

# Heeding Peru's Lesson: Paying Reparations to Detainees of Anti-Terrorism Laws

Lisa J. Laplante\*

## Abstract

This article examines how Peru's anti-terrorism legislation erected as part of its 20 year internal armed conflict against insurgent groups led to systematic violations of human rights. The defects of these laws, particularly those related to the lack of procedural due process rights, resulted in the arrest and detention of thousands of people, the majority of whom were eventually found innocent and released. These laws were eventually ruled unconstitutional by Peru's Constitutional Tribunal. However, before then, numerous people detained under the laws submitted their complaints to international human rights monitoring bodies such as the United Nations Human Rights Committee and the Inter-American Human Rights Commission and Court. Decisions by these institutions provide detailed guidance on legislative defects that *per se* violate non-derogable human rights, while also recognising that those detained under these laws have a right to reparations. The author argues these precedents put other nations on notice as they design their own anti-terrorism legislation.

## 1. Introduction

As critics vociferously condemn examples of anti-terrorism legislation that omit protection of individual liberties, those detained under these laws are beginning to file national civil suits seeking redress. The outcome of this litigation may establish that this genre of national security legislation does not come without later economic costs, in addition to the more immediate human costs. A substantial body of international human rights jurisprudence supports this assertion, and examples of anti-terrorism legislation have been found to be in violation of the fundamental rights of those detained under it. Moreover, these decisions hold that detainees enjoy the right to reparations for their arbitrary detention and unfair trials, among other violations.

Many of these decisions arose out of the situation caused by Peru's anti-terrorism legislation erected by former authoritarian president Alberto Fujimori in 1992 in response to that country's ongoing internal armed conflict against terrorist groups. Taken as a whole, this jurisprudence provides a laundry list of those defects in legislative design that inevitably violate individual rights and simultaneously produce grave and disturbing consequences that perturb our moral consciousness. Indeed, these decisions on Peru's much criticised attempt to combat terrorism offer crucial lessons for other countries as they seek to balance national security with individual human rights.

For instance, in *Casafranca v Peru*,<sup>1</sup> the United Nations Human Rights Committee (HRC) evaluated the arrest, detention, trial and conviction of a Peruvian citizen imprisoned for

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\* B.A., Public Policy, Brown University 1991; M.Ed., University of Massachusetts/Amherst 1994; J.D., New York University School of Law, 1999. Legal consultant for Liberated Innocents in Lima, Peru; Research Associate and Project Director, Praxis: An Institute for Social Justice, Boston, USA.

1 981/01, CCPR/C/78/D/981/2001 (2003); II IHRR 79 (2003).

the offence of terrorism in Peru, finding numerous violations of the International Covenant of Civil and Political Rights 1966 (ICCPR).<sup>2</sup> In finding incidents of torture, arbitrary arrest and detention, and violations of due process, the HRC established important jurisprudence regarding standards for the treatment of terrorist suspects. The *Casafranca* case offers a chilling look at the consequences of anti-terrorism legislation that unabashedly strips away due process in the name of combating terrorism. It also provides a mere snapshot of the systematic violation of thousands of other Peruvians who were caught in the wide net woven by Peru's laws.

Casafranca suffered two arrests for the same charges of terrorism over a ten-year time span based only on police attestations and the declarations of other people being held in coercive situations. As a young student of dentistry, Casafranca was first arrested in October 1986 after being stopped at gunpoint by the police. He was released and then later arrested once more in a building near his home without an arrest warrant, although he was not in *flagrante delicto*. He was held for 22 days incommunicado in preventive detention without charges in the offices of the national police office responsible for combating terrorism.

During his detention, the victim alleged to have been subjected to savage and cruel physical, psychological and mental torture, which he eventually reported in his second trial and to the police. According to the victim, the police forced him to make self-incriminating statements through physical manipulations of his body, which included bending back his hands, twisting his arms, hoisting him in the air, putting a pistol in his mouth, attempting to drown him at the beach and putting a stick up his anus.

Despite maintaining his innocence, Casafranca was charged in 1986 with committing homicide, causing bodily injury and carrying out acts of terrorism. The police accused him of commanding the militia arm of a terrorist cell of *Sendero Luminoso* (Shining Path), the Maoist group that began a reign of terror in Peru in 1980. Although Casafranca did not know the other people charged along with him, those others accused him of the above stated crimes, and Casafranca hypothesised that their accusations were forced under duress of torture. This was a common practice during this regime, and will be discussed below.<sup>3</sup>

No other evidence corroborated these accusations, as the police admitted that a search of Casafranca's person and home did not reveal any weapons, explosives or subversive propaganda. They did claim, however, that a writing analysis revealed political texts considered subversive to be his. The investigating prosecutor relied only on the police statement and accusation of the other defendants. However, the interrogating judges found him innocent of the charges, acquitting him in December 1988.

Almost ten years later, the Office of the Attorney General applied to annul this 1988 judgment. As a consequence, in April 1997, 'faceless' (masked) judges found that the facts had not been properly determined nor the evidence verified and declared the judgment void. As a result, the police arrested Casafranca at his home in September 1997 based on the same charges that led to his arrest in 1986. Consequently, in January 1998 he was sentenced to 25 years detention by the Special Criminal Counter-Terrorism Division, whose decision was later confirmed by the Supreme Court. The communication to the HRC points out that the judgment forming the basis of his conviction was a literal reproduction of the police attestation.

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<sup>2</sup> 999 UNTS 171.

<sup>3</sup> Although not discussed in this communication, Peru's anti-terrorism strategy included benefits for those who 'repented', which led to many false accusations as suspects attempted to escape duress, or trial and conviction altogether, by accusing other people. The law permitted a suspect to be convicted based on these accusation alone. See Régimen de Arrepentimiento, Decreto Ley No. 25499 del, 16 mayo 1992; and Reglamento Decreto Supremo No. 013-93-JUS Del, 8 mayo 1993.

In its examination of the facts of this case, the HRC found violations of Articles 7, 9, 14 and 15 of the ICCPR in relation to Casafranca's arbitrary arrest and detention, torture, delayed judicial review and unfair trial. Moreover, the HRC declared that the State Party was obligated to release and compensate Casafranca under Article 2(3)(a)<sup>4</sup> of the ICCPR and ensure that similar violations do not occur in future. The HRC reiterated this obligation in the concluding paragraphs of its decision, pointing out that the State, by becoming a party to the Optional Protocol, essentially recognised the competence of the Committee to determine whether there has been a violation of the ICCPR, and in such a case to 'provide an effective and enforceable remedy when a violation has been established.'<sup>5</sup>

The *Casafranca* case resonates with a basic principle in international law that where a State has violated the rights of an individual there arises an obligation to reinstate the victim's rights and repair the harm caused him or her.<sup>6</sup> This obligation, recognised as customary law, as well as consecrated in various human rights treaties, applies even during states of emergencies and times when national security is at risk. Indeed, it is often during such situations that the principle becomes all the more relevant and important.

## 2. Peru: Dealing with the Aftermath of a War against Terrorism

The HRC's decision in *Casafranca* came on the heels of the Peruvian Truth and Reconciliation Commission's (TRC) Final Report, published in August 2003.<sup>7</sup> The story of the alleged victim offers just a glimpse of the magnitude of personal tragedies and the seriousness of the human rights violations that resulted from Peru's 20 year internal armed conflict with insurgent groups that led to a prolonged state of emergency and laws and practices that compromised personal freedoms—stories revealed by the TRC in fuller detail in its nine volume report.

The *Casafranca* case and the results of TRC's truth gathering efforts provide poignant lessons amid increased international criticism of other national campaigns against terrorism perceived to erode fundamental human rights protections. In particular, the *Casafranca* decision, read in conjunction with earlier HRC decisions concerning the impact of Peru's anti-terrorism legislation, reinforces the principle that even during states of emergency and battles against terrorism certain human rights remain non-derogable. This principle includes prohibitions against torture, cruel, degrading and inhuman treatment and the preservation of judicial guarantees like due process designed to protect against the violation of these fundamental rights.

In effect, the HRC's order for the release and compensation of Casafranca puts all other State Parties to the ICCPR on notice as they design national security legislation. That is, it informs them that States do not have an unlimited prerogative to adopt any strategy deemed convenient to their campaign, but instead must observe human rights in their treatment of those

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4 'Each State Party to the present Covenant undertakes: ... (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity...'

5 Supra n. 1 at para. 10.

6 See, for cases and discussion, Laplante, 'Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and The Duty of Prevention', (2004) 22 *Netherlands Quarterly of Human Rights* 347.

7 Peruvian Truth and Reconciliation Commission, Final Report, 28 August 2003, available at: <http://www.cverdad.org.pe/ingles/ifinal/index.php>. (TRC Final Report).

suspected of acts of national terrorism.<sup>8</sup> The *Casafranca* jurisprudence also can be used to advise States to be proactive in designing national security measures so as not to exclude judicial protections, thus obviating the need to later pay for the damages caused by such omissions.

This said, the significance of the *Casafranca* decision is best understood within the context of Peru's bloody past. The TRC has estimated that approximately 69,000 people were killed or disappeared during Peru's battle. This war began in 1980 with the emergence of the self-proclaimed Maoist party *Sendero Luminoso*, whose acts of terror against the general population prompted each incumbent government during almost two decades of internal armed conflict to adopt its own drastic measures to attempt to crush this national threat. All of these governments were democratically elected and publicly committed to upholding the rule of law and human rights, although in practice failed to observe such principles.

In particular, anti-terrorism laws devoid of due process guarantees were touted by the state as its greatest weapon for capturing terrorist leaders, but in reality these laws became its sharpest blade against hundreds of innocent people.<sup>9</sup> From 1980 until the present, Peru has established more than 22 laws in its effort to combat terrorism. The most criticised are those promulgated in 1992 during Alberto Fujimori's National Emergency and Reconstruction government in which the national Congress was shut down; the same regime under which Casafranca suffered his second arrest for terrorism in 1997.

Stripping away due process protections, Fujimori's anti-terrorism laws compromised the protected rights of hundreds of people like Casafranca by allowing for:

- arrests without a warrant based on an overly vague definition of terrorism and sedition;
- prolonged incommunicado detention during interrogation;
- denial of petitions of *habeas corpus*;
- conditions that permitted mistreatment and torture used to elicit coerced confessions;
- being paraded before the press in stripped uniforms undermining presumptions of innocence;
- prosecutors mandated to bring charges even when they could offer no evidence, cursory trials before 'faceless' (masked) judges;
- limited or no opportunity to review the evidence or cross examine witnesses;
- convictions based solely on police attestations or confessions and/or the uncorroborated testimony of another person 'repenting' in exchange for accusations against others and a lower sentence; and other serious limitations to the defendant's ability to a self defense.<sup>10</sup>

The legislation also required many suspects to be tried before military courts for sedition, although this charge varied little from the enumerated terrorist acts which triggered jurisdiction of civil courts. According to complaints filed at the national level with human rights

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8 While this article explores this general principle based on International Human Rights Law, such protection also arises out of the Geneva conventions which apply to situations of armed conflict. See generally Kalshoven, (ed.), *The Implementation of International Humanitarian Law* (Netherlands; Martinus Nijhoff Publisher, 1989); Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002).

9 The Peruvian TRC provides ample evidence that it was in fact years of intelligence work that led to the arrest of terrorist leaders and not the anti-terrorist legislation promulgated by Fujimori. Peruvian Truth and Reconciliation Commission, Hatun Willakuy: Versión Abreviada del Informe Final de la Comisión De La Verdad y Reconciliación (Lima, Peru: 2004) at 258.

10 *Informe de la Comisión de Juristas Internacionales sobre la Administración de Justicia en Perú* (Lima, Peru: Instituto de Defensa Legal, 1994) at 52-68.

organisations, Casafranca's experience merely offers a template of the typical experience had by the thousands of other people subject to Peru's anti-terrorism legal system. Indeed, his story could be substituted with a countless number of other Kafka-esque tales of finding oneself in the wrong place at the wrong time, only to spend as many as 15 years waiting to vindicate one's innocence. In fact, prior to the *Casafranca* decision, the HRC issued other communications involving scenarios factually similar to the one in *Casafranca* that also gave rise to violations of the ICCPR. In one case, the HRC commented that Peru's '[anti-terrorism legal system] fails to guarantee a cardinal aspect of a fair trial within the meaning of Article 14 of the ICCPR.'<sup>11</sup> This finding was echoed by other international monitoring bodies as well as jurists.

### A. *International Condemnation of Peru's anti-terrorist laws*

Over the years, other regional and international human rights bodies have echoed the criticisms of the HRC concerning the defects of Peru's antiterrorism laws, expressing particular concern about the absence of judicial protections.<sup>12</sup> In fact, in the case of *Loayza-Tamayo*, the Inter-American Court of Human Rights issued strong orders to reform the national laws so they would conform to the standards set out in the Inter-American Convention.<sup>13</sup>

The Inter-American Court's call for reform was repeated in the case of *Castillo Petruzzi et. al.*, in which the Court ordered the State to '... adopt the appropriate measures to amend those laws and ensure the enjoyment of the rights recognized in the Convention to all persons within its jurisdiction, without exception.'<sup>14</sup> In the *Cantoral Benavides* case, the Inter-American Court reiterated the principle that 'a rule per se can violate Article 2 of the Convention, whether or not it has been applied in a specific case.'<sup>15</sup> In that decision, the Court wrote:

177. the State violated Articles 7(1), 7(2), 7(3), 7(4) and 7(5), 5(1) and 5(2), 8(1), 8(2), 8(2)c, d, f) and g), 8(3), 8(5), 9, 7(6) and 25(1) of the American Convention to the detriment of Luis Alberto Cantoral-Benavides, meaning that it has not complied with the general duty of respecting the rights and freedoms recognized in the Convention and of guaranteeing their free and full exercise, as established in Article 1(1) of same.

178. The Court observes, furthermore, as it has in the past, that the provisions contained in the emergency legislation adopted by the State to combat terrorism, and in particular Decree Laws No. 25.475 and 25.659, applied to Mr. Luis Alberto

11 577/94, *Polay Campus v Peru* CCPR/C/61/D/577/1994 (1997); 10 IHRR 628 (2003) (The HRC found violations of Articles 10(1) and 7 of the ICCPR for the conditions of the victim's detention, including being held incommunicado immediately following arrest, for the degrading treatment of being put on public display in a cage, as well as for a year of solitary confinement following his conviction; and of Article 14 (1), (2) and (3) (b) and (d), ICCPR for a criminal trial before 'faceless judges' as well as the violation of the presumption of innocence). See also, 678/96, *Gutierrez Vivance v Peru*, CCPR/C/74/D/678/1996 (2002); 9 IHRR 924 (2002) where the HRC found violations of Articles 14(1) and (3)(c), ICCPR for fair trial violations including the 'faceless judges'; and 688/96, *Arredondo v Peru*, CCPR/C/69/D/688/1996 (2000); 8 IHRR 59 (2001) where the HRC found violations of Article 10(1), ICCPR for conditions of detention; Articles 9(1) and (3), ICCPR for arbitrary arrest; Article 14 (1), ICCPR for fair trial violations including use of 'faceless judges'; and Article 14(3)(c), ICCPR for failure to provide undue delay in criminal proceedings.

12 See, for example, IACtHR, Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.83, Doc. 31 (1993) at paras 20-4 and paras 52-73 and IACtHR, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev. (2000) at paras 64-116.

13 *Loayza-Tamayo v Peru* IACtHR Series C 42 (1997); 6 IHRR 683 (1999) at paras 68 and 192(5).

14 *Castillo Petruzzi et. al. Peru* IACtHR Series C 52 (1999); 7 IHRR 690 (2000) at para. 222.

15 *Cantoral Benavides v Peru* IACtHR Series C 69 (2000); 8 IHRR 1049 (2001) at para. 176 (footnotes omitted).

Cantoral-Benavides in the present case, violate Article 2 of the American Convention, because the fact that said decrees had been issued and were in force in Peru means that the State had not taken the proper steps of internal law to enforce the rights embodied in the Convention.<sup>16</sup>

In 1993, the Inter-American Commission for Human Rights similarly concluded that:

This new body of law is contrary to universally accepted principles of legality, due process, judicial guarantees and the right of self-defense; under these laws, merely being suspected of a terrorist act or of in any way collaborating in terrorist acts is sufficient cause to hold someone in prison for long periods, regardless of whether that person actually committed an act classified as terrorism or treason. In the opinion of the Commission, this is a grave threat to the people's juridical security.<sup>17</sup>

Criticisms of the anti-terrorism laws have also come from different international organisations and entities. For example, the International Commission of Jurists commented that:

By not linking the proscribed conduct to the subjective element of terrorist intent, this decree law can be interpreted to permit law enforcement officials to regard almost any act of violence as a crime of terrorism (or treason). A criminal statute susceptible to such interpretations invites grave errors that can result in serious miscarriages of justice.<sup>18</sup>

With the benefit of hindsight, Peru's TRC confirmed that these worries were well-founded. In its chapter devoted to the subject of Peru's anti-terrorism legislation the TRC wrote 'the phenomena of innocent people in prison constitutes one of the most dramatic consequences of the application of the antiterrorism legislation not only for the number of people affected, but also the gravity of violations committed against their fundamental rights.'<sup>19</sup>

One expert witness before the Inter-American Court of Human Rights testified that 'The principal characteristic of the new legislation was its capacity to be used as much as an instrument to sanction conduct that really constituted crimes as it could also over-criminalize acts that, from a rational point of view, should not be judiciable.' That is, 'it created the latent possibility that any conduct undesirable to the authoritarian regime could be included as a terrorist act.'<sup>20</sup> In fact, the case in which this expert testified related to the arrest and detention of a medical doctor accused of treating a terrorist combatant who became a suspect after her husband, a journalist, wrote for the national newspaper considered sympathetic to the terrorists groups. Moreover, given that the definition of terrorism included the crimes of apology and association, the net became even wider. One adolescent living in a rural community in the Andean highlands fed a group passing by who, unbeknown to the boy, turned out to be members

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<sup>16</sup> Ibid. at paras. 177-8.

<sup>17</sup> Inter-American Commission on Human Rights, 'Peru', Annual Report, 11 February 1994, OEA/Ser.L/V.85, Doc. 9 rev. The Commission ratified this opinion in its subsequent special report on Peru in 2000, supra n. 12 at para. 81. More recently, the CIDH published a report which provides general human rights guidelines for anti-terrorism legislation. See, CIDH, Report On Terrorism And Human Rights, 22 October 2002, OEA/Ser.L/V/II.116.

<sup>18</sup> International Commission of Jurists, *La Administración de Justicia en Perú* (Lima, Peru: Instituto de Defensa Legal, 1993) at para. 45.

<sup>19</sup> TRC Final Report, supra n. 7, Volume VI, Chapter 1.6 'La violación del debido proceso' at 427.

<sup>20</sup> *De la Cruz-Flores v Peru* IACtHR Series C 115 (2004) at para. 49. (translation by the author).

of *Sendero Luminoso*. Thus when asked by the police, the youth readily affirmed that he had fed these strangers. As a result, he spent 15 years in jail during which time he suffered torture.<sup>21</sup>

### ***B. Responding to Critics: Identifying ‘the innocents’ in prison***

Even before the Peruvian TRC characterised the effect of the anti-terrorism law not even Fujimori could ignore the ‘phenomena’ identified by international bodies. In 1996, under pressure from the national and international human rights community, he created a special commission to review cases of allegedly innocent people imprisoned in maximum security prisons on charges of terrorism. This review process has resulted in the release of almost 800 people through presidential pardon (a much criticised misnomer given their innocence), after the commission found no reasonable basis for their detention. These numbers do not include the people also subject to the anti-terrorism laws who were absolved of all charges upon conclusion of their trial, such as occurred in Casafranca’s first hearing on charges of terrorism in 1988.

In fact, the TRC estimates that approximately 48.5% of 33,954 persons detained between 1983-2000 were absolved through the regular judicial proceedings.<sup>22</sup> Reports by human rights organisations confirm that many of these people spent years in maximum security prisons, enduring mistreatment and torture, before being exonerated. The Peruvian Ombudsman has opined that most of the instances of innocent people would have been avoided had the ordinary juridical guarantees like due process been in place.<sup>23</sup>

### ***C. Creating Conditions Conducive to a Policy of Torture***

The fact that most of the people arrested for terrorism, including Casafranca, were also subject to torture and mistreatment, especially during interrogation, points further to the inherent risks of forsaking judicial protections in Peru’s anti-terrorism legislation that gave unduly wide discretion to officers responsible for handling suspects. Casafranca’s complaint of degrading treatment arrived after the HRC had already expressed its profound concern about the ‘persistent reports of torture or cruel, inhumane and degrading treatment of persons detained under suspicion of involvement in terrorist activities...’.<sup>24</sup> Similarly, the Committee against Torture concluded in its investigation of Peru’s observation of the UN Convention against Torture, that ‘despite the existence of constitutional provisions protecting them, the rights of detained persons have been undermined by the anti-terrorism legislation, most of which was adopted in 1992 and is still in force, and which makes detainees particularly vulnerable to torture.’<sup>25</sup>

In *Casafranca*, the HRC widely interpreted Article 7 of the ICCPR to include an obligation to order an investigation if a detainee alleges torture although Article 7 does not explicitly mention this requirement, unlike the Inter-American Convention against Torture (Article 8)<sup>26</sup> and the Convention against Torture (Article 13)<sup>27</sup> which explicitly do include such a

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21 Transcript of Testimony on file with the author.

22 TRC Final Report, supra n. 19, at 428.

23 Defensoría del Pueblo, La Labor de La Comisión Ad-Hoc a Favor de los Inocentes en Prisión (2001) at 73.

24 Concluding Observations of the Human Rights Committee: Peru, 25 July 1986, CCPR/C/79/Add.67 at para. 355.

25 Inquiry under Article 20: Peru, 16 May 2001, A/56/44, paras 144-193 at para. 164.

26 ‘The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.’

requirement. The HRC's reading of Article 7 reflects the absolute and non-derogable nature of the right to not be tortured<sup>28</sup> and the growing consensus that prevention requires that all complaints of torture be followed by a mandatory investigation, especially where a conviction may be made based on a self-incriminating confession that was elicited under duress of torture.

The HRC's decision corresponds with its earlier findings of the pervasive use of torture in Peru's anti-terrorism strategy, creating an assumption that Casafranca was indeed subject to torture. The HRC thus implied that when complaints are made of torture, especially in a legal regime designed to fight terrorism by streamlining judicial protections, Article 7 requires an investigation of the detainee's complaint. The HRC's decision also can be read to mean that no statute of limitations apply to this requirement since it made its determination despite Peru's claim that Casafranca's complaint was not made in a timely fashion.

Similarly, the Inter-American Court also found violations of its equivalent article protecting personal integrity in its cases on Peru's anti-terrorist legislation. Recently, in the *de la Cruz* case, the victim did not allege that she had been tortured. However, her representatives invoked Article 5 due to the anguish caused by the circumstances of her prolonged and incommunicado detention and other highly restrictive conditions of her detention as forms of cruel and inhuman treatment. The Court found in favour of the victim:

[o]ne of the reasons why being held incommunicado is viewed as an exceptional instrument is due to the grave effects it has on the detainee. In effect, being isolated from the external world produces in any person moral suffering and problems to the psyche, putting them in a situation of particular vulnerability and raises the risk of aggression and arbitrariness in prisons.<sup>29</sup>

Moreover, the Court reiterated that the protection of Article 5 is absolute and non-derogable, applying in the most difficult circumstances including states of emergency and wars against terrorism.<sup>30</sup> Indeed, the fact that Peru's anti-terrorism law created a context conducive to torture greatly motivated both national and international critics to question the legitimacy of the anti-terrorism legal regime used by Peru in its strategy to win its war against terrorism.

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Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.'

Article 8, Inter-American Convention to Prevent and Punish Torture 1985, OAS Treaty Series No. 67.

27 'Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.' Article 13, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85.

28 General Comment 21 establishes that this right may not be suspended during times of war, threat of war, internal political instability or states of emergency. See para. 3, Human Rights Committee, General Comment No. 21, Replaces General Comment 9 concerning humane treatment of persons deprived of liberty (Art. 10), 10 April 1992, HRL/GEN/Rev.1 (1994) at 33; 1-2 IHRR 26 (1993).

29 *De la Cruz- v Peru*, supra n. 20. at para. 129 (translation by author).

30 Ibid. at para. 125.



### 3. Setting a Precedent for Similarly Situated Victims

The *Casafranca* decision comes as just one more in a long line of condemnations of Peru's failure to guarantee judicial protections in its anti-terrorism legislation. As one of the few cases to reach an international venue, however, the *Casafranca* decision sets an important precedent for similarly situated victims in Peru now seeking redress, especially within the context of Peru's historic phase of transitional justice in which the government is currently considering what to do with the TRC's final recommendations including those related to reparations. Among the beneficiaries of its Integral Plan of Reparations are those people referred to as the 'Liberated Innocents' who were liberated either through Fujimori's special commission or upon being absolved.

Rather than depending on the political will of the State, however, the HRC frames the issue of compensation in binding terms, referring to the fact that 'pursuant to article 2 of the ICCPR, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the ICCPR and to provide an effective and enforceable remedy when a violation has been established'.<sup>31</sup> Similarly, the Inter-American Court of Human Rights has ordered monetary and non-monetary reparations in all of its judgments involving people detained under Peru's anti-terrorism legislation.<sup>32</sup> Given the fact that the anti-terrorism laws have been considered by numerous international bodies to be *per se* in violation of international human rights conventions and treaties,<sup>33</sup> the next conclusion is that all persons subject to its application would potentially be able to demonstrate violations that also give rise to this right to reparations.

In fact, Peru's own highest court confirmed the existence of this right in response to a group of 'Liberated Innocents' who brought their civil suit for damages before the truth commission was formed. In July 2000, while Fujimori was still in office, the Peruvian Constitutional Court found in favour of the plaintiffs, declaring that the victims had the right to compensation since the convicted were pardoned for reason of judicial error based on the Peruvian Constitution as well as Article 14(6) of the ICCPR.<sup>34</sup>

Noteworthy is that the Peruvian Court's Declaratory judgment referred to a specific category of people imprisoned under the country's anti-terrorist legislation. Similarly, the Peruvian TRC recommended reparations for the 'Liberated Innocents', those afore-mentioned Peruvians detained on charges of terrorism who have already won their release from prison after affirming their innocence either through being absolved through judicial proceedings or pardoned by the special commission mentioned above. In contrast, the *Casafranca* decision implies that the right to a remedy would belong to persons regardless of their innocence or guilt.

Though observing this line of reasoning would have been politically untenable for the TRC given that Peruvian society is still deeply traumatised by the years of terrorism. Opponents of the work of the TRC accused it of encouraging a relapse of terrorism and warned that the TRC would offer amnesty to imprisoned terrorists. They printed lists of 'terrorists already set free' (actually people pardoned by the special commission when found innocent) to spook the general public and undermine the authority of the TRC.

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<sup>31</sup>Supra n. 1 at para. 10.

<sup>32</sup> See for example, *Cantoral-Benavides v Peru*, supra. n. 15 and *Loayza-Tamayo v Peru*, supra. n. 13.

<sup>33</sup> In the case of *Castillo Petruzzi et al.* supra. n. 14, the Inter-American Court of Human Rights ruled that the antiterrorism judges 'sin rostro' (masked) violated due process and ordered new trials, reparations to be paid to victims, and legislative reform.

<sup>34</sup> Tribunal Constitucional de Peru, Expediente 1277-99-AC/TC (27 October 2000). For general discussion see Laplante, supra n. 6 at 367-71.

The HRC, however, operating outside of the national political context, has consistently ordered compensation in all of its communications concerning people subject to Peru's anti-terrorism laws, never inquiring into the culpability of the victim. The procedural defects during the arrest, detention and trial of these victims, alone, gave rise to the violations. Perhaps even more controversial is that the *Casafranca* decision considered these violations to be so serious, including double jeopardy, as to merit the release of the victim, again regardless of inquires into innocence or guilt.

The HRC is not the first international body to order the release of a person subject to Peru's anti-terrorism laws. In 1997, the Inter-American Court of Human Rights ordered the release and compensation of Maria Elena Loayza Tamayo, a Peruvian professor convicted of terrorism in Peru.<sup>35</sup> She was arrested in February 1993 by DINCOTE, the police branch response for arresting terrorist suspects, without an arrest warrant issued by a competent judge, for the alleged collaboration with *Sendero Luminoso*. This accusation was based on the denouncement of an acquaintance who accused Loayza-Tamayo in order to qualify for benefits of the Law of Repentance, which allowed her to escape a long sentence in her own case.

Loayza-Tamayo was kept in incommunicado for 10 days, during which time she was subjected to mistreatment and torture to elicit a confession. She never received information about the charges against her and was denied communication with her family and lawyer. Moreover, the law denied her family and lawyer the ability to apply for *amparo* in her favour. Loayza-Tamayo endured unduly long periods of detention awaiting her trials first in the military court where she was acquitted and then in the civil court where she was eventually tried for the same acts as the first trial and sentenced to 20 years of prison in October 1994. Eventually, the Inter-American Court issued its judgment irrespective of the issue of the victim's innocence or guilt. Peru complied with the Court's judgment releasing Ms. Loayza from prison a year later and eventually paying her reparations.<sup>36</sup>

Neither the HRC nor the Inter-American Court for Human Rights has the capacity, yet, to consider a collective complaint that could handle the claims of all the people subjected to Peru's anti-terrorism laws. However, the potential presents an extreme challenge to the government of Peru just as it is feeling national and international pressure to take action on the TRC's recommendations to redress past wrongs to build the rule of law.

On a wide scale level, however, a program of reparations that could include compensation, and possibly release, for all people subject to the anti-terrorism laws is politically unpalatable regardless of the State's obligation under international law. When Fujimori was still in office, this demand, on a much smaller scale, led Peru to withdraw its consent to the Inter-American Court's contentious jurisdiction in 1999.<sup>37</sup> The next year, country representatives from Peru explained to the HRC that the Inter-American Court had exceeded its authority when it ordered the reform of the anti-terrorism legislation and retrial of the convicted terrorists because if such trials 'resulted in the release of the terrorists concerned, it would have set a very undesirable precedent for future cases of terrorism....'<sup>38</sup>

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<sup>35</sup> *Loayza-Tamayo v Peru*, supra n. 13.

<sup>36</sup> *Loayza-Tamayo v Peru* (Reparations) IACEHR series C 42 (1998); 7 IHRR 136 (2000).

<sup>37</sup> Withdrawal from the jurisdiction of the Court by the Peruvian State, reprinted in Annual Report of the Inter-American Court of Human Rights [1999], 24 January 2000, OEA/Ser.L/V/III.47, doc. 6 at 42. In January 2001, Peru reinstated its recognition of the Court's jurisdiction soon after the resignation of Fujimori. See Annual Report of the Inter-American Court of Human Rights 2001, 18 February 2002, OEA/Ser.L/V/III.54 at 52.

<sup>38</sup> Summary record of the 1880th meeting: Peru, 27 October 2000, CCPR/C/SR.1880 at para. 23.

The representative's statement proved to have prescient value. Peru now faces pressure from hundreds of 'Liberated Innocents' who were included in the TRC's integral reparation plan and thus feel political support to demand reparations. Furthermore, if a political solution does not pan out they are also pursuing civil claims in the national courts and anticipate resorting to the international forums should their internal claims fail. The precedent of *Casafranca* aids them in their argument that they are entitled to reparations given the similarity of their situations.

Moreover, in January 2003, the Constitutional Court of Peru found numerous Articles of Peru's anti-terrorism laws unconstitutional.<sup>39</sup> In response, the State embarked upon retrying some 2,500 people convicted of terrorism under those laws with the intention of providing the due process protections that had been missing from their previous trials. Indeed, in its November 2005 ruling in *García Asto y Ramírez Rojas v Peru*, the Inter-American Court ordered reparations for Peruvians who were beneficiaries of these new criminal trials pursuant to the Peruvian Constitutional Court's order and consequent reform of the anti-terrorist law.<sup>40</sup>

In its opinion, the Inter-American Court specifically acknowledged the new trials, but says it still has jurisdiction to nevertheless determine violations of the petitioner's original arbitrary arrests, unfair trials and torture and order reparations.<sup>41</sup> In 2006, the Peruvian State paid 200,000 US dollars to these petitioners, complying with the Inter-American Court's orders.<sup>42</sup> Previously, the Peruvian government paid similarly significant monetary indemnifications to petitioners detained under Peru's anti-terrorism laws also in accordance with the Inter-American Court's orders, as discussed above.<sup>43</sup> In this way, these cases build a substantial body of international law that provides a decisive precedent for this latter group of beneficiaries to join their innocent counterparts in seeking reparation for the violations that arose out of their original arrest, detention and trial.<sup>44</sup>

#### 4. Conclusion

Observing the lessons gleaned from other national experiences of campaigns against terrorism can lead to great savings in both economic and human suffering. As a country now trying to address the systematic human rights violations caused by its anti-terrorist legislations, Peru represents a critical case study of national strategies to combat terrorism that push both ethical and legal limits. Moreover, its experience warns that if not planned well, such legislation can result in later complications that require addressing the legal claims of people detained under such laws. This political quagmire can often cause great problems in societies trying to address the past while the fear of terrorism still filters the emotional reactions of the population, threatening to undermine rule of law projects in transitional democracies. Above all else, the unacceptable pain and suffering caused to human beings demands a careful study of how to design such legislation so as to uphold the most fundamental of human rights.

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39 Sentencia del Tribunal Constitucional del Peru, Marcelino Tineo Silva y Mas de 5,000 Ciudadanos, Exp No. 010-2002-AI/TC, available at: <http://www.justiciaviva.org.pe/jurispu/Sentencia-Legislacion%20Antiterrorista.pdf>.

40 *García-Asto and Ramírez-Rojas v Peru* IACtHR Series C 137 (2005).

41 Ibid.

42 'Estado pagará US \$200 mil por orden de Corte Interamericana', *Correo*, 22 February 2006.

43 See for example, IACtHR Resolution, Supervision of fulfillment of Judgment Loayza Tamayo v Peru, 3 March 2005; IACtHR Resolution, Supervision of fulfillment of Judgment Cantoral Benavides v Peru, 17 November 2004; and IACtHR Resolution, Fulfillment of Judgment Castillo Paez v Peru, 17 November 2004.

44 It is important to mention that some petitioners in the García-Asto case had been eventually absolved of charges of terrorism during their new trial, for lack of evidence, a result shared by many other prisoners undergoing new trials ordered by Peru's Constitutional Court, as discussed above.