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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Second periodical reports of States Parties due in 1993

Addendum

PERU*

[20 January 1997]

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* For the initial report submitted by the Government of Peru, see document CAT/C/7/Add.16; for its examination by the Committee, see documents CAT/C/SR.193, CAT/C/SR.194 and Add.2, and Official Records of the General Assembly, Fiftieth Session, Supplement No. 44 (A/50/44), paras. 62-73.

I. REVIEW OF ANTI-TERRORIST MEASURES

Anti-terrorist measures

1. The State has the legal obligation to combat by lawful means all those groups that threaten the lives and persons of its citizens. Therefore, in view of the criminal nature of acts of terrorism, which were considered to constitute “serious common crimes” by the Inter-American Specialized Conference on Terrorism of the Organization of American States held in Lima, Peru in April 1996, we are dealing with a matter that falls within the jurisdiction of every sovereign State, each Government having a legitimate right to pursue such anti-terrorist policies and strategies as it may deem most appropriate, while observing the rules for the protection of human rights, including those legal rights to which even terrorists may be entitled. Against this background, the Government of Peru enacted extensive anti-terrorist legislation clearly defining the crimes of treason and terrorism.

2. As part of that legislation, Decree-Law No. 25475 was enacted laying down penalties for acts of terrorism and procedures for investigation, examination and sentencing and providing for concealment of the identity of judges, officials of the Office of the Public Prosecutor and the court officers taking part in the trial (“faceless judges or courts”).

3. The Government felt compelled to resort to such penal legislation and to the suspension of rights allowed under states of exception in order to combat terrorist crime. At the same time, a legal and institutional structure was devised that was capable of effectively fighting terrorism, which had spread over the entire national territory and was seriously jeopardizing the very life of the nation.

4. The anti-terrorist legislation is intended to make the law enforcement bodies more effective, providing them with the tools necessary for stern repressive action against those committing or abetting terrorist acts. Extended powers were therefore given to the police, without prejudice to the powers of monitoring and oversight vested in the Office of the Public Prosecutor. Accelerated summary procedures were also laid down to ensure a rapid response when charges are brought for such crimes, enabling the legal situation of those accused to be determined promptly and fairly.

Faceless judges

5. The institution of “faceless judges” and the use of military courts to try crimes of treason are two essential features of criminal proceedings on this model. This is because terrorist groups used to identify judges, intimidate them and in many cases attempt to murder them. Moreover, because the judicial machinery was unreliable - and therefore needed to be overhauled - the perpetrators and abetters of these crimes were not being properly punished. Worsening of terrorist violence therefore made it necessary to turn to the military courts to judge these crimes.

Pre-trial detention by police

6. The Constitution provides for pre-trial detention by police not exceeding 15 days. This does not, however, mean that detainees are left without legal defence, as the role of the Office of the Public Prosecutor was not eliminated by the anti-terrorist legislation. Not only do procurators visit detention centres and arrange for the defence of detainees, but they also ensure that police investigations remain within the bounds set by the law.

7. All detentions are reported to the Office of the Public Prosecutor and the courts, whereupon the procurators carry out their functions of monitoring and oversight. The Constitution prohibits torture and also grants detainees the right to request an immediate medical examination. Therefore, despite the powers accorded to the police to prolong pre-trial detention in cases of terrorism, espionage and drug-trafficking, the Peruvian legal system empowers the Office of the Public Prosecutor to guarantee the rights of detainees and accused persons and accords the latter the right to demand medical examinations in order to determine whether or not there has been ill-treatment.

8. In cases of treason, Decree-Law No. 25744 authorized the extension of remand in police custody, but that decision lay not with the police themselves but with the military courts. In any case, the present Constitution does not allow such an extension (article 2°.24.“f”).

Defence Counsel

9. Decree-Law No. 25475 restricted the intervention of defence counsel before the accused had made a formal statement, because there were organizations of lawyers linked to terrorist groups who would coach or threaten detainees, forcing them to adopt a particular attitude during the trial. This restriction did not affect the role of the Office of the Public Prosecutor in ensuring that the detainee received proper legal defence.

10. The Constitution stipulates that all persons have the right to consult personally and be advised by the defence lawyer of their choice upon being summoned or detained by any authority (article 139°.14). Concern for providing maximum guarantees of the right of defence is thus embodied in that constitutional rule.

Enforced disappearance

11. The crime of enforced disappearance of persons has been incorporated into our penal laws by means of Decree-Law No. 25592 of 2 July 1992, which lays down punishments for “officials or public servants who deprive persons of their liberty by ordering and carrying out actions that result in their officially confirmed disappearance”.

12. The very existence of this offence is proof of the determination of the State to stamp out practices by members of the security forces that violate human rights. The investigation of such cases by provincial procurators

and the publication of specific guidelines on the matter (Resolution No. 342-92-MP/FN of 11 June 1992), as well as the setting-up, with international assistance, of a national register of detainees, are evidence of the efforts being made by the Government to eradicate such practices, which are a major stumbling block to national pacification.

Basis for the review of anti-terrorist legislation

13. The anti-terrorist laws enacted by the Government were designed to deal resolutely and firmly with a certain type of criminal activity that had spread dangerously throughout the national territory. Subversive groups, considered by everyone to be the main violators of human rights in Peru, had to be fought by emergency legislation. The legal framework created by means of Decree-Law 25475 of 5 May 1992 filled that need.

14. New legal definitions were given for crimes that constitute terrorism, a repentance act was passed and a procedural model put in place that led to a number of arrests, the dismantling of the organizational structure of terrorist groups and the passing of sentences consonant with the gravity of the offences committed. Today, thanks to all these measures, there is a much appreciated and generalized feeling of security and confidence among the citizenry.

15. The anti-terrorist legislation has had very positive repercussions, in that terrorist violence has lessened. It thus became necessary to reformulate the legal framework to suit the present circumstances and to revise, gradually but determinedly, particular aspects of that legislation so as to help attain the ultimate goal of national pacification. It was in that context that the Easing of Measures Act was passed.

The new flexibility policy

16. In the light of the progress made, the Government has been pursuing a policy of introducing flexibility into anti-terrorist legislation so as to arrive at more precise definitions of offences considered as treason or terrorism, and to ensure that due process will be guaranteed under the new procedures in both military and civilian courts.

Easing of Measures Act

17. On 25 November 1993, Act No. 26248, known as the Easing of Measures Act, was adopted, introducing significant changes to the anti-terrorist legislation. The following may be mentioned:

(a) Procedural guarantees: Article 6 of Decree-Law No. 25659 stipulated that at no stage of the police investigation and the penal trial would applications for procedural guarantees be allowed on the part of detainees who were suspected or accused of crimes of terrorism or treason. This rule, which was designed to prevent disruption of the investigation by applications for procedural guarantees introduced for purposes other than their proper legal function, has been amended by the Easing of Measures Act, which restores the right to apply for guarantees and lays down a special procedure for such cases;

(b) Unconditional release: Decree-Law No. 25475 stated that during the pre-trial proceedings the accused must not be released under any circumstance, regardless of their legal status. The Easing of Measures Act amends this rule by empowering the criminal judge, ex officio or on application by the accused, to order unconditional release pursuant to the Code of Penal Procedure. The ruling must be referred for consultation and the release may not take place until a final decision is reached;

(c) Sentencing in absentia: Decree-Law No. 25728 empowered judicial bodies to sentence in absentia persons guilty of the crimes of terrorism and treason. Given the present situation in regard to the prosecution of such offenders and the progress made in dismantling terrorist organizations, the exercise of that power is no longer warranted. The rule has therefore been repealed by the Easing of Measures Act;

(d) Defence Counsel: Article 18 of Decree-Law No. 25475 stipulated that in proceedings for terrorism, defence counsel shall not be allowed to act simultaneously for more than one accused at national level. That legal provision was designed to counteract a strategy used by terrorists, whereby they would set up support organizations (dubbed “People's Aid” or “Democratic Lawyers”) which recruited lawyers whose activities were aimed at manipulating the accused, obstructing the investigation and acting as liaison between the accused and political leaders. Thanks to an efficacious anti-subversion policy, major victories have been scored against such support organizations, considerably reducing the danger of disruption of the evidence-gathering process and frustration of the purposes of the penal proceedings posed by the lawyers linked to subversive groups. The Easing of Measures Act has repealed that provision;

(e) Special appeal for review in the military courts: In the accelerated summary proceeding used to try crimes of treason in military courts, the Easing of Measures Act has extended the grounds for special appeal for review applicable to all those who are not leaders, chiefs or some equivalent in a terrorist organization. If, on the evidence used to substantiate the verdict of guilty or with additional evidence, it can be established that account was not taken of elements that could be decisive for an acquittal, the special appeal will be declared admissible, so that a materially fair decision can always be reached.

New measures to increase flexibility

18. With the same basic aim of promoting greater flexibility, Act No. 26447 was published on 20 April 1995, introducing some important new amendments:

(a) Faceless courts: Act No. 26447 provided that the so-called faceless courts would cease to operate and that the crimes of terrorism envisaged under Decree-Law No. 25475 would henceforth be tried by the competent magistrates pursuant to current procedural and organizational rules. The magistrates would be duly appointed and identified under the rota system. Act No. 26537 of 12 October 1996 provided that this measure would take effect on 15 October 1996;

(b) Defence counsel and Office of the Public Prosecutor: For the purposes of their own defence, suspects are accorded the right to appoint and be advised by the defence counsel of their choice from the start of the police intervention. The defence counsel's participation, including the interview with the suspect, may not be restricted even if it has been ordered that the detainee should be held incommunicado. Defence counsel and the representative of the Office of the Public Prosecutor must be present when the suspect is making a statement to the police. If the suspect has not named defence counsel, the police, in agreement with the Office of the Public Prosecutor, will accord him assigned counsel, who will be provided by the Ministry of Justice;

(c) Criminal liability of minors: Article 20 (2) of the Penal Code was amended by article 1 of Decree-Law No. 25564, which provided that minors of less than 18 years of age could not be criminally liable, except for those who had committed or taken part in acts qualified as terrorism, who must be less than 15 years of age for the exemption to apply. Act No. 26447 restores the original text of the Penal Code, stipulating exemption from criminal liability for minors of less than 18 years of age in general.

19. Likewise, Act No. 26590 was promulgated on 12 April 1996, adding the following subparagraph (i) to article 13 of Decree-Law No. 25475: “A summons may be issued for a new trial, should the Supreme Court overturn an acquittal.”

State of emergency

20. Constitutional theory recognizes that in a democratic system there may arise extraordinary and unforeseen situations which compromise or seriously disrupt the functioning of legal and political institutions, the stability and proper running of the State or Government and the life of society, compelling the Executive to assume exceptional powers and take exceptional decisions to cope with the crisis and restore normality.

21. These situations must therefore be managed on the principle that the application of the relevant regulations is subject to the limits imposed by an “exceptional legal situation”. In Supreme Decree No. 022-84-PCM, the Peruvian State defines states of emergency, lays down categories and/or degrees and sets out the prerequisites and procedures for declaring states of emergency in the types of situation explicitly mentioned in the Constitution.

22. Article 137 of the Constitution regulates states of exception. They are declared by the President of the Republic, with the agreement of the Council of Ministers. The Supreme Decree approving the state of emergency must state its duration and the territory affected, and provide for reporting to Congress or to the Standing Commission. The states of exception recognized under the Constitution are state of emergency and state of siege.

23. A state of emergency is decreed in the event of disturbance of the peace or internal order, disaster or other grave circumstance affecting the life of the nation. In such cases, the constitutional rights of freedom and personal security, inviolability of the home, and freedom of assembly and movement may be curtailed or suspended. The duration of a state of emergency

may not exceed 60 days. It can be extended only by a new decree. The armed forces assume control of internal order if the President of the Republic so decides.

The process of national pacification under states of emergency

24. States of emergency have their constitutional basis in domestic law and are compatible with the rules of international law concerning the effective protection and safeguarding of human rights, as contained for example in the American Convention on Human Rights and the International Covenant on Civil and Political Rights. The pacification tasks carried out by the armed forces in areas covered by the emergency came within this framework and were performed in strict compliance with the legal provisions governing the system of national defence.

25. The armed forces intervene in areas placed under a state of emergency only when the legal instrument declaring that state also provides that they shall assume responsibility for internal order as part of their activities in the various spheres of national defence and in conformity with the guidelines and plans expressly approved by the President of the Republic. Their actions are therefore determined by a policy that is ordered, planned, prepared, directed and led by the Executive, through the system of national defence.

26. States of exception are governed by Act No. 24150 of 6 June 1985, as amended by Legislative Decree No. 749 of 8 November 1991, which “lays down the rules that must be observed under states of exception in which the armed forces assume control of internal order, in all or part of the territory, pursuant to articles 231 and 275 of the Political Constitution of Peru” (both articles ratified by articles 137 and 165 of the Political Constitution of 1993).

Role of the armed forces

27. The aforementioned Act No. 24150 stipulates that when the armed forces take over responsibility for internal order at the decision of the Government, this is done through a Military Political Command charged with coordinating and agreeing on actions with the various public and private sectors in fulfilment of pacification and development plans. The command is also responsible for conducting development activities in the areas under its jurisdiction, to which end the competent authorities will furnish the requisite funding, goods, services and human resources for carrying out its mission. As logic requires, the national police force is placed under the orders of the Military Political Command.

28. By Directive No. 023-MD of 28 October 1991, the Ministry of Defence, in laying down the rules and procedures to be observed in order to facilitate the conduct of operations in areas placed under a state of emergency, stipulated that human rights must be respected, with particular reference to visits by representatives of the Office of the Public Prosecutor, the Judiciary and the International Committee of the Red Cross.

29. Further, article 72 (b) of Supreme Decree No. 001-DE/SGMD to regulate the implementation of the Organization Act of the Ministry of Defence

prescribes that the Commanders in Chief of the branches of the armed forces are responsible for internal order during states of exception when the President of the Republic so decides.

30. Directive No. 001-EMFFAA/DDHH of January 1995 sets out the rules governing human rights in areas where a state of emergency has been declared and where operations are being carried out that concern all aspects of national security, specific responsibilities being assigned to the armed forces. Note that Supreme Decree No. 064-91-DE/SG approved Directive No. 023-MD/SGMD, which in setting forth the norms and procedures to be followed in order to facilitate the conduct of operations in areas declared to be in a state of emergency, specifies that human rights are to be enforced and safeguarded.

Proceedings for habeas corpus

31. The declaration of a state of exception does not suspend the possibility of initiating proceedings for habeas corpus and actions of amparo and, where rights are curtailed or suspended, the judge must examine the reasonableness and proportionality of the curtailment, in keeping with article 200 of the Constitution.

Functioning of the Office of the Public Prosecutor

32. Article 8 of Legislative Decree No. 052, the Organization Act of the Office of the Public Prosecutor, also stipulates that the declaration of a state of emergency or siege shall not interrupt the activities of the Office of the Public Prosecutor nor interfere with the right of citizens to have recourse to or visit that office personally.

33. Legislative Decree No. 665 of 2 September 1991 authorizes procurators in areas where a state of emergency has been declared to enter military installations or any other detention centres in order to check on the situation of detainees or persons reported missing, and further stipulates that the Ministries of Defence and the Interior should take the necessary steps to provide procurators with facilities and guarantees for the discharge of their functions.

34. Similarly, Ministerial Resolution 1072-91-IN/DM provides that in areas where a state of emergency has been declared the duty officers at police stations and posts (now known as police offices) will be responsible for directly receiving and attending to procurators in the performance of their duties.

Social and economic actions during states of emergency

35. In the social and economic sphere, Supreme Decree No. 003-86-PCM set up the Special Commission on the Development Plan for the Emergency Area with the task of coordinating plans for the overall development of the emergency area at the highest level. The Commission comprises:

1. The head of the National Planning Institute (INP), who chairs it.

2. One Vice-Minister for each branch of the public sector.

3. The chief of the military political command for the emergency area.

4. The head of the National Institute for Development (INADE).

5. The chiefs of the military political commands for the sub-divisions of the emergency area.

6. The heads of corporations within the emergency area.

36. An Emergency Areas Development Programme has also been drawn up and placed under the responsibility of the INP, which will plan, execute and carry out whatever is decided by the Special Commission.

II. TRIAL OF CIVILIANS IN MILITARY COURTS

37. Article 139 of the Political Constitution of Peru of 1993 states: "The following are principles and rights of the judicial function: (1) the unity and exclusiveness of the judicial function. There does not exist nor can there be established any independent judicial authority with the exception of the military and arbitration machinery. No judicial process is possible through assignment or delegation." The constitutional basis of the military jurisdiction lies in that regulatory framework and it is assigned very special functions, in regard to civilians, though these may only be carried out in those cases permitted by the law and in no situation other than those already mentioned. It is only in a context of restricted authority that exclusive "jurisdiction" will be legitimate.

Competence of the military courts

38. Article 173 of the Political Constitution states: "In cases of abuse of office, members of the armed forces and the national police force shall be tried in the competent court and are subject to the Code of Military Justice. The provisions of that Code do not apply to civilians, except in cases of treason against the fatherland or terrorism as defined in the law. The judicial review procedure mentioned in article 141 is applicable only when sentence of death is pronounced. Those infringing the rules of compulsory military service shall be subject to the Code of Military Justice."

39. Hence, in all situations involving abuse of office by members of the armed forces or the police, offenders are to be tried in military courts under the Code of Military Justice. In almost all cases of offences not connected with their duties, members of the armed forces may be tried before the competent judiciary body and under the terms of the relevant penal law.

40. Civilians are tried in military courts under the relevant code only when accused of treason in wartime, terrorism or refusal to perform compulsory military service.

41. It may therefore be affirmed that under no circumstances do the ordinary courts have narrower or more restricted jurisdiction compared with the military courts. The competence of the latter is expressly limited to certain types of case, not only when it comes to trying civilians (treason, terrorism and refusal to perform military service), but also in judging members of the armed and police forces themselves, their jurisdiction being restricted to cases of abuse of office.

Trial of civilians for crimes of treason

42. It should be pointed out in this connection that at present, military courts are competent to try those indicted on treason charges in cases of terrorism. This is regulated by Decree-Law 25659 which classifies as treason certain methods employed in the commission of terrorist acts (specifically, conduct constituting "aggravated terrorism"). The procedure applicable in such cases is the summary procedure laid down in the Code of Military Justice for trials in the theatre of action (article 1, Decree-Law 25708). The rules set out in article 13 of Decree-Law 25475 on pre-trial and trial proceedings, may be used to supplement this procedure in the hearing of cases. In that event, the procedure will be shortened by up to two thirds (article 5, Decree-Law 25659). Mention should be made of article 721 of the Code of Military Justice, which provides that in cases of flagrante delicto, a Special Court Martial convenes to receive summary evidence and pass immediate judgement.

43. With the classification of aggravated terrorism as treason and hence subject to the Code of Military Justice, it should be made clear that it is the general rules in force for this type of offence which are applied, including article 78, which was specifically designed to delimit their applicability. It states that the crime of treason shall be deemed to have been committed by any Peruvian by birth or naturalization, or anyone who in whatsoever way is under the protection of the laws of Peru who commits any of the acts enumerated in the 27 subparagraphs of that article.

44. Furthermore, the reasons why it became necessary for military courts to try terrorists reside, according to many authors, in the inability of the ordinary courts, faced with the cowardly methods of intimidation used by terrorists, to do an effective job of dispensing justice and punishing those responsible for terrorist acts in the country. Hence the need to refer cases of aggravated terrorism to military courts, whose specific characteristics enable them to deploy effective internal security measures and thus ensure that terrorist offenders are brought properly to justice.

Regulation of military jurisdiction

45. For the reasons already given, and bearing in mind the power vested in military courts by the Constitution to try civilians in those cases **expressly mentioned in article 173**, any regulation in that regard, based on the recommendation made by the Committee, must be subject to the procedures prescribed for constitutional reform and be consistent with the policy of national pacification.

III. THE NATIONAL COUNCIL OF THE JUDICIARY - THE OMBUDSMAN

The National Council of the Judiciary

46. The National Council of the Judiciary is an autonomous body created under the Constitution and responsible for selecting and appointing judges and procurators, except when those officers are elected by the people. Article 150 of the Constitution prescribes that this Council must be independent and shall be governed by its Organization Act, promulgated by Act No. 26397 of 6 December 1994. Its functions are:

(a) To appoint, on the basis of a public competitive examination and personal evaluation, judges and public prosecutors at all levels;

(b) To confirm the appointment of judges and public prosecutors at all levels every seven years. Those not confirmed may not re-enter the judiciary nor the Office of the Public Prosecutor. The ratification process is independent of disciplinary measures;

(c) To impose the penalty of dismissal upon members of the Supreme Court and Senior Government Procurators, and, at the request of the Supreme Court or the Board of Senior Government Procurators, on judges and procurators at all instances. The final, reasoned decision is issued after an interview with the party concerned and may not be contested.

47. It should be mentioned that in the context of the reform of the judiciary, the Judicial Coordination Council has been set up in an attempt to modernize the judiciary and adapt that State authority to the needs of the nation by creating a reliable and efficient structure and a corps of judicial officers thereby strengthening the rule of law in our country.

Judicial Coordination Council

48. Act No. 26623 of 18 June 1996 created this Council, composed of the President of the Supreme Court of Justice of the Republic, who chairs it, the President of the Constitutional Court, the Minister of Justice, the President of the National Council of the Judiciary, the Attorney-General of the Nation, the President of the Board of Directors of the Academy of the Judiciary, the Doyen of the Lima Bar Association; the President of the Board of Doyens of the Associations of Notaries of Peru; a representative of the Faculties of Law of the National Universities; and a representative of the Faculties of Law of the Private Universities. The Council's functions are the following:

(a) To coordinate the general policy of the organs of the judiciary and to determine an inter-institutional policy to complement it;

(b) To coordinate the plans and programmes of work of each of the bodies represented on the Council;

(c) To execute joint programmes for the preparation, education, training, selection, evaluation and continuing supervision of magistrates and officials of the constituent bodies;

(d) To set up channels for information-sharing by means of networking, on matters and topics of common interest, interchanging studies and research projects and promoting the image of the justice system.

(e) To approve the setting up of standing or temporary committees jointly with other institutions concerned with the administration of justice, so as to unify institutional operating guidelines and settle any conflicts that may arise; and,

(f) Any other functions established by the Council in its organizational and operating regulations.

The Ombudsman

49. Articles 161 and 162 of the 1993 Constitution approved the creation of the Office of the Ombudsman, stipulating that its structure should be determined by an organization act. Pursuant to that constitutional mandate, the Democratic Constituent Congress passed Act No. 26520 (Ombudsman Organization Act), published in the Official Journal of 8 August 1995, setting out as general principles that the incumbent of the post was to be the officer called the Ombudsman, whose duty it would be to safeguard the constitutional and fundamental rights of the individual and the community, and to oversee the discharge of the duties of the State administration and the provision of public services to the community.

50. The Ombudsman is elected by a two-thirds vote in Congress to a term of office of five years. To be elected Ombudsman, a person must be at least 35 years of age, be a lawyer, and have a reputation for integrity and independence. The Ombudsman discharges his functions in a fully autonomous manner. He has no binding mandate, receives no instructions from any authority, and is subject only to the Constitution and the Organization Act governing his Office. He bears neither civil nor criminal liability for the recommendations and in general the opinions he may issue in the discharge of his functions. He enjoys immunity and may not be detained or brought to trial without the authorization of Congress, except in case of flagrante delicto. The procedure for the appointment of the Ombudsman by Congress is laid down in Act No. 26535, published on 4 October 1995 in the Official Journal and superceding article 3 of Act No. 26520.

51. Article 9 of Act No. 26520 sets forth the following as some of the Ombudsman's main functions: to file proceedings for habeas corpus, “amparo”, habeas data, popular proceedings and proceedings for failure to implement decisions, all these in defence of the constitutional and fundamental rights of the individual and of the community. The Ombudsman may also intervene in habeas corpus proceedings to assist in the defence of the injured party. Further, he organizes and administers the National Register of Remand and Sentenced Detainees.

52. Article 16 of Act No. 26520 prescribes that the authorities, officials and servants of public bodies must provide any information requested by the Ombudsman and cooperate in any inspections that he may decide to make of government departments, national police establishments and penitentiaries, and State organs subject to his examination. To that end he may appear in person,

even without prior notice, to obtain any requisite data or information, carry out personal interviews or examine files, reports, documents, background information and any other elements that he may deem useful.

53. Likewise, article 17 of the Act cited provides that article 16 shall be implemented, without prejudice to the legal restrictions in regard to judicial secrecy and the invocation of the supremacy of the interests of the State, in cases that are duly justified by the competent bodies, solely on questions pertaining to security, national defence or international relations. Article 17 further provides that the decision not to transmit or display documents for the reasons given in the preceding paragraph should be approved in agreement with the Ministers of Defence, the Interior or Foreign Affairs, depending on the case, by the head of the sector concerned, which will issue the requisite certification for transmission to the Ombudsman.

54. Finally, if the same case of human rights violation is being investigated by another government authority, official or institution, the Ombudsman shall have access to all relevant information. He may likewise transmit to the competent authorities the results of his own investigation.

55. During states of exception, the Ombudsman, in the performance of his constitutional functions, may draw the attention of the competent administrative, judicial or military authorities to measures which, in his judgement, are patently contrary to the Constitution or affect the principal constitutional and fundamental rights of the individual and the community and which should therefore be repealed or amended immediately.

56. Act No. 26295 makes him responsible for organizing and administering the National Register of Remand and Sentenced Detainees and provides that he shall chair its Coordinating Committee. He also has the right to initiate legislation and may propose measures that would help improve the performance of his functions. This system of monitoring, which was previously a function of the Office of the Public Prosecutor-Attorney-General, undoubtedly represents a major step forward in the protection of human rights and shows the Peruvian Government's commitment to ensuring respect for them.

Appointment of the Ombudsman

57. By Legislative Resolution No. 26584 of 1 April 1996, the Congress appointed the Ombudsman - a further clear illustration of the process of democratizing the country's institutions. The choice fell upon Dr. Jorge Vicente Santistevan y de Noriega, who has decided to give priority to women, children and internally displaced persons and has proposed to that end the creation of branch offices of the Ombudsman's office where needed throughout the country. Once set up, the Ombudsman's office will begin operating in September 1997. It already has a budget and adequate operating infrastructure.

IV. ACTIVITIES OF THE PROCURATORS

58. Article 2.24 (f) of the Constitution provides that all persons have the right to personal freedom and security. Therefore, no one may be detained except by a written and reasoned order issued by the courts, or by the police

authorities in the event of flagrante delicto. The detainee must be placed at the disposal of the competent court within 24 hours or on the expiry of the prescribed period.

59. The constitutional provision cited further states that these time limits do not apply in cases of terrorism, espionage and illicit drug trafficking. In such cases, the police authorities may take suspects into pre-trial custody for a period not exceeding 15 calendar days. They must report to the Office of the Public Prosecutor and to the courts, which may take over jurisdiction before the end of the period.

60. Pre-trial police custody for a period not exceeding 15 days is therefore envisaged in the Constitution. This does not, however, mean that detainees lack proper defence, for the part played by the Office of the Public Prosecutor was not eliminated under the anti-terrorist legislation. The procurator not only visits detention centres and arranges for the defence of detainees, but is also responsible for ensuring that police investigations remain within the bounds set by the law. All detentions are reported to the Office of the Public Prosecutor and to the courts and it is from that moment that the procurators begin their work of monitoring and oversight.

61. For cases of treason, Decree-Law 25744 (Rules governing police investigations, pre-trial and trial proceedings, and execution of sentence for crimes of treason as defined in Decree-Law 25659), which was published in September 1992, provided for an extension of pre-trial police custody, though the decision lay not with the police authorities themselves but with the judicial authority on duty in the special military court. In any event, and without prejudice to the constitutional guarantees set out above, it must be considered that the present Constitution, promulgated in 1993, does not permit such an extension (article 2.24 (f)).

62. Under article 12 (c) of Decree-Law 25475, the police may detain persons suspected of involvement in crimes of terrorism for a period not exceeding 15 calendar days, and must submit a written report within 24 hours to the Office of the Public Prosecutor and to the competent penal court.

Special register of disappeared persons

63. Decree-Law No. 25592 of 26 June 1992 prescribed prison sentences for officials or public servants who deprive persons of their liberty by ordering and carrying out actions that result in their disappearance, once this has been duly substantiated. It also provided that in addition to keeping a register of persons reported missing, containing the information necessary for their identification, police stations should immediately inform the Provincial Procurator of reports of persons missing within his district.

64. The Decree further provides that provincial procurators shall investigate complaints about missing persons and report on the situation to the senior procurator, of the circuit jurisdiction concerned. The latter will in turn report to the Attorney-General's Office, which will act in accordance with its powers and functions. The Attorney-General's Office will submit a monthly report to the National Human Rights Council of the Ministry of Justice

on complaints concerning persons missing throughout the country. A draft law is currently being studied under which that report would also be submitted to the Congressional Committee on Human Rights and Pacification.

Register of reports on disappeared persons

65. In keeping with the foregoing and based on its powers and functions, the Attorney-General's Office issued on 10 July 1992 resolution No. 342-92-MP-FN providing that all provincial procurators for penal matters and provincial attorneys with mixed duties shall, during their respective duty periods, keep a register of reports of missing persons.

66. Decree Law No. 25592 stipulates that the above-mentioned officials must give priority to complaints known to them concerning disappeared persons. They shall be responsible for the immediate investigation of such complaints and shall inform the most senior government procurator of the results of that investigation within 48 hours of receipt or referral of the complaint. They shall also visit jails and similar establishments in order to investigate complaints of disappeared persons which have been lodged with their offices.

67. Last, article 5 of Resolution No. 342-92-MP-FN calls for the Special Offices of the Ombudsman and Procurator for Human Rights to establish a Register of Complaints relating to Disappeared Persons, containing a synopsis of information provided by senior government procurators. The Office shall also prepare appropriate forms for the recording and collation of that information so that it can be transmitted to the National Council for Human Rights of the Ministry of Justice.

Special Offices of the Ombudsman and Procurator for Human Rights

68. Supreme Decree No. 009-93-JUS of 3 April 1993 approved the basic structure of the Office of the Public Prosecutor and the Special Offices of the Ombudsman and Procurator for Human Rights, considered one of its line agencies, which operate in the various judicial districts of the Republic.

69. Accordingly, by Circular No. 005-94-MP-FN, the Attorney-General's Office specified the functions and responsibilities of the Special Offices of the Ombudsman and Procurator for Human Rights, pending the Ombudsman's assumption of his own functions, in accordance with the Constitution. This circular states that under article 159, paragraph 1, of the Constitution, the Office of the Public Prosecutor, as the representative of society before the law, is responsible for initiating judicial proceedings, either on its own behalf or at the request of a third party, in order to uphold the law and the public interests protected thereby and to ensure the independence of the judiciary and the proper administration of justice.

70. To date, the Special Offices of the Ombudsman and Procurator for Human Rights of the various judicial districts of the Republic have been given the following responsibilities in the field of human rights:

(a) Investigating reports of human rights violations, enforced disappearance, extrajudicial execution, ill-treatment, wounding or torture, offences committed by members of the Peruvian police or armed forces,

arbitrary detention, ill-treatment during detention, delays in judicial proceedings, irregularities during the trial of cases involving terrorism, and ill-treatment of prison inmates, in order to ensure full respect for human rights; and, if necessary, bringing violations of those rights to the attention of the competent provincial procurators' offices;

(b) Ensuring respect for the human rights of, inter alia, the mentally ill, the disabled, alcoholics and drug addicts;

(c) Maintaining the Register of Complaints relating to Disappeared Persons called for under Resolution No. 342-MP-FN of 10 July 1992.

71. However, the 1993 Political Constitution created the institution of the Ombudsman's Office, with the responsibilities stipulated therein, as an autonomous body independent of the Office of the Public Prosecutor. As a result, the latter is no longer competent to act as the people's Ombudsman vis-à-vis the Government or to handle citizens' complaints and reports concerning civil servants and government officials in general.

72. The Special Offices of the Ombudsman and Procurator for Human Rights were converted into ordinary offices by Supreme Decree No. 036-94-JUS of 17 June 1994, which altered the basic structure of the Office of the Public Prosecutor; however, on 16 November 1994, the Government promulgated Act No. 26387, which ordered them to be re-established pending the installation and entry into operation of the Ombudsman's Office.

73. On 17 November 1994, the Attorney-General's Office, in exercise of its mandate, issued Resolution No. 709-94-MP-FN, which re-established the Special Offices of the Ombudsman and Procurator for Human Rights in the judicial districts of Ancash, Apurímac, Arequipa, Ayacucho, Huancavelica, Huánuco, Junín, La Libertad, Lima, Callao, Piura and San Martín.

V. DECLARATION PROVIDED FOR UNDER ARTICLES 21 AND 22 OF THE CONVENTION

74. Peru is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, an international instrument which was adopted by Legislative Decision No. 24815 of 12 May 1988; it was ratified on 14 June 1988 and the instruments of ratification were deposited on 7 July 1988. The possibility of making the declaration under articles 21 and 22 of the Convention is currently under consideration by the competent bodies, in accordance with domestic procedures, so that the Peruvian State can take a decision on the matter.

VI. TORTURE AS AN INDEPENDENT OFFENCE

75. Bills proposing mention in the Penal Code of offences defined as “human rights violations”, including torture, have been prepared and are currently undergoing the normal procedures for consideration by Congress.

VII. EDUCATION OF LAW ENFORCEMENT PERSONNEL, CIVIL AND MILITARY, AND PROGRAMMES FOR THE FULL REHABILITATION OF VICTIMS

76. National pacification must be achieved in a context of respect for human rights. To that end, legislation has been promulgated in order to guarantee the full exercise of those rights during action taken as part of the fight against terrorism. This legislation includes Act No. 25211 of 16 May 1990, which calls for the implementation of a national plan for the dissemination of, and instruction concerning, the Peruvian Constitution and covenants and conventions for the protection and promotion of human rights. The plan is now being put into effect in all civilian and military schools, government offices and State-owned businesses.

77. There have undeniably been cases of human rights violations, but it should be emphasized that this practice is not condoned in Peru. For that reason, the military provides soldiers with instruction and awareness training, and the armed forces and the police have issued numerous directives and regulations aimed at, firstly, teaching soldiers and police officers to respect human rights, secondly, preventing behaviour towards civilians which constitutes violation of their fundamental rights and, thirdly, severely punishing those responsible for human rights violations.

78. Thus, under Act No. 25211 of 16 May 1990 (Dissemination of, and instruction concerning, the Peruvian Constitution and covenants and conventions for the protection and promotion of human rights in all civilian and military schools, government offices and State-owned companies) and a Presidential Directive approved by the Council of Ministers on 9 September 1991 (Presidential policy guidelines on human rights within the framework of national pacification), the following directives and regulations have been issued:

(a) Directive No. 023-MD-SGMD of October 1991: contains rules and procedures to be followed during military operations so as to ensure respect for and protection of human rights; it mentions a number of aspects such as:

(i) Cooperation with representatives of the Office of the Public Prosecutor in the exercise of their functions;

(ii) Intervention of the inspectorates in cases of human rights violations in order to implement a system for receiving, processing and following up reports of such violations;

(b) Directive No. 05-MINDEF of April 1992: instructs the armed forces to develop programmes of human rights education for staff members at all levels;

(c) Directive No. 025-CCFFAA-D3-1E of 23 November 1993: issues instructions for standardizing human rights instruction to the Peruvian armed forces and police at all levels at which counterterrorism operations are carried out, namely rank and file and junior staff (technicians and non-commissioned officers), lieutenants and captains (company level), and majors (battalion level), to ensure that all staff receive instruction. It establishes programmes on the following human rights-related matters: basic

aspects, international law, domestic law, anti-terrorist law, ethics and human rights violations, protection bodies, international humanitarian law and its relationship to human rights. The following instructional levels were borne in mind in establishing curricula:

(i) training schools for officers and junior staff (60 class hours);

(ii) armed forces and police training schools (lieutenants) (35 class hours);

(iii) classes for rank and file members of the armed forces and police (24 class hours);

(d) Armed Forces Joint Command Directive No. 01-COFI-DOP/PLN of April 1994: includes provisions concerning pacification planning by the military. Annex 8 thereof (Human rights) contains provisions to ensure that human rights are respected and protected during operations to combat terrorism and drug trafficking. This document regulates a series of activities such as:

(i) Procedures to be followed in cases involving complaints lodged against members of the security forces for human rights violations allegedly committed as a consequence of the operations;

(ii) Procedures to be borne in mind in lodging complaints of human rights violations against terrorists;

(e) Directive No. 001-EMFFAA/DDHH of January 1995: sets standards and includes provisions concerning human rights in the areas where a state of emergency has been declared and where operations pertaining to any aspect of national security are conducted, giving specific responsibilities to the armed forces.

79. The Ministry of Defence has organized a system for the implementation of these regulations, which has the following structure:

(a) A directing agency consisting of the Office of the Under-Secretary for Pacification and Human Rights of the Ministry of Defence;

(b) A promotional agency consisting of the Division of Human Rights of the Armed Forces Joint Command;

(c) Executing agencies consisting of the national security zones, the Port Authority and the counterterrorism forces, which themselves have units in the national security subregions (large unit) and national security areas (battalion);

(d) At each level, assistance is provided by a Military Legal Service official.

Self-defence committees

80. Since public support is one of the most important aspects of the pacification strategy, self-defence committees have been created in order to achieve that goal. In some cases, attacks on them by terrorist groups have resulted in human rights violations by these committees.

81. To cope with this situation, the Armed Forces Joint Command has issued Directive No. 011-CCVFFAA-D3/IE-1993, which stipulates that the members of these committees must be given instruction in human rights and international humanitarian law, a training programme being prepared to that end.

Publication of books, pamphlets and other documents

82. In order to facilitate this instruction, a series of publications in the area of human rights (such as manuals, pamphlets and posters) have been produced. These include a teacher's manual, which contains human rights course syllabuses, and a special publication aimed at informing all personnel of the most important aspects of respect for human rights and entitled “The Ten Commandments of the Forces of Law and Order”. In 1993, this publication was distributed to all members of the armed forces and the police. In 1994, an armed forces manual entitled “Human Rights: Principles, Rules and Procedures”, which describes the programmes developed on the basis of the above-mentioned directives, was printed and distributed.

Compensation and rehabilitation of victims

83. It must be borne in mind that some damage, such as loss of human life, deprivation of liberty, maiming, mental illness or, generally speaking, diminished health, is irreparable; nevertheless, it is essential for a State under the rule of law such as Peru to find appropriate ways of providing some degree of compensation for damage caused by human rights violations, judicial error or abuse of authority.

84. We attach the greatest importance to incorporating provisions for compensation, reparation and the elimination of human rights violations into national legislation as a means of alleviating the suffering of the victims and, ideally, of eliminating the consequences of these acts and restoring the conditions which prevailed prior to the offence.

85. Article 139, paragraph 7, of the Constitution guarantees compensation, in a form to be determined by law, for judicial error during criminal proceedings and for arbitrary detention, without prejudice to any personal liability incurred. Act No. 24973 of 28 December 1988, which remains in force, deals with compensation for judicial error and arbitrary detention. Compensation is paid by the State through the National Judicial Error and Arbitrary Detention Compensation Fund after an accelerated summary civil court hearing.

86. The Civil Code deals in broad terms with the issue of non-contractual liability or wrongful act, stipulating that anyone who has been harmed by the illegal conduct of a public official or civil servant may claim appropriate compensation from the offender or the State (Civil Code, arts. 1969 and 1981).

Under civil law, articles 1969 et seq. of the Civil Code establish that anyone who causes harm to another through wilful misconduct or culpable negligence must pay compensation to the victim. The Civil Code states that anyone who has another person under his authority is responsible for harm caused by that person while on duty or during the exercise of his functions. In this case, both the direct and indirect offenders would be held jointly liable.

87. The Civil Code also establishes the existence of non-material damage, specifying that the victim must be compensated proportionately to the degree of damage and to the harm done to the victim or his family. Compensation must take into account the consequences of the action or omission which caused the personal injury or non-material damage, and there must be a causal relationship between the act and the damage.

88. Moreover, the Penal Code in force also covers civil compensation for harm or damage incurred. This is determined at the time of conviction or sentencing and includes both restitution of property or an equivalent monetary payment and compensation for damages. This procedure is also covered by the Civil Code provisions on compensation.

89. Legislative Decree No. 768 of 4 March 1992 establishes that compensation for arbitrary detention may be awarded by the civil court judge of the place where detention occurred or of the victim's place of residence, at the victim's discretion. It also stipulates that the procedure to be followed in such cases is the shortened hearing, which, as its name indicates, is a type of proceeding whereby rapid settlement of a claim is sought. Its various stages therefore include both the possibility of appearing at a hearing where evidence is presented to demonstrate the reality of the damage alleged and that of appearing at an earlier stage of the procedure, at which time the parties to the conflict mediate their differences and seek an equitable solution.

90. This process has been adopted in order to ensure that the right to compensation can be exercised by all, in an attempt to avoid complicated proceedings and bearing in mind the possible vulnerability of the victims. It is also recognized that compensation must be proportionate to such damage resulting from human rights violations as can be calculated monetarily, taking into account the material or non-material damage sustained by the victim.

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