modified by Legislative Decree No. 959, "the civil party is entitled to challenge the proceedings, offer information for investigation or proof, participate in investigative and testimonial hearings, intervene in oral proceedings, file appeals as envisaged by law, and file requests to defend his legitimate rights and interests..."

<sup>135</sup> *El Comercio*, 3 October 2005. According to the Ombudsman's Office, of the 1512 victims in preliminary and judicial investigations, 364 have professional legal counsel and 1148 have no legal assistance.

### 3. Brief Comments on the Classification of Crimes in Cases Investigated by the CVR

One topic that deserves special attention is the legal classification of the crimes arising out of the human rights violations investigated by the CVR. In general the classification has been appropriate, making the substantive domestic criminal legislation consistent with international human rights law. In the case of extrajudicial executions and forced disappearance there are fairly common criteria and it has not been particularly problematic to classify these crimes. In the case of torture, some positions could be fortified with additional clarification.

Of the 21 on-going criminal cases against State officials, extrajudicial executions have been charged as aggravated homicide (13 cases); other cases have been classified as forced disappearance (9 cases), abduction (7 cases), torture (2 cases) and genocide (1 case).

In 10 of the cases involved, prosecutors have relied on the concurrence of two or more crimes.<sup>136</sup> For example, in the case of the Colina Group, 4 the human rights violations were classified as 4 different crimes (aggravated homicide, forced disappearance, abduction and aggravated abduction).<sup>137</sup> In the case of human rights violations in the Los Cabitos Military Base, these were classified as aggravated homicide, forced disappearance and torture; and in the case of arbitrary executions in Accomarca, the charges were formulated as aggravated homicide, forced disappearance and abduction. In other cases there has been concurrence of two crimes.

#### 3.1. Extrajudicial Executions Classified as Aggravated Homicide

In general, extrajudicial executions have been classified as aggravated homicide, since extrajudicial execution is not defined as such in Peruvian criminal law. The Peruvian Penal Codes of 1924 and 1991 include the crime of aggravated homicide in articles 152 and 108 respectively; to qualify, the killing must involve great cruelty (that is, the victim was tortured or subjected to inhumane treatment before being executed) or cruel circumstances (the victim was defenseless and incapable of presenting a danger to justify the crime), among other aggravating circumstances.

The aggravating factor of great cruelty has been used in the cases of the killing of 34 campesinos in Lucmahuayco, the murder of Indalecio Pomatanta Albarrán, the Colina Group (Cantuta), and the murder of villagers by *campesino* patrols (Pichanaki Delta), since in these cases the victims were subjected to acts of torture before being executed. In the case of the killing of 34 campesinos in Lucmahuayco, the Criminal Court of the Province of La Convención declared that:

the acts described fit the criminal definition set forth in article one hundred fifty-two of the Penal Code of nineteen hundred and twenty-four [since] the testimonies obtained allege that in this case, members of the Civil Guard, before proceeding to deprive the victims of their lives, submitted them to acts of cruelty, that is, they tortured them, and even raped some of the women [ . . . ].<sup>138</sup>

The aggravating factor of cruel circumstances was applied in the case of the Chavín de Huántar Operation and extrajudicial execution of members of the MRTA, because of the context in which the execution was carried out and the situation the victims were in. The indictment issued by the 3<sup>rd</sup> Special Criminal Court states that:

despite having overpowered and captured several of these individuals [members of the subversive groups] far from protecting their rights and taking them to the authorities for appropriate legal action [ . . . ] they executed them by shooting them in the head; from which it can be inferred that they mortally attacked people who, at some point during the course of the operation, had been disarmed, and left defenseless and in the custody of the soldiers [ . . . ] consequently [ . . . ] the conduct attributed to the defendants fits the typical description of a crime against life, body and health— homicide in its classification as aggravated,

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<sup>136</sup> According to articles 48 and 50 of the Peruvian Penal Code, there are two types of concurrence of crimes: *concurso ideal de delitos*, conceptual concurrence, when one act can be divided into a number of different offenses according to the legal interests affected, and *concurso real de delitos*, factual concurrence, when a number of criminal acts occur in one case that can be classified as separate crimes.

<sup>137</sup> There were also other charges not directly related to human rights violations, such as illicit association with the purpose of committing a crime, crimes against the administration of justice and crimes against property.

<sup>138</sup> File No. 596-2003, Resolution of 30 January 2004.

since the act was committed under cruel circumstances.<sup>139</sup>

One problem with using the charge of aggravated homicide is that there are 5 cases in which the aggravating circumstances have not been specified. This has occurred in the cases of arbitrary executions in Accomarca, the arbitrary execution of residents of Cayara, the murder of villagers in Totos, the murder of Quispillacta community members, and arbitrary executions in Pucará.

The failure to specify why the homicide charge is aggravated may lead to unnecessary delays in the criminal process and serious challenges by the defense counsel, since evidence must be gathered during the preliminary investigation not only as to the death of the victims, but also as to the underlying circumstances that support the aggravated homicide charge. Nevertheless, this situation can be remedied during the trial itself, according to current Peruvian procedural law, without affecting due process.

Lastly, there has been one case—that of Rafael Salgado Castilla—which was inappropriately classified as simple homicide, despite the evidence, so that it was prosecuted inadequately.

### 3.2 Cases Classified as Forced Disappearance

In 10 cases, judges have brought charges of forced disappearance. The application of this type of criminal charge to acts that occurred before forced disappearance was incorporated into the Peruvian Penal Code does not involve any breach of legal principle, since it is recognized in international human rights law as a continuing crime until the victim is discovered.<sup>140</sup> The Peruvian Constitutional Court has made the same argument, in its judgment of 18 March 2004 in the Villegas Namuche case (File No. 2488-2002-HC/TC).

in continuing crimes new legal norms may be passed, which will apply to those who commit such crimes at that time, without constituting retroactive application of criminal law. Such is the case in forced disappearance, which [. . .] should be considered a continuing crime as long as the fate or whereabouts of the victim have not been determined” (paragraph 26).

Following this approach, the Mixed Jurisdiction Court of Víctor Fajardo in Ayacucho opened proceedings in the case of the disappearance of candidates in Huancapi with this statement on 7 October 2004:

although the alleged detention of the victims began on 19 April of the year 1991, at which point our Penal Code did not yet criminalize the specific crime against humanity known as forced disappearance, that does not constitute an impediment to a criminal prosecution [. . .], for while the principle of legality in criminal law [. . .] includes the guarantee of *lex previa* [. . .]; in the case of crimes of a continuing nature, the applicable criminal law is not necessarily the one in force when the crime was committed, since as long as the fate and whereabouts of the victim are not determined, the crime of forced disappearance is a continuing crime, as established in article III of the Inter-American Convention on Forced Disappearance of Persons, as well as the judgment of the Peruvian Constitutional Court in File No 2488-2002-HC/TC [. . .].

Likewise, the 4<sup>th</sup> Supra-Provincial Criminal Court, in its resolution of 1 July 2005 on the case of arbitrary executions of residents of Cayara, stated that:

in order to determine what criminal legislation applies to the crime of forced disappearance, we refer to the precedent of mandatory compliance issued by our Constitutional Court (judgment No. 2488-2002-HC/TC, of the eighteenth of March of two thousand and four); said precedent leads us to conclude that in cases of continuing crime, as long as the fate or whereabouts of the victim have not been established, article 320 of the Penal Code, modified by Law 26926, applies.

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<sup>139</sup> Indictment of 11 June 2002.

<sup>140</sup> The continuing nature of forced disappearance has been covered by the Inter-American Convention on Forced Disappearance of Persons, which in article III states that “[. . .] This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined”. Meanwhile, the Inter-American Court of Human Rights declared in its judgment of 29 July 1988 on the Velásquez Rodríguez case, that “155. The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee[. . .]”.

Two different legal positions emerge in connection with the classification of forced disappearance cases. The first argues conceptual concurrence between the crime of forced disappearance of persons (article 320) and the crime of abduction (article 223 of the 1924 Penal Code or article 152 of the 1991 Penal Code), while the other argues only apparent concurrence, in that the charges are mutually exclusive, since either type completely covers the act.

In the cases of arbitrary executions in Accomarca, the Colina Group, human rights violations in Los Cabitos Military Base, forced disappearance of Pedro Haro and César Mautino, forced disappearance of authorities in Chuschi and human rights violations in Counter-Subversive Battalion No. 313 in Tingo María, the model of conceptual concurrence has been used for the crimes of forced disappearance of persons and abduction. An example of this is seen in the ruling by the Mixed Jurisdiction Court in Cangallo on 4 April 2003 in the case of forced disappearance of authorities in Chuschi:

for the alleged crimes to be properly classified it must be remembered that in terms of a crime against liberty in the form of abduction, the principle of time and space [applies] since it was committed when the 1924 Penal Code was still in force, and in terms of a crime against humanity in the form of forced disappearance, since this is a continuing crime and to this date the victims have not been located, article VII of the Inter-American Convention on Forced Disappearances to which the Peruvian State is Party [applies and be it therefore] resolved: to proceed criminally against Collins Collantes Guerra [. . .] for allegedly committing a crime against liberty in the form of abduction, and a crime against humanity in the form of forced disappearance [. . .].<sup>141</sup>

On the other hand, in the cases of the disappearance of candidates in Huancapi, the killing of 34 campesinos in Lucmahuayco and arbitrary executions of residents of Cayara, the judges established a relationship of apparent concurrence between the crimes of forced disappearance and abduction. The Mixed Jurisdiction Court of Víctor Fajardo, which handled the case of disappearance of candidates in Huancapi, stated in the formal opening of the judicial investigation, that:

this crime (forced disappearance) differs from abduction, in that although both involve the deprivation of liberty, abduction does not require the denial that detention has occurred or the refusal to account for the person's whereabouts, which are the determining factor for disappearance, so that the characteristics of Abduction are subsumed under the crime of Forced Disappearance, which by nature is a multiple, complex, continuing or permanent offense [. . .] be it therefore resolved to issue indictment against José Luis Israel Chávez Velásquez [and others] for allegedly committing a Crime Against Humanity in the form of Forced Disappearance.<sup>142</sup>

On the other hand, some of the disappearance cases recommended by the CVR for prosecution have been inappropriately classified as abduction only. In the case of abduction and forced disappearance of Ernesto Castillo Páez, the 3<sup>rd</sup> High Criminal Prosecutor's Office of Lima, in Decision No 986-2003 of 11 September 2003, formulated an indictment only for the crime of abduction, even though in the description of the facts it states that to that date there was no news of the victim's whereabouts:

Upon review of events, it appears that on the 21<sup>st</sup> day of October of 1990, in the morning hours, there was a terrorist attack on Juan Velasco Alvarado Avenue in the Villa El Salvador district [. . .] members of the General Police force, as it was known then, appeared on the scene [. . .] when they were close to Central Park in Group 17, Sector II, second zone, in search of crime suspects, they proceeded to stop Ernesto Rafael Castillo Páez, who was passing by the area, overpowered him, and put him in the trunk of the police vehicle; it was later known that Juan Carlos Mejía León, Commander of the General Police, had ordered suspected subversives to be transferred to the headquarters of the 22<sup>nd</sup> Command station [. . .] and to this date, the whereabouts of the man they seized remains unknown.

In this case, the charge of abduction does not cover all aspects of the criminal act which Ernesto Castillo Páez suffered. The crime of abduction applies only to the period between the victim's detention (21 October 1990) and 3 July 1992, the date when forced disappearance of persons was criminalized in Peru (article 320 of the Penal Code).

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<sup>141</sup> File No. 023-2003.

<sup>142</sup> File No. 792-2004. Resolution of 7 October 2004.



The omission of the crime of forced disappearance in the indictment could lead to sentencing that does not meet the international obligations of the Peruvian State set out in the judgments of the Inter-American Court of Human Rights (dated 3 November 1997 and 27 November 1998) in this case.

### **3.3. Difficulties in Classifying the Crime of Torture**

In the cases of human rights violations in the Los Cabitos Base and the murder of Indalecio Pomatanta Albarrán, acts constituting violations of the victims' physical integrity have been categorized as crimes of torture, based on article 321 which was added to the Penal Code in 1998.

The 2<sup>nd</sup> Criminal Court of Huamanga has opted for a flexible approach to the principle of legality in terms of human rights crimes. In a ruling on 21 January 2005, which formally opened the judicial investigation of the case of human rights violations at the Los Cabitos Base, the court applied the following logic:

although indeed torture was not legislated in the 1924 Penal Code, nevertheless, the law created classes of crimes of injury to the person that did protect the right to integrity, since what it protected was the right to physical, psychic and moral integrity. These acts, having been constituted as degrading to the person, and infringing personal dignity, cannot therefore be classed as simple causing of injury or mere common crimes; however, at the time the criminal offense was committed, torture was prohibited by the International Convention on Human Rights [sic], which protects the physical, psychic and moral integrity of the person and obliges the State to ban torture in its domestic legislation [thus] the principle of legality is flexible for crimes against humanity since it is not valid to argue that the offense was not criminalized in domestic legislation at the time the acts were committed [ . . . ].

Torture was not classed as a crime in Peruvian law at the time the acts were committed. This leads to the question of whether applying the charge of torture to acts carried out prior to its existence breaches the principle of non-retroactivity of criminal law.

The "flexible approach" to the principle of legality is not the only possible way to prevent impunity for crimes of torture. The Truth and Reconciliation Commission stated in its report on this case that:<sup>143</sup>

596. Although torture was not criminalized in domestic criminal legislation at the time the acts under investigation occurred, classifying them as such according to the current legal definition is a clear indicator of the gravity of the offenses committed and the extent to which our contemporary legal culture rejects such acts.

597. At the time the acts of torture were committed they were classed in our criminal law as crimes of injury to the person [ . . . ]

It should be said that defining some crimes of injury to the person as acts of torture does not in any way lessen their nature as crimes against humanity, nor does it prevent application of the principles recognized in international human rights treaties, especially that of imprescriptibility, since these are crimes that involve serious human rights violations.<sup>144</sup> According to the First Chamber of the Federal Court of Buenos Aires, this "not only does not contradict any principle of international law but, on the contrary, allows their objectives to be attained, by making possible the trial and punishment of those responsible for crimes against humanity".<sup>145</sup>

### **3.4. Extrajudicial Executions Classed as Crimes of Genocide**

The earlier case of the massacre of campesinos in Santa Bárbara on 4 July 1991 led to judicial proceedings on charges of genocide, but the case was dismissed by virtue of the amnesty law (Law No. 26470), in July 1995.

However, on 14 July 2005, thanks to requests from the Ministry of Public Prosecution and the Ombudsman's

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<sup>143</sup> CVR, Report on the case of human rights violations committed in the Los Cabitos Base No. 51.

<sup>144</sup> 3<sup>rd</sup> Special Criminal Court. Case of the Chavín de Huántar Operation and extrajudicial execution of MRTA members, resolution of 11 June 2002.

<sup>145</sup> *Primera Sala de la Cámara Federal de Buenos Aires*. Case No. 33714, Videla, Jorge Rafael (Condor Plan), judgment of 23 May 2002.

Office, the Mixed Jurisdiction High Court of Huancavelica overturned the amnesty ruling and ordered the case reopened, at the stage it had been at earlier, just prior to oral proceedings. The indictment issued by the Mixed Jurisdiction Prosecutor's Office of Huancavelica against Javier Bendezú Vargas<sup>146</sup> and others with respect to crimes committed against Francisco Hilario Torres and others states that:

the defendants kidnapped 15 people including children and old people; [from the investigation] it appears there is proof that the 15 people abducted were killed and their lifeless bodies were blown up and their remains scattered as a result of dynamite used by members of the Peruvian Army, all of which clearly constitutes a crime against life, body and health — Genocide, since part of an ethnic race was exterminated (that of natives of the Campesino Community of Santa Bárbara).

The classification of genocide used here raises two questions. The first has to do with the legal right protected by the category —the existence of certain human groups considered to be stable<sup>147</sup>— and the second, with the possibility of proving an intent to destroy, entirely or in part, a national, socio-ethnic or religious group.<sup>148</sup> As the Constitutional Court of Colombia declares, regarding the crime of genocide, “it involves not only life and physical integrity —which are protected— but the very right to existence of human groups.”<sup>149</sup>

According to the CVR, this case should be classified as aggravated homicide, as stipulated in article 108 of the 1991 Penal Code, given the concurrent circumstances of concealing a crime (article 108 paragraph 2), and of acting with great cruelty and under cruel circumstances (article 108 paragraph 3), since the Army members killed the victims to conceal the theft of hundreds of head of cattle, the damage done to homes and the kidnapping they had carried out. Thus, the Army members took advantage of the victims' defenselessness to kill them (they were tied up and under control) and subjected them to cruel mistreatment, making them suffer. Thus the classification of the crime in the indictment is questionable since it is difficult to prove intent to partially destroy an ethnic group.

#### **4. Epilogue**

Twenty-eight months after the CVR completed its work, there has been significant progress in the process of prosecuting the 47 cases of human rights violations it investigated. There have also been a number of problems that must be corrected.

The fact that there are 22 criminal proceedings going on, that a large number of alleged perpetrators have been charged, and that procedural challenges to the trials have been overruled, shows that the impunity mechanisms frequently used in the past are gradually being overcome.

However, even though there have been important steps forward in terms of creating a specialized legal sub-system to investigate and try human rights crimes, there are gaps in the way it has been set up. These mostly pertain to issues of determination of the appropriate forum, the absence of ongoing, specialized training, the lack of personnel dedicated exclusively to human rights cases, and adequate logistical support.

The difficulty of offering effective protection to the witnesses, families and victims in human rights cases is a constant source of anxiety for the justice system. Another concern is the lack of cooperation from the Armed Forces in the investigations. Military tribunals insist that they are competent to judge human rights cases, even though the Constitutional Court and the Supreme Court have repeatedly ruled that they are not. There are also difficulties in executing arrest warrants issued by the judicial authorities.

In order to overcome these obstacles, we believe the specialized system needs to be strengthened, since it still has gaps in its design. Greater cooperation on investigations must be demanded of military institutions, and effective

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<sup>146</sup> In his testimony before a military court Bendezú said that he did not order the killing of the community members in the way or circumstances mentioned by his codefendants and the witnesses, claiming that the detainees committed mass suicide in a single act, hurling themselves into a deep ravine as they were walking towards the military base at Lircay. His testimony runs from Folios 43 to 45 of File No. 2118-91 of the military court.

<sup>147</sup> GIL Y GIL, Alicia. “¿Qué es el genocidio?” In: *El genocidio y otros crímenes internacionales*. Rev. Colección Interciencias, Valencia, 1999, pp. 139-163.

<sup>148</sup> Article 319 of the Penal Code of 1991.

<sup>149</sup> Constitutional Court of Colombia. File D-3176, judgment of 28 March 2001.

protection to victims and witnesses must be offered. We must acknowledge that the justice system has not yet met the expectations of victims' families. A more prompt response from the institutions charged with administering justice must be demanded for victims who are still waiting.

The task of doing justice in Peru is now more necessary than ever to restore respect for the law, enforce human rights, strengthen democracy, and insure decency and a firm hand in the struggle against those who committed crimes with the protection of power. If the justice system does not meet these goals we run the grave risk of losing confidence in our institutions and undermining the very foundations of the State.

## **Criminal Trials of Terrorist Organizations**

**Luis E. Francia Sánchez**

### **1. Introduction**

The years of political violence that Peruvian society endured from the beginning of the 1980s left a legacy of unresolved issues, among them the need to prosecute those responsible for the human rights violations and crimes

inflicted on Peruvian society not only by State agents, but also members of the terrorist organizations: Shining Path and the Túpac Amaru Revolutionary Movement (MRTA).<sup>150</sup>

The 1990s were marked by a criminal justice policy designed to clamp down on cases of terrorism, which was expressed in legislation and prosecutions that infringed basic rights. This led to the imprisonment of many innocent people and criminal trials that were unlawful, since they did not comply with basic aspects of due process.

During the process of institutionalization and democratization of the Peruvian State that began in late 2000, the need to hold new trials for prisoners convicted of terrorism was a challenge accepted by various entities within the democratic regime. The Constitutional Court declared the antiterrorist legislation passed since 1992 to be unconstitutional and annulled the criminal trials in which such legislation was used. Congress and the Executive Branch approved new antiterrorist legislation that complied with the Constitutional Court's judgment and finally the rest of the Judicial Branch set to work on new trials that were beset by legal and social problems.

At the same time, the inquiry by the *Comisión de la Verdad y Reconciliación*, Truth and Reconciliation Commission (CVR) was under way. In its *Final Report*, the CVR concluded clearly that the terrorist groups were responsible for crimes committed during the internal conflict that Peruvian society suffered from 1980 on.

This essay will cover the main features of the trials, the challenges they involved and the results they yielded, with special emphasis on the so-called "mega-trial" of Shining Path leaders.

## 2. The Status of the Terrorism Trials at the End of the Fujimori Regime

By the end of the Fujimori regime, the terrorist movements had clearly been defeated, due to the actions of the police and armed forces, who tracked, located and captured the groups' leaders and the majority of their members. They then underwent criminal trials under antiterrorist legislation passed after the *coup d'Etat* of 5 April 1992 by the president at the time, Alberto Fujimori.

This legislation can be seen in the following statutes in particular:

- *Decreto ley*, Law 25475 (6 June 1992), which defined the offenses of terrorism and established procedures for investigation, indictment and trial.
- Law 25659 (13 August 1992), which defined the offense of *traición a la patria*, treason.<sup>151</sup>
- Law 25708 (10 September 1992), which detailed the procedure for trials for the crime of treason.
- Law 25728 (18 September 1992), which permitted sentencing of defendants in absentia.
- Law 25744 (27 September 1992), which listed the rules to be followed in the investigation, trial and execution of sentence for the crime of treason.
- Law 25880 (26 November 1992), which classified as a crime of treason the conduct of educators who use their position of influence to advocate terrorism.

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<sup>150</sup> There is considerable debate in Peru about whether to use the expression "terrorist organizations" or "subversive movements". I use the former because it is the term used in Peruvian criminal statutes. I believe the actions of these two movements can be classified as terrorist. According to the Truth and Reconciliation Commission, the Communist Party of Peru-Shining Path used "murder and torture concomitantly on a massive scale as methods of 'armed struggle' [. . . and] kidnapping as a way of recruiting. Overall, these methods had the effect of provoking fear and anxiety in the population and constitute a terrorist strategy [. . . that], due to its systematic or widespread nature, involved grave crimes against humanity". COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Informe Final*, Final Report. Lima: CVR, 2003. Volume I, p. 245. Meanwhile, the Commission held MRTA responsible for 1.5% of the casualties reported to it, and concluded that this group acted "in a similar way to other armed Latin American organizations", in that "it employed murder [. . .], hostage-taking and the systematic practice of kidnapping". *Ib.*, volume VIII, p. 358.

<sup>151</sup> This erroneous label, which referred to aggravated forms of terrorism and not to what is fundamentally understood as treason, led to problems and criticism. Apparently, one of the reasons for adopting it was so that the offense could be tried in military court.

As a result of these statutes, and of the actions of the security forces —particularly the police antiterrorist forces— there was a significant increase in the number of detentions on charges of terrorism and “treason” from 1992 on, which peaked in 1996, at which point there were 3,725 people incarcerated on these grounds in Peruvian jails.<sup>152</sup>

Sadly, the “success” of the State’s crime policy and of the trials was based on legislation that infringed basic rights, which led to constant criticism from national and international human rights organizations and civil society, as well as from the Peruvian State itself.<sup>153</sup>

The deficiencies in the legislation can be summarized as follows:

- In terms of law, it violated the principle of legality, since the criminal charges of terrorism and treason contained similar elements, which made it difficult to draw a clear distinction between them. Both used ambiguous, generic terms and concepts, widening the margin of discretion for police, prosecutors and judges in applying the charge;<sup>154</sup> which led to abuse and excessive penalties.
- In terms of procedures, it gave the police expanded power to run investigations, even though according to the constitution, the *Ministerio Público*, Ministry of Public Prosecution was supposed to handle them. It established detention on suspicion; it affected the right to legal defense by allowing the prisoner to be denied access even to his defense lawyer, and by stipulating that a lawyer could represent only one defendant on charges of terrorism or treason; it established the judge’s obligation to order preventive detention in all cases and prohibited any form of liberty for the defendant during the trial, violating the presumption of innocence; the defense was constrained since officers who prepared the police report could not be summoned as witnesses, and because the short time-limit for the (extremely summary) trials prevented the preparation of an adequate defense.
- In terms of prison conditions, it established a rigid regime, severely limited the prisoners’ freedom in prison (via one-person cells and limited yard time), reduced their contact with relatives and their access to the media. The length of sentences was increased through the prohibition against the application of any rules that would shorten the sentence.

The enactment and enforcement of this legislation drew observations from the Inter-American Commission of Human Rights (hereafter “the Inter-American Commission”) and judgments by the Inter-American Court of Human Rights (“the Inter-American Court”), which pointed out the laws’ deficiencies and ordered the State to take immediate action to end the infringements by modifying the antiterrorist laws and bringing them into line with the standards in the American Convention on Human Rights (“the American Convention”).

An example of this position is seen in the judgment on the case of Castillo Petruzzi *et al*, which ordered the Peruvian State to:

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<sup>152</sup> According to the *Boletín de Estadística* (Statistical Report) of the National Penitentiary Institute for October 1996, in that month there were 2,977 people imprisoned on charges of terrorism and 748 for treason.

<sup>153</sup> From the time it was created in 1996, the *Defensoría del Pueblo*, Ombudsman’s Office repeatedly challenged the antiterrorist legislation and the way the criminal trials were being conducted, recommending repeal of the new legislation. This can be seen in the Ombudsman’s Reports, Nos. 11 and 29. *Derechos Humanos y Sistema Penitenciario. Supervisión de Derechos Humanos de personas privadas de libertad. Elaborado por la Adjuntía de Derechos Humanos - Programa de Asuntos Penales y Penitenciarios. Serie Informes Defensoriales N.º 11.* Lima: Defensoría del Pueblo, 1998 and *Derechos Humanos y Sistema Penitenciario. Supervisión de Derechos Humanos de personas privadas de libertad 1998-2000. Elaborado por la Adjuntía para los Derechos Humanos y las Personas con Discapacidad - Programa de Asuntos Penales y Penitenciarios. Serie Informes Defensoriales N.º 29.* Lima: Defensoría del Pueblo, 2000.

<sup>154</sup> In current Peruvian criminal law the police report is an important element of proof and contains conclusions that imply, among other things, a legal determination of the time of offense committed, which is usually followed by the prosecutor when presenting the accusation before the criminal judge. The relevance of this police document was much greater in cases of terrorism, under the legislation mentioned earlier.

14. [...] adopt the appropriate measures to amend those laws that this judgment has declared to be in violation of the American Convention on Human Rights and to ensure the enjoyment and exercise of the rights recognized in the American Convention on Human Rights for all persons under its jurisdiction, without exception.<sup>155</sup>

The first sign of acknowledgment that the legislation was excessive and that the infringement of rights needed correcting was the creation of the *Ad Hoc* Commission<sup>156</sup> to evaluate requests for pardon or *derecho de gracia*, clemency from defendants or people convicted who believed themselves innocent.<sup>157</sup>

The work of the Commission, from August 1996 to 31 December 1999,<sup>158</sup> led initially to 485 prisoners being freed. That figure increased to 759 by the end of 2005, as can be seen in the following chart.

CHART No. 1. People imprisoned on charges of terrorism and treason and pardoned as innocent

Government	Periods	Number pardoned
Alberto Fujimori	August 1996 – November 2000	513
Valentín Paniagua	November 2000 – July 2001	154
Alejandro Toledo	July 2001 – December 2005	92
<b>TOTAL</b>		<b>759</b>

Chart drafted by: The Consequences of Violence Team of the Section on Human Rights and the Disabled, Ombudsman's Office.

While there is no denying that innocent people may still be in jail, by the end of 2000 (when Fujimori's regime ended) criticism had clearly ceased to be directed primarily at the cases of wrongful conviction and had shifted to the validity of the proceedings whereby people were sentenced for terrorism and treason, since the trials could not pass a basic test of constitutionality or respect for minimum guarantees of legality recognized in international human rights treaties and the Constitution itself.

Some laws had been modified, allowing improvements of procedural aspects and gradually upgrading prison conditions, but that did not overcome the criticisms of Peruvian law. During Fujimori's regime the following statutes were passed:

<sup>155</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS. Castillo Petruzzi *et al* Case. Judgment of 30 May 1999. Series C No. 52, paragraph 226 (Dispositive points).

<sup>156</sup> Created by Law 26655 (passed 17 August 1996) and made up of a representative of the president of the Republic, the Ombudsman and the Minister of Justice. The law established an initial time-limit of six months (subject to one extension), but subsequent legislation (Laws 26749, 26840, 26895, 26940 and 27014) extended it to 31 December 1999, at which point its work was transferred by Law 27234 to the National Council on Human Rights at the Ministry of Justice. The choice of a legal mechanism to grant freedom to these individuals was preceded by some debate, since both pardon and clemency are presidential prerogatives, a mechanism for pardon assigned by the Constitution to the president of the Republic, so that, strictly speaking, they involved "pardoning the guilty" with no recognition of the innocence of the prisoners. However, it seemed the best way to achieve their freedom and both the State and society recognized that their imprisonment was unjustified.

<sup>157</sup> The legislation governing the trials and the way they were conducted meant that many innocent people were convicted. This situation became untenable since there were cases of glaring judicial error, which was acknowledged by the relevant authorities of the government of the time.

<sup>158</sup> When the National Council on Human Rights at the Ministry of Justice took over, using the reports and inquiries conducted by the *Ad Hoc* Commission.

- Law 26248 (25 November 1993) revoked the obligation to resolve prior challenges and motions for dismissal in the main file at the time of sentencing. Also, it repealed article 18 of Law 25475, which prohibited lawyers from representing more than one defendant at a time, Law 25728, which allowed for sentencing in absentia and Law 25659, which limited habeas corpus petitions.
- Law 26447 (21 April 1995) revoked the limitation on the lawyer’s right to intervene following the initial police report.
- Law 26671 (12 October 1996) repealed the use of hooded prosecutors and judges from 15 October 1997 on.
- Law 27079 (29 March 1999) made it possible to substitute a detention order for an order to appear in court in the case of defendants who had renounced their allegiance [to an organization].
- Supreme Decree 005-97-JUS (25 June 1997) established “Rules for Daily Regimen and Progressive Changes in Treatment for Prisoners Indicted and/or Convicted of the Crimes of Terrorism and/or Treason”, which developed the guidelines in Laws 25475 and 25744. This daily regimen considerably limited the rights of the detainees: visits by family members (friends were excluded), access to the prison yard, visits by spouses or lovers, work and education. However, later on in Fujimori’s own regime laws were passed that relaxed these rules.<sup>159</sup>
- The Resolution by the President of the National Penitentiary Institute 674-99-INPE, approved guideline 001/99-INPE-OGT-OTE on “rules for the entry of books, magazines and/or newspapers in penitentiary establishments in the Republic”, thereby guaranteeing the right of access to information.

Given all these modifications, the situation gradually became untenable. Keeping a group of people incarcerated without having properly tried and sentenced them affected the legitimacy of the State, precisely when, from late 2000 on, Peru was strengthening its institutions and bringing them in line with the minimum requirements for a democratic state.

Therefore, during the transitional government of President Paniagua and the first few months of President Toledo’s administration, wholesale reform of the antiterrorist legislation was suggested and discussion began on how to retry those serving prison sentences for terrorism without releasing them at that point, especially the main leaders of the terrorist organizations. During this period the legal modifications enacted were focused on prison sentences:

- Supreme Decree 003-2001-JUS (9 January 2001) modified the special prison regimes. Regarding visits by family and friends, direct visits were allowed three days a week, up to a maximum of eight hours. Interviews and communication with the defense lawyer were made direct, private and confidential. Finally, in terms of access to the prison yard and “corridors”, prisoners were only shut up in their cells between 21:00 hours and 06:00 hours in the morning.
- Supreme Decree 006-2001-JUS (23 March 2001) gave prison authorities the power to limit and suspend some rights of detainees, on a temporary basis (up to 120 days, renewable), if grounds for so doing were properly documented.

In this context the Justice Commission of the Congress of the Republic prepared a preliminary report containing a single organized list of the antiterrorist legislation to be debated and approved after the Constitutional Court had ruled on the constitutional challenge brought by a group of citizens.

During this period close attention was paid to the new trial of American citizen Lori Berenson, after the military court annulled her life sentence and referred the case to the civilian court system.<sup>160</sup> After trial by the *Sala Nacional de Terrorismo*, National Terrorism Court, Lori Berenson was convicted on 20 June 2001 of terrorism (specifically for collaborating with terrorism) and sentenced to 20 years in jail. Her sentence was confirmed by

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<sup>159</sup> Supreme Decrees 008-97-JUS (26 August 1997) and 003-99-JUS (18 February 1999).

<sup>160</sup> Berenson was initially given a life sentence for treason in early 1996 by a military court. However, in 2000 the Military Supreme Court annulled the trial after evaluating new evidence that indicated Lori Berenson was not an MRTA leader.

the Supreme Court (13 February 2002).

The progress of this new trial was followed with intense interest. It was seen as a test case for how the new terrorist trials should be conducted, for although the Constitutional Court had still not ruled on the constitutional challenge, it was widely felt that the previous trials had been so flawed that the Peruvian state would at some point have to start a whole new round of trials.

### 3. The Constitutional Court's Ruling

On 15 July 2002 more than 5,000 citizens filed a constitutional challenge to the antiterrorist legislation with the Constitutional Court,<sup>161</sup> which accepted the case on 17 July.<sup>162</sup> The Court's ruling of 3 January 2003 was published the next day in the official paper *El Peruano*.<sup>163</sup> The decision, which incorporated the experience of other countries, not only declared the legislation unconstitutional, but laid down standards of interpretation for criminal law judges.<sup>164</sup> The Court examined the constitutional validity of the Laws and finally declared the following:

- The crime of treason was unconstitutional, based on the arguments of the Inter-American Court of Human Rights in the case of Castillo Petruzzi *et al.*
- The crime of advocating terrorism was unconstitutional since it over-criminalized conduct already defined in article 316 of the Penal Code (advocating a crime); because it affected the principle of legality (clarity) and the right to freedom of expression.
- The standards that judges should consider to interpret the criminal offense of terrorism.
- The delimitation and interpretation of conduct prohibited in the basic definition of the crime of terrorism (article 2 of Law 25465), managing to preserve its constitutionality by setting limits to the objective elements and open clauses in the original text.
- Limitations to the application of life sentences, in compliance with the constitution, by introducing measures to avoid them being permanent, and establishing a mechanism for eventual release by setting a time-limit after which a sentence may be reviewed.
- The following were unconstitutional: trials by military courts, the prohibition of the right to challenge the assigned judge (article 13 section h) under Law 25475, solitary confinement of detainees by police order (article 12 section d) of Law 25475.
- Standards of interpretation for the rule that a judge should issue a detention order at the beginning of a trial (article 13 section a of Law 25475), establishing that this should be understood in light of article 135 of the Code of Criminal Procedures, meaning that the order was not obligatory and should not be issued automatically, but rather that the existence of required conditions should be determined before proceeding to order preventive detention.
- Continuous solitary confinement of prisoners during the first year of detention and the prohibition on shared cells (article 20 of Law 25475), were unreasonable and excessive, cruel and inhuman treatment, since they infringed article 2 section 1 of the Constitution and article 5 sections 1, 2 and

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<sup>161</sup> Specifically, Laws 25475, 25659, 25880, 25708 and 25744.

<sup>162</sup> The deadline for bringing actions of unconstitutionality had been extended to six years by Law 27780, which stated that the time would be counted “from the date when the Constitutional Court was formed; that is, from 24 June 1996, without including the period when the Court was composed of only four justices, since it would have been impossible to bring an action of unconstitutionality at that time”.

<sup>163</sup> The judgment on file 010-2002-AT/TC can be seen at the following electronic address:

<<http://www.tc.gob.pe/jurisprudencia/2003/00010-2002-AI.html>>.

<sup>164</sup> These are laid out by the Court in provisos 27 to 33; they establish that judges may endorse or overrule challenges of unconstitutionality, but that there are other types of rulings (interpretive, additive, substitutive, exhortatory, etc.) that aim to avoid “gaps in legislation or generating even worse effects than those deriving from a declaration of unconstitutionality of a statute”. The Court concluded that “the present ruling is stipulative, since it explains the concepts, extent and effects of the judgment”.



6 of the American Convention. The Court found likewise for the provision ordering prisoners to be held in single-person cells during their period of incarceration.

The Court's judgment helped bring the antiterrorist legislation in line with the Constitution and the American Convention, for its ruling was binding, and led to certain obligations for the branches of State: Congress had to modify the legislation, and the Judicial Branch had to adjust its interpretation of the law for charges of terrorism.

Also, the judgment clearly stated that it "does not lead to a right of release for those tried or convicted under laws found to be unconstitutional". The Court tried to forestall the turn of events when the trials were overturned if the prisoners filed for immediate release, which would have created an unmanageable situation. In terms of the mandate for the Judicial Branch, after Fujimori's regime ended and before the Court's ruling, it tried to adapt criminal prosecutions to the above-mentioned standards, as in the case of Lori Berenson.<sup>165</sup>

#### **4. The New Antiterrorist Legislation and the New Scenario**

After the Court's decision, the President of the Republic made an announcement to the nation on 7 January 2003 asking Congress to authorize the Executive Power to pass legislation to allow compliance with the Court's ruling. This was approved by Law 27913 (9 January 2003), creating a Commission to design new legislation. The Commission's work culminated in the approval of a series of Laws.

- Law 921 (18 January 2003), which established a new sentencing system for crimes of terrorism, including a mechanism for reviewing the sentence of life imprisonment after 35 years of incarceration.
- Law 922 (12 February 2003), which fixed procedures for overturning the trials for treason by military courts, and the laws that would apply to new terrorism trials.
- Law 924 (20 February 2003), which added a paragraph to article 316 of the Penal Code, making the offense of advocating a crime an aggravated one in cases of terrorism.
- Law 925 (20 February 2003), which sets out the mechanism of effective collaboration [as a grounds for criminal law benefits].
- Law 926 (20 February 2003), which overturned trials by secret ("hooded") judges and prosecutors and the prohibition on challenges to the seated judge.
- Law 927 (20 February 2003), which established rules for sentencing benefits for the crime of terrorism.

Once these statutes were in place, the remaining challenge for proper prosecution of suspects in crimes allegedly committed by terrorist organizations was for the justice system. The objective was clear: to retry those accused of terrorism, in legitimate proceedings that fulfilled due process requirements, and to impose proportional and appropriate penalties for those responsible for terrorist acts that affected the country. The courts needed to strike a balance between the two, but that was going to be difficult given the opposing interests and opinions that were likely to come up in the process.

#### **4.1 The Situation of Prisoners Accused of Terrorism**

Obviously, for the terrorist organizations (the majority of whose members were in prison), the annulment of the trials and the start of new ones represented an ideal scenario for speaking out and publicizing their goals or messages. It is interesting to note that their calls for "a political solution to the problems created by the violence" gave way to debate at the highest levels of the justice system about holding new trials and the new laws passed by the Peruvian state for that purpose.<sup>166</sup>

Before the new trials began, those already incarcerated for terrorism were held in various prisons around the

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<sup>165</sup> But in this trial the standards on antiterrorist legislation established by the Inter-American Commission and Court were taken into consideration.

<sup>166</sup> This does not mean that there had not been legal debate earlier, but at this point it redoubled so that an overall strategy was designed.

country, separated from other types of prisoners, and grouped according to their affiliation with the different terrorist movements or their factions. The conditions in which they were held were similar to those of the rest of the prison population,<sup>167</sup> and while there were shortcomings and deficiencies in prison services, they were no worse than those suffered by the rest of the prisoners. There is no evidence of any discrimination or segregation, either in the prisons run by the National Penitentiary Institute or the National Police.<sup>168</sup> The most striking characteristics of the inmate population before the start of the new trials were:

- In most cases there was reasonable circumstantial evidence of criminal responsibility. The majority of the innocent detainees were released thanks to the work of the *Ad Hoc* Commission, mentioned earlier.
- The groups were tightly-knit in terms of internal organization, but were split into various factions, especially among the Shining Path members: those who were pro-negotiation,<sup>169</sup> those determined to “carry on”,<sup>170</sup> independents or mavericks,<sup>171</sup> and those who had renounced their affiliation,<sup>172</sup> among others. The MRTA inmates, who were only a small proportion in comparison to Shining Path, presented a unified front and kept apart from the rest of the inmates.
- The majority had been in jail for approximately ten years or more. This is crucially important in terms of understanding why, even with the new sentences, some inmates are being released after having completed their sentences or a significant part of them, thanks to the application of sentence-reduction privileges.

#### 4.2 Criticism of the New Legislation and the Decision in the Berenson Case

After the new legislation was published, it came under heavy criticism from inmates convicted of terrorism, who felt that it still did not comply with the Constitution or international human rights treaties. The criticisms essentially affirmed that the new laws:

- Still did not adequately define the crime of terrorism, and that the penalties were extremely severe.
- Validated evidence gathered in the previous trials, which implied a breach of due process, since that evidence was obtained in violation of their fundamental rights.
- Did not establish sentence reduction benefits similar to inmates for other crimes, which implied discrimination.<sup>173</sup>

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<sup>167</sup> As to the law on penitentiaries, Supreme Decree 015-2003-JUS (23 September 2003) approved the Rules of the *Código de Ejecución Penal*, Penal Sentences Code, which regulated prisoners’ conditions, rights and duties and established a *Régimen Cerrado Ordinario*, Regular Closed Regimen, identical to the above-mentioned Supreme Decree 003-2001-JUS. Thus, the prison regimen for terrorist inmates was no different than for the rest of the Peruvian prison population. Later, Supreme Decree 016-2004-JUS (21 September 2004) modified articles 62 and 65 of the Rules, and established a much more severe Special Regime, to be applied to some prisoners after a classification process. That regimen is only applied in the Piedras Gordas prison (north Lima), which holds a small group of prisoners convicted of terrorism.

<sup>168</sup> One of the features of Peru’s prison system is that a group of prisons are still run by the police. However, resource and personnel belong to the National Penitentiary Institute (INPE). Thus, at present the police are in charge of a large proportion of terrorist inmates, for example the 496 men held in Miguel Castro Castro penitentiary and 124 women in Chorrillos Women’s Maximum Security jail. While this situation has led to serious problems in the past, at present the situation is relatively calm and there have been no major incidents in either prison.

<sup>169</sup> Followers of Abimael Guzmán Reinoso and his proposals for a “political solution” and abandoning the armed campaign, articulated in the so-called “Peace Accord” signed by Guzmán Reinoso in 1993.

<sup>170</sup> Followers of Óscar Ramírez Durand (“comrade Feliciano”), who continued the armed struggle after the capture of Guzmán Reinoso in 1992, until he himself was arrested in 1999.

<sup>171</sup> Those who had belonged to the organization, but had left of their own accord.

<sup>172</sup> A small group who had collaborated with the justice system by giving information about the subversive organizations.

<sup>173</sup> The new legislation allowed for two types of sentence reduction privileges: time off because of work or education, the ratio being seven days of work for one day of sentence, and *semilibertad*, partial parole on completing three quarters of the sentence. In most common crimes, time off is earned according to a ratio whereby

Given these criticisms of the new legislation, the Inter-American Court's decision on the Berenson case was awaited with anticipation. Indeed, before her trial in a civilian court, Lori Berenson's defense filed a complaint with the Inter-American Commission, which deliberated until November 2004, when a decision was made. Although the judgment made no direct pronouncements on the new legislation, since Berenson's second trial occurred before the Constitutional Court's ruling and the enactment of the new laws, it did make some statements that can be understood to confirm the validity of the new trials and legal modifications undertaken by the Peruvian State.

#### **a. Compliance with the Principle of Legality**

In the complaint, the Inter-American Commission and Berenson's counsel argued that this principle had been infringed by her second sentence, since she was convicted of collaborating with terrorism. According to the Inter-American Commission, Peruvian law (article 2 of Law 25475) defined the offense of terrorism "in an abstract and imprecise way". Therefore, the offense of terrorism and the category of collaborating with it (article 4) violated the principle of legality enshrined in article 9 of the American Convention. These observations referred not only to the previous legislation, but to that enacted after the Constitutional Court's ruling.

In its decision, the Inter-American Court declared that the first sentence (imposed by the military court) had affected the principle of legality by applying the so-called crime of "treason". But it did not reach the same conclusion about the trial conducted by the civilian court. In fact, after considering the Peruvian Constitutional Court's ruling, the Inter-American Court argued that classing Berenson's conduct as an act of collaboration was not unacceptable:

127. [. . .] Of course, the determination of the existence, in her case, of acts of collaboration, must be done on the basis of the legal definition of the offense of terrorism. *The formulation of charges of collaboration with terrorism does not, in the Court's view, present the deficiencies observed earlier regarding the charge of treason. This Court does not find those criminal charges to be incompatible with article 9 of the American Convention.*
128. For the above-mentioned reasons, regarding the trial and sentencing under civilian jurisdiction, the Court believes that the State has not been proven to have violated article 9 of the American Convention to the detriment of the alleged victim, in applying article 4 of Law No. 25475.<sup>174</sup>

Thus, the charges of terrorism and collaborating with terrorism legally complied with the American Convention and no further objections were raised about their use in the new trials.<sup>175</sup>

#### **b. Due Process**

According to the Inter-American Commission, the Peruvian State had violated judicial guarantees established in the American Convention (article 8) both in the proceedings before the military court and in the trial conducted in civilian court.<sup>176</sup> In its judgment, the Inter-American Court considered some aspects of judicial guarantees.<sup>177</sup>

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two days of work equates to one day less of the sentence and parole is granted after completing one third of the sentence. Although the treatment differs, it should be noted that the new legislation is more generous than the Constitutional Court's ruling, which states that the prohibition on sentence reduction benefits for certain crimes (like terrorism) in the legislation is not unconstitutional. Finally, although terrorist inmates have limited rights to sentence reduction benefits, under Peruvian law there are some crimes for which all such types of benefits are prohibited.

<sup>174</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS. *Lori Berenson Mejía Case*. Judgment of 25 November 2004. Series C No. 119. Paragraphs 127 and 128. The italics are the author's.

<sup>175</sup> Cfr. Also the judgments of the Inter-American Court on the cases: *De la Cruz Flores*, Judgment of 18 November 2004. Series C No. 115 and *García Asto and Ramírez Rojas vs. Peru*, Judgment of 25 November 2005.

<sup>176</sup> Specifically, in the civilian trial, it declared that: a) evidence gathered during the military trial had a "crucial probative role" in the civilian one, since it formed the "basis for the indictment" and the "basis for the sentence"; b) a person could not properly be convicted on the basis of illegal evidence, obtained by violating that person's human rights; c) in the new trial there was no order to re-examine all the evidence for the indictment and the defense, so

Although it accused the civilian judges of not having been independent or impartial, it recognized that Berenson's right to be heard by a judge of competent jurisdiction had been honored and that the allegation of bias could not be examined by the Inter-American Court since it was not first raised within the Peruvian court system. Furthermore, the Court declared that the second trial respected the presumption of innocence, provided adequate opportunity and means for preparing a defense, and respected the requirement that judicial rulings express their rationale, the right to interrogate witnesses and appeal the verdict before a judge or a higher court, the right to a public trial and the right not to be tried twice for the same crime (*non bis in idem*).

As to the evidence used in the second trial, the Inter-American Court differentiated between the evidence that came from the military trial, which it considered inadmissible, and that gathered directly under civilian jurisdiction, which it did not discuss. Finally, the Court stated, in reference to the Peruvian Constitutional Court's ruling and the subsequent legislative modifications enacted, that it "values and emphasizes the work of the State in its recent legislative reforms, since these represent an important step forward in this area".<sup>178</sup>

The content of this judgment, especially as regards the validity of classifying terrorism as a criminal offense and the validity of evidence, set a framework for the new trials. It was important because when the Inter-American Court upheld the validity of the new Berenson trial, it was understood that the new trials would not be challenged on the issues spoken to by the Berenson ruling.<sup>179</sup>

#### **4.3 The Judicial Branch: the *Sala Penal Nacional de Terrorismo*, National Criminal Court for Terrorism**

Now known as the *Sala Penal Nacional para casos por terrorismo* (from now on, the National Criminal Court), this court handles prosecution of cases of terrorism. It has existed since 1997, when the *Sala Penal Permanente*, Permanent Criminal Chamber of the Supreme Court ordered the creation of the *Sala Penal Corporativa para Casos de Terrorismo con Competencia a Nivel Nacional*, Corporate Criminal Court for Terrorist Cases with Nationwide Jurisdiction,<sup>180</sup> which replaced the system of prosecution in place from 1992, with hooded judges. Later, in January 2001, its jurisdiction was extended to offenses considered as "special terrorism".<sup>181</sup> In July 2002 it was given exclusive jurisdiction over cases of terrorism,<sup>182</sup> and subsequently, in September 2004, it was again extended to cover Crimes Against Humanity and others involving human rights violations.<sup>183</sup>

The National Criminal Court is made up of:

- Four supraprovincial criminal courts, which oversee investigation of trials for terrorism, with nationwide jurisdiction. Their work is coordinated with that of four provincial prosecutors' offices, in charge of bringing accusations and carrying out investigations.

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that the procedural irregularities of the military trial were not corrected; d) the sentence did not allow differentiation between the evidence gathered in the military trial (which violated Lori Berenson's rights) and those gathered in the second trial (which would not have done so); e) by allowing the police report as proof in the civilian trial, the Peruvian state violated the alleged victim's judicial guarantees; f) there were insufficient grounds for the sentence; and g) Berenson's defense counsel alleged, among other things, that the judge and the prosecutor interrogated key witnesses when neither Berenson nor her defense attorney were present.

<sup>177</sup> Paragraphs 129 and following of the judgment of the case of *Lori Berenson Mejía vs. Peru*.

<sup>178</sup> Paragraph 234 of the judgment of the case of *Lori Berenson Mejía vs. Peru*.

<sup>179</sup> Also on these issues see the judgments of the Inter-American Court on the following cases, cited earlier: *De la Cruz Flores*, Judgment of 18 November 2004. Series C No. 115 and *García Asto and Ramírez Rojas vs. Peru*, judgment of 25 November 2005.

<sup>180</sup> Administrative Ruling 001-97-SPPCS-T-PJ, of 10 December 1997.

<sup>181</sup> Administrative Ruling 009-2001-CT-PJ, of 11 January 2001. Cases of "special terrorism" involved common crimes (basically organized crime) which were classified as "special" thanks to a series of legislative decrees on National Security passed in 1988. This measure, adopted by the government of president Fujimori, was meant to provide heavier sentences and limit defendants' rights in cases of especially serious crimes, such as terrorist cases.

<sup>182</sup> Administrative Ruling 097-2002-CE-PJ, 5 July 2002.

<sup>183</sup> Administrative Ruling 170-2004-CE-PJ, 30 September 2004.

- Four criminal courts, in which defendants are tried for terrorism, with nationwide jurisdiction. They collaborate with four superior criminal prosecutors, who are in charge of presenting the legal grounds for indictment during oral proceedings.

The National Criminal Court's jurisdiction covers the entire country,<sup>184</sup> but it can also coordinate with regular trial Superior Courts when cases would normally fall within their territorial jurisdiction. The National Criminal Court has asserted its extraordinary nationwide jurisdiction on a discretionary basis and only in cases when it felt it was necessary.<sup>185</sup>

Realizing the importance of the National Criminal Court's work, especially given the new trials, the Judicial Branch sought to meet its infrastructure needs, providing administrative and computer support to help it process files in many complex cases. After the ruling by the Constitutional Court was announced and in light of the work the National Criminal Court would have to take on, the Executive Council of the Judicial Branch granted the president of the National Criminal Court special powers to make necessary internal changes so as to be able to handle the coming case-load properly and efficiently.<sup>186</sup> The Council also made some administrative changes to make the National Criminal Court more powerful.<sup>187</sup> Meanwhile, the Ministry of Public Prosecution had to designate prosecutors to participate in the trials, even though the Judicial Branch was in charge of the overall process.

## 5. Criminal Responsibility of the Terrorist Groups

Clearly, the criticisms of the antiterrorist legislation enacted after 1992 and the trials of terrorist suspects violated a series of fundamental rights, but that does not necessarily imply that the defendants could not reasonably have been convicted of the offenses with which they were charged. During the conflict, members of the terrorist organizations committed not just excesses, but actual crimes against citizens who had nothing to do with the conflict and against members of the security forces, in the form of injuries and damage to property. Leaving aside the political motivations behind their actions, obviously the acts themselves needed to be prosecuted and sentenced like any other crime, in accordance with the procedures and sanctions laid down in national law. The judgments of the Inter-American Court and the Peruvian Constitutional Court called for modification of the law, but they also allowed the Peruvian state to exercise its right to prosecute and punish those responsible for such crimes, since the State's deficiencies and abuses do not constitute a rationale for exonerating those who committed crimes.

### 5.1 The CVR's *Final Report*

The Truth and Reconciliation Commission's *Final Report* clearly describes the human rights abuses and violations committed by the Peruvian state against people suspected of belonging to terrorist organizations, in terms of the substantive legislation, prosecutions that breached basic norms of due process and prison conditions.<sup>188</sup> The CVR

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<sup>184</sup> The courts and chambers of the Special Criminal Court are based in Lima, but have jurisdiction to investigate and prosecute offenses from anywhere in the country, since they can be held in places where the defendants are detained. This national jurisdiction is an exception to the rule that every chamber and court has an explicitly-defined territorial jurisdiction.

<sup>185</sup> As an example, one could look at the number of cases tried and releases granted by the Special Criminal Court and the High Courts, cited later.

<sup>186</sup> These powers had to do, among other things, with the work of chambers and courts in the National Criminal Court: supervising proper control of the courts and criminal chambers, preparing the chambers for the trials, scheduling national hearings, authorizing courts and chambers to carry out investigations out of their territorial area, receiving information on trials in the chambers and issuing directives (on consultation with the Executive Council of the Judicial Branch). The president could also order the rotation of auxiliary personnel.

<sup>187</sup> The Management of the Judicial Branch was told to give priority to the National Criminal Court's requests and the *Secretaría de Coordinación Nacional*, National Coordination Office was physically moved to the same building as the National Criminal Court, to help monitor the progress of the trials around the country.

<sup>188</sup> In the CVR's *Final Report* this topic is repeatedly covered. In volume VI: Patterns in the Perpetration of Crimes and Human Rights Violations (1.6 Violation of Due Process), there is a detailed analysis of antiterrorist legislation, the way criminal trials were conducted and especially the conditions under which these people were incarcerated.

did not ignore the responsibility of the judicial system and its personnel in violating human rights during the terrorism trials; it specifically lists the responsibilities of the Judicial, Executive and Legislative Branch. The forcefulness and clarity of the CVR's conclusions make them worth quoting at length.<sup>189</sup>

With regard to the structural conditions under which the judicial system worked (its internal organization, the legislation it had to apply), it is clear that responsibility for the grave abdication of functions relating to the administration of justice lies mainly with the executive branch, since it did not exert sufficient will or resources to come up with true reform of the system; and also the legislative branch, which approved seriously flawed legislation, such as the subordination of the judicial branch and mechanisms that violated the right to due process. However, the Commission feels that the judicial system and justice system personnel cannot attribute all responsibility for the abdication of justice to structural factors, since no structure functions alone. Without their servility and submissiveness and —probably— fear, which do not belong in anyone who claims to be an honest judge, the structural limitations could not have manifested themselves the way they did. Not all flawed institutional structures lead to such widespread impunity for crimes and human rights violations; likewise, not all dictatorships or draconian legal measures lead to massive numbers of convictions and such widespread violations of the rights of detainees. The justice system did not carry out its mission properly; it did not secure efficient or legal convictions for the actions of the subversive groups; it did not protect the rights of detainees, nor put a stop to the impunity with which agents of the State were committing grave human rights violations. In the first place, the judicial branch acquired the reputation of a “sieve” that released the guilty and convicted the innocent; secondly, its agents failed to guarantee the rights of detainees, collaborating in the perpetration of grave violations of the right to life and to physical integrity; lastly, there was no attempt to bring members of the armed forces accused of serious crimes to justice. Every single dispute over jurisdiction was resolved in favor of the military courts, where the events went unpunished. The Ministry of Public Prosecution deserves special mention, since its members —with some honorable exceptions— abdicated their role of ensuring strict respect for human rights in connection with detentions and turned a deaf ear to the pleas of the victims' families. On the contrary, it relinquished its duty to report crimes, dragged its feet over investigations and carried out extremely deficient forensic work, all of which contributed to a situation of lawlessness and impunity. Under Fujimori's dictatorship, the Ministry of Public Prosecution slavishly obeyed the orders of the Executive Branch. With a few notable exceptions, the judicial system did not use the laws adequately to defend the rights of victims of the crimes and violations committed by the subversive groups or by state agents, even when it still had the ability to do so under a democracy. In contrast, when unconstitutional legislation that violated human rights principles was imposed, by a dictatorship, it was applied scrupulously and without criticism, which in practice favored measures and situations that violated the fundamental rights of the Peruvian people.

The CVR did not, however, neglect to acknowledge and detail the terrorist movements' responsibility for crimes during the period of internal conflict. It declared that Shining Path was directly responsible for crimes against humanity and that it was the principal violator of human rights, as seen in the following conclusion:

2. Investigations carried out by the CVR clearly demonstrate that *the PCP-SL [Communist Party of Peru-Shining Path] was the principal perpetrator of crimes and human rights violations*. The ideology and strategy of the PCP-SL led to heinous acts, and *the widespread and systematic nature of these practices reliably prove to the CVR that members of the PCP-SL and in particular their national leaders and so-called “high command” are directly responsible for the perpetration of crimes against humanity*. Furthermore, these behaviors, in the CVR's opinion, constitute grave infractions of the Geneva Conventions, which all parties in hostilities are bound to respect. The treacherous actions of the PCP-SL on the ground, hiding among the civilian population, avoiding the use of distinguishing

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The issue of breaches of human rights follows the argument established by the judgments of the Inter-American Court, providing examples to help explain the extent of the phenomenon.

<sup>189</sup> COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Final Report*. Volume III. Political And Institutional Actors (2.6 “Conduct of the Judicial System During the Internal Armed Conflict”).

features, and launching surprise attacks, among other similar methods like the use of terrorist actions, constituted a calculated method designed to provoke brutal reactions by the forces of law and order against the civilian population, thereby adding enormously to the suffering of the communities where hostilities were occurring [. . .].<sup>190</sup>

The CVR stated that the MRTA was also responsible for crimes in its campaign, although of lesser magnitude.<sup>191</sup> The importance of searching for all the perpetrators was expressed by the CVR in its recommendations in volume IX of the *Final Report*, which read:

e. Furthermore, to recommend that the National Court for Terrorism of the High Court of Justice of Lima take note of the information established by the CVR regarding crimes committed by members of Shining Path and MRTA, and of the criteria it established for attributing responsibilities to the commanders and leaders of those subversive organizations, within the context of judicial proceedings for crimes of terrorism currently under way [. . .].<sup>192</sup>

Even though the responsibilities established by the *Final Report* were not news, since Peruvian society knew about the campaigns waged by the terrorist groups, nevertheless, the forcefulness and clarity with which they were laid out ran counter to the legal and political strategy of those organizations. The precision and conscientiousness of the CVR's work, and its solidly-documented conclusions, meant that when the *Final Report* was released, the media and society in general renewed their opinion of the level of violence and criminality of the terrorist organizations. The moral weight of the CVR's conclusions helped to cement that perception. Thus, it became clear to Peruvian society that individuals responsible for the crimes committed by the terrorists needed to be punished. That perception was heightened by the fact that Peruvian society had in previous years witnessed the process of pardons led by the *Ad Hoc* Commission, which allowed innocent people who had been unjustly arrested and convicted of terrorism to go free. Thus it was perceived that the majority of those still in jail were the ones responsible for the crimes committed since 1980. Therefore, while it cannot be said that the CVR's *Final Report* made a substantial difference to people's understanding of the conflict in terms of the responsibility of the terrorist organizations, it did underline the need for them to stand trial.

## 6. The New Trials: Problems and Results

After the new legislation was passed, terrorist inmates had the possibility of defining their legal situation via a new criminal trial, if they so wished, or abiding by the original sentence. They could also request sentence reduction privileges, which were reinstated (after being banned in 1992). The central role fell to the National Criminal Court, and the volume of cases it handled must be taken into consideration in any evaluation of its work.

Under the new antiterrorist legislation, there were two grounds for annulment of the trials:

- Trials before a military court for treason, which were annulled by Legislative Decree 922 for that reason. The decree ordered the Supreme Council of Military Justice to promptly forward all such files to the National Criminal Court. This was the situation for over 700 inmates.
- Trials before “hooded judges” for the crime of terrorism, which according to Legislative Decree 926 must be annulled (both the verdicts and the trials). However, considering that in certain circumstances inmates had almost completed their sentences, the law allowed them to renounce the annulment of the sentence.<sup>193</sup> It should be pointed out that at the start of the new trials there were more than 1,100 people sentenced for terrorism, the large majority of whom had been convicted by “hooded judges”.

According to a publication by the Institute for Legal Defense, 738 cases were re-tried, of which the National

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<sup>190</sup> *Ib.*, volume II, Conclusions on the Parties to the Conflict: The Communist Party of Peru, Shining Path. Emphasis added.

<sup>191</sup> *Ib.*, volume II, Conclusions on the Parties to the Conflict: The Túpac Amaru Revolutionary Movement.

<sup>192</sup> *Ib.*, volume IX, Recommendations by the CVR for a National Commitment to Reconciliation.

<sup>193</sup> This had considerable impact on the number of trials conducted by the National Criminal Court.

Criminal Court in Lima handled 610 directly.<sup>194</sup> But this number has fluctuated since some files were added and others subtracted. Thus, it is unclear whether there are more cases in this second round, but there is a better prosecution strategy based on what happened the first time around.

A large number of the new trials were cases handled previously by “hooded judges” (432), while those tried by military courts were somewhat fewer (306). All these cases were taken on by the National Criminal Court directly.

When the National Criminal Court started work, in February 2003, it was not given a deadline for finishing. The majority of those convicted for terrorism have petitioned for release from the time their trials were annulled. As part of their legal strategy they have requested release on grounds of excessive detention, since Peruvian legislation sets a time limit for detentions prior to sentencing, which in the case of terrorism is 36 months (article 137 of the Procedural Penal Code). According to the counsel for the defense, the defendants were detained for more than 10 years under sentences that were annulled, which created a situation of imprisonment without conviction that far exceeded the time limit for preventive detention. However, legal rulings (including the Constitutional Court’s decision) show that when cases of terrorism are annulled, the period of preventive detention is calculated from the moment the trial is annulled.<sup>195</sup> Thus, in most cases, if there was no conviction by February 2006, the judicial authorities would have to grant conditional release to those indicted for terrorism. Clearly this would bolster the argument of those who have criticized the National Criminal Court.<sup>196</sup>

## 6.1 The Main Problems and Solutions

The challenges facing the Peruvian criminal justice system in prosecuting terrorist suspects involve not just the number of cases that need to be tried, but also certain specific difficulties, depending on the length of time passed, the type of offense committed and the circumstances of the first trials. These include:

- Acquiring sufficient evidentiary material.
- Evaluating the validity of evidence in the first trial.
- Establishing criteria for differentiating levels of participation (whether the defendant was a low-level member or a leader).
- Ascertaining the organizational structure of the terrorist groups, among other things.

To this we should add the fact that the annulled trials used judicial classifications that were inadequate or imprecise, an issue which had to be resolved in the new trials.

### a. Deficiencies in the Legislation

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<sup>194</sup> JUSTICIA VIVA. Sala Penal Nacional. *El trabajo en los casos de terrorismo*. Lima: Instituto de Defensa Legal, 2005.

<sup>195</sup> For an opinion on the length of detention cfr. INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of *García Asto and Ramírez Rojas*. Judgment of 25 November 2005. Series C. No. 37. The Court determined that since he had undergone over fourteen years of imprisonment without a sentence, while the second trial was going ahead (after the first was annulled for following legislation that was declared unconstitutional), Mr. Ramírez Rojas’ right to freedom had been violated. The Court did not rule out the possibility that the justice system might establish a new way of calculating the length of detention after annulling the first trial, but it stipulated that, in that case, there should be adequate legal grounds for such a legal ruling. This is shown in paragraph 143 of the judgment, which indicates that the court “over 14 years after issuing that cautionary measure, did not present sufficient grounds for continuing with detention”. Although the State had argued that the delay in the trials was due to the fact that over two thousand of them had been annulled because of the Constitutional Court’s ruling, the Court ruled that those events did not free the State from its legal obligations to justify such an extensive delay, and thus the State was violating due process guaranteed by the American Convention for not having tried the victim during a reasonable amount of time, leaving the situation up to the national judge to resolve.

<sup>196</sup> Such criticisms are analyzed in part 6.4 of this essay.



According to Judge Pablo Talavera,<sup>197</sup> president of the National Criminal Court, the legislation passed in 2003 has some drawbacks that can be summed up as follows:

- The penalties set are in some cases excessive. For example, the penalty for the basic offense of terrorism is 20 to 35 years and for aggravated cases it ranges from 25 years to life imprisonment; but as the trials progressed it became clear that there were three types of Shining Path members: rank and file,<sup>198</sup> mid-level<sup>199</sup> and leaders.<sup>200</sup> Clearly the aggravated forms include the leaders of the organization, while the basic charge is reserved for the rank and file and mid-level members, so that obviously in some cases a penalty of up to 20 years for simply belonging to an organization is excessive.<sup>201</sup>
- The criteria for determining whether or not a person belongs to a criminal organization are not clear. There are certain behaviors, like simply participating in activities such spraying [slogans] on walls or passing out leaflets, which in some cases imply active membership in the organization and in others merely the desire to be accepted into the organization.
- The offense of associating with intent to commit a crime in cases of terrorism (classed as an independent offense), could be abolished and replaced by an aggravated form of the offense of association with intent to commit a crime.
- There is no way of distinguishing individual terrorism, meaning a person who, though not part of an organization, commits actions that fit the criminal definition of the offense of terrorism. There have, for example, been people who have carried out acts described as terrorism for financial gain.
- There are no rules governing confessions by the leaders of terrorist groups, which could be useful in some cases, if the information involved top authorities in the organization and did not confer exemption from sentencing.<sup>202</sup> The lack of legal rules for this situation means there is no encouragement or incentive for leaders of these organizations to testify, as can be seen in the case of Ramírez Durand.<sup>203</sup>

## b. The Validity of Evidence: Evidence Obtained During the First Trial and Evidence that Violates Fundamental Rights

One of the arguments invoked by the defendants in terrorism cases (after the ruling by the Constitutional Court and the new antiterrorist legislation), was to deny all validity to the investigations and the evidentiary material in the first trials, since they violated fundamental aspects of due process. This obviously created a serious problem for the justice system, because so much time had elapsed since the alleged events took place that obtaining new evidence would be extremely hard.

However, the ruling by the Constitutional Court<sup>204</sup> and the Inter-American Court (on the Berenson case) clearly

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<sup>197</sup> Interview conducted by the author. Lima, 13 December 2005.

<sup>198</sup> One who merely belongs to the organization, and can carry out secondary duties.

<sup>199</sup> One who is fully involved in the organization and who, while not a leader, has an important role.

<sup>200</sup> A member of the main leadership of the terrorist organizations.

<sup>201</sup> The law is clear on this matter; according to article 5 of Law 25475, mere membership carries a penalty of no less than 20 years imprisonment.

<sup>202</sup> Obviously, providing information about subordinates would not justify a reduction in sentence. Nor would exemption from sentencing be appropriate, considering the extent of the leaders' responsibility.

<sup>203</sup> As will be shown in part 6.2, Óscar Ramírez Durand (alias "comrade Feliciano") is the only member of the central leadership of Shining Path who has testified and offered information in the criminal trial against Abimael Guzmán Reinoso and the leaders of Shining Path. Nevertheless, current legislation does not allow the application of privileges for effective collaboration in his case because of his role as a leading figure in a terrorist movement.

<sup>204</sup> Regarding the evidence presented in the military court, in paragraph 103 of the judgment the Constitutional Court declared that "it is not flawed or inadmissible because the right to be tried by a competent judge was violated. [. . .] the breach of that constitutional right does not automatically affect the validity of the types of evidence gathered or presented in court before that breach was declared". However, the CVR in its *Final Report*, volume VI.

demonstrated the need to differentiate the evidence obtained during the first trial from that based on earlier information, but re-processed for the new one.

Judge Pablo Talavera indicates that the use made of evidence from the previous trials has varied:

- It has been established that evidence obtained by violating fundamental rights is not admissible.<sup>205</sup>
- Court records from the military prosecutor were allowed, on the basis of necessity.
- Following, filming, or audio-taping of individuals has been allowed if done in a public place.
- Private documents that were seized have only been considered when they did not affect the person's privacy.

As can be seen, the National Criminal Court has weighed the validity of evidentiary material and established that in some cases it is admissible.

### c. Testimony from Informants

A substantial number of trials held during the 1990s were based mainly on testimony by people charged with terrorism who provided information in exchange for reduced sentences or release. When the new trials started, it became clear that those individuals would have to testify again in order for the new evidence to be weighed. That presented the first difficulty: the informants' fear and reluctance to testify again, especially since their identities had been concealed during the first trials, and many were now inmates in the same jails as others convicted of terrorism. In light of these problems, the National Criminal Court decided not to call such people unless strictly necessary.

However, this did not prevent errors by the *Comisión de Evaluación de la Ley de Arrepentimiento*, Commission for Evaluation of the Law on Informers (CELA), a branch of the Ministry of Justice, in charge of guaranteeing court appearances and coordinating the security of informants. A classic case occurred when the media published the name of an informant, who as a result refused to testify in the new trials, for safety reasons.<sup>206</sup>

Although in some cases the defendants have tried to object to the use of such statements, the National Criminal Court has considered their validity, implementing necessary security measures as the legislation requires. Judge Pablo Talavera indicates that there have been some problems in terms of the level of security that informers should be provided and the offers that were made in return for their collaboration. This means that in some cases people have not reiterated their earlier testimony in the new trials, especially in the case of MRTA.<sup>207</sup>

### d. Complexity of the Trials Due to the Type of Criminal Organization: The Megatrials

During the first trials and others that were held up until 2003 (when the new prosecutions began) there was no legal strategy for prosecuting complex cases according to the type of offense, the number of defendants and the involvement of a complex criminal organization. To try and solve this, in recent months there has been an attempt to group the files, joining some and discarding others, so as to improve the chances of successful prosecution.

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Patterns in the Perpetration of Crimes and Human Rights Violations (1.6 Violations of Due Process), challenges that criterion, pointing to the magnitude of the violations of rights in the trials before military courts.

<sup>205</sup> Indeed, in several judgments it has been clearly established that such violations imply that the evidence obtained is inadmissible. For example, in the trial for the attack on the El Polo shopping center (discussed in part 6.4 of this essay), the fact that the police had no warrant to enter a home ruled out the use of the evidence found there.

<sup>206</sup> The citizen involved was Luis Alberto Arana Franco, involved in terrorist activities, who provided information that led to the capture of Abimael Guzmán Reinoso and the leadership of Shining Path in September 1992. His identity was published, which seriously affected his safety, as shown in the publication of the daily paper *La República* on 10 November 2004. The report can be seen on the following page:

<[http://www.larepublica.com.pe/antiores/index.php?option=com\\_content&task=view&id=58527&Itemid=483&fecha\\_edicion=2004-11-10](http://www.larepublica.com.pe/antiores/index.php?option=com_content&task=view&id=58527&Itemid=483&fecha_edicion=2004-11-10)>

<sup>207</sup> Cfr. interview cited earlier.

The complexity of the trials stems from the fact that usually they do not involve isolated events, but rather a series of acts carried out during the same time period, but in different geographical areas, according to whether the organization was Shining Path or MRTA. Responsibility for each act lies with those who performed it, but also with those who ordered it within the existing framework of command. This means, for example, that theoretically the central leadership of both organizations should be included in every trial of rank and file or mid-level members; or that all the rank and file should be grouped into a single trial.

Thus, as previously stated, there has been a sorting process for accumulating and disaggregating the files, leading to the so-called “mega-trials” for the leaders of Shining Path and MRTA. This is a mechanism that helps rationalize prosecution and also avoids Shining Path leaders having to face numerous trials in which they would have to repeat their statements over and over again. The fact that such trials are now being conducted, after the prosecution of simpler cases, does not necessarily indicate a concerted strategy (according to Judge Pablo Talavera), since the trial of the top leaders of Shining Path was supposed to start in November 2004, but had to be suspended a few days after it began.<sup>208</sup>

Given the complexities, the relationship between the trials and the involvement of a centralized terrorist organization, it has been argued that a matter adjudged in one proceeding could be considered evidentiary material in another, allowing evidentiary material to be shared. Especially for prosecution of mid- and high-level figures in terrorist cases, the defendants’ testimony to the CVR is important. Although that testimony was guaranteed confidential while the CVR was functioning, once its inquiry ended, the information passed to the Ombudsman’s Office, where it is governed by the law of Access and Transparency of Public Information, and may be subpoenaed by the justice system. Even though it could be argued that the testimonies were not intended for use in criminal trials against the defendants, there is no rule that prohibits the public, and even less the justice system, from knowing their contents.<sup>209</sup>

#### e. Prison Conditions for Detainees

Under Peruvian law, there is no judge who presides over penal sentences, a legal authority to whom an inmate could appeal if he feels one of his rights has been violated in jail. If an inmate believes this has happened, he must file a petition of *habeas corpus* before the criminal judge. The Special Criminal Court has developed and extended its power to guarantee due process not just in the investigation and prosecution stage but also by intervening on some decisions by prison authorities, when it felt they infringed the rights of the inmate. In at least three cases, the National Criminal Court has issued rulings on the situation of inmates in the El Callao Naval Base:

- When the Ministry of Justice issued a ruling modifying the rules at the Naval Base, establishing that visits by relatives and attorneys should take place in visiting rooms. The National Criminal Court ruled that the regulations on use of the visiting rooms violated due process (on interviews with defense attorneys), since they did not guarantee adequate communication and confidentiality between the inmate and his attorney. It also argued that the Ministry of Justice ruling did not have authority to limit an inmate’s fundamental right (to maintain contact with his family), and that a statute was needed on the matter.
- In a second case, the National Criminal Court found a punishment given to an inmate at the Naval Base to be invalid, arguing that it violated the principle of legality, since neither the offense allegedly committed by the inmate nor the **punishment were listed in the Penal Sentences Code,**

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<sup>208</sup> The trial of Shining Path leaders began in November 2004, but had to be suspended after the first session due to the conduct of the defendants (who delivered diatribes advocating the armed struggle), which caused a scandal in the media and society. The criticism directed at the members of the court caused two of the judges to resign from the case, causing the oral proceedings to be permanently suspended and therefore annulled. Subsequently they were restarted before another criminal court made up of different judges. The new oral proceedings began in September 2005.

<sup>209</sup> Although the law of Transparency and Access to Public Information (Law 27806) establishes certain exceptions, it makes clear in article 15C that these do not apply to the Judicial Branch.

**and although they were** listed in the Naval Base regulations, the Code was a higher authority and therefore took precedence.

- Finally, again on the Naval Base, it ruled that the administration of the base be transferred to the National Penitentiary Institute, and that the Navy would no longer run it.

#### f. Diversity of Jurisprudential Criteria

One development that has impacted the process is that sentences by the National Criminal Court have been appealed before the Supreme Court, which has followed different criteria, depending on whether the appeal was heard in the *Sala Penal Permanente*, Permanent Criminal Chamber or the *Sala Penal Transitoria*, Transitional Criminal Chamber. The two have different criteria on some topics, so there is no unity of approach. Finally, it should be noted that in some cases it is difficult for prosecutors to accompany the National Criminal Court to the places where the trials are being held.

#### g. Double Jeopardy

As seen earlier, while the judgments of the Constitutional Court and Inter-American Court and the conclusions of the CVR argue that the first terrorist trials infringed the defendants' human rights, they never call for the immediate release of inmates as part of their judgments or recommendations.<sup>210</sup> On the contrary, they called for modifications to the statutes followed by new trials.

While Lori Berenson's defense argued, as demonstrated earlier, that a second trial constituted double jeopardy, the Inter-American Court disallowed that argument, thereby validating the new legislation and the second trial before a civilian court. After the new antiterrorist statutes were passed, it seemed that a possible legal strategy for the defendants would be to invoke the prohibition on double jeopardy to prevent new trials and request immediate release, but after the Inter-American Court's judgment on the Berenson case that option was not used in the new trials.

### 6.2 The Trial of Shining Path Leaders: the Lucanamarca Massacre<sup>211</sup>

After the proceedings against Shining Path leaders in November 2004 resulted in a mistrial,<sup>212</sup> oral proceedings were held again in September 2005 against Abimael Guzmán Reinoso and 23 other people.<sup>213</sup> The proceedings were held in the Special Trials Chamber in El Callao, next to the Naval Base.<sup>214</sup> It was called the "megatrial" because of its complexity and size, since the defendants were charged with a series of crimes, among them aggravated terrorism, aggravated homicide (murder) and other related crimes against the State, which carried penalties up to life imprisonment. The "megatrial" involved the leaders of Shining Path on charges of aggravated terrorism and murder (aggravated homicide). While Guzmán Reinoso and other Shining Path leaders are involved

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<sup>210</sup> One exception is the case of Peruvian citizen María Elena Loayza Tamayo, initially acquitted of the crime of treason by a military court and later convicted by a civilian court. In this case the Inter-American Court argued that the acquittal by the military court constituted *res judicata*, and therefore ordered her immediate release. INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Loayza Tamayo vs. Peru. Judgment of 17 September 1997. Series C. No. 33.

<sup>211</sup> In order to understand the details of the "megatrial", in addition to the documentation consulted, the author interviewed Judge Pablo Talavera (see note 48) and Gustavo Campos, an attorney with the Human Rights Commission (COMISEDH) (interviewed on 9 December 2005), who is representing a group of relatives of victims of the Lucanamarca massacre.

<sup>212</sup> See note 59.

<sup>213</sup> However, some of the defendants in the "mega-trial" did not belong to the Central Committee, such as Marta Isabel Huatay Ruiz, Víctor Zavala Cataño and Margot Lourdes Liendo Gil. Likewise, some people who were on the Central Committee were not included, such as Quinteros Ayllón and Ramírez Durand, who were being tried for events that occurred later.

<sup>214</sup> The panel of judges was composed of Justices Pablo Talavera Elguera (president), Victoria Sánchez Espinoza and Jimena Cayo Rivera Schreiber

in various trials, the four most important cases have been grouped together in this trial in order to establish the existence of Shining Path's central command structure. The cases are:

- The Lucanamarca massacre, in which they are alleged to have decided the death of 69 *campesinos* in April 1983.
- The control and management of *El Diario*, which served Shining Path's propaganda system as a mechanism for expressing their ideology and particularly for advocating terrorist actions. An example of this function is the publication of the so-called "interview of the century".<sup>215</sup>
- The capture of Guzmán Reinoso, which revealed the existence of a national command and control structure, whose ideological, political and military head was Guzmán Reinoso; and also of the "Central Committee", the "Permanent Committee" and the "Political Bureau", consisting of Elena Iparraguirre Revoredo (the organization's second-in-command), Laura Zambrano Padilla and María Pantoja Sánchez.
- The César Vallejo Academy, which was used by the Shining Path as part of its so-called "Central Logistical or Economic Apparatus".

Various types of evidentiary material have been used to try and demonstrate that Shining Path's internal structure centralized decision-making in the so-called Central Leadership. In these cases, especially in the Lucanamarca massacre, the theory of criminal responsibility through another's conduct is being used to determine the responsibility of the leadership. This form of authorship is based on "control of the will via apparatuses of power".<sup>216</sup>

The Ministry of Public Prosecution seeks to demonstrate via this case that Guzmán Reinoso set up and directed Shining Path's Central Committee, and that he was on the military committee, the body that allegedly planned and executed the "People's War". According to the Ministry of Public Prosecution, Guzmán Reinoso and his codefendants planned Shining Path's campaign to include four types of strategy: propaganda and agitation, sabotage, selective annihilation and "guerrilla warfare". In light of these allegations, the Ministry of Public Prosecution requests life imprisonment for Guzmán Reinoso and the top leaders,<sup>217</sup> as well as civil reparations of 3,000 million New Sols<sup>218</sup> to the State. In the Lucanamarca case 500,000 New Sols are requested for the heirs of the 69 victims murdered.

#### a. The Lucanamarca Massacre

One of the most unforgettable charges against Guzmán Reinoso is the massacre of 69 members of the ranching

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<sup>215</sup> An interview with Guzmán Reinoso in the edition of 24 July 1988, in which he discusses the so-called "People's War", explains how it was fought and justifies its consequences, such as the death of civilians, among them the *campesinos* in Lucanamarca. The complete text is available at: <http://www.eldiariointernacional.com/Descarga/Entrevista/Entrevista.htm>.

<sup>216</sup> As is well-known, Claus Roxin posits three forms of control of events that give rise to authorship, understood as criminal responsibility: control of the action (direct authorship), control of the functional act (coauthorship) and control of the will (criminal responsibility through another). On the latter, Roxin argues that control of the will can exist via the use of organized power structures, so that the intermediary author has access to an organization that functions according to his will, in which his orders are carried out. This organization is the instrument the author uses to commit a crime, while its members are obedient and subject to it, thanks to a structure characterized by a principle of hierarchy and distribution of labor. These characteristics are seen in actual power apparatuses and also some businesses, government institutions and organized crime in general. Via the use of such organizations, the author may be any person whose position allows him to give orders to his subordinates. The CVR, in its *Final Report*, volume I, chapter 4: The Legal Dimension of Events, applies this theory to the case of terrorist organizations like those of the State.

<sup>217</sup> Elena Iparraguirre Revoredo, Óscar Ramírez Durand, Laura Zambrano Padilla, María Pantoja Sánchez or María García Ramírez or Marcela Ruiz López, Angélica Salas de la Cruz, Margie Clavo Peralta, Martha Huatay Ruiz, Víctor Zavala Cataño, Juana Durand Araujo and Ostaff Morote Barrionuevo or Ostap Morote Barrionuevo.

<sup>218</sup> [Editors note] In January 2006, one Peruvian New Sol was worth 0.29715 US dollars (1 US\$ = 3.36535 NS).

community of Lucanamarca (Ayacucho), in April 1983. This event demonstrates the level of violence used by Shining Path and their contempt for life. The CVR's *Final Report* states that:

from the early morning hours of Sunday 3 April 1983, approximately sixty members of the Communist Party of Peru-Shining Path, armed with axes, machetes, knives and fire-arms, launched an attack that began in the area of Yanacollpa, continued through Ataccara, Llacchua and Muylacruz and finished in the town of Lucanamarca. All these places are in the district of Santiago de Lucanamarca, Hunacasancos Province, Ayacucho. As a result of the crazed attack by Shining Path, sixty-nine *campesinos* were brutally murdered.<sup>219</sup>

This action was allegedly Shining Path's revenge for the behavior of the townspeople of Lucanamarca on 22 March 1983, when they rebelled against the presence and control of Shining Path in the area, capturing and killing two local Shining Path leaders.<sup>220</sup> Guzmán Reinoso acknowledged the responsibility of the Shining Path Central Command when he testified before the CVR that as leader of the organization he bears the most blame: "[. . .] your honors, we repeat, we do not deny our responsibility, I have my own share, I bear the most blame, I will never deny my responsibility, it wouldn't make sense [. . .]."<sup>221</sup> Other leaders like Elena Iparraguire, Osmán Morote and Martha Huatay also admitted responsibility, but declared that their actions were merely "errors" and "excesses".

While it was conducting its inquiry, the CVR coordinated with the authorities to exhume the bodies and submit them for analysis by forensic anthropologists, which led to the identification of 62 victims and established the cause and manner of death of the 69 victims. This confirmed that the attack exceeded any reasonable form of combat between two sides and that the aggressors had abused their superiority and the defenselessness of the *campesinos*,<sup>222</sup> constituting a violation of the provisions of International Humanitarian Law. According to the CVR, the massacre was ordered and planned by the Shining Path Central Command and carried out by the Main Force of the Cangallo-Fajardo Area Committee, which meant the State needed to determine criminal responsibilities and conduct prosecutions, because impunity would affect the rights of the victims' relatives and society as a whole.

## b. The Progress of the Trial

The beginning of the trial provided a chance to observe the main arguments by Shining Path leaders' defense lawyers. The central argument by Guzmán Reinoso and the group's leaders is that the Ministry of Public

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<sup>219</sup> To arrive at this conclusion the CVR considered the testimony given to it, investigations carried out by the Human Rights Commission (COMISEDH), the inspection performed by the CVR Forensic Investigation Unit from 17-22 October 2002, and the exhumation report ordered by the Ministry of Public Prosecution and prepared by the Institute for Legal Medicine, CVR forensic experts and the Peruvian National Police *Dirección de Criminalística*, Criminal Studies Bureau.

<sup>220</sup> They were Olegario Curitomay, who allegedly formed part of the main Shining Path contingent in the area; and "comrade Nelson", an important figure in the Shining Path Area Committee covering the provinces of Cangallo and Víctor Fajardo in the department of Ayacucho.

<sup>221</sup> Testimony before the Truth and Reconciliation Commission in the El Callao Naval Base on 10 September 2002, in volume II of the *Final Report*, chapter 2: Cases Investigated by the CVR (2.6. The 1983 Lucanamarca Massacre).

<sup>222</sup> The majority of the deaths were directly caused by blows with heavy, sharp objects—probably axes and machetes—concentrated on the head and to a lesser extent the upper extremities. In only six cases, death resulted from close-range shots to the head. The blows received by the victims were homicidal in intent, designed to cause the victims' death, since they were concentrated on the vital organs and a large number of the victims had multiple cranial fractures. The location and direction of the wounds show that the victims were probably attacked when they were beneath their assailants and defenseless. This pattern of assault was similar in all the locations where the *campesinos* were attacked. The fact that 18 of the victims were children (between 6 months and 10 years old), 8 were elderly (between 50 and 70 years old) and 11 were women (between 13 and 49 years old, some of whom were pregnant), shows that over half the victims were people unable to fully defend themselves, who presented no threat to the life or [physical] integrity of the assailants.

Prosecution theory of power apparatuses and criminal responsibility through another person is a construct that only applies to State institutions, not civil movements like Shining Path. Furthermore, they argue that criminal responsibility through another person was only included in criminal statutes from 1991 on, so it cannot be applied to the Lucanamarca case. Guzmán Reinoso has declared, reiterating his testimony to the CVR, that during the years of armed struggle there was a conflict between two sides at war, in which although there may have been excesses, like in the case of Lucanamarca, there is no criminal responsibility. Thus, he only accepts a certain level of political responsibility.<sup>223</sup>

The main proofs of responsibility in this case are the so-called “interview of the century”, the testimony of Ramírez Durand and the results of the CVR’s inquiry. Since the CVR’s *Final Report* has already been quoted, the following will focus on the other two probative elements.

In the “interview of the century”, Guzmán Reinoso discusses the events in Lucanamarca and accepts his responsibility and the role of Shining Path’s Central Command:

It’s been an intense, hard campaign, there have been some complicated and tough moments. Faced with the use of paramilitary forces and military action by the reactionaries, our answer was an action that spoke loud and clear: Lucanamarca, they won’t forget it and neither will we, of course, because they saw a response they couldn’t imagine, over 80 were annihilated there, that’s the truth; and we admit, it was excessive, as we said in 83, but there are two sides to everything in this life: our problem was a decisive strike to crack down on them, make them understand it wasn’t that easy; sometimes, like then, the Central Command itself planned the action and gave the orders, that’s how it was. The main thing there was that we struck decisively, we cracked down on them and they realized they were dealing with a different sort of people’s army, we weren’t the ones they’d fought before, they got that; the trouble was, it was excessive [ . . . ]<sup>224</sup>

Meanwhile Ramírez Durand, the only one who is testifying in the trial, has repeatedly blamed Guzmán Reinoso, Augusta La Torre Carrasco<sup>225</sup> and Iparraguirre Revoredo,<sup>226</sup> who made up Shining Path’s Central Committee in 1983. According to Ramírez Durand’s version of events, information from the head of the Cangallo Fajardo Committee on the death of Shining Path commanders in his area was received during a meeting of Shining Path’s Central Committee in February 1983. This led to a private meeting between Guzmán Reinoso, Iparraguirre Revoredo and La Torre Carrasco, in which they decided to strike back. This was communicated to the rest of the members at the meeting, although they were not told exactly what the nature and the objectives of the action were, the assumption being that it involved Lucanamarca, since the attack against the community there occurred early the next month. Ramírez Durand denies any responsibility for the events at Lucanamarca, claiming that he was not part of the Central Committee at that time. He has also accused Guzmán Reinoso of other acts (receiving a million dollars from the man known as “comrade Artemio” en 1987), and blames Guzmán for causing Shining Path’s downfall because he “bureaucratized and militarized” Shining Path by setting up various subversive committees in the interior of the country.

A significant development in the hearings is the presence of Alfredo Crespo as Guzmán Reinoso’s defense attorney since November 2005. Crespo was convicted of belonging to the legal arm of Shining Path and was recently released after serving his sentence.<sup>227</sup> Lastly, as attorney Gustavo Campos has pointed out, it is curious that the

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<sup>223</sup> During the trial, in a session held 4 October 2005 before the criminal court, Guzmán Reinoso denied being a terrorist, defining himself as a “revolutionary combatant” and admitting his political and ideological responsibility for the *People’s War* launched by his terrorist group. He subsequently refused to testify during the trial. Meanwhile, Iparraguirre Revoredo and Angélica Salas de la Cruz refused to respond to questioning.

<sup>224</sup> Cfr. <<http://www.eldiariointernacional.com/Descarga/Entrevista/Entrevista.htm>>.

<sup>225</sup> Guzmán Reinoso’s wife, alias “comrade Norah”, who was the second in command of Shining Path until her death in 1988, for reasons which were never fully established

<sup>226</sup> Alias “comrade Miriam”, Shining Path’s third highest leader until the death of “comrade Norah”, when she assumed second place in the organization and later became Guzmán Reinoso’s mistress.

<sup>227</sup> Even though the prosecutor and the Special Solicitor General opposed this, the Criminal Court rightly declared

strategy of silence is shared by Shining Path leaders and the top military officers in the trial of the Colina squad, believed to be responsible for the worst cases of human rights violations committed by the State.

### 6.3 The Results of the Trials

#### a. Release of Terrorist Inmates

It is clear from the following table that in recent years the number of people incarcerated for terrorism has been gradually dropping, especially between 2003 and 2005, in other words during the period when the National Criminal Court was not functioning.

CHART No. 2. Inmate Population Related to Terrorism (1996-2005)

	Terrorism			Treason			Total
	Men	Women	Total Terrorism	Men	Women	Total Treason	
<b>1996, October</b>	2603	374	2977	612	136	748	<b>3725</b>
<b>1997, October</b>	2311	323	2634	577	138	715	<b>3349</b>
<b>1998, October</b>	2042	275	2317	680	143	823	<b>3140</b>
<b>1999, October</b>	1755	240	1995	767	150	917	<b>2912</b>
<b>2000, October</b>	1554	213	1767	805	153	958	<b>2725</b>
<b>2001, October</b>	1310	146	1456	727	131	858	<b>2314</b>
<b>2002, November</b>	1046	132	1178	644	113	757	<b>1935</b>
<b>2003, August</b>	1000	144	1144	570	96	666	<b>1810</b>
<b>2004, October</b>	1144	172	1316	21	1	22	<b>1338</b>
<b>2005, September</b>	909	150	1059	3	0	3	<b>1062</b>
<b>2005, December</b>	823	136	959	0	0	0	<b>959</b>

Source: National Penitentiary Institute Statistics

Prepared by: the author

As the chart shows, between August 2003 and December 2005 approximately 850 individuals interned for terrorism were released.<sup>228</sup> This drop led to criticisms of the National Criminal Court, since some sectors in society felt that it showed the justice system was being soft on terrorism and that the legal strategy of terrorist groups was a “success”.<sup>229</sup>

As previously noted, some analysts, including members of the police and political parties, believe there is a system for relaying information between inmates, their relatives and the freed prisoners; they believe that Shining Path is orchestrating events and that its forces are being allowed to regroup and mount a new campaign of political and even military presence in some parts of the country, a process in which the ex-convicts play a crucial role.<sup>230</sup> In order to counteract this suspected resurgence of Shining Path they propose, among other things, surveillance of the ex-prisoners.

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that there was no legal impediment to Crespo exercising his profession.

<sup>228</sup> A figure similar to the one given by congressman Luis Ibérico, who was quoted on 1 December 2005 in the daily paper *El Comercio* (page A9) as stating that 981 people imprisoned for terrorism were released between 2003 and 2005.

<sup>229</sup> This topic will be explored in part 6.4 of this essay.

<sup>230</sup> Congressman Ibérico demonstrates this line of thinking: “This information pipeline allows Shining Path leaders to continue to run their criminal organization from jail and no one does a thing.”



## b. Reasons for Release of Terrorist Inmates

Clearly it is the Judicial Branch that is granting releases to people accused or convicted of terrorism, since in recent years these inmates have not benefited from presidential pardons or clemency. Nevertheless, it must be stressed that the releases do not mean the Judicial Branch is being lenient. This can be shown more clearly if we analyze the reasons for the releases. The following chart contains data provided by the National Criminal Court's National Coordinating Committee on releases granted in 2003 and 2004:

CHART No. 3. Terrorist Prisoners Released 2003-2004

Judicial Instance	Year		Total 2003 - 2004	%
	Year 2003	2004		
National Criminal Court	81	159	240	32.88
Supra-Provincial Courts	35	66	101	13.84
Provincial Chambers and Courts	189	200	389	53.29
	305	425	<b>730</b>	<b>100%</b>

Source and preparation: National Coordinating Committee for the National Criminal Court

Obviously, the number of releases is much higher than for previous years (1993-2002), as seen in the next chart. But that increase is due to the start of the new trials, and as will be shown, there are various different reasons for the releases.

CHART No. 4. Terrorist Prisoners Released 1993-2002<sup>231</sup>

Year	Releases
1993	154
1994	332
1995	287
1996	180
1997	137
1998	176
1999	118
2000	120
2001	36
2002	19

Chart 3 shows that most of the releases (53.29%) were granted by criminal courts and chambers in the interior of the country, while the courts and chambers of the National Criminal Court (based in Lima but with national jurisdiction) granted the remaining 46.72%.

While the National Criminal Court has not yet compiled statistics on the releases granted during 2005, it is reasonable to assume that we will see the same trend as in 2003 and 2004, which would confirm the hypothesis that the reduction of the prison population is due to decisions by the judicial authorities. The second step of analysis is to look at the reasons for those releases, since they are not all necessarily due to acquittals; there are various other reasons also.

<sup>231</sup> JUSTICIA VIVA. *Ib.*, p. 23.

CHART No. 5. Reasons for Releases of Terrorist Inmates 2003-2004<sup>232</sup>

		National Criminal Court	Supra-Provincial Courts	Total	%
<b>Acquittal</b> (26.69%)	Acquitted	91	-	91	26.69
<b>Sentence Reduction Privileges</b> (31.08%)	Conditional release	20	81	101	29.62
	Semi-release	1		1	0.29
	Parole earned	-	4	4	1.17
<b>Release on Procedural Grounds</b> (8.8%)	Surpassed detention limit	1		1	0.29
	Detention order changed / revoked	19	8	27	7.92
	Provisional release	2	-	2	0.59
<b>Sentence Served</b> (19.35%)	Sentence purged	58	-	58	17.01
	Sentence completed	7	-	7	2.05
	Sentence adapted	1	-	1	0.29
<b>Procedural Challenge</b> (11.15%)	Statute of limitations	17	-	17	4.99
	Double jeopardy	11	5	16	4.69
	Criminal consequences disallowed	2	3	5	1.47
<b>Other</b> (2.92%)	No merit	4	-	4	1.17
	Annulment annulled <sup>233</sup>	2	-	2	0.59
	Immediate release	1	-	1	0.29
	Release when trial annulled	1	-	1	0.29
	Security measure <sup>234</sup>	1	-	1	0.29
	Lacks object of annulment Decree 926	1	-	1	0.29
<b>Total</b>		<b>240</b>	<b>101</b>	<b>341</b>	<b>100.00</b>

Source: National Coordinating Committee of the National Criminal Court

Preparation: The author

The data cover only the years 2003 and 2004, and include the chambers, criminal courts and supra-provincial courts of the Special Criminal Court, which means only 341 have been analyzed,<sup>235</sup> but they confirm some assumptions

<sup>232</sup> This includes data received not just from the criminal courts and chambers in Lima, but also the rest of the country. According to information from Judge Pablo Talavera, from 1999 to 2002 the average number of acquittals was higher, 87% of those convicted, since only 13% of those tried were found guilty. This did not necessarily mean the judges were being lenient, but that it was difficult to gather enough probative elements and locate witnesses, 14 years after the first trials.

<sup>233</sup> Term used by the National Criminal Court statisticians.

<sup>234</sup> Measure used when a person cannot be charged.

<sup>235</sup> It was not possible to get detailed information from the criminal courts and chambers in the interior of the

about the reasons for the releases. This chart seeks to group the various reasons under broad categories that allow us to see whether a judicial instance absolved the accused or used other mechanisms. Thus, we may conclude that:

- Only 26.69% were acquitted or absolved, a small percentage, which is understandable since although responsibility may exist in many cases, there is insufficient evidence to overturn the presumption of innocence. Bearing in mind that not all the accused are guilty whatever the crime, it is reasonable that a percentage of them could not be convicted, either because they were indeed innocent or for lack of evidence.
- Almost a third (31.08%) were released due to application of sentence reduction benefits, in other words they were found guilty and served part of their sentences but were then freed through early release mechanisms in our legislation.<sup>236</sup> The large majority was given conditional release, a smaller number earned sentence reduction (via work or education on a 7 to 1 ratio) and there was one case of semi release.
- 8.8% were released on procedural grounds, which does not mean they were innocent, since their trials are still on-going and they could be found innocent or guilty. Surpassing the detention limit (after being detained for 36 months without sentencing); having one’s detention order changed or revoked to an order to appear in court; and provisional release are merely incidents in the criminal trial, which do not amount to a definitive decision and cannot be seen as predicting the final result.
- A large group, 19.35%, was released after being found guilty and serving their entire sentence, or else their sentences were purged<sup>237</sup> or adapted.<sup>238</sup> While the terminology varies, in all cases the sentence has been served and there is no presumption of innocence.
- In 11.15%, release was granted in response to procedural challenges by the defense, so that the court did not pass sentence on the defendant’s innocence or guilt. These involved statutes of limitation, whereby the crime could not be prosecuted due to the length of time since it was committed; double jeopardy, when the events for which the defendant has been indicted were already judged in a previous trial;<sup>239</sup> and finally “criminal consequences disallowed”, applied when the defendant was a minor when the crime was committed, meaning he cannot be tried by a criminal court, and the trial is dismissed.<sup>240</sup>
- Finally, in 2.92% of the cases releases were due to various motives that have nothing to do with a decision on the defendant’s responsibility, except in the “no merit” group, which involves cases where the High Prosecutor of the Criminal Court decided after investigation that there were insufficient grounds for a criminal trial, since the evidence gathered was inadequate. This is tantamount to acknowledging that, had the case gone to trial, the defendant would have been acquitted.

When we look at the number of releases, we must bear in mind that according to Justicia Viva, during 2003 and 2004 the National Criminal Court alone (excluding the courts and chambers in the interior of the country) convicted 287 people.<sup>241</sup> If we add to that the 165 people convicted between January and October 2005,<sup>242</sup> we have a total of 465 convictions by the National Criminal Court.

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country, but it is reasonable to assume that the breakdown would be similar.

<sup>236</sup> As mentioned previously, these privileges were eliminated in the legislation passed in 1992, but reinstated by the new legislation passed in 2003.

<sup>237</sup> The sentence imposed was similar to the amount of time the person was detained awaiting trial. In such cases, although the sentence acknowledges the defendant’s responsibility, immediate release is granted due to the length of preventive detention.

<sup>238</sup> The sentence is modified, since the first sentence applied a penalty greater than that specified by the new criminal statutes.

<sup>239</sup> A second trial would violate the prohibition against being tried twice, known as *non bis in idem*.

<sup>240</sup> The file must then be transferred to a family judge for a hearing and possibly a behavioral correction measure. However, since the statute of limitations for offenses committed by adolescents is much shorter than for adults, it would almost certainly have expired in all these cases.

<sup>241</sup> JUSTICIA VIVA. *Ib.*, p. 19.

<sup>242</sup> Statistic data provided by the National Coordinating Committee of the National Criminal Court.

#### 6.4 Attitudes Towards the National Criminal Court

Given the importance and complexity of its work, the National Criminal Court and its judges have been recognized for their integrity and efficiency, but have also been criticized both by attorneys for the defendants in terrorism cases and by those who feel the Court has not been firm or tough enough in punishing the accused. There have been certain situations that have drawn a lot of criticism on the Court.

One of these occurred in November 2004, when oral proceedings against Shining Path leaders had to be suspended. This marked the most sensitive and difficult moment for the prosecution. The government and even the president of the Republic immediately called publicly for the court to act firmly and named a new Special Solicitor General for cases of terrorism.<sup>243</sup>

The polemic continued for some months. In October 2005 the Special Solicitor General for cases of terrorism criticized sentence reduction privileges for terrorist inmates, arguing that in many cases they were helping Shining Path re-establish its leadership;<sup>244</sup> he also criticized the sentence in the car-bombing attack at the El Polo Shopping Center<sup>245</sup> for being (in his view) lenient. A few days later, he denounced the criminal court trying Abimael Guzmán and other Shining Path leaders, for “playing along with the terrorists” and being “soft on them”, which the court considered a “breach of the ethical duties of a lawyer” which affected and detracted from the work of the Judicial Branch, and fined him 7,209 New Sols.

As we have seen, the release of terrorist prisoners and the granting of sentence reduction rights have led to charges that the justice system is being too lax in terrorist cases. These condemnations increased after Shining Path carried out some terrorist attacks in the latter half of 2005. According to the critics, the releases demonstrate the success of Shining Path’s legal strategy.<sup>246</sup>

As already noted, some analysts, including members of the police and political parties, believe there is a system for relaying information between inmates, their relatives and the freed prisoners; they believe that Shining Path is orchestrating events and that its forces are being allowed to regroup and plan a new campaign of political and even military presence in some parts of the country, a process in which the ex-convicts play a crucial role. The defense attorneys for those accused of terrorism have voiced considerable criticism, especially of some of the judges on the Special Criminal Court whom they believe to be biased against their clients. However, in recent months those objections have lessened considerably.

#### 6.5 Perspectives

The coming months will see the culmination of a process that began years ago, the prosecution of those responsible

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<sup>243</sup> See note 60 for an explanation of what happened. The Solicitor General, who is charged with representing and defending the rights and interests of the State in trials to which it is a party, was criticized by the president of the Republic in a message to the nation (broadcast a few days after the incidents in the courtroom), for not having prepared enough for the trial. He was immediately replaced by a former Supreme Court justice, Dr Guillermo Cabala, known to be critical of the Special Criminal Court.

<sup>244</sup> A month earlier, Congressman Mauricia Mulder Bedoya, a member of the American Popular Revolutionary Alliance (APRA), said he was concerned that Shining Path was staging a military, legal and political come-back, thanks to legal loop-holes and the Government’s failure to carry out some of the CVR’s recommendations.

<sup>245</sup> This occurred on 20 March 2002, days before the US president was scheduled to visit Peru, in a shopping center close to the US embassy. At the beginning of September 2005, those involved were sentenced to between 30 and 20 years of imprisonment, but a group of defendants were exonerated.

<sup>246</sup> According to Congressman Luis Ibérico, in a statement published on 1 December 2005 in the daily paper *El Comercio* (page A9), “somehow Shining Path has managed to get incredible results with its strategy, or struggle on the legal front, as they put it. The problem is, the ex-convicts are boosting the “ranks of the party, the Army and the legal front of Shining Path”, as planned by the movement. This is alarming and something should be done about it”.

for the terrorist actions the country has suffered. After a long and difficult process, the Peruvian State is about to legitimize its handling of these cases and impose valid and legal penalties.

One factor that should be borne in mind in the months to come is the length of time these people have served: after their military or civilian trials were annulled, by 2006 they had spent 36 months in jail, the maximum length of time for preventive detention according to Peruvian procedural law. If they have not been sentenced, they may request release on procedural grounds. While it is possible that, given the complexity of the cases, the Ministry of Public Prosecution may request an extension of the preventive detention period, it will be a decisive moment for the defense strategy of Guzmán Reinoso and his codefendants, and of other defendants in similar situations.

But even after sentencing, the prisoners will not return to jail for long periods. On the contrary, given the penalties applicable to the basic class of terrorism (from 20 to 35 years), many of them are about to or have already completed enough of their terms that they can now apply for parole. In either case, they are entitled to release after having served an extensive time in jail. Thus, the number of inmates will continue to drop gradually. The only ones left in prison eventually will be the leaders of the terrorist organizations, who will be given life sentences or very lengthy jail terms.

Some years ago, that prospect would have caused a storm of criticism and indignation among the Peruvian people, exacerbated or shared by the media, politicians and members of the security forces. As time has gone by it has come to be seen as something natural, except by an isolated few, although the terrorist attacks carried out in recent months raised further questions about the releases.

It is undeniable that those convicted for terrorism are politically and morally accountable for what they did, regardless of the political agenda that led them to get involved in the armed struggle. Their actions led to the death or breach of fundamental rights of others, acts which carry responsibility and an appropriate penalty. It is also recognized that the way those penalties were applied in the early years was characterized by abuse of the basic rights of detainees, who were separated from their families, isolated and humiliated. But since a group of them may be about to regain their liberty, it should be pointed out that being released will have its own difficulties and challenges for them:

- They will have to adapt to a society that is totally different from the one they knew when they went to prison over a decade ago. Society now may, logically, be suspicious of them because of their past.
- They will have to face family and friends with whom many of them had little contact but to whom they will have to turn initially.
- They will have to deal with financial insecurity and job problems exacerbated by the fact that in many cases they are disqualified from continuing their trade or profession because of their jail time.
- Since the majority of the sentences included hefty civil reparations, they will have to make those payments in order to rehabilitate themselves and close their legal record.

While these problems are similar to those faced by any ex-prisoner, the particular nature of these cases should not be ignored. In people marked by an ideology, there is an additional obstacle to the rehabilitation that jail is supposed to achieve. In many cases, incarceration did not mean renouncing their political agenda, and while none of the inmates openly plans to continue the armed struggle when freed, it is not clear whether they will be willing to participate in political life.

The group spirit in the jails may not continue after the inmates are gradually released, since the discipline and organization of prison life is replaced by the need to satisfy immediate basic individual needs. As already discussed, there are those who are alarmed that the terrorists are reforming and regrouping, and while there is some evidence of Shining Path action in certain parts of the country, there is no proof so far that any of those released have been involved in the attacks.

## Conclusions

The country is clearly now in the final stage of prosecuting those responsible for the terrorist acts suffered. There

are fewer and fewer inmates and criminal trials pending. The second round of trials, as already indicated, served a double purpose: legitimate judicial proceedings that respected the minimum requirements of due process, and also proportional and adequate penalties for those responsible for terrorist acts. The balance between these two was necessary but difficult to obtain due to the opposing interests and opinions.

In terms of evaluating what has been achieved, it can be said that despite the challenges to judicial criteria, legal guarantees have been respected, which has actually led to criticism of the judges for making too many concessions. However, it should be acknowledged that this does not imply the defendants were treated leniently. Such criticism is inherent to any trial, and is all the more explicable and understandable in an experience where such complicated and difficult events have to be defined, where society suffered such damage and there are contradictory perceptions about the responsibility of the members of the terrorist groups.

The challenges faced by the Peruvian State, so far successfully, with the prosecution of those responsible for human rights violations, marks the end of a process begun over a decade ago, that led initially to a repressive penal response that violated fundamental rights, subsequent acceptance of the error of that policy and finally new trials which have faced multiple problems, but which show that the earlier trials were not necessary for justice to be done properly and effectively.

As has been noted, the CVR's inquiry and its *Final Report* were not irrelevant to this whole process. However, they had less impact than in the case of prosecutions of state agents who violated human rights. Firstly, the excesses and rights violations in the 1992 legislation and the flaws in the first terrorist trials were acknowledged by Fujimori's own regime, after a series of critiques and comments from national and international bodies (especially the judgments by the Inter-American Court). The partial modifications of some laws up to the end of the year 2000 demonstrate that acknowledgment, as does the creation of the *Ad Hoc* Committee to free innocent detainees.

When most of the innocent prisoners had been freed, a set of circumstances created by the downfall of the Fujimori regime led to a historic period of democratic growth, especially during the transition government of President Paniagua and the first few months of President Toledo's administration. At this point, institutions like the Constitutional Court once again assumed their proper role of ensuring respect for citizens' fundamental rights.

In this context, the Constitutional Court declared the antiterrorist legislation to be unconstitutional, ordered new laws drafted and said that detainees should be retried. The new legislation, though it has some problems, does respect the Constitution and international human rights treaties.

Meanwhile, the CVR was created and carried out its inquiry. Its conclusions about the accountability of the terrorist organizations were extremely clear, pointing to the level of violence and criminality that the terrorist campaign inflicted on Peruvian society, and the need for proper, fair trials.

After this, the job passed to the justice system, particularly the National Criminal Court. So far, it has risen to the task and held fair trials, despite criticism from various quarters (including by the attorneys representing those indicted for terrorism). The CVR's material has been useful, but has not been of principal relevance. Without diminishing the importance of the CVR's inquiry and *Final Report*, we can conclude that they accompanied a process begun years earlier, unlike the prosecution of state agents, where the CVR has had much more impact.

## **Gender, Sexual Violence and Criminal Law in Post-Conflict Peru**

**Katya Salazar Luzula**

## 1. Introduction

The *Comisión de la Verdad y Reconciliación de Perú*, Peruvian Truth and Reconciliation Commission (CVR) was created to clarify the development, events and accountability for the terrorist violence and human rights violations that occurred in Peru between May 1980 and November 2000, for which both sides, insurgent groups and State agents, are to blame; the CVR was also asked to come up with proposals for promoting peace and harmony among Peruvians.<sup>247</sup>

Following its mandate, the CVR analyzed the political, social and cultural circumstances in society and State institutions that contributed to the tragic violence that spread through the country. In order to help prevent such things happening again, the CVR was also charged with formulating proposals for reparation and honoring the victims and their families, recommending institutional, legal and educational reforms, and establishing mechanisms to monitor compliance with its recommendations.

The CVR was not granted jurisdictional powers, but instructed to collaborate with jurisdictional bodies in investigating the crimes and human rights violations committed by subversive groups or State agents, “to attempt to determine the whereabouts and situation of the victims, and identify, where possible, those presumed responsible.”<sup>248</sup>

The CVR’s *Final Report* was released on 28 August 2003. It contains two sections on gender issues: the first analyzes how women were affected by the various human rights violations committed during the internal armed conflict, and emphasizes how the impact on them was different from that on men; the second deals specifically with the topic of sexual violence against women, in various forms (rape, forced cohabitation, forced pregnancies, forced abortions, sexual slavery, among other things) in that same period.

To further contribute to the work of jurisdictional bodies, the CVR forwarded its findings on 47 cases to the *Ministerio Público*, Ministry of Public Prosecution, including the names of victims and suspected perpetrators, for evaluation and subsequent criminal indictment of the suspects, where necessary. Of these 47 cases, 2 involved sexual violence against women.

This essay is divided into two parts. The first half discusses the CVR’s main conclusions about sexual violence against women during the armed conflict. The second examines the cases of sexual violence referred to the Ministry of Public Prosecution. It describes their current status, the principal challenges they represent for Peru’s justice system, and the prospects for prosecuting these and other new cases of sexual violence against women during the internal armed conflict in our country.

## 2. The Gendered Impact of Violence During the Internal Armed Conflict

Most of the women affected by the conflict in Peru from 1980-2000 lived in the departments of Ayacucho, Huancavelica and Apurímac, three of the poorest areas in the country, located in the mountains in the south, where most of the population are *campesinos*. Their profile was fairly similar to that of the men affected by the violence: low income, mostly Quechua speakers (73%)<sup>249</sup> from rural areas (80%).<sup>250</sup>

The CVR’s *Final Report* shows that 80% of the deaths during the armed conflict were men;<sup>251</sup> however, the violence affected people in various ways and its impact was not limited to the number of dead or disappeared.

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<sup>247</sup> The Truth and Reconciliation Commission was created by Supreme Decree 065-2001-PCM on 4 June 2001.

<sup>248</sup> Article 2 part b of Supreme Decree 065-2001-PCM.

<sup>249</sup> The Truth and Reconciliation Commission’s *Final Report* shows that three out of four victims were *campesinos* whose native language was not Spanish.

<sup>250</sup> COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Informe Final, Final Report*. Lima: CVR, 2003. Volume VIII, p. 63.

<sup>251</sup> *Ib.*, volume VIII, p. 102.

Gender roles in Peruvian society determined both how men and women participated in the armed conflict, and also the effects it would have on them. For women, the impact of the violence on their lives went far beyond traditional human rights violations, a fact which has unfortunately been minimized and even ignored all these years.

Besides being victims of murders, detentions and torture just like men, many girls and young women from rural areas were recruited by Shining Path and the Túpac Amaru Revolutionary Movement (MRTA), often forced into relationships and obliged to remain serving for the insurgents against their will. The women were made to do various types of work and were often subject to sexual abuse. Meanwhile, many women were victims of sexual assault committed by State agents, especially members of the Armed Forces, who used it to obtain information or confessions, as a punishment for collaborating with subversive groups, or simply as a form of pressure against the women's fathers, husbands, sons or brothers in detention.

It was also women who were affected by the detention, disappearance or death of their husbands, sons, fathers or brothers. They were the ones who had to take charge of searching and lodging complaints or requests with the justice system for family members who had been detained or disappeared. It was they who had to go to government offices, jails, military bases and police stations, where they were often victims of abuse and humiliation because they were women, indigenous, poor, and spoke Quechua. They were frequently subjected to human rights violations, such as detention, torture and even acts of sexual violence.

The conflict also affected men and women's physical and mental health differently. As a result of the detention, death or disappearance of their husbands, fathers or brothers, women had to move to other regions and become the breadwinners for broken families with no fathers, with young children who had suffered the violence themselves. "[I]t is these destitute, culturally uprooted and socially stigmatized widows or orphans who have to shoulder responsibility for the survival of the family".<sup>252</sup>

### 3. Sexual Violence Against Women During the Internal Armed Conflict

#### 3.1 The Legal Framework

The Supreme Decree founding the CVR stipulated that it was to focus on the following events: a) murders and kidnappings; b) forced disappearances; c) violations of the collective rights of the country's Andean and indigenous communities; and d) other crimes and grave violations of people's rights.<sup>253</sup>

The CVR believed—as it said explicitly in its *Final Report*—that sexual violence in general, and rape of women in particular, constitute forms of “torture” and therefore, even though these behaviors were not actually mentioned in its mandate, they were investigated by the CVR.<sup>254</sup>

The CVR's position was backed by the Inter-American Commission on Human Rights (IACHR), which had argued in a report on the human rights situation in Haiti in 1995 that rape as a form of political repression constituted not merely inhumane treatment that damages a person's physical, mental and moral integrity as stated in article 5 of the American Convention on Human Rights, but was also a form of “torture” according to article 5(2) of that document.<sup>255</sup> The same argument is made in the IACHR's report on the case of Raquel Martín de Mejía, who was

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<sup>252</sup> There is detailed information on this point in the COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Final Report*, volume VIII, Part Two: “Los factores que hicieron posible la violencia”, “The Factors that Made the Violence Possible” and Part Three: “Las secuelas de la violencia”, “The Consequences of the Violence”.

<sup>253</sup> Article 3 of Supreme Decree 065-2001-PCM.

<sup>254</sup> Cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Final Report*, volume VI, p. 272.

<sup>255</sup> Cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. Report by the Inter-American Commission on Human Rights on the Human Rights Situation in Haiti, 1995, OEA/Ser.L/V.88, Doc. 10 rev., 9 February 1995, paragraphs 132-133.



raped by an agent of the Peruvian State as a form of punishment and intimidation.<sup>256</sup>

The CVR also pointed out that acts of sexual violence committed during the armed conflict were not isolated incidents, but rather a widespread practice by State agents. These acts mostly occurred during military or police operations in Andean or Amazon communities, in the context of arbitrary detentions with no prosecutor present and forced disappearances of individuals suspected of having ties to subversive groups.<sup>257</sup>

In particular, the *Final Report* declares that there was a repeated and persistent practice of rape, especially by state agents. Although it uses similar wording for acts of sexual violence, the *Final Report* does not explicitly state that these reached a level of systematic practice. Such a declaration would have meant acknowledging the existence of a national plan or state policy to commit such acts, which the CVR was not in a position to do, on the basis of the information at its disposal.<sup>258</sup>

However, the *Final Report* did make the proviso that acts of sexual violence might have reached the level of systematic practice in some provinces of Ayacucho, Huancavelica and Apurímac, during some periods. This statement is extremely important for determining criminal accountability, since in these cases, not only the actual perpetrators but also their military superiors could be held responsible for not exerting proper control over the forces under their command, if they knew or should have known that their subordinates were committing or planning these violations, and did not take necessary and reasonable steps to prevent or restrain them or report the events to the appropriate authorities.<sup>259</sup>

### 3.2 The Principal Findings

On the basis of the 16,885 testimonies from around the country given to the CVR,<sup>260</sup> the Commission concluded that there had been an alarmingly high incidence of forms of sexual violence against women in Peru (rape, forced prostitution, forced cohabitation, sexual slavery, forced abortions and pregnancies, among other things). It decided the problem needed a new approach.

Up until that point, sexual violence had been seen as “collateral” damage, a secondary effect of the armed conflict and not as a human rights violation in its own right; it was not reported and was even seen as a normal and everyday occurrence. When women spoke of the impact of the violence on their lives, they usually talked about their male relatives’ detention, torture or disappearance, but not about what happened to themselves.

The CVR decided from the outset that its whole inquiry needed to be gender-sensitive and that the *Final Report* would incorporate a gendered perspective and discuss the crimes committed against women. It therefore appointed a specialist consultant to collaborate with the inquiry.<sup>261</sup>

The CVR worked to develop the gender aspect of its inquiry in various ways. Among them, CVR staff were trained to be able to identify when a woman had suffered sexual violence and register that information properly in testimonies taken in the field. Also, the teams of interviewers sent out to the villages and communities to take testimonies were made up of equal numbers of men and women.

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<sup>256</sup> Cfr. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Report 5/96, case 10,970, Peru, 1 March 1996. Annual Report of the Inter-American Commission on Human Rights, 1995. III) Reports on individual cases. Case of Raquel Martín de Mejía.

<sup>257</sup> Cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Final Report*, volume VI, p. 382.

<sup>258</sup> For a more detailed explanation of the criteria used by the CVR to define certain crimes and human rights violations as systematic or widespread, cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Final Report*, volume I, p. 218.

<sup>259</sup> Cfr. *Ib.*, volume I, p. 238.

<sup>260</sup> Cfr. *Ib.*, volume VIII, p. 64.

<sup>261</sup> This gender and human rights specialist was Julissa Mantilla Falcón, who is also a lawyer. She worked with the CVR’s staff to help make sure that gender was included throughout the CVR’s inquiry.

Despite the information in the testimonies, there are very few reports of sexual violence in the CVR's database. There are a number of reasons for this, among them the fact that the database only listed cases of rape but not other forms of sexual violence, and only when the victims were identified, so that for statistical reasons cases where there were only general references to the events were excluded, which happened to be the majority of cases.

While sexual violence is statistically underrepresented in the database, there is much information in the CVR's *Final Report* showing a high incidence of such cases. However, there is even more information in the testimonies, many of which were not further investigated for lack of time.<sup>262</sup> For example, in 30 of the 118 testimonies taken by the CVR in the Chorrillos Women's Prison in Lima, women mention having been raped, and in 66 cases they say they were subjected to other types of sexual violence, meaning that approximately 81% of these women were victims of sexual violence. To this day, not one of those cases has been investigated by the Peruvian justice system.<sup>263</sup>

Regarding the perpetrators, the CVR established that both State agents and members of Shining Path or MRTA were involved, although in different proportions. While 83% of the rape cases appear to have been committed by State forces, approximately 11% involved the guerrillas. Even though this figure tilts the balance of responsibility towards the State, we should emphasize that the insurgents were responsible for acts like forced abortions, forced cohabitation and sexual slavery, which were virtually absent on the State side.<sup>264</sup>

#### 4. The Special Investigations Unit and the Cases of Sexual Violence Investigated by the CVR

In order to collaborate with the Peruvian justice system to investigate human rights violations committed by subversive groups and State agents during the armed conflict, the CVR created a Special Investigations Unit (SIU), and gave it the task of investigating some representative cases of human rights violations. The results of these investigations were presented to the Ministry of Public Prosecution along with the necessary evidence for formulating indictments with the Judicial Branch, if the Ministry decided to pursue the case.

The SIU did pioneering work, highlighting the CVR's commitment not just to truth, but to justice. No other Truth Commission in Latin America had a similar mandate to investigate cases of human rights violations and formally present its conclusions and recommendations to the Ministry of Public Prosecution, including the evidence gathered, names of victims, witnesses and alleged perpetrators.<sup>265</sup>

After several discussions among the commissioners about the number of cases and selection criteria, a group of approximately 200 cases were chosen, of which 73 were selected as pertaining to abuses committed during all the different presidential administrations and showing human rights violations committed both by the State and by subversive groups. Also, some cases were included on the list because their gravity and/or the impact they had on Peruvian society meant they had to be investigated by the CVR (such as the car bombing on Tarata Street, the murder of María Elena Moyano, etc.).

The SIU had no jurisdictional powers, but the CVR's mandate established that public officials had a "duty to cooperate" to help it accomplish its mission. Therefore, its members could interview any public official or authority, request information they felt relevant, carry out visits, inspections or any other measure they felt necessary. Public officials requested to testify by the CVR were amenable, and in fact the majority of them (both civilian and military) did appear. Other citizens who were invited to testify did not all respond positively.<sup>266</sup> It

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<sup>262</sup> The CVR testimonies and other documentary holdings are available in the Collective Memory and Human Rights Information Center, run by the Ombudsman's Office.

<sup>263</sup> Cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Final Report*, volume VI, p. 284.

<sup>264</sup> Cfr. *Ib.*, volume VI, p. 287.

<sup>265</sup> Following the mandate established in Supreme Decree 065-2001-PCM, the SIU focused on cases of murders and disappearances, forced disappearance, torture and other serious harm. The SIU went through various stages, but in its final year about 30 people were on it, including lawyers, assistants and administrative personnel, under the direction of Dr. Wilfredo Pedraza Sierra.

<sup>266</sup> The CVR had no jurisdictional powers, so that the collaboration of people who were not civil servants was

should be stressed that the military courts allowed access to their files. In many cases, it was the first time that people outside the military had been given access to this material, and new and valuable information was obtained. Even though in some cases information had already been gathered by NGOs or legal authorities, the majority of the cases were new ones brought to light by the testimonies given to the CVR, many of them in the context of massive human rights violations in a given time-period and area, and many committed on a single military base.

At the end of its mandate, the SIU described its findings in lengthy reports presented to the CVR and the Ministry of Public Prosecution. The reports were over 15,000 pages long and were summarized in the CVR's *Final Report*.<sup>267</sup> Investigating the cases meant looking for evidence at the scene of the alleged crimes, which in most cases had occurred more than ten years before (normally in rural areas far from urban centers), locating the victims and witnesses, and identifying suspects.

The reports sent to the Ministry of Public Prosecution were drafted by the SIU and then reworked and approved by the commissioners, using both national and international law. Since the cases were going to be tried in Peruvian courts, the reports emphasized arguments and analysis using national legislation, although they also referred to applicable rules and principles from international human rights and humanitarian law.

These reports necessarily referred to the CVR's mandate and the context of the political violence at the time of the events, and included human rights violations corroborated by the CVR and legal analysis of the cases. The alleged events, responsibility and participation were analyzed using categories of criminal offenses in current Peruvian law. The reports also included an analysis of the viability of prosecution, dealing with the issues of prescription, amnesty and jurisdiction over trials of the events investigated.

The reports incorporated a section on how the alleged offenses violated international human rights and humanitarian law, and each report contained a separate chapter mentioning States' obligations to investigate, prosecute and punish those responsible for serious human rights violations, according to international human rights law.

Bearing in mind that it was not the SIU's job to prosecute or sentence anyone, but merely to provide the Ministry of Public Prosecution with sufficient material to bring an indictment before the Judicial Branch, the SIU evaluated the evidence gathered in a serious and rigorous way, but without attempting to rise to the standards of judges and prosecutors. It was very careful to distinguish the reports it received of specific events from the official version, and to identify which facts the CVR had been able to corroborate. In every case it spoke of "alleged perpetrators" and merely "recommended" the Ministry undertake investigations of the events described.

Discussion of cases of sexual violence basically revolved around how to obtain evidence and how to classify the offenses. From the beginning it was clear that any evidence available after so many years would not be sufficient to prove rape, if the prosecutors used traditional criteria for investigating such cases, since normally an examination by a forensic doctor is required. The events occurred long ago, and apart from testimonies from the victims and some circumstantial witnesses, there were no forensic examinations or eye witnesses.

Therefore, the SIU decided that while the reports should be based on domestic law, they should give the prosecutors sufficient new material to investigate the cases as part of a context of massive human rights violations, using international human rights and humanitarian law as doctrinal and legal reference, which would allow some flexibility in terms of criteria for evaluating evidence.

#### 4.1 The Manta and Vilca Case

From the early 1980s on, Shining Path became very influential in the department of Huancavelica thanks to its propaganda work in the local schools. In 1983, there was much unrest in the districts of Moya, Vilca and Manta, where a Shining Path detachment was recruiting young people, organizing support bases and designating its own delegates to replace the existing local officials.

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optional.

<sup>267</sup> They do not include the names of the alleged perpetrators.

In September 1983, Shining Path came to the district of Manta and forced local government officials to resign.<sup>268</sup> In subsequent months they murdered various townspeople and boycotted the municipal elections that year. Shortly afterwards, Shining Path members went to the capital of the district of Moya and murdered the justice of the peace and administrative staff at the local school. In 1984, a group of armed insurgents in the district of Vilca arrested and murdered townspeople who had opposed Shining Path.

In response to this situation, between 1982 and 1983 a series of supreme decrees were issued declaring a state of emergency in several provinces in the department, which came under the control of the Political-Military Command headquartered in Ayacucho. In March 1984, three military bases were set up in the districts of Manta and Vilca, in order to provide security for the population. However, during the time the military bases were functioning, the local population suffered a variety of violations of their rights at the hands of the military; mainly arbitrary detentions, torture, theft and looting. Many women were victims of sexual violence, with the main perpetrators being Army troops stationed in the military bases in the area.

In the district of Manta there are at least 32 registered cases of children whose fathers are soldiers who refused to acknowledge them. The registrar at the Civil Registry Office in the town of Manta stated in testimony to the CVR that since 1984, in the last twenty years he had filled out birth certificates for children whose fathers were soldiers stationed in the district. Many of the women listed their child's surname as the father's rank or the assumed name the father used (for example, "Soldier", "Moroco" or "Captain").<sup>269</sup>

The CVR's inquiry proposed that sexual violence was a method of torture that constituted a pattern of action by military personnel in the area, who took advantage of their power to commit these crimes. Many of the victims were accused of being linked to terrorism, although in some cases the crimes were committed to pressure them to give information or confess, or as a form of intimidation during military operations.

Various testimonies in the *Final Report* show that the military thought that one terrorist in the family or the community meant that all the rest were terrorists too. A representative case is that of N. N. Q., who was raped in April 1984 by several soldiers who were sent to the district of Moya to provide security during the election:

[. . .] she was stopped by six soldiers among whom she recognized Lieutenant Sierra, who shouted: "Here's the other terrorist (*terruca*), you're screwed now, terrorist, now you've got to tell us everything you know", while she was beaten by Lieutenant Sierra who punched and kicked her, asking her for the location of people on his list. When she did not reply, Lieutenant Sierra pulled down her pants and underwear, and pushing her semi-naked to the ground and began intercourse [. . .] He answered, "You can take more than that, Indian", then opened the door and told the rest of the soldiers to come in and do what they wanted, meaning that they should rape her too. The five of them had intercourse with her one after the other [. . .].<sup>270</sup>

The women of Manta and Vilca found themselves caught between the two sides, having Shining Path living with them on the one hand and then being punished for it by the Armed Forces. Ms. C. R. S., her sister-in-law G. A. C. and her neighbor E. L. S., residents of the annex of Ancapa, district of Acobambilla, were summoned to the base at Manta in May 1984 for interrogation on subversive actions in the area. When they did not provide the information the soldiers were asking for, they were raped for collaborating with the terrorists:

[. . .] forcing them to go to the Base, where Officer Ruti warned them to "tell the truth" about the presence of subversives "or they would be punished". The three women were taken to the Base and there the same officer asked them about the presence of subversives and the three indicated that indeed, Shining Path

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<sup>268</sup> The districts of Manta and Vilca are in the north of the province of Huancavelica, in the mountains in the south of the country, over 3,500 meters (11,500 feet) above sea-level.

<sup>269</sup> For more information on this case cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Final Report*, volume VIII, pp. 105-118.

<sup>270</sup> Sworn testimony of N. Q. P. given to the SIU on 9 November 2002.

members did come from time to time. Then the officer told the three soldiers to take the women to a room in the base [ . . . ] once in the room Officer Ruti told them to get undressed [ . . . ].<sup>271</sup>

Impunity was the general rule in these crimes. None of the victims reported the crimes for fear of being murdered, detained or raped again. In exceptional cases, some victims were courageous enough to report the aggressor to the head of the military base. In the best case scenario they obtained a promise of marriage from the rapists in exchange for not reporting them to the police, a promise which was rarely kept.

#### 4.1.1. Legal Analysis

The CVR's report to the Ministry of Public Prosecution includes testimonies that refer to at least 24 women raped by soldiers in the bases at Manta and Vilca. There was a debate in the SIU about what legal classification to use, and eventually a charge of rape was chosen, a criminal offense at the time the events occurred.<sup>272</sup> Also, since in many cases the women were held against their will for days and even weeks on the military bases, the report also included the count of "aggravated abduction" in four of the cases, due to the cruel treatment used against the victims.<sup>273</sup> In order to underline the gravity of the crimes committed, the report stated that the sexual violence the women underwent was also a form of "torture" and thus also constituted an infraction of international human rights law.

In-depth analysis was provided on issues that might be problematic for the prosecutors in charge of investigation. Firstly, the analysis clearly established that the civilian courts were competent to try the cases, since military tribunals are exceptional jurisdictional bodies for trying members of the Armed and Police Forces only for military crimes, in other words, when military legal interests have been infringed. Military jurisdiction is not a privilege that attaches to the person and therefore, it does not automatically apply just because members of the Armed or Police Forces are victims or defendants in an action; instead, it is a substantively defined basis for jurisdiction, which applies only to the breach of strictly military interests, which did not occur in this case.

Likewise, the report declared the amnesty law to be inapplicable in this case, based on the decision by the Inter-American Court on Human Rights in the *Barrios Altos* case and the subsequent interpretive ruling declaring the amnesty laws inapplicable in Peru and any judicial rulings issued on the basis of those laws to be legally void.<sup>274</sup>

The CVR's inquiry concluded that sexual violence against women in the districts of Manta and Vilca was persistently and repeatedly committed by military forces stationed in the counterinsurgency bases in the area, and that these acts must be seen in the context of sexual violence against women during the armed conflict in Peru. Although the CVR does not explicitly say that it was a systematic practice, this can be deduced from the information gathered by the CVR and included in the *Final Report*, which argues, among other things, that in many cases the officers in charge of the military bases committed the abuses themselves, whereas in others they encouraged and even ordered their subordinates to commit them. Clearly, the commanders of the military bases tolerated this, since they did not take the necessary measures to stop the behavior or punish those responsible. In many cases, the victims were threatened by the perpetrators not to report the abuse and those who did got no response.<sup>275</sup>

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<sup>271</sup> Sworn testimony of C. R. S. to the SIU in January 2003.

<sup>272</sup> At the time of the events the 1924 Penal Code was in force. Article 196 states that "He who by means of violence or serious threats forces a woman to undergo sexual intercourse outside marriage shall be sentenced to jail or prison for no less than two years".

<sup>273</sup> 1924 Penal Code, article 223: "He who deprives another of his personal liberty in any way, without the right to do so, shall be sentenced to imprisonment of no more than two years and no less than one month. The sentence shall be imprisonment of no more than fifteen years or no less than one year: 1.- If the offender abducted a person to abuse or corrupt them [ . . . ] 3.- If the abducted person has been treated cruelly or if the abduction lasted more than a month".

<sup>274</sup> Cfr. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Barrios Altos* Case (Chumbipuma Aguirre *et al*). Judgment of 3 September 2001, IACHR (Series C) No. 83 (2001).

<sup>275</sup> Cfr. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Final Report*, volume VIII, p. 117.

#### 4.1.2 Current Status of the Case

In August 2003, the CVR delivered the report on the Manta and Vilca case to the *Fiscalía de la Nación*, Attorney General's Office. However, it stayed there until February 2003 when it was assigned to the Huancavelica Provincial Criminal Prosecutor's Office, under Prosecutor Aurorita de la Cruz. Two months later, the Prosecutor's Office ruled that it would open the case without specifying what crime was under investigation.

The First Provincial Criminal Prosecutor's Office is one of two that investigate crimes committed anywhere in the department of Huancavelica.<sup>276</sup> It has also been assigned the task of investigating human rights cases, which has added considerably to its case load. The *Instituto de Defensa Legal*, Institute for Legal Defense (IDL) has been representing the victims, while the *Red para la Infancia y la Familia*, Network for Children and Families (REDINFA) is providing psychological support. Despite the difficulty of investigating the case, there has been some progress. Most of the women have given statements to the Prosecutor's Office, and one of the probable perpetrators has been found. He is willing to provide information about the events in Manta and Vilca in return for certain concessions.<sup>277</sup>

In view of the serious time and budget constraints on the Prosecutor's Office in charge of the case, victims' lawyers have been actively participating in the investigation. They have traveled to the area to coordinate statements by the victims and to look for extra evidence that might expedite the Prosecutor's work. They have obtained old photographs of some of the soldiers stationed in the area who have been named by the victims.

As this essay was being written, the investigation was ongoing but progressing very slowly. The Prosecutor has not yet determined the charges nor identified the probable suspects. It is to be hoped that the Prosecutor will formally announce an indictment for torture as defined under international human rights law, and that it will be investigated and punished in accordance with Peru's international commitments. In this international framework, there is no statute of limitation for torture.

#### 4.2 The Monteza Benavides Case

María Monteza Benavides was arrested on 30 October 1992, outside the Enrique Guzmán y Valle National University, in Lima, by members of the Army's 1<sup>st</sup> Division of Special Forces as she was leaving the campus. The reason for her arrest was her alleged participation in Shining Path activities and involvement with two people who were detained a few days earlier and charged with possessing and storing explosives to commit terrorist attacks.

Her arrest was illegal, since it was performed by members of the Army who were not legally authorized to investigate a crime of terrorism. Also, it took place without a prosecutor and was performed by two soldiers in civilian clothing. They took her to the army headquarters of the 1<sup>st</sup> Division of Special Forces in the district of Chorrillos, Lima, where she remained until 3 November 1992, when she was handed over to the DINCOTE.<sup>278</sup> She was never formally notified why she had been detained.

The 1<sup>st</sup> Division of Special Forces headquarters was not an authorized detention center. During its inquiry, the CVR discovered that María Monteza was held *incomunicado* for the four days she was in military custody, in a room used as a cell that did not meet the minimum requirements for that purpose, deprived of light, personal hygiene and sleep and never informed where she was, what authority was responsible for her detention or who was in charge of her investigation and custody.

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<sup>276</sup> Huancavelica has a population of approximately 427,000 inhabitants and an area of 22,132 km<sup>2</sup> (8,538 square miles).

<sup>277</sup> The legal term is *colaboración eficaz*, effective collaboration —regulated by Law 27378 passed on 10 December 2000— which permits certain concessions to people involved in crimes listed in the law—among them the crime of corruption and some human rights crimes— in exchange for relevant information about the case.

<sup>278</sup> *Dirección Nacional Contra el Terrorismo*, National Directorate Against Terrorism.

On the basis of testimony and documentation, the CVR established that this procedure by the Intelligence Department of the 1<sup>st</sup> Division of Special Forces was not an “excess” stemming from a personal decision by the head of the military unit (Lieutenant Colonel Julio Alberto Rodríguez Córdova), but instead a well-known procedure authorized by the commander in chief of the 1<sup>st</sup> Division of Special Forces at that time, Brigadier General Luis Pérez Documet.

During the course of her trial for terrorism, María Monteza reported having been subjected to physical and psychological torture, including rape, by members of the Peruvian army. She made that complaint to the director of the prison she was held in, who informed the Ministry of Public Prosecution, which began an investigation.

On 14 July 1993, María Monteza gave birth to a baby girl. At the time of delivery she was about eight and a half months pregnant, which would place the conception towards the end of October 1992, when she was detained in the army headquarters of the 1<sup>st</sup> Division of Special Forces, in Lima.

#### 4.2.1 Legal Analysis

The CVR argued that officers of the Peruvian army, Julio Rodríguez Córdova, Luis Pérez Documet and members of the operational group of the 1<sup>st</sup> Division of Army Special Forces under their command were co-authors in the crime of “aggravated abduction”<sup>279</sup> of María Monteza. The aggravating factor was included because rape was added to the deprivation of light, hygiene and sleep, to being held *incomunicado*, and to the physical abuse she suffered during the time she was detained. The CVR concluded that there was also sufficient evidence to justify a judicial investigation against officer Julio Alberto Rodríguez Córdova and members of his operational group in the 1<sup>st</sup> Division of Special Forces of the Peruvian Army under his command, for the crime of “aggravated rape”.<sup>280</sup>

The Prosecutor’s Office in charge of the rape investigation said that it had managed to establish that the crime was indeed committed because the medical report corroborated that “the prisoner filing this complaint is pregnant and, that as a result of these acts, has conceived a child”. However, it ordered the complaint to be shelved provisionally, since “it was not possible to fully identify the suspects in this crime [ . . . ]”.<sup>281</sup>

The military also held an inquiry into these events. Since the crime of rape is not covered by the Military Justice Code, the military tribunal defined the events as abuse of authority and finally shelved the inquiry, stating that there was no proven criminal responsibility of military personnel.

One of the central reasons why both jurisdictions denied that rape had been committed was the different medical exams performed on the victim. While these did not provide information that could constitute objective evidence of rape, the CVR’s position was that this could not be used as evidence that she was not raped, since in 1992 forensic examinations in Peru consisted only of external examinations and were oriented toward the type of exam requested by the competent authority and the symptoms or comments given by those being examined. In other words, if the authority requested an examination of injuries, the examination would not include aspects related to sexual integrity, especially if the person examined had not made a complaint of rape.<sup>282</sup>

Meanwhile, the examination of Monteza by the National Police on November 3 1992 was a type of exam that is by definition strictly visual and rules out any other type of examination. It should be added that it was performed by two male doctors who were members of the police force. In the case of torture involving sexual violence, these

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<sup>279</sup> *Secuestro agravado*, defined in part 1 of article 152 of the 1991 Penal code, modified by Laws 26222, 26630 and article 1 of Legislative Decree 896.

<sup>280</sup> Described in article 170 of the 1991 Penal Code.

<sup>281</sup> Ruling of the 44<sup>th</sup> Provincial Criminal Prosecutor’s Office in Lima, 2 May 1995.

<sup>282</sup> Interview by members of the SIU with Dr Yolanda Cáceres Bocanegra, forensic doctor, member of the Peruvian Society of Forensic Medicine, in the province of El Callao on 24 January 2003. She indicated that nowadays forensic examinations of detainees include specific questions about possible acts of torture. This interview is mentioned in the case summary included in the CVR’s *Final Report*, volume VI, p. 384.

facts add up to circumstances in which the victim might reasonably have been unwilling to make a complaint.

Also, the forensic examination and its results, whether positive or negative, do not by themselves prove or disprove whether the alleged events occurred. They must be analyzed in the overall context of probative elements turned up by the investigation. The forensic doctor is not solely responsible for making that judgment, but rather the judge or competent authority.

Specialist research on torture and sexual violence shows that the signs of rape are not limited to physical evidence, since the experience also has consequences for the victim's mental health—known as “rape trauma syndrome”—which can be detected by a skilled psychological assessment. The victim was in fact given a psychological examination in 1995, while she was being held in the Chorrillos Prison. It states that:

When the subject of her pregnancy is brought up, it is immediately clear that Magdalena goes into a “conflict zone”. Her tone of voice changes dramatically and she is overcome by intense, confused emotions. She stammers and feels pain, guilt, ambivalence and rage. In other words, she experiences an intense and varied range of affect that one would expect in a person who has suffered a trauma. In this case we could even speculate that it is an “encapsulated trauma”, meaning that it takes up part of her mental activity and does not contaminate the rest. This feature would suggest she is using disassociation as a defense. Thus, we find emotions and affects that are consistent with a pregnancy resulting from an assault as undeniably violent as multiple rape.<sup>283</sup>

The same document concludes that “from the interview with María Magdalena Monteza described above, it is reasonably clear that her sense of self-blame can be explained by the context: imprisonment, torture, multiple rapes, subsequent pregnancy”.<sup>284</sup>

Thus, although it was not possible to identify direct evidence of the sexual assault of María Monteza Benavides, the information obtained by the CVR allows us to reconstruct a context in which it is highly probable and which calls for full investigation by the competent jurisdictional authorities.<sup>285</sup>

As regards prescription, in a case of multiple crimes, according to article 80 of the Peruvian Penal Code, there is a separate statute of limitations for each crime. According to the rules on prescription in the 1991 Peruvian Penal Code, neither of the criminal actions—for sexual assault or aggravated abduction—had exceeded the statute of limitations when the report was presented to the Ministry of Public Prosecution.

#### 4.2.2 Current and Future Prospects for the Case

The Attorney General's Office referred the CVR's report to the 5<sup>th</sup> Supra-Provincial Prosecutor's Office, under Prosecutor Mario Gonzales. For no apparent reason, the Prosecutor's Office launched an investigation for a crime against humanity—disappearance. Ms. Monteza Benavides' attorneys are attempting to have the charges altered to “aggravated abduction” and “torture” in the form of sexual assault.

As in the Manta and Vilca case, so far the Prosecutor's Office and the defense have focused on searching for evidence rather than legal discussion. In this case, since none of the charges has exceeded the statute of limitations, international law would play a complementary role in the investigation. The victim has given a statement to the Prosecutor's Office and Julio Rodríguez Córdova, former head of the Military Intelligence Department of the 1<sup>st</sup> Division of Special Forces, is now slated to testify also.

At the request of the victim's attorneys, the Prosecutor's Office asked the Ministry of Defense for photographs of the members of the army unit in charge of María Magdalena Monteza's detention when the events occurred. There

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<sup>283</sup> Report by Dr Matilde Ureta de Caplansky, mentioned in the case summary included in the CVR's *Final Report*, volume VI, p. 388-389.

<sup>284</sup> *Ibid.*, volume VI, p. 3.

<sup>285</sup> For more information on this case, see the CVR's *Final Report*, volume VI, pp. 384-390.



is a striking likeness between one of the soldiers and María Magdalena Monteza's daughter. The victim's lawyers requested a DNA test. Unfortunately, this has been delayed because Monteza is afraid of finding out who her daughter's biological father is, since he is also her rapist, and of losing certain rights over her daughter.

Unlike the Manta and Vilca case, the main problems here are not the legal definition of the offenses or procedural obstacles to prosecution, but the emotional ramifications of pressing charges for sexual assault committed by State agents leading to an unwanted pregnancy and a daughter.

## 5. The Main Obstacles to Investigation in These Cases

There are certain obstacles that are common to both the Manta and Vilca and Monteza Benavides cases, and others that are peculiar to each of them. In the Manta and Vilca cases, the difficulty encountered by the victim's attorneys and the prosecutor is how to come up with evidence, since the scene of the events is a long way from the departmental capital and is hard to reach (in fact, at the time this essay was completed, the prosecutor in charge of the case had never been to the area where the events occurred).

Even though the Ministry of Public Prosecution is the authority in charge of conducting investigations and furnishing evidence, its serious personnel and financial constraints limit its ability to do so and victims' lawyers have to be especially active in the investigations. They are the ones who have located the victims in Manta and Vilca and helped arrange for them to travel to the Prosecutor's Office to give statements. They have located the witnesses, and even one of the suspects, and they consented to give their statements after the victims' lawyers explained the importance of the case to them. In contrast to the Armed Forces' refusal to provide information, the victims' lawyers have managed to obtain photographs of the military personnel stationed at the bases in the area at the time of the events.

Once the victims have been identified, the next complication is actually obtaining their testimonies. Given the type of crime involved, there is a great deal of fear and shame about speaking of what happened. While it is difficult for any woman to discuss such things, it is particularly difficult for women in rural areas. First, it is necessary to secure the victims' trust, explain what the trial is about, why it would be a good thing for them and other women who have suffered what they did, so that they are the ones who decide whether to testify and press charges. This is often difficult, because they would rather not remember the events, and because in most cases they are now married and their husbands and children do not know about what happened to them.

Past experience shows that successful investigation of cases of sexual violence requires a multidisciplinary team including not only attorneys but also psychological counseling for the victims. In the Manta and Vilca case, REDINFA is working alongside the IDL lawyers to provide support and counseling for the women throughout the judicial proceedings. Counseling services are also being provided to the community, with the aim of raising awareness and educating people about what happened so that they will support the victims. The organization Cooperation for the Andes (COOPERANDES), based in the area, is liaising between victims and the IDL as well as offering necessary logistical support to attorneys when they travel to the area.<sup>286</sup> In the María Monteza case the need for counseling support is even clearer: the main hurdles for prosecution are not legal, but psychological. While Monteza has a need for justice, she finds it painful to remember the events and she is afraid of pressing charges.

One thing to note about the Manta and Vilca case is that community support for the victims has not been unanimous, in contrast to the reaction in other types of human rights violations like forced disappearance, extrajudicial executions, etc. The reason is linked to a series of cultural factors: on the one hand, the victims are women, and women in rural areas in Peru are less powerful than men. On the other hand, even though men deny this, what the soldiers did to women in the community twenty years ago is still being done by members of the community itself today, which makes it difficult to condemn.

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<sup>286</sup> COOPERANDES works on training community leaders and educating schoolchildren and adolescents about their rights. It is also working with teachers to develop ways of disseminating the historical record in the community.

There is also the issue of the Ministry of Public Prosecution's lack of support and commitment. The First Provincial Criminal Prosecutor's Office in Huancavelica in charge of the Manta and Vilca case is also in charge of investigating common crimes. There are only two criminal provincial prosecutors to handle the entire department of Huancavelica. They are overloaded and understaffed, and lack the necessary material and logistic resources to carry out a proper investigation. In fact, as indicated above, at the time of writing the prosecutor in charge of the case had never been to the area where the events occurred and the victims' testimony was taken thanks to the support and initiative of the victims' lawyers and other non-governmental organizations collaborating on the case. Obviously, the main responsibility for this falls on the higher officials within the Ministry and not on the prosecutors in charge of the case; nevertheless, it would help if the prosecutors were more assertive, because the authorities in Lima might then make some changes.

The last important factor is the current lack of training for justice system personnel and victims' attorneys on the topics of international human rights, humanitarian and criminal law and on developments in case-law and doctrine in these areas in other countries. Civil society organizations and academic institutions need to promote training, debate and information exchange among staff assigned to these cases, so they are kept abreast of new information that might be useful for investigating and resolving these cases.

## 6. The Peruvian Judicial System: Current and Future Perspectives for Cases of Gender Violence

So far, there has not been a single conviction in any case of sexual violence committed during the internal armed conflict. Although there appear to be certain political pressures at work in some cases, it is not clear that the Ministry of Public Prosecution or the Judicial Branch has ever decided as a policy matter not to investigate cases recommended for prosecution by the CVR, including cases of sexual violence. It is possible to say, however, that there is a lack of interest in pursuing such cases. Judges and prosecutors have been bogged down by various factors like personnel and logistical shortages, heavy case-loads and lack of awareness of doctrinal and jurisprudential advances on such topics in other countries, and have opted for easy solutions: not pressing forward with investigations, not using state-of-the-art rationales in rulings, not launching new official investigations. The CVR's *Final Report* includes innumerable extracts of testimony from women who describe in detail different acts of sexual violence they underwent while detained by State agents or kidnapped by members of Shining Path or MRTA. So far, no official investigation has been opened into that data.

Although there are no convictions, current investigations are tending to stretch the legal requirements for evidence in cases of sexual violence in the context of grave human rights violations. This does not mean that traditional rules for evaluating evidence no longer apply, but just that new rules are being created for cases that occurred in "new" or *sui generis* situations, which should be examined in light of developments in international human rights law in the last few years. Thus, repeated and consistent testimony by victims and evidence that these were not isolated events but part of a context in which acts of sexual violence were performed repeatedly and persistently, should be key elements in determining the nature of the crimes and who is responsible for them.

If it is found that an act of sexual violence was committed within the context of a widespread and systematic practice in a particular time and place, judges should not limit criminal responsibility to the actual perpetrators but extend it to the officers in charge of military bases where the events occurred or where the soldiers who committed the acts were stationed. The issue of whether their superiors were also to blame should be examined, as well as whether they encouraged, tolerated and eventually obliged their subordinates to carry out the abuse. It is important to determine not only whether those in charge were aware of what was going on but whether they should have known and whether they took the necessary steps to put a stop to it. Furthermore, it should be established whether the allegations were investigated and the perpetrators punished.

It has become clear that one reason for the delay in investigations is the reluctance of some State institutions to hand over requested information. The Ministry of Public Prosecution and the Judicial Branch should take a different approach to these institutions, assert their authority, and demand they hand over the information that has been requested.

Finally, just as it needs to train its staff, the Judicial Branch must give prosecutors and judges in charge of these cases more financial, personnel and logistical resources. Although it is obvious that Peru does not have the capacity at present to investigate all the cases in the CVR's *Final Report* in which there is evidence that a crime was committed, the Judicial Branch and the Ministry of Public Prosecution should discuss the matter and come up with criteria for recommending investigation in at least some of the cases.

## **Human Rights, Justice and Democratic Transition: Institutional Review**

**Ronald Gamarra**

Studies and approaches to the issue of prosecuting human rights violations in a time of democratic transition often limit themselves, for obvious reasons, to explaining the status, progress, problems and setbacks of prosecutorial

investigations and criminal trials. Rarely is there an attempt to go beyond the criminal and procedural framework and present the more complex, dynamic picture of the difficulties involved in getting all the institutions of State to work together for truth and justice. The obstacles include their different levels of commitment to that goal; their institutional (re)design or the creation, approval and implementation of measures to complement or facilitate criminal prosecution; and, in general, the collaboration and support needed to allow crime control and prevention agencies to comply with the *Final Report* of the *Comisión de la Verdad y Reconciliación*, Truth and Reconciliation Commission (CVR).

What follows is a brief attempt to sketch that broader context, via a presentation of the measures passed in Peru by seven State institutions on prosecution and the CVR's conclusions since the collapse of Alberto Fujimori's authoritarian regime. Those institutions are the Executive Branch, the Congress of the Republic, the Judicial Branch, the Ministry of Public Prosecution, the Constitutional Court, the Ombudsman's Office and the Armed Forces.

Looking at all these measures together gives us a more realistic picture of the State's commitment—both theoretical and real—to the task of prosecuting human rights violations, the institutional dynamics and differences, the level of enthusiasm of the various entities, and the general and specific problems and tensions that they have (or have not) dealt with.

## 1. The Executive Branch

After the collapse of the authoritarian government of Alberto Fujimori, the Executive Branch, under Valentín Paniagua Corazao and then Alejandro Toledo Manrique, set up the CVR (Supreme Decree 065-2001-PCM of 4 June 2001) and created the necessary conditions for it to work properly. When the Commission's inquiry was over and it published its Final Report on 28 August 2003, the government acknowledged the CVR's recommendations as binding, in an attempt to avoid a repetition of the dreadful circumstances that led to so many years of terror in Peru.

The Executive Branch adopted the following measures in accordance with the CVR's recommendations:

a) In February 2004, the government issued Supreme Decree 003-2004-JUS, which created the *Comisión Multisectorial de Alto Nivel*, High-Level Multisectorial Commission (CMAN), to come up with State policies for peace, collective reparations and national reconciliation. The initiative was laudable, since it was effectively a sort of post-CVR commission. However, there was criticism that the commission's powers were not extensive enough, since it was only designed to look at collective reparations and not individual ones; and also of its make-up, since it had few civil society representatives and none from the Ombudsman's Office.

The *Coordinadora Nacional de Derechos Humanos*, National Human Rights Coordinating Committee (CNDDHH), an umbrella group of 63 non-governmental organizations working on human rights protection, promotion and education around the country, argued that the commission could not provide the kind of monitoring recommended by the CVR in its *Final Report*, that it did not meet all the CVR's recommendations, and that they were concerned the government did not fully understand the nature of comprehensive reparations, since the CMAN's founding statute only mentions collective reparations.

b) In July 2005, Supreme Decree 047-2005-PCM approved the Comprehensive Reparations Plan: Multiannual Program 2005-2006, drawn up by the CMAN. This was welcomed by victims of the armed conflict (the majority of whom were, as the CVR has established, *campesinos*, poor, and socially excluded) and by the country as a whole, since reparation is a vital pre-condition for the process of national reconciliation and the decree provided a blueprint for State action on reparations and indicated what costs the central government would shoulder.

However, as former CVR commissioner Sofía Macher pointed out, the Plan should have included local and regional reparation requests, which were crafted over a long period with the full participation of victims and others affected by the violence, as well as their public officials. It is the local and regional levels that show clearly, and in detail, the demand and the need for reparation. This effort should be taken into consideration by the State and the CMAN.

c) On a more general level, Supreme Decree 017-2005-JUS, issued in December 2005, approves the National Human Rights Plan, which seeks to unify, consolidate and connect national policy at different levels and in different areas, so as to reinforce ways of promoting and protecting human rights.

The Plan, which was drawn up jointly by State and civil society representatives, recognizes a set of policies for strengthening fundamental rights: a) institutionalizing the human rights focus in public policies; b) helping State institutions and civil society focus on human rights; c) guaranteeing full compliance with comprehensive human rights; and d) implementing affirmative action policies to support the rights of the most vulnerable sectors of the population, to obtain equal treatment and eradicate discrimination.

One of the goals of these policies is to implement the CVR's recommendations in the *Final Report* and to achieve full civil, political, economic, social and cultural rights.

d) In recent years—even before the CVR's *Final Report*—the State agreed to abide by a significant number of judgments issued by the Inter-American human rights protection system. Indeed, “in the context of Peru's new governmental policy on human rights protection”, the Peruvian state has acknowledged, via agreements for friendly settlement or by acceptance of rulings by the Inter-American Commission and Court, that it is responsible for a significant number of human rights violations committed during Alberto Fujimori's administration, in breach of its international obligation as a state party to the San José Pact.

Thus, the Peruvian Government presented “a broad proposal for solving a large number of cases (165), over 50% of the Peruvian cases under the jurisdiction of the IACHR”.<sup>287</sup> Actually, the proposal contained offers of friendly settlement, acknowledgment of responsibility, search for comprehensive solutions and requests for cases to be closed (nine cases).

After the Peruvian State's acceptance of responsibility, the Inter-American Court of Human Rights issued rulings on cases involving Barrios Altos (March and September 2001), brothers Emilio and Rafael Gómez Paquiyauri (8 July 2004) and Pedro Huilca Tecse (3 March 2005). Peru has cooperated with the rulings by paying compensation or publishing the facts of the ruling in the official paper *El Peruano*.<sup>288</sup>

One particularly important development was the judgment of the Inter-American Court of Human Rights in the case of Lori Berenson Mejía, who was sentenced to twenty years imprisonment for terrorism (June 2001, upheld in February 2002). The State not only contested the case, but went on to allege it had upheld “the standards established by the Convention and by the jurisprudence of the Court.” In its ruling (25 November 2004), the Court decided to reject the Inter-American Commission's complaint, arguing that Berenson's rights were respected in her trial. The judgment contains a full analysis of Peru's attempts to improve its antiterrorist legislation and bring itself closer to international standards of protection for human rights.

It is also worth stressing Peru's position *vis à vis* the International Criminal Court, which it ratified (Peru signed the Rome Statute on 7 December 2000 and deposited the Instrument of Ratification on 10 November 2001), as well as the fact that Peru did not accept American pressure to sign a bilateral agreement withdrawing nationals of both countries from the Court's jurisdiction.

e) Meanwhile, the State must be commended for its persistence in pursuing extradition of the fugitive Alberto Fujimori, first from Japan and then from Chile. As readers will remember, the former president faces a series of criminal charges for acts of corruption and grave human rights violations (Barrios Altos and La Cantuta, among others), for which a detention order has been issued. Fujimori has been declared a fleeing prisoner and there is a national and international arrest warrant out for him.

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<sup>287</sup> Joint press release dated 22 February 2001, signed by Claudio Grossman, President of the Inter-American Commission on Human Rights, and Diego García-Sayán, Peruvian Justice Minister.

<sup>288</sup> Cfr., for example, *El Peruano*. Supreme Decree 183-2005-JUS.

In January 2006, the Peruvian government filed an extradition request for Alberto Fujimori Fujimori with the Chilean authorities. Although the Peruvian State considered including all the charges he faces in the extradition proceedings —except those that do not meet the requirements of the 1932 extradition treaty with Chile regarding double jeopardy and seriousness of the crime—; eventually it decided to request extradition on twelve counts: ten crimes of corruption and two human rights violations (Barrios Altos, La Cantuta and events that occurred in the basement of the Army Intelligence Service).

g) It should not be overlooked that in July 2005, the Executive Branch presented a bill called “Concessions Process for Effective Collaboration and On the System of Protection for Collaborators, Victims, Witnesses and Experts” (Bill 13398/2004-PE), designed to unify the inconsistent legal treatment currently given to suspects who collaborate with an investigation (Law 27378 for cases of corruption and human rights violations, Legislative Decree 925 for the crime of terrorism and Law 28008 for Customs offenses); the bill attempts to cover gaps in current legislation (staffing shortages which hinder many Ministry of Public Prosecution and Judicial Branch proceedings); overcome shortcomings in the system (failure to apply concessions awarded, lack of guarantees for those needing protection, information leaks, over-extended police force in charge of investigations, corroboration and protection); and come up with the resources needed for the collaboration system to work.

The bill rightly proposes a single statute covering all the different forms of legal rewards for collaboration, which would standardize legal treatment and procedure for effective collaboration (in criminal law). It proposes enforcing various articles of the Criminal Procedures Code issued by Legislative Decree 957. The bill also calls for an extension of concessions to those already convicted, basically via shortened sentences. Reasonably, it maintains the prohibition on extending concessions to leaders of criminal organizations and existing limitations on concessions for perpetrators of human rights violations. It also defines which individuals should be offered protection (including witnesses and experts), heightens the level of security offered; and clarifies the procedure for revoking concessions.

Obviously it would be a good idea if the bill included input from civil society (from the National Human Rights Coordinating Committee, for example) and if the changes it proposes were not funded from the Special Fund for Money Obtained Illicitly from the State (FEDADOI), which should be used mainly for combating corruption.

## Analysis

Despite the progress described above, in general it must be said that the essential problems and issues plaguing the Peruvian justice system have not yet been resolved; specifically, political support for the CVR’s conclusions and for prosecuting the cases it recommended has eroded with time and evolved into criticism of the report’s supposed mistakes, exaggerations and bias about State agents’ responsibility for the perpetration of human rights violations.

In fact, the Executive Branch has done little or nothing to help promote investigations and criminal proceedings for justice and reparation. Indeed, various officials have criticized the CVR and the judges and prosecutors in charge of the few human rights cases that have come to trial, and they have even gone so far as to say we need to look to the future and let the wounds heal and stop criminal prosecutions.

In addition, the police force, which is part of the Executive Branch, is not doing enough to carry out judicial arrest warrants for members of the military charged with human rights violations (the level of compliance is less than 20%), even though in many cases, the National Police know perfectly well where the suspects live. Clearly, this situation is undermining the efficacy and authority of the human rights subsystem.

In an unacceptable concession to the military, the State has decided to cover the legal fees of a large number of private attorneys representing Army personnel accused of human rights violations (Supreme Decree 018-2002-PCM, issued 8 March 2002 and Ministerial Ruling 548-DE/MGP); in other words, outside the public defender system.

In July 2004, the government promulgated Supreme Decree 009-20004-DE/SG, which establishes jurisdiction for offenses listed in the Military Justice Code involving members of the Armed Forces on internal security operations

in areas not under emergency rule (Law 28222). The decree states that, in principle, such acts fall under military jurisdiction, except for common crimes which fall under the jurisdiction of civilian bodies.

This same logic of abdicating authority, weakening the human rights subsystem and emboldening the military can be seen when the Executive Branch passed Law 28636 authorizing it to draft a new Military Justice Code. Nearly all the committee members appointed in December 2005 to draft the code were from the military; none were from civil society or the Ombudsman's Office.

Needless to say, the Executive Branch has not established adequate procedures to ensure dismissal of members of the Armed Forces or security forces when there is sufficient evidence of past participation in serious human rights violations. It is clear that there has been no firm stance on that front, nor has there been any attempt to check that people who committed serious human rights violations are not still employed in the Armed Forces or public administration. Even worse, the State committed the despicable act of promoting army officer Humberto Cáceda Pedemonte, indicted for involvement in the Colina Group (a death squad, whose members committed crimes like Barrios Altos and La Cantuta), who is currently undergoing oral proceedings in the court next to the El Callao Naval Base.

## **2. *The Congress of the Republic***

In the area of post-conflict measures, some of which appear in the CVR's *Final Report*, the Congress of the Republic has succeeded in legislating on some interesting topics such as internal displacement, absence due to forced disappearance and the comprehensive reparations plan. As regards prosecution, it has approved the UN Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, included the offense of failing to report a human rights crime in the Penal Code, passed the effective collaboration law and revoked former president Alberto Fujimori Fujimori's immunity from prosecution, so that he can be tried for human rights violations.

a) On the subject of internal displacement, Law 28223, of May 2004, recognizes the specific status and legal nature of "Displaced Persons". It deals with the various legal problems not resolved by previous statutes: it defines the rights and guarantees protecting people against forced displacement, the help to which they are entitled while they are displaced and while they return, relocate and get settled, and incorporates the UN Human Rights Commission's *Guiding Principles on Internal Displacement*,<sup>289</sup> but adjusts them to reality and to Peruvian legislation.

b) In December 2004, Congress passed Law 28413, which covers absence due to forced disappearance during the period 1980-2000, in accordance with one of the recommendations in the CVR's *Final Report*: "in order to solve the legal problems created by forced disappearance, and to provide firm legal status for the disappeared so their relatives may have full exercise of their rights, the CVR recommends modifying the Civil Code to include a special legal definition. That definition should recognize legal declarations of absence due to disappearance of anyone who was forcibly disappeared between May 1980 and November 2000, with no further notice of their fate or whereabouts".<sup>290</sup>

The new law modifies the Civil Code, regulates the legal status of absence due to forced disappearance, sets up a special registry for the disappeared and describes the procedural rules that apply. Obviously, it is meant to provide relatives of people who were forcibly disappeared and others who have a legitimate interest with the necessary documentation to be able to claim their rights. It is important because it normalizes the legal situation of the disappeared, which facilitates restitution of citizens' rights to victims of political violence.

Theoretically, the law covers the cases of at least 9,261 people who, according to the CVR, were abducted or detained and subsequently disappeared, and who were never heard from again.

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<sup>289</sup> U.N. Doc. E/CN.4/1998/53/Add.2 (1998).

<sup>290</sup> COMISIÓN DE LA VERDAD Y RECONCILIACIÓN. *Informe Final*. Lima: CVR, 2003. Volume IX, pp. 132 and 133.

c) Also, the Congress debated and passed Law 28592 on the *Plan Integral de Reparaciones*, Comprehensive Reparations Plan (PIR). This statute represents a significant step in the direction of the CVR's recommendations. It offers a broad definition of victims of the violence, confers various powers and autonomy on the CMAN—the coordinating body—and creates the Council for Reparations, which is supposed to design and run a Single Registry of Victims. This should mean that many reparations will actually materialize, since it implies recognition by the State (acknowledgment of individual violations) which gives individuals the right to receive reparations and obliges the State to provide them.

As the National Human Rights Commission has argued, the law “meets many of the definitions and practical proposals suggested by the CVR, and therefore constitutes a legal framework for a real national reparations policy”.<sup>291</sup>

Former CVR Commissioner Sofía Macher has pointed out that now the PIR is in place, there are three major goals that need to be accomplished as quickly and efficiently as possible: a) making sure the CMAN has enough autonomy and power to carry out the provisions of Law 28592, for which it will need support mainly from the Executive Branch and civil society; b) setting up the Council for Reparations properly, so that its members are sufficiently representative; and c) finding an experienced and decentralized agency to run the Registry of Victims so that registration is orderly and efficient.

However, the law only covers non-monetary reparations to individuals (study grants, housing, health-care, etc.) and collective reparations, meaning that the individual monetary reparations (compensation) proposed by the CVR remain up in the air.

d) In terms of trials for human rights violators, Congress agreed to revoke immunity and thus allow criminal proceedings against former president Alberto Fujimori Fujimori for his participation in the events in Barrios Altos and La Cantuta. It subsequently authorized the Congressional Commission to bring cases against him for other crimes against humanity (events in the basement of the Army Intelligence Service, the murder of union leader Pedro Huilca Tecse, the torture of journalist Fabián Salazar, etc.).

Another piece of legislation worth mentioning is Law 27378 on effective collaboration, which was approved in December 2000. It was passed in the context of the struggle against corruption, but extended to cases of human rights violations. The law initially made perpetrators of crimes against humanity ineligible for concessions; since that law made it difficult to get vital first-hand information, particularly on activities related to the paramilitary Colina Group, it was modified. Now, although sentences cannot be avoided, they can be reduced. The usefulness and advisability of this law were clearly demonstrated in the Colina Group trial, since it was invoked by three of the group's members. They provided information that proved extremely important for establishing the truth and determining responsibilities.

Congress also passed Law 28516 in May 2005. This modifies Article 407 of the Penal Code to broaden the definition of failure to report a crime, in cases where the crime involves genocide, torture or forced disappearance; it fills a legal loophole and is of obvious importance in the fight to end impunity.

*In June 2003, Congress passed Legislative Ruling 27998, which approves Peru's adoption of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.*

## Analysis

With regard to prosecutions, however, the Congress of the Republic has never debated the need to set up a temporary specialized system, created by law, to try cases of crimes and human rights violations, as the CVR

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<sup>291</sup> Assessment of State actions to implement the recommendations of the Truth and Reconciliation Commission's *Final Report*, August 2004 - August 2005.



recommended. In reality, Congress did not want to touch an issue the political parties are loath to bring up because it leads to friction with the Armed Forces, and they were not willing to face the consequences. That was and still is the limiting factor for action by Congress in terms of prosecutions of human rights violations. The rulings by the Judicial Branch and the Ministry of Public Prosecution were therefore received with relief by the legislators. As a matter of fact, Congress has made no move since then to organize or improve the human rights subsystem.

There have been a few voices in Congress calling for an amnesty law for members of the military and police charged with human rights crimes. This has never been formally discussed in any commission or by Parliament as a whole, among other reasons because the Inter-American Court of Human Rights judgment on the Barrios Altos case has proved to be so powerful.

However, it must be said that Congress's role in reforming the military justice system was pitiful and quite undemocratic. After the Constitutional Court issued two rulings questioning the essence of the *Ley Orgánica de Justicia Militar*, Institutional Law of Military Justice and the *Código de Justicia Militar*, Military Justice Code, Congress waited almost a year before debating how to bring military tribunals into line with the Constitution and the rule of law; and right at the end of the 2005 session, it declined to legislate on the Military Justice Code and accepted every single one of the Supreme Council of Military Justice's revisions to the law.

In November 2005, Parliament agreed to cede authority to the Executive Branch to draft the new Military and Police Code of Justice by legislative decree within 35 calendar days. The new code included penal, procedural and sentencing rules. In the debate, supporters of the bill claimed that Congress was not "in a position to draw up a Military and Police Code of Justice"; that the code "could be written" by specialists "in the Supreme Council of Military Justice", that the Executive Branch "has already been working on proposals" and that "it is not appropriate for other organizations to meddle" with the commission named by the Executive Branch.<sup>292</sup> In other words, they advocated renouncing the right to legislate, handing the issue over to the military and virtually excluding civil society from analysis and decision-making.

As a result, on 6 December, Law 28636 was approved with the terms and conditions noted above, and a day later Supreme Ruling 071-2005-DE/SG named the commission in charge of drawing up the Code of Military and Police Justice. It is composed of a representative of the Ministry of Justice, who will head the commission; two representatives of the Ministry of Defense; two representatives of the Ministry of the Interior; and two representatives of the Supreme Council of Military Justice.

It must be stressed, as clear confirmation of the military's control of the topic and the circumstances, that the Supreme Ruling was not issued by the Ministry of Justice but by the Ministry of Defense, and that the Commission consists mainly of people linked to the defense sector, even though the justice system has overriding jurisdiction on the issue. Besides which, institutions such as the Judicial Branch, the Ministry of Public Prosecution and the Ombudsman's Office have been totally excluded from participating. Needless to say, civil society does not figure at all.

Clearly, when Congress approved the Institutional Law of Military Justice, it did so in obvious defiance of the Constitutional Court, since the law reverses the direction indicated by the supreme constitutional authority in its ruling on file no. 0023-2004-AI/TC. The bill passed as Law 28665 on 7 January 2006 merely introduces partial modifications and a few adjustments to the military justice system, which do not add up to full compliance with the Constitutional Court's ruling and which, needless to say, do not fundamentally change the concept, structure and organization of military tribunals. For example, a) there is no real attempt to eliminate dependency on and bias toward "military justice", since the law merely creates a *Sala Suprema Penal Militar Policial*, Supreme Criminal Military and Police Court, which is awkwardly tacked on as a Chamber of the Supreme Court —although care was taken to ensure it would have mixed composition, and indeed, a majority of military judges— while the other military tribunals have no natural connection or relationship to the Judicial Branch. Instead they reproduce the previous parallel organizational structure seen in the Institutional Law of Military Justice; b) the president of the

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<sup>292</sup> "Justicia Militar: ofensiva castrense" in <<http://www.justiciaviva.org.pe/notibak/2005/12diciembre/07/nota01.htm>>.

Supreme Military and Police Court—a member of the military—is director and administrator of Budgeting; c) this Court, no less, is supposed to decide conflicts over jurisdiction in military crimes; d) the judges belong to a Judicial Body for Military and Police Matters and their career is administered by the Supreme Military and Police Court. They must be acting officers and have legal training on military and police matters; and e) the judges will be named by the National Council of Magistrates within a period of four years; meanwhile, there will be temporary nominations of judges, tribunal members and auxiliaries by the Supreme Military and Police Court.

On the issue of military justice, as on other topics, Congress and the parties in it have shown an egregious lack of political will to carry out democratic reform of institutions; growing unease about the activity of the Constitutional Court; and, incidentally, a great awareness of the wishes of the brand-new military sector of the electorate, which consists of almost 100,000 voters.

### **3. The Judicial Branch**

According to the Truth and Reconciliation Commission, the internal armed conflict that Peru suffered from 1980-2000 was the most intense, widespread and prolonged period of violence in the entire history of the Republic. The best estimate at the number of casualties is 69,280 people, with the *campesino* population being the hardest hit (of all the victims reported, 79% lived in rural areas, 75% were native speakers of Quechua or other indigenous languages and 56% worked in agriculture or fishing). 55.5% of the crimes perpetrated can be attributed to armed groups, and the remaining 44.5% were committed by the security forces and self-defense militias.

Considering the gravity, scale, extent, systematic nature, and the high number of casualties and breaches of legal rights, there is no doubt that the crimes committed by the security forces (forced disappearances, extrajudicial executions, torture) obeyed a plan or common criminal pattern. They constituted a practice of human rights violations and deserve to be described as crimes against humanity.

The large majority of those crimes were never investigated or brought to trial. The individuals directly responsible for crimes against humanity were protected by a complex impunity strategy whereby prosecutors failed to investigate the events, and in the few cases where the Judicial Branch did initiate criminal prosecution, the military courts immediately claimed jurisdiction over issues they were not competent to try. Cases were brought on illegal grounds, leading to dismissals or light sentences. Thus, on the one hand, the Peruvian justice system abdicated its role while on the other, the military tribunals merely acted as an impunity mechanism that served the interests of the Fujimori regime and carried out the orders of the president's chief advisor, Vladimiro Montesinos Torres.

After Alberto Fujimori's regime fell, a particular set of democratic, political and legal conditions arose that made it possible to think about successfully prosecuting human rights violators. To follow that logic, one must look at the cases brought both within the anticorruption system and the human rights subsystem.

#### **3.1 Prosecution of Human Rights Violators in the Anticorruption System**

From 2001 on, the Ministry of Public Prosecution, the Judicial Branch and the *Ad Hoc* Public Solicitor for the case of ex-chief of staff Vladimiro Montesinos Torres and former president Alberto Fujimori became involved in a task that transcended merely combating corruption. They worked together to try and identify the members and *modus operandi* of the Colina Group, a criminal organization that Montesinos and Fujimori created by taking advantage of their official roles. These judicial bodies also concentrated their efforts on the extradition of Alberto Fujimori and on verifying the cases in which the effective collaboration process was used.

The inquiries of prosecutors and special judges, and of the Solicitor's Office, helped elucidate the background (the Scorpion Group, which acted in the jungle and the mountains towards the end of the nineties, under the direction of Santiago Martín Rivas), the structure of the paramilitary Colina Group (coordinator, head of operations, administrator, group commanders), the procedures used (research, definition of the objective, planning, approval), the resources available to it (arms, vehicles, telephones and money, provided by the Army Intelligence Service

logistics department at the request of the Chief of Military Intelligence), the relation between its members, its cover agencies (the Compransa company) and the extent of human rights violations it committed (massacres in Barrios Altos, La Cantuta, Pedro Yauri, *campesinos* in El Santa, among others). It was confirmed that the violations committed in the previous decade were planned, organized, systematic crimes carried out by organizations belonging to the Executive Branch as part of a policy of terror.

This led, for example, to the reopening of the Barrios Altos massacre case (November 1991), and subsequent criminal indictments for 19 members of the Armed Forces (Generals Hermoza Ríos, Salazar Monroe and Rivero Lazo, among others) and one civilian (Vladimiro Montesinos) for simply belonging to the Colina Group and also for their participation in the events. Warrants for immediate detention or house arrest were issued for many of them. Later, criminal trials began on the La Cantuta, Pedro Yauri and El Santa cases, bringing the number of defendants to more than 40; eventually, all these trials were consolidated into one (ruling of Special Criminal Court “A”, 28 December 2004, which brought all the cases under the heading of file 032-2001, the trial of the Barrios Altos massacre).

In August 2005, oral proceedings against the Colina Group members began. In September of that year, the First Anticorruption Court accepted the motion for summary decision brought by Julio Chuqui Aguirre and Marco Flores Alván—who confessed to the charges in the indictment—and sentenced them to six and four years of imprisonment respectively.

This episode is enormously important. It is the first time in Peru’s history that human rights violators have confessed publicly, before a competent court, to membership in a death squad, to their involvement in multiple murders in Barrios Altos and La Cantuta, in the forced disappearances of *campesinos* in El Santa and of the journalist Pedro Yauri, and pointed the finger at other members of the Army currently standing trial.

It is the first time that anyone charged with human rights violations has indicated their acceptance of the terms of the indictment and, consequently, invoked the institution of summary decision (Law 28122). From now on, they will serve as witnesses in the trial, and must appear whenever summoned by the judges.

The request for summary decision and the sentence itself, which declared the request admissible, marks a break from the legal strategy of Vladimiro Montesinos Torres, Nicolás Hermoza Ríos, Santiago Martín Rivas and other defendants, which consisted of uniformly denying the existence of a paramilitary group within the army, and arguing that therefore they had not committed crimes against humanity. It also breaks the defendants’ united front and ends the pressure exerted by the so-called “intellectual authors” and mid-level officers in the Colina Group on some of the direct perpetrators who, faced with the evidence piling up against them and the sentences being called for by the Prosecutor’s Office, had to choose between their fear or confession.

Finally, the fact that Chuqui Aguirre and Flores Alván—and also Isaac Paquiyaury Huaytalla, whose sentence for effective collaboration was approved—are no longer standing trial will make the oral proceedings go faster, since it cuts down the number of defendants, and strengthens the probative elements against members of the paramilitary group. The judges are now in a position to publicly confront Montesinos Torres, Hermoza Ríos and Martín Rivas with the direct allegations made by the three soldiers mentioned.

Given the importance and the ramifications of the summary judgment sentence by the anticorruption judges, it is not surprising that it was opposed beforehand by the defense and challenged afterwards. The procedural challenges were denied by the First Specialist Criminal Court, and will likely be upheld by the Supreme Court. Actually there is nothing irregular about the summary judgment—as Montesinos Torres and company allege—since the judges followed the letter of the law: article 5 of Law 28122, updated by article 244 of the Criminal Procedures Code (according to the modification passed by Legislative Decree 959) and the Supreme Court ruling of 21 September 2004 in file 1766-2004, which is binding, allows for the possibility of summary judgment in trials in which there are multiple defendants but one part of them requests it.

It is also important to note that in the criminal proceedings against Alberto Fujimori Fujimori, no. 19-2001 AV in the Special Criminal Chamber of the Supreme Court, for the La Cantuta and Barrios Altos crimes, the Ministry of

Public Prosecution —via ruling 022-2004-FSC-MP—indicted the president on charges of murder, grievous bodily harm and forced disappearance, and requested a thirty-year prison sentence. On the basis of this and other charges linked to human rights violations, extradition requests were filed for the fugitive ex-president, first with Japan, and now with Chile.

### 3.2 Prosecuting Human Rights Violators in the Human Rights Criminal Law Subsystem

The Judicial Branch created a structure and specialized judicial division for human rights prosecutions, which initially functioned as an adjunct to the anticorruption system, and then became its own subdivision of the criminal law system. The Judicial Branch's decision, which was originally meant to respond to a precise recommendation by the CVR and to deal with the complexity of investigating human rights violations, was taken without a clear sense of what was required in terms of urgency and volume of need, so that the structure or subsystem has been “pieced together” on the go, with setbacks within the Judicial Branch, duplication of functions between entities, and little coordination with the Ministry of Public Prosecution.

In September 2004, the Executive Council of the Judicial Branch issued administrative ruling 170-2004-CE-P, which renamed the National Court in charge of trying terrorism cases as the “National Criminal Court”. Its jurisdiction was extended to include crimes against humanity and common crimes that constitute violations of human rights. It also renamed the Specialized Criminal Courts for crimes of terrorism as Supra-Provincial Criminal Courts with the same jurisdiction as the National Criminal Court. They function as part of the Superior Courts of Ayacucho, Lima and others as needed.

In March 2005, via administrative ruling 060-2005-CE-PJ, the territorial jurisdiction of the Supra-Provincial Criminal Courts was extended to the entire nation. Days later, administrative ruling 075-2005-CE-PJ clarified that only the Supra-Provincial Criminal Courts of Lima would have jurisdiction over the whole country.

In April 2005, the National Criminal Court issued ruling 01-2005-P-SPN, which states that criminal courts and courts of mixed jurisdiction in the various judicial districts must refer new indictments issued by the Ministry of Public Prosecution, allegations awaiting indictment for crimes against humanity, and common crimes that constitute cases of human rights violations, to the Central Registry for human rights cases of the Supra-Provincial Criminal Courts of Lima.

The Ombudsman's Office has argued that it is “questionable” whether parts of this ruling are “compatible with fundamental rights” (statement 186-2005-DP, 10 May 2005), such as legal protection, the right to evidence, the principle of (procedural) immediacy [evidence and witnesses must appear directly in court; written statements are not sufficient], and the defendant's right to equal treatment in the trial.

Currently, counting the cases open in the anticorruption system and others being handled by authorities not specifically designated for human rights cases, there are at least 59 investigations and criminal trials ongoing for human rights violations. Of those, 47 were recommended for prosecution by the CVR and 12 by the Ombudsman's Office; 39 are being handled by designated human rights prosecutors and courts and 20 by prosecutors and courts with a mixed case-load.<sup>293</sup> 9 of the cases are in the oral proceedings stage.

Among the cases being investigated or already referred to the Judicial Branch are the following: the disappearance of Ernesto Castillo Páez, the Colina Group, Totos, forced disappearance of local officials in Chuschi, the Lucanamarca massacre, the Santa Bárbara massacre, the arbitrary execution of residents of Cayara, human rights violations in the Los Cabitos army base, events in the prisons in June 1986, arbitrary executions in Pucará, the killing of *campesinos* in Lucmahuayco, the murder of Indalecio Pomatanta Albarrán, the Huanta case, the killings of *campesinos* in Putis, executions in Pomatambo and Parcco Alto, Pucayacu, the murder and disappearance of students and professors at the National University of the Center, sexual violence in Huancavelica (the military bases

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<sup>293</sup> OMBUDSMAN'S OFFICE. *A dos años de la Comisión de la Verdad y Reconciliación*. Informe Defensorial N.º 97. Lima: Defensoría del Pueblo, 2005.

at Manta and Vilca), etc.

During the transition to democracy, the Judicial Branch has had occasion to rule on fundamental issues for the progress of justice, the cause of human rights and the prosecution of human rights violators, in cases tried in the human rights court subsystem. The judges resolved various issues that came up during the course of criminal proceedings and, in an affirmation of the duty to investigate and try cases of human rights violations, they rejected 8 amnesty motions, 7 motions for application of the statute of limitations, 13 for double jeopardy and 4 challenges to the nature of the case.

Various verdicts by the Supreme Court on jurisdictional disputes brought by the military court should also be mentioned, since they are landmark judgments that oblige military tribunals to offer constitutional guarantees, by explicitly and clearly delimiting what constitutes a military crime.

When the Supreme Court considered the Armed Forces' claim of jurisdiction over the case of the murder of the young man Indalecio Pomatanta Albarrán, committed by members of the Navy, it declared that military crimes must contain the following fundamental elements: the behavior violates Armed Forces or Police Force interests; the defendant must be a member of the services and the event must take place on active duty; the "life of a person is not a legally protected interest of the Armed Forces"; that "according to International Human Rights and Criminal Law, committing horrific crimes and serious attacks on human rights can never be considered an 'act of duty'"; and furthermore, it decided to make its legal rationale a binding precedent, "given the particular importance of the issue under consideration, the general nature of the interpretation of constitutional and legal rules involving the notion of military crimes, and the nature of the judgments by the Inter-American Court of Human Rights and the Constitutional Court".<sup>294</sup>

Similar verdicts were issued by the *Primera Sala Penal Transitoria*, First Temporary Criminal Chamber on the dispute over jurisdiction in the case of the disappearance of local officials in Chuschi (jurisdiction ruling 29-04 of 14 December 2004) and by the Permanent Criminal Chamber on the case of the torture and death of Efraín Aponte Ortiz (jurisdiction ruling 08-2005 of 1 July 2005) and the murder of Marcelino Valencia Álvarez and Zacarías Pascua Mamani (jurisdiction ruling 18-2005 of 23 August 2005).

## Analysis

One of the lessons learned in the anticorruption subsystem is that it is always easier to initiate, try and conclude cases against human rights violators when the prosecution can manage to establish some kind of link between the defendant and a concrete act of bribery or corruption. Alberto Fujimori, Vladimiro Montesinos Torres and the members of the Colina Group were initially investigated and indicted for corruption, well before the CVR was created, and much of the progress was achieved before the *Final Report* came out. In fact the CVR used information that had already been obtained by the anticorruption subsystem. Of course, once the report was published, it made it easier to continue legal proceedings against the defendants for human rights abuses in that subsystem.

However, the human rights subsystem is rather weak, and does not meet the CVR's explicit recommendation. It is not equipped to deal with the complex nature of human rights investigations. Although in some specific cases, handled by competent and —it must be said— brave prosecutors and judges, there has been some significant progress: complaints were properly reported, there were solid grounds for indictment, direct application of international human rights and criminal law, justified arrest warrants for the defendants, prompt initial investigations, procedural challenges by the defense (amnesty, statutory limitations and double jeopardy) were denied etc; nevertheless, there is no denying that prosecuting human rights cases is a slow process. The criminal court subsystem handling such cases is weak: it lacks political commitment and support, funding, staff, and proper protection for its judges. In many cases the judges carry a heavy case-load of investigations and trials for common crimes. They often decide not to open official investigations, or are reluctant to apply international human rights

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<sup>294</sup> Verdict of the Permanent Criminal Chamber of the Supreme Court, on jurisdiction 18-2004, 17 November 2004.

law. They have the hard task of conducting a criminal trial on events that occurred years ago, in which the evidence, witnesses and survivors are almost always in remote areas far from the prosecutors and the courts and relevant information is regularly withheld by the military authorities.

It should also be pointed out that there is no official backing for prosecuting cases of sexual violence against women, and that the investigations being held are exasperatingly slow and inadequate. The Manta and Vilca case, for example, is still languishing even though almost 30 months have passed since it was presented to the Attorney General's Office and 22 months have passed since it was assigned to the Provincial Criminal Prosecutor's Office in Huancavelica. The investigations by the Ministry of Public Prosecution in this case and also the Magdalena Monteza Benavides case do not clearly and specifically place them under the criminal category of torture.

#### **4. The Ministry of Public Prosecution**

One positive development in terms of prosecution is that in April 2005, the Ministry of Public Prosecution issued Attorney General's resolution 815-2005, mandating prosecutors to reopen investigations into accountability for human rights violations in cases that were dismissed by amnesty laws 26479 and 26492. This is important because, although cases like Barrios Altos were reopened by national courts thanks to the rulings by the Inter-American Court of Human Rights (March and September 2001), there had been considerable resistance by prosecutors and judges to officially reopening investigations or legal proceedings that were closed by the amnesty laws.

From now on, prosecutors may request that legal proceedings be reopened, but the Ministry of Public Prosecution should also reopen investigations that were shut down for the same reason.

##### **a) The Anticorruption System**

After the Inter-American Court of Human Rights clarified its judgment in the Barrios Altos case (September 2001), the Ministry of Public Prosecution declared that the 1995 amnesty laws no longer constituted a procedural obstacle for criminal actions against human rights violators in other cases besides Barrios Altos. This allowed official complaints—and later indictments—to be filed in important human rights cases.

In April 2001, the Ministry did not oppose the reopening of the Barrios Altos case, but instead called for the indictment to include other alleged perpetrators and accomplices, and asked the judicial authorities to issue arrest warrants for the defendants. After that, it carried out a series of investigations that led to charges accepted by the Judicial Branch in the cases of the disappearance of journalist Pedro Yauri (2002), the disappearance of students and a professor from La Cantuta University (2003) and the disappearance of campesinos in El Santa (2003).

During these proceedings, the Anticorruption Prosecutor has generally argued very firmly that statutory limitations and amnesty provisions are not applicable to crimes against humanity, and that human rights violations do not constitute military crimes and therefore military courts are not competent to handle them.

In 2005, after all the cases were grouped under the heading of the Barrios Altos case (file 28-1001, in the specialized First Criminal Court), the Attorney General's Office issued indictments against members of the Colina Group on counts of illicit association with the intent to commit a crime, aggravated homicide, attempted aggravated homicide and forced disappearance. It requested sentences of up to 25 years imprisonment.

On the allegations of human rights violations against Alberto Fujimori Fujimori, specifically in the Barrios Altos and La Cantuta cases (file 19-2001 AV, Special Criminal Chamber of the Supreme Court), in March 2004 the Ministry of Public Prosecution issued an indictment on counts of aggravated homicide, grievous bodily harm and forced disappearance. It requested a sentence of up to 30 years imprisonment.

What is striking is the Ministry of Public Prosecution's position on dismissals or acquittals by military tribunals. The Attorney General's Office has not moved to pursue criminal prosecution nor has it made any statements on the matter (for example, on the allegations presented against Pérez Documet, Montesinos Torres and Hermoza Ríos regarding La Cantuta).

## b) Human Rights Subsystem

As in the case of the structure set up within the Judicial Branch to handle human rights cases, the Ministry of Public Prosecution's subsystem was also created "piecemeal". First, in April 2002, the Ministry followed the Inter-American Commission on Human Rights' ruling on the obligation to investigate forced disappearances by creating the Specialized Prosecutor for Forced Disappearance, Extrajudicial Execution and Exhumation of Clandestine Graves, in ruling 631-2002-MP-FN.

Then, in June 2002, the Attorney General's ruling 1122-2002-MP-FN named prosecutors in Ayacucho and Huancavelica to coordinate investigations into forced disappearances. In December 2003, Attorney General's ruling 2034-2003-MP-FN created a Chief Specialized Prosecutor for Forced Disappearance, Extrajudicial Execution and Exhumation of Clandestine Graves, with national jurisdiction, based in the city of Lima. In the same year and month, Attorney General's ruling 2036-2003-MP-FN created a Specialized Provincial Prosecutor for Forced Disappearance, Extrajudicial Execution and Exhumation of Clandestine Graves, with jurisdiction over the judicial district of Ayacucho. In December 2003 and January 2004, three prosecutors were designated in Huancavelica, Huancayo and Coronel Portillo to handle these matters.

In November 2004, the structure underwent a significant change. Ruling 1645-2004-MP-FN by the Attorney General reorganized the Ministry of Public Prosecution along the lines of the human rights subsystem in the Judicial Branch (the National Criminal Court and the Supra-Provincial Criminal Courts). The Specialized High Prosecutor's Office became the National High Criminal Prosecutor's Office, and its jurisdiction was extended to crimes against humanity, common crimes that constitute violations of human rights and related crimes. The specialized provincial prosecutors' offices became supra-provincial criminal prosecutors' offices.

Lastly, in August 2005 the Attorney General issued ruling 1602-2005-MP-FN, which gave supra-provincial criminal prosecutors based in Lima territorial jurisdiction over Lima, Callao and Cono Norte for crimes against humanity and terrorism; the Specialized Prosecutor for Forced Disappearance, Extrajudicial Execution and Exhumation of Clandestine Graves became a supraprovincial criminal prosecutor with jurisdiction over Ayacucho; and it designated the provincial prosecutors of Huaraz, Cajamarca, Cusco, Huánuco, Huancayo, Trujillo, Piura, Abancay, Arequipa, Puno and Moyabamba, granting them functional and territorial jurisdiction.

This last measure rightly and wisely ensures that human rights investigations take place in the places where the violations occurred and be led by prosecutors from the area. As the administrative rules state, the Ministry of Public Prosecution must gather evidence of a crime reported and if that evidence—or the victims and witnesses—are located in a different area, then investigation must be held in the places where the events occurred.

These changes introduced by the Ministry of Public Prosecution respect the right to an appropriate judge, direct presentation of evidence and prompt proceedings, and they acknowledge an obvious fact, namely that the victims and witnesses live far from the capital city and that for them to make the trip to find out how their cases are going or answer a judicial summons involves expenses that neither they nor the Judicial Branch is capable of meeting.

With regard to the work of Ministry of Public Prosecution staff in the human rights subsystem, it should be emphasized that the provincial prosecutors have done a remarkable job. Unlike their colleagues in Lima, they have based their indictments on direct application of international human rights treaties.

## Analysis

Various criticisms can be leveled at the Ministry of Public Prosecution in terms of its handling of prosecution of human rights violations. Firstly, there are a great many cases of human rights violations in the prosecutor's office that still have not been referred to the Judicial Branch. Even though the Ministry claims that this is due to its lack of resources, in many cases the basic reason is lack of commitment or interest on the part of the prosecutors to go ahead with investigations and indictments, despite the existence of ample evidence of the crimes and the responsibility of the suspects.

Secondly, it is worth commenting on the Ministry's failed attempt to revoke the amnesty laws passed by Alberto Fujimori's administration. It is striking that the Attorney General presented bill 13485/2005-MP on 15 August 2005, which proposed "revoking" the amnesty laws 26479 and 26492. This is a worrying move by the Ministry because it is, on principle, unnecessary and unproductive. The topic was closed, domestic debate in legal circles had come to an end and all organs of the justice system held the same position (time and again, prosecutors and judges from different courts and districts invoked the judgment of the Inter-American Court of Human Rights and denied amnesty claims by military defendants).

## 5. The Constitutional Court

In these years of transition to democracy, the Constitutional Court has become a fundamental resource for strengthening the judicial system and indeed for the development of democracy in the country. At present, it is the most influential institution in terms of defending human rights, because of its credibility and the impact of its rulings. Also, it has incorporated the CVR's conclusions into its rulings and legal rationales, as well as International Human Rights Law and the developments in jurisprudence by supranational monitoring bodies. The Constitutional Court has made decisive contributions to prosecuting perpetrators of grave human rights violations.

Of course, the rulings of the Constitutional Court have been used by judges and prosecutors on numerous occasions as a basis for their own decisions.

### a) Reconstruction and Preservation of the Truth

The Constitutional Court has ruled on three occasions in favor of the right to truth. The right of the victims, their relatives and society as a whole to know the truth, see justice done in a particular case and obtain reparation for the damage inflicted was recognized in the judgment on the case of forced disappearance of Genaro Villegas Namuche, a student in the Faculty of Mining Engineering at the National University of Piura, on 2 October 1992. The Court declared that the right to truth had been violated and ordered the Ministry of Public Prosecution to initiate an investigation (file 2488-2002-HC/TC, Piura, ruling of 18 March 2004). It did the same in the case of forced disappearance and extrajudicial execution of Peter Cruz Chávez during the events in the prison of Lurigancho, on 18 June 1986 (file 2529-2003-HC/TC, Lima, ruling of 2 July 2004); and in the case of forced disappearance of José Domínguez Berrospi (file 1441-2004-HC/TC, Lima, ruling of 22 July 2004).

### b) Application of International Humanitarian Law

The Constitutional Court has declared that international humanitarian law provisions "do not require any formal validation, and are automatically applicable if there is an act contrary to the minimal rules of humanity" (file 2798-2004-HC/TC, ruling published 10 February 2005).

### c) Prosecution

The Constitutional Court has had occasion to declare statutory limitations inapplicable to forced disappearance. In the above-mentioned ruling on Villegas Namuche, it argued that "knowing the circumstances in which the human rights violations were committed, and in the case of death or disappearance, the nature of the victim's fate, cannot be subject to statutory limitations. Even if a great deal of time has passed since the offense was committed, the individuals directly or indirectly affected by a crime of this magnitude always have a right to know who did it, the date and place where it was committed, how it was done, why the person was executed and where his remains are, among other things".

In another crucially important ruling, on the case of Gabriel Vera Navarrete, the Constitutional Court recognized the existence of an "irrevocable nucleus of rights established in mandatory rules in international law", which constitute a "mandatory interpretive norm" for Article 44 of the Peruvian Constitution (the obligation to guarantee full enforcement of human rights); it stated that international human rights law oversees the protection of individual rights, "but at the same time it demands the intervention of Criminal Law against individuals responsible for the



infraction”; and it reiterated that forced disappearance constitutes a continuing crime and “violates multiple norms”.

#### d) Reforms

In 2004, the Constitutional Court issued two rulings declaring most of the rules governing military tribunals to be unconstitutional and requiring Parliament to pass new legislation on the issue within twelve months along the lines indicated by the Court. This meant redesigning military tribunals to comply with the principles of the rule of law: respect for the balance of powers, judicial independence and due process.

The Court’s ruling of 16 March 2004 on Law 24150 spelled out the role of the Armed Forces in states of emergency, the principles of jurisdictional unity and exclusivity, the extent of military jurisdiction and the nature of military crimes (file 0017-2003-AI/TC).

The ruling of 9 August 2004 on the Institutional Law of Military Justice and the Military Justice Code stated that military courts should respect the principles of the rule of law: separation of powers, judicial independence and compliance with the Constitution; it barred individuals serving in the Armed Forces from acting as judges; ruled the appointment of military judges by the Executive Branch to be unconstitutional; affirmed military and police defendants’ right to defense; and declared the Military Ministry of Public Prosecution unconstitutional (file 0023-2003-AI/TC).

The Constitutional Court gave Congress a grace period of no more than 12 months to adjust legislation on the military courts to the Constitution and to the ruling, stating explicitly that at the end of that period the ruling would automatically go into force.

### 6. The Ombudsman’s Office

Like the Constitutional Court, the Ombudsman’s Office has played a vital role in the process of ensuring prosecuting cases of human rights violations, monitoring compliance with the CVR’s conclusions and strengthening democracy in Peru. Clearly, the work of the Ombudsman’s Office, its incisive reports, solid legal arguments, *amicus curiae* briefs and support for victims and their lawyers have helped motivate the various professionals involved in criminal prosecution: prosecutors, judges and lawyers.

#### a) Prosecution

Supervising the prosecution of human rights cases is an on-going concern of the Ombudsman’s Office, but that is not all it does. Its work actually goes far beyond that. For example, it has carried out 12 new investigations into human rights violations and referred them on completion to the Ministry of Public Prosecution.

The Ombudsman’s Report no. 77, “Extrajudicial Executions: Cases Investigated by the Ombudsman’s Office”, recommended the Ministry of Public Prosecution take a series of steps to set up a specialized system for investigating human rights crimes: appointing specialized prosecutors who would work exclusively on this topic, reinforcing the High Prosecutors and Specialized Prosecutors in Lima and Ayacucho and creating other prosecutors in the departments most affected by the violence. The report also recommended that the Judicial Branch establish a specialized system of courts and high chambers.

Subsequently, Ombudsman’s Report no. 86, “One Year After the Truth and Reconciliation Commission”, approved by the Ombudsman’s Office in resolution 020-2004/DP, notes the problems occurring in the prosecution process, and emphasizes the following: 1) the absence of a specialized system for investigating human rights cases; 2) the temporary nature of the judicial personnel handling the investigations (27 out of 41 prosecutors and 5 out of 8 judges); 3) the excessive case-load of the prosecutors heading the investigations; 4) the absence of a common strategy for conducting such investigations; 5) difficulties in gathering evidence; 6) parallel investigations by the military courts; 7) difficulties in defining the charges to be brought; and 8) training and logistical support needs.

The Report also formulates a series of recommendations, such as the need to develop a specialized system of

prosecutors, courts and chambers in charge of trying human rights crimes; the duty of the Ministry of Defense and the Ministry of the Interior to pass on information in their records, operational reports, files, or any other data on the events and suspects that would help elucidate human rights violations to the Ministry of Public Prosecution and the Judicial Branch; the duty of the President of the Supreme Council of Military Justice to instruct military judges and prosecutors not to initiate or reopen parallel investigations in cases of human rights violations, etc.

Finally, Ombudsman's Report no. 97, "Two Years After the Truth and Reconciliation Commission", approved by Ombudsman's resolution 0021-2005/DP, lays out the factors that impede adequate and successful prosecutions. The main one is the absence of a "previously thought-out plan to set up investigatory bodies for human rights violations. Instead, they have developed gradually, piecemeal, and there is even some duplication. All the indications are that there was no prior coordination between the Ministry of Public Prosecution and the Judicial Branch, but that both bodies simply reacted to the urgency of the cases".

Regarding protection for the victims, their relatives and witnesses, the Ombudsman's Office argues that although there are legal provisions for this, in the legal proceedings there is "refusal or ignorance on the part of some prosecutors and judges about applying protection measures", and that "the measures mandated are either not carried out properly or are insufficient".

The Report also indicates that in investigations linked to the discovery of human remains in clandestine graves, "there has been a lack of resources to pursue inquiries, which makes it impossible to carry out forensic anthropology investigations".

#### b) Reforms

Regarding military courts, the Report states that although the Constitutional Court, the Supreme Court and the Inter-American Court of Human Rights have ruled against military tribunals trying human rights cases, they are attempting to do so by actions (such as requests for information and investigations by bodies such as the *Vocalía de Instrucción del Consejo Supremo de Justicia Militar*, Investigations Section of the Supreme Council of Military Justice) which were mostly initiated at the request of military defendants being tried by the Judicial Branch.

## 7. *The Armed Forces*

Over the years, the Armed Forces have become the most implacable critic of the CVR's *Final Report* and the main opponent of prosecution for human rights violations.

#### a) Prosecution

In March 2001, just after Inter-American Court of Human Rights had issued its judgment declaring the 1995 amnesty laws null and void and obliging the State to prosecute and punish the individuals responsible for the murders committed in Barrios Altos, the military justice system was persuaded to revise the way its tribunals functioned and to annul the writs of dismissal from 1994 and 1995, which illegally exonerated the defendants during that period. This cleared the way for the cases to be tried by the Judicial Branch, and also favorably resolved the issue of applying treaties and rulings by international courts in domestic cases.

As readers may remember, after the Inter-American Court of Human Rights ruled, the Full Chamber of the Supreme Council of Military Justice (CSJM) issued a resolution on 1 June 2001 (no. 494-V-94, Barrios Altos case), recognizing that

"the supranational judgment constitutes a specific ground for annulling all resolutions, even final ones such as in the present case, in which orders of dismissal were issued by national jurisdictional bodies, in contravention of the [Inter-American Court's] ruling, so that the annulment of those orders becomes mandatory and inevitable; This Supreme Court, upon learning of the international judgment advises that the dismissals that

closed investigations into serious acts that gave rise to the intervention of the Military Justice system and permanently exempted the defendants from the proceedings referred to in this case, clearly violate the fifth point of the judgment of the Inter-American Court of Human Rights, which orders the State to hold an investigation [. . .]; Given the facts proven by the international judgment, the dismissal orders, by permanently exempting the defendants from criminal prosecution, constitute an obstacle that must be removed [. . .]; [. . .] the Military Justice system is obliged to comply with the judgment [. . .] issued by the Inter-American Court of Human Rights [. . .] BE IT RESOLVED: TO ANNUL the Decisions of the Review Chamber of the Supreme Council of Military Justice [. . .] confirming the resolutions of the War Chamber [. . .] that DISMISS [the cases . . .]; [and] RULED: to refer the writs to the Review Chamber of the Supreme Council of Military Justice” [Sic].

And the Review Chamber of the CSJM, in a resolution on 4 June, moved to “ANNUL the dismissal rulings” and agreed to “REFER trial of the present case to the Civilian Courts”.

Unfortunately, in a weak democracy the Armed Forces have gained the upper hand again in this situation and are becoming bolder. Currently, the military courts are claiming jurisdiction over some important cases of human rights violations. According to official figures, the Investigations Section of the War Council of the CSJM is handling 21 of the CVR cases. Among them are:

- Forced disappearance of Nicolás Chocas Caveró and others (case of forced disappearance of students from the National University of the Center), Investigations Section of the CSJM, case 2004-0143-52000
- Extrajudicial execution and forced disappearance of Catalina Mendoza Quispe and others (Los Cabitos case, 1983-1985), Investigations Section of the CSJM, case 2004-0128-52000
- Extrajudicial execution of Jesús Vera Virgilio and others (Operation Aries case), Investigations Section of the CSJM, case 2004-0095-5200
- Extrajudicial execution of Nemesio Fernández Lapa (Pucayacu case), Investigations Section of the CSJM, files 2004-0058-5200 and 2004-1023-00171; and
- Extrajudicial execution of Juan Cruz Rojas and others (Left bank of the Huallaga River case), Investigations Section of the CSJM, case 2004-0096-52000.

These constitute open defiance by the military tribunals and non-compliance with the Constitutional Court’s ruling on file 0023-2003-AI/TC, which went so far as to say they could not continue to try cases of serious human rights violations—which are not military crimes and whose victims are civilians—effective immediately, so that the *vacatio sententiae* or grace period of twelve months allowed by the Constitutional Court did not apply. “Proceedings against members of the military for human rights crimes and in general, for any offense that could be considered a crime against humanity, are not included in the *vacatio sententiae*, since by their nature, these crimes may not be tried by military tribunals” (paragraph 91).

The fact that the military justice system has continued to judge cases of human rights violations shows there is a political perspective that is opposed to prosecution and that tries to impose old impunity mechanisms for the perpetrators of human rights violations. We must not forget that, historically, military tribunals have been a source of impunity for grave human rights violations committed by members of the Armed Forces and Police during the years of political violence; and now, in the midst of transition to democracy, they continue to defy the civilian authorities and the principles of the rule of law.

The same rebellious stance is seen in the military authorities’ refusal to comply with arrest warrants issued in the few criminal proceedings underway for crimes against humanity; the minimal cooperation of the military with judicial requests to hand over vital information for establishing truth and responsibility; the CSJM’s idea of remodeling the Tarapacá base to house defendants charged with crimes against humanity, under the questionable rationale that only a military facility can guarantee military prisoners the necessary “personal safety” (a VIP prison).

b) Opposition to Reform of the Military Justice System

In 2004, the Constitutional Court passed two rulings that highlighted various unconstitutional elements in the Military Justice Code and the Institutional Law of Military Justice, and gave Congress 12 months to reform the military court legislation in line with the Constitution and its ruling, stating explicitly that at the end of 12 months the ruling would automatically go into force.

Of course, the CSJM announced its displeasure with the content and ramifications of the Court's decision, arguing that civilians do not understand the importance of its work and that modifying its structure and jurisdiction would detract from national defense. Immediately afterwards, it began a political and media campaign to find formulas to "overcome" the constitutional barrier imposed by the Court and allow some changes in the military courts so that things could basically stay the same. The CSJM sought allies in Congress and eventually managed to get law 28665 passed. This law deals with the organization, functions and competence of specialized jurisdiction in military and police crimes.

The law does not define current military justice as a specialized jurisdiction within the Judicial Branch, but maintains it as an independent jurisdiction. In that reading, it does not suggest a real, solid integration of "military justice" into the Judicial Branch, but only creates a *Sala Suprema Penal Militar Policial*, Supreme Criminal Military and Police Court which is tacked on to the Supreme Court, although it carefully stipulates that it will be composed of a mixture of judges, the majority of whom are military. Also, the president of the Court—a military judge—is the director and administrator of Budgeting for the "specialized jurisdiction in criminal military and police matters", and will administer the resources currently listed under the CSJM. Incidentally, as if to "give it a little something", the Court gets to rule on competing claims of jurisdiction over military crimes, something that as everyone knows, the military have wanted for a long time and in recent years these cases have been resolved in favor of the intervention of common criminal judges (in the cases of Indalecio Pomatanta, the students of Pumo, local officials in Chuschi).

The other military justice bodies have no institutional connection to the Judicial Branch and remain outside its structure. Instead, they reproduce the previous parallel organizational set-up created by the Institutional Law of Military Justice: the brand-new High Criminal Military and Police Council takes over the functions of the Supreme Council of Military Justice; the Criminal Military and Police Territorial Councils fulfill the role of what used to be known as Councils of War; and the Criminal Military and Police Courts replace the Military Courts.

The Supreme Criminal Military and Police Court will oversee the appointment and careers of judges on the Military and Police Criminal Judicial Body. They will be officers on active service with "military and police legal training", with priority given to military "training" and "experience". There is a mistaken assumption that the appropriate "specialty" for criminal military matters involves knowing about life and the hardships on the bases rather than familiarity with legal categories and institutions.

The persistence of military logic in the new structure is also shown in the requirement that the judges hold certain ranks, depending on what court they are working in and the fact that they cannot try service members of higher rank than themselves.

According to the proposal, the judges must be nominated by the National Council of the Judiciary within 4 years. In the meantime, there will be temporary appointments of judges, tribunal members and auxiliaries. The same will be true for the Supreme Military and Police Criminal Court.

For its part, Congress abdicated its legislative function regarding the Code of Military Justice, and delegated its power to approve the Code to the Executive Branch via a legislative decree.

## 8. CONCLUSIONS

It is only possible to make progress on prosecuting human rights violations if the whole machinery of the State is involved; in other words, when the State does more than pay lip service and uses its various institutions to show it has the political will to pursue truth and justice. Of course, the Ministry of Public Prosecution and the Judicial

Branch have fundamental and irreplaceable roles in that area; but without the political support of the Executive Branch and the collaboration and back-up of institutions like the Congress of the Republic, the Constitutional Court, the Ombudsman's Office and the Armed Forces, progress is slow and halting. The process runs into too many obstacles and setbacks and runs the risk of possibly failing.

In Peru, with regard to the cases referred for prosecution by the CVR, it is possible to observe the different contributions of State institutions to bringing perpetrators of human rights violations to trial and also how the passing of time, and changes in the political climate, can affect the State's commitment to prosecution and compliance with the CVR's *Final Report*. In terms of the Executive Branch, for example, the initial rhetoric about a "new government policy on the protection of human rights" and the much-heralded announcement of a series of measures was not sustained over the years. Enthusiasm lagged and then turned into a series of criticisms of the supposed mistakes, exaggerations and bias in the CVR report about State agents' responsibility for human rights violations. All of this demonstrated a general lack of political will in the government to support the process of truth and justice.

The important prosecution-oriented laws passed by the Congress of the Republic following the CVR's recommendations did not turn out to be quite enough to provide decisive support for the task of investigation and trial of perpetrators of human rights violations. Particularly noteworthy in this regard is the early failure of the political parties represented in Congress to design a specialized temporary judicial subsystem for prosecuting crimes against humanity and their subsequent refusal to reorganize the mechanism created by the Ministry of Public Prosecution and the Judicial Branch. It is also worth underlining Parliament's abdication in the face of the military initiative to reinforce military tribunals at the expense of the Judicial Branch in general, and specifically, the prosecution of members of the security forces accused of human rights violations.

As to the Armed Forces, early on, while they were weakened by their association with the authoritarian regime of Alberto Fujimori, they initially accepted the prosecutions that were being initiated; but later, seeing the weakness of the democratic government, they rebelled and proceeded to try cases of human rights violations in military tribunals. The existence of a political perspective opposed to prosecution is demonstrated by the military authorities' refusal to carry out arrest warrants issued by criminal courts on open cases of crimes against humanity, and by their lack of collaboration with judicial requests for vital information leading to the truth and the establishment of responsibilities. Towards the end of 2005, the Armed Forces succeeded in imposing their agenda of fortifying military justice via a new Institutional Law and a new Military Justice Code.

The Constitutional Court, of course, plays an altogether different role, as does the Ombudsman's Office. Both bodies have contributed within their spheres of competence to strengthening the legal system and, needless to say, to prosecuting perpetrators of grave human rights violations. They are the great allies of a group of democratic judges who are fighting for truth and justice, in the context of the CVR's *Final Report*.

In this institutional context of lack of political support from the Executive Branch, indifference in the Congress of the Republic and open opposition from the Armed Forces, those directly involved in criminal prosecution of human rights violations encounter all sorts of obstacles. These are exacerbated by the mistakes and limitations of the Ministry of Public Prosecution and the Judicial Branch, who have created a weak criminal subsystem. Their staff does not always handle cases for prosecution properly or firmly, the evidence to be gathered is almost always in remote areas far from the prosecutors and courts, and requests for supporting material are regularly denied by military officials.

## ***Contributors***

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A Peruvian lawyer and member of the legal team of the Human Rights Association (APRODEH) in Peru since 1993, Ms. Cano has been the Association's principal lawyer since 1997. She has represented victims on behalf of APRODEH as a civil party in various criminal trials, including the La Cantuta and Barrios Altos massacres and other crimes carried out by the Colina Group during the government of Alberto Fujimori. She began her career in human rights advising *campesinos* in Ica on land tenure issues, then worked as head of the municipal legal team dealing with land issues for population settlements. In 1990, she took a position in the Municipality of Comas clearing property titles. She was forced to leave her job due to threats by Shining Path.

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A Peruvian with a Masters in International Political Economy from the University of Warwick (England) and a law degree from the Catholic University of Peru, he is currently Executive Director of the Institute for Democracy and Human Rights at the Catholic University of Peru (IDEHPUCP). He has previously served as Executive Secretary of the Peruvian Truth and Reconciliation Commission; General Secretary of the Andean Commission of Jurists; consultant to the Ministry of Foreign Relations; and head advisor to the Justice Ministry during the transitional government from 2000-2001. He now teaches Jurisdictional Policy in the Masters Degree Program at the Law Faculty of the Catholic University of Peru, as well as teaching in the University's Postgraduate Diploma in Human Rights. He has also taught Sociology in the Catholic University's Social Science Department. In 2001, he was awarded the Order of Civil Service by the Peruvian State for distinguished service during the transitional government.

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An Argentine lawyer who earned his degree from the University of Buenos Aires (1998) and completed a Masters degree in Law from the University of Palermo (2004), he is currently a candidate for a Masters of Law degree at Yale Law School (2006). From 2004-2005, he held a Hubert H. Humphrey fellowship at the University of Minnesota and worked as a consultant for the International Center for Transitional Justice in New York. Prior to that, he worked in Argentina as a law clerk for the Supreme Court of Justice of the province of Buenos Aires; coordinator for the Institutional Reform Area at the Center for Legal and Social Studies (CELS); law clerk for the San Isidro Criminal Court of Appeals and Guarantees; law clerk for Criminal Oral Tribunal no. 23 in Buenos Aires and legal advisor to the National Prison Ombudsman. He has taught Criminal Law and Criminal Procedures at the University of Palermo and been Practicum Supervisor and Teaching Assistant for courses on Human Rights and Guarantees and Criminal Theory at the University of Buenos Aires. He was lead contributor to *El Estado frente a la protesta social* (CELS and Siglo XXI, 2003) and has published various articles and notes on topics in his field.

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A Peruvian lawyer who received his law degree from the Law Faculty of the Catholic University of Peru, Mr. Sánchez has worked on human rights issues in non-governmental organizations since 1992, among them the Andean Commission of Jurists and the Episcopal Commission for Social Action. He has been Commissioner for the Program for Criminal and Penitentiary Affairs at the Ombudsman's Office in Peru since 1998. He has also collaborated on research projects and publications in Peru and abroad (the GTZ Agency in Chile and the Institute for Comparative Studies in Law and Society in Argentina) on penal law, indigenous jurisdiction, juvenile criminal law and criminal procedural law. In 2001 he was a consultant to the Multisectorial Commission charged with drafting the Regulations for the Special Community Service Law and in 2001 and 2003 he represented the Ombudsman's Office as substitute member on the Multisectorial Commission in charge of drafting the Regulations for the Code on Execution of Criminal Sentences. He currently holds training workshops on criminal and penitentiary issues, organized by the Ombudsman's Office and the Legal Information Bureau for the Justice Ministry.

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Of Argentine and U.S. nationality, Mr. Méndez has been President of the International Center for Transitional Justice since 2004 (ICTJ). In July of that year, he was appointed the United Nations Special Advisor on the Prevention of Genocide. He was professor of Law and director of the Center for Civil and Human Rights at the University of Notre Dame (1999-2004). He served as executive director of the Inter-American Institute of Human Rights in Costa Rica (1996-1999), and between 2000 and 2003 he was a member of the Inter-American Commission on Human Rights of the Organization of American States, serving as its president in 2002. He was also director of the Americas Division and General Counsel of Human Rights Watch (1982-1996). He is the recipient of several human rights awards, the most recent being the Jeanne and Joseph Sullivan Award of the Heartland Alliance in May 2003, and the inaugural Monsignor Oscar A. Romero Award for Leadership in Service to Human Rights, presented by the University of Dayton, Ohio in April 2000. He has published various articles and essays on issues in transitional justice and the Inter-American human rights system. He was co-editor, with Guillermo O'Donnell and Paulo Sergio Pinheiro, of the book *The (Un)Rule of Law and the Underprivileged in Latin America*, published in 1998 by the University of Notre Dame Press in English, Spanish and Portuguese.

### **Karim Ninaquispe**

A Peruvian, with a law degree from the San Marcos National University, Ms. Ninaquispe completed postgraduate

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### **Katya Salazar Luzula**

A Peruvian lawyer, Ms. Salazar Luzula studied law at the Catholic University of Peru and completed a Masters degree in German law and international public law at the University of Heidelberg. She is currently Program Director of the Due Process of Law Foundation, a non-governmental organization based in Washington, D.C. She was assistant coordinator of the Special Investigations Unit of the Peruvian Truth and Reconciliation Commission (2003) and investigator in the Human Rights Division of the Peruvian Ombudsman's Office (1999-2000). She worked as an attorney for the Coalition Against Impunity (Nuremberg, 1998) and at the Institute for Legal Defense (Lima, 1993-1996). From 1996 to 1997 she was a Legal Fellow at the International Human Rights Law Group (now Global Rights), in Washington D. C.

### **Eduardo Vega Luna**

A Peruvian, with a law degree from San Marcos National University, Mr. Vega Luna also studied for his Masters in criminal law there. He worked toward his Masters on peace and development in the UNESCO sponsored Philosophy program on Peace and Development at the Jaime I University in Spain. Currently, he heads the team that supervises and monitors the consequences of the violence and compliance with the Truth and Reconciliation Commission's recommendations at the Peruvian Ombudsman's Office. He has worked as the legal advisor on human rights issues for the Episcopal Commission for Social Action and the Institute for Legal Defense in Peru. He was coordinator of the Technical Bureau for the *Ad Hoc* Commission on Pardons for Innocent Prisoners accused of terrorism in Peru.

## Translator of the English Edition

### **Catherine Jagoe**

A British and US national, Ms. Jagoe is a translator, interpreter and writer. She holds a BA in modern & medieval languages (1984) and a PhD in Spanish (1989) from Cambridge University, England. Before becoming a full-time translator, she worked in academia for 11 years, becoming Associate Professor of Spanish at the University of Wisconsin-Madison, specializing in gender theory, translation and 19th-century studies. She has published scholarly articles and books about gender in Spain. Her latest literary translation is of Elsa Osorio's *My Name Is Light* (Bloomsbury, 2003), a novel about the children of the disappeared in Argentina, which won the Amnesty International prize for fiction. She has translated work on human rights from Argentina, Venezuela, Colombia and Chile, including essays by Luisa Valenzuela and Paula di Dio in *The Art of Truth-Telling About Authoritarian Rule* (University of Wisconsin Press, 2005). She is an active member of the American Translators Association and holds ATA certification for translation from English<>Spanish.



## International Center for Transitional Justice

The International Center for Transitional Justice helps countries pursuing accountability for mass atrocities or human rights abuses. The Center works in societies emerging from repressive regimes or engaged in armed conflicts, as well as established democracies where historical injustices or systemic abuse remain unresolved. It provides comparative information, legal and policy analysis, documentation and strategic research to governments, non-governmental organizations and others.

Its work focuses on five key elements of transitional justice: developing strategies for prosecuting perpetrators; documenting violations through nonjudicial means, such as truth commissions; reforming abusive institutions; providing reparations to victims; and facilitating reconciliation. The ICTJ is committed to building local capacity and generally strengthening the emerging field of transitional justice. To do this it works in close partnership with organizations and experts from around the world. It is based in New York but also has offices in Brussels, Geneva and Capetown, South Africa.

IDEHPUCP

The Institute for Democracy and Human Rights of the Pontifical Catholic University of Peru (IDEHPUCP) is a university body created to help strengthen democracy and respect for human rights in Peru via education, academic and applied research, the creation of civil society and State forums for dialogue and problem-solving, and the promotion of values that support the rule of law and human rights.

The IDEHPUCP, established in 2004, was inspired by the *Final Report* of the Peruvian Truth and Reconciliation Commission. In its first two years of operation, it has worked intensively on academic curriculum design (planning and implementing the first Masters degree in Human Rights in Peru), research (including studies on building historical memory, violence in Peruvian society and the criminal prosecution of violations of fundamental rights) and public outreach (public forums, international seminars and publications). It also provides technical assistance to various State agencies, runs training courses for legal professionals and advocates for implementation of the institutional reforms suggested by the Truth and Reconciliation Commission.