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THE ADMINISTRATION OF JUSTICE AND
THE HUMAN RIGHTS OF DETAINEES

Report of the Secretary-General prepared pursuant to
Subcommission resolution 1994/33

Addendum

The present document contains information submitted by the Governments of Namibia and Peru, as well as by the United Nations Educational, Scientific and Cultural Organization and the International Committee of the Red Cross, received after the preparation of document E/CN.4/Sub.2/1995/17.

Namibia

[Original: English]
[5 April 1995]

General

1. We agree generally with the provisions, particularly because the payment of reparations demonstrates in no uncertain terms that perpetrators of gross human rights violations are not immune from punishment and the payment of adequate compensation to the victims.

Clause 7

2. We fail to see the justification that States should provide reparation to victims. Such an arrangement can only be justified if the State through its servants or agencies is the perpetrator. If the violation is committed by individuals in their personal capacity, then the State shall only make available appropriate facilities to enable the victims to demand and receive reparation from such perpetrators, for example, the provision of State-sponsored legal aid to assist and represent indigent victims in order to obtain reparation.

Clause 18

3. In the absence of other evidence, reparations should be based also on the corroborative evidence of family members, medical and other health professionals and reputable researchers who have undertaken reliable research on the violations.

Peru

[Original: Spanish]

[19 May 1995]

1. Peru would be able to endorse the view expressed in the document under review, to the effect that the violation of any human right should give rise to a right of fair and decent compensation for the victim, provided that the act in question is proven and the perpetrator's responsibility established.
2. It has to be borne in mind that there are certain types of harm which are irreparable, such as loss of life, deprivation of liberty, bodily harm, mental harm resulting from sexual attacks, or damage to health as a whole. Nevertheless, in a State governed by the rule of law, such as Peru, it is essential to identify suitable means of ensuring a measure of compensation for harm caused by human rights violations, judicial error or abuse of authority.
3. We believe that the provision made under Peruvian legislation for mechanisms such as reparation, compensation and the cessation of the act that constitutes a violation of human rights is of vital importance, as these measures alleviate the suffering of the victims and, in the best of cases, put an end to the act itself and restore the situation that existed prior to the violation.
4. In conformity with the proposed basic principles and guidelines, Peru recognizes the duty of every State to make reparation in case of a breach of the obligation to respect and to ensure respect for human rights and fundamental freedoms. Accordingly, since the adoption of its Constitution, Peru's legal order has established the obligation to ensure respect for human rights.
5. Under the Constitution, the protection of the human being and respect for his or her dignity are the ultimate objective of society and of the State. Thus, in conformity with the proposed basic principles and guidelines, Peru recognizes the right of the individual to life, to identity and to physical integrity (art. 2, para. 1); to equality before the law (art. 2, para. 2); to freedom of conscience and religion (art. 2, para. 3); to freedom of information (art. 2, para. 4); to honour and to privacy (art. 2, para. 7); to freedom of creative activity (art. 2, para. 8); to the inviolability of the home (art. 2, para. 9); to secrecy and inviolability of private communications and documents (art. 2, para. 10); to freedom of movement (art. 2, para. 11); to freedom of assembly (art. 2, para. 12); to freedom of association (art. 2, para. 13); to freedom to enter into a contract (art. 2, para. 14); to freedom of work (art. 2, para. 15); to freedom to own property and to inherit (art. 2, para. 16); to take part in civic life (art. 2, para. 17); to preserve the secrecy of his or her beliefs (art. 2, para. 18); to ethnic and cultural identity (art. 2, para. 19); to submit petitions (art. 2, para. 20); to nationality (art. 2, para. 21); to liberty and security of person (art. 2, para. 24); to protection for health (art. 7); to education (art. 13); to join a trade union, to collective bargaining and to strike, and to protection against arbitrary dismissal (arts. 27 and 28).

6. With these considerations in mind, the legislative authority endorses efforts to attain an ideal of justice and social welfare, in conformity with the contemporary trends that characterize a State governed by the rule of law and respectful of the rights of its citizens, which in fact predate and are of a higher order than the State; in other words, rights are not vested in individuals by the Constitution, but exist prior to the Constitution and to the State itself.

7. This set of principles provides a sound foundation on which to base reparation for violations of human rights, as the rights in question are not deemed to be the consequence of the promulgation of a Constitution or the institution of a legal order, but are inherent to individuals, who are born with them, regardless of the type of society in which they may live.

8. Accordingly, the Government of Peru has devoted special attention to questions relating to the duty of the State to respect and ensure respect for the human rights and fundamental freedoms of all persons under its jurisdiction.

9. In order to ensure that the principles enshrined in the initial articles of the Peruvian Constitution do not remain a mere statement of intent, but on the contrary, are fully observed in Peruvian society, a series of procedures and measures have been introduced throughout the Constitution to provide proper recognition for and observance of the rights of victims of human rights violations, i.e. reparation.

10. Article 139 of Peru's Constitution stipulates that compensation, in the manner determined by law, for judicial errors in criminal trials and for arbitrary detention, without prejudice to any liability deriving therefrom, is a principle, inter alia, of the jurisdictional function.

11. Accordingly, the Constitution recognizes the authority vested in the police, military and judicial authorities in response to aspects of Peru's present political and social circumstances, such as terrorism and drug trafficking, which it counterbalances by extending to citizens the right to compensation for any errors committed in violation of their individual freedom, as well as for any errors committed in respect of their identity, particularly in the course of procedures to identify and punish persons responsible for terrorism and drug trafficking, both of which, because of their gravity, are subject to special procedures.

12. Thus, on account of the possibility of violations of individual freedom occurring, there are a number of provisions which, in accordance with the proposed basic principles and guidelines, are designed to provide rapid and fair redress.

13. Legislative Decree No. 768 of 4 March 1992 stipulates that the civil magistrate of either the place of detention or the place of residence of the victim, at the latter's discretion, shall be competent to hear a claim for compensation arising out of arbitrary detention. The Decree also determines that the appropriate type of procedure in respect of such violations is the

summary procedure which, as its name suggests, is designed rapidly to settle the claim. Thus, the various phases of the procedure offer the possibility of attending a hearing at which the evidence to establish the harm is examined; it also offers the possibility, at an earlier stage to the above, for the parties concerned to attend conciliation proceedings in order to seek a mutually satisfactory solution.

14. The purpose of this procedure is to ensure that the right to reparation is available to all and to avert excessive difficulties, bearing in mind the possible vulnerability of the victims. Thus, the relevant Peruvian legislation incorporates one of the principles put forward in the proposed basic principles.

15. However, proper mechanisms to ensure protection for human rights are to be found not only in Peru's Constitution. Current criminal procedural legislation authorizes any citizen, in cases where the public right of action applies, to lodge a complaint with the Government Procurator's Office against any criminal offence that infringes fundamental rights (Code of Criminal Procedure, art. 76). Similarly, article 11 of the Government Procurator's Office Organization Act stipulates that responsibility for exercising the public right of action is vested in the procurator, who shall exercise it of his own motion or at the request of the injured party or a member of the public. A citizen may file the complaint with the provincial procurator or the senior government procurator, who is required, if the complaint is admissible, to initiate the appropriate preliminary proceedings and to institute criminal proceedings with the judicial authority.

16. The new system of criminal procedure incorporates the contemporary accusatory system of trial. It vests in the Government Procurator's Office a leading role for investigating offences, strengthens the rights of the defence and the safeguards for the accused, and institutes a judiciary whose key function is to monitor the procurator, order coercive measures and direct the trial phase. Ordinary offences come under the jurisdiction of the regular courts. Offences connected with the exercise of official functions come under the military courts, provided that they involve conduct directly connected with military or police functions and in so far as they affect exclusively military legal interests and the discipline of the armed forces or police (new Code of Criminal Procedure, art. 14).

17. In addition, article 509 of the Peruvian Code of Civil Procedure establishes the civil liability of judges if, in the exercise of their judicial functions, they injure the parties or third persons by acting in a fraudulent or negligent manner. Recognition of the civil liability of judges in no way exempts them from their administrative or criminal liability, which they may incur should they act in a way that is contrary to existing judicial principles.

18. For example, a judge who engages in misrepresentation or fraud or commits a denial of justice by refusing or omitting to perform an act or performs another at the behest of an outside party will be guilty of fraudulent conduct.

19. Moreover, a judge will be deemed guilty of negligence if he commits a serious error of law or makes an unsustainable interpretation of law, or if he impedes a proper defence by failing to analyse the facts established by the victim.

20. However, the legal norm goes even further and lays down a series of presumptions to determine fraudulent or negligent conduct on the part of judges. This presumption will operate if, in his ruling, the judge contradicts a judgement handed down by him previously in a similar case, unless he substantiates the discrepancy or, if he hands down a ruling at variance with, or dissenting from, the opinion of the government procurator, as appropriate, on matters for which mandatory or uniform case law exists, or on inadmissible grounds.

21. The purpose of these provisions is to give people a series of remedies, deemed uniform, in order to ensure they enjoy adequate protection should they suffer any harm.

22. The above norm also stipulates that the State and judge or collegiate judges who handed down the ruling from which the harm results are jointly and severally liable for damages.

23. In the civil sphere, Peru's substantive legislation stipulates, in its articles 1969 et seq., that whosoever fraudulently or negligently causes harm to another is liable for compensation. The same legislation stipulates that anyone who has another person under his orders shall be responsible for any harm caused by the latter, if the harm results from the latter's exercise of his office or the performance of his respective duties. In this case, both the direct perpetrator and the indirect perpetrator shall be jointly and severally liable.

24. Peru's Civil Code also admits the concept of moral harm, which gives rise to compensation based on its scale and the damage caused to the victim or his family. Compensation will take into account both the consequences resulting from the act or omission whereby the harm to the person was caused and the moral harm, provided that there is a sufficient causal relationship between the act and the harm caused.

25. Peru's Code also incorporates some of the principles contained in the proposed basic principles. Thus, the provisions relating to moral harm under article 1984 include mental harm, harm to reputation or dignity and lost opportunities, etc.

26. The provision of Peru's 1984 Civil Code relating to non-contractual liability is ideally suited to claiming fair reparation for the violation of any right, and above all of the basic rights which, as is noted above, are enshrined in the Constitution.

27. It is also noteworthy that Supreme Decree No. 17-93-JUS of 2 June 1993 determines that the members of the judiciary incur civil liability for any harm and injury they cause, in conformity with the relevant legislation, and that they are also liable for any offences they commit in the exercise of their functions, with the proviso that the members of the judiciary incur

disciplinary liability for any irregularities committed by them in the exercise of their functions. Complaints about and investigations into disciplinary matters involving judges will be handled and decided by the judiciary.

28. The decree stipulates, inter alia, that the following acts shall give rise to disciplinary liability: abuse of lawful authority towards subordinates, or persons in any way involved in legal proceedings; breach of legally prescribed duties and prohibitions arising out of failure to exercise constant control over auxiliaries and subordinates and failure to impose the relevant penalties when appropriate.

29. Penalties against magistrates guilty of such acts are enforced by the following organs:

- (a) The plenary Supreme Court;
 - (b) The Executive Council of the Judiciary;
 - (c) The Office for the Supervision of Judges of the Judicial Branch;
- and
- (d) The District Office for the Supervision of Judges of the Judicial Branch, if appropriate.

30. Act No. 24973 was adopted on 28 December 1988 as part of this body of legislative protection designed to redress errors in the administration of justice; the Act regulates compensation for judicial errors and arbitrary detentions.

31. The Act stipulates that anyone detained by the police or administrative authorities without due cause or subjected to detention which, even if justified, exceeds the limits set by the Constitution or by the sentence, shall be entitled to compensation for arbitrary detention. Anyone not brought before the competent judge by the deadline established by the Constitution shall also be entitled to compensation.

32. In addition, anyone who, after having been convicted by due process of law, obtains a review of his sentence, or a ruling from the Supreme Court declaring the sentence erroneous or arbitrary, shall be entitled to compensation for judicial error. In addition, anyone who has been subject to due process of law and deprived of his liberty as a result thereof and subsequently had his case shelved or been acquitted is also entitled to compensation.

33. Act No. 24973 also incorporates another of the proposed basic principles and guidelines, i.e. proportionality of compensation, as its article 4 stipulates that compensation for arbitrary detention shall be in direct proportion to the length of the detention and to the victim's income, which must be duly authenticated. The Act also requires compensation to be proportional to the economically assessable harm resulting from human rights violations, depending on the material or moral harm caused to the victim.

34. The Government of Peru believes that the existence of a State structure that enshrines the representative democratic system, in keeping with Peru's long-standing tradition, is of vital importance to ensure proper protection of human rights and rapidly resolve human rights problems.

35. Accordingly, as befits Peru's democratic character, its Government derives its authority from the people. Article 45 of the Constitution states that authority shall be exercised within the limits of and subject to the responsibilities established by the Constitution and the law.

36. In actual fact, we would hardly be able to talk of protection of human rights and reparation for human rights violations if we did not possess a system for the administration of justice that was based on the principles of independence and the observance of due process of law, as well as on effective jurisdictional protection, which are responsible for ensuring the rule of law and respect for fundamental rights and public freedoms. A key guarantee, in addition to the principle of an independent, objective and impartial judge (Constitution, art. 146), is the requirement that judges should give precedence to the Constitution over any provision of law that may infringe it, and the principle of normative hierarchy (Constitution, art. 51).

37. In addition to approving, interpreting, amending or abrogating legislative acts and decisions, the key role of the legislative branch is to ensure observance of the Constitution and the law and to order appropriate measures to ensure that offenders answer for their offences (Constitution, art. 102). Accordingly, the 1993 Constitution established the Ombudsman's Office (Defensoría del Pueblo) as an autonomous agency reporting annually to the Congress on its activities, and responsible for protecting the constitutional and fundamental rights of individuals and of the community and for monitoring the State administration's compliance with its duties and the provision of public services to citizens (Constitution, arts. 161 and 162).

38. In addition, in conformity with the regulations of Congress, there is a congressional Human Rights Committee, which is responsible for protecting and safeguarding human rights and for investigating human rights violations. The Committee is a cornerstone of the overall system of human rights protection in Peru.

39. The executive branch has institutionalized agencies responsible for furthering and protecting human rights. A noteworthy front-line agency of the Ministry of Justice is the National Council for Human Rights (Legislative Decree No. 25993, art. 7), which is responsible for promoting knowledge of coordinating, and disseminating human rights and providing advice in order to safeguard and ensure the effectiveness of the fundamental rights of persons (Ministerial Decision No. 076-93-JUS, art. 127). In conformity with its internal regulations, the Council is composed of representatives of different branches of the State and of society at large (Supreme Decree No. 038-93-JUS).

40. Moreover, each ministry and armed forces and national police institute has a human rights department, which has the task of ensuring respect for fundamental rights and public freedoms. The State acknowledges and respects the contribution made by NGOs defending human rights. There are many such

organizations operating in all spheres of human rights protection and promotion. Noteworthy among them is the National Coordinating Body for Human Rights, which centralizes and represents the NGOs as a whole.

41. In conformity with the proposed basic principles and guidelines, Title V of Peru's Constitution, ("Constitutional guarantees") establishes six constitutional safeguards or procedural instruments designed to protect fundamental rights and the primacy of the Constitution (Constitution, art. 200), thereby meeting the objective of providing suitable procedural mechanisms to ensure that victims obtain the right to reparation.

42. The following procedural mechanisms are established by the Constitution:

Action of habeas corpus, which applies to any act or omission by any authority, official or individual that infringes or jeopardizes either individual liberty or the constitutional rights associated therewith;

Action of amparo, which applies to any act or omission by any authority, official or individual that infringes or jeopardizes the other rights recognized by the Constitution. Amparo does not apply to legal norms or to any judicial decisions resulting from regular legal process. This is easy to understand because there are specific constitutional remedies against the former, which are described below, while appropriate appeal procedures are available against the latter;

Action of habeas data, which applies to any act or omission by any authority, official or individual that infringes the rights covered by article 2, paragraphs 5, 6 and 7, of the Constitution. The paragraphs in question respectively guarantee freedom of information, prohibit data-processing services from providing information that constitutes a violation of the right to privacy, and guarantee the right to honour and good reputation;

Action of unconstitutionality, which applies to any legislative norms contrary to the Constitution as regards either their form or substance, such as acts, legislative decrees, emergency decrees, treaties, congressional regulations, regional norms and municipal ordinances;

Public right of action, which applies to any infringement of the Constitution and the law, against regulations, administrative rules and decisions and decrees of a general nature, regardless of the authority issuing them;

Action for enforcement, which applies to any authority or official refusing to comply with a legal norm or administrative act, without prejudice to legal liability.

43. The Constitution stipulates that the exercise of these guarantees and the consequences of a declaration of unconstitutionality or illegality of the norms shall be regulated by an Organization Act. An action of unconstitutionality is decided by the Constitutional Court, whose decision is final. The other actions are lodged with the judiciary and may only reach the

Constitutional Court if the courts dismiss them, with the exception of a public right of action, over which the Constitutional Court is denied jurisdiction.

44. It should be emphasized that the remedies of habeas corpus and of amparo continue to operate under a State of emergency. If they are lodged in respect of rights that have been suspended or restricted, the courts are required to examine the reasonableness and proportionality of the restrictive act (Constitution, art. 200).

45. Peru's legal system provides for comprehensive protection of human rights. A dual system of protection, both domestic and international, operates, as Peru has ratified virtually all the international human rights instruments and is subject to the supervision of the various monitoring bodies, such as the Inter-American Commission on Human Rights and the United Nations Human Rights Committee.

46. The Constitution, in Title IV, Chapter XI, has established the Ombudsman's Office as an autonomous nationwide institution. The Ombudsman is elected or dismissed by a vote of two thirds of the members of Congress. He is entitled to the same immunities and prerogatives as members of Congress, has a five-year term and is not subject to mandatory instructions (art. 161).

47. As has already been noted, the Ombudsman's Office defends the constitutional and fundamental rights of individuals and of the community. He submits an annual report to Congress and may initiate legislation and propose measures to enable him better to perform his duties. The institution, which used to be part of the Government Procurator's Office, in the Office of the Attorney-General, is unquestionably a step forward for the protection of human rights and demonstrates Peru's determination to ensure they are observed.

48. The actions of habeas corpus and amparo continue to operate when a state of emergency has been declared. As regards those rights which are restricted or suspended, the court is required to examine the reasonableness and proportionality of the restrictive act (Constitution, art. 200). Similarly, article 8 of the Government Procurator's Office Organization Act stipulates that a declaration of a state of emergency shall not suspend the activity of the Government Procurator or the right of citizens to apply to or address him in person.

49. Detention in police custody for a period not exceeding a fortnight is authorized by the Constitution. Nevertheless, persons in police custody are not deprived of their right to a defence, as the functions of the Government Procurator's Office were not suspended by the anti-terrorist legislation. The procurator not only visits places of detention and ensures the defence of the detainees, but ascertains that the police investigation remains within the bounds of the law. All detentions are reported to the Government Procurator's Office and to the judge, after which the procurators perform their monitoring and supervisory functions. The Constitution prohibits torture and recognizes the right of detainees to request an immediate medical examination. Consequently, although greater powers are vested in the police, the Peruvian legal system recognizes the authority of the Government Procurator's Office to

guarantee the rights of citizens and the right of the latter to demand medical examinations to determine whether or not they have been improperly treated.

50. Human rights are the subject of continual debate and Peru strives to keep its human rights legislation up to date, and makes considerable efforts in other spheres which are essential to improve the standard of living of its citizens. Thus protection is afforded to the victims, relatives and friends of persons whose fundamental rights have been infringed.

51. Cases of human rights violations of different kinds and at different levels occur in many countries, whether developed or underdeveloped. Measures to prevent such violations must aim to establish institutions which focus on areas of emergency and ceaselessly to carry out thorough investigations into complaints of official misconduct.

52. As is explained in this report, Peru is implementing major measures to attain a proper level of protection of human rights in Peru. Accordingly, it has already adopted many of the measures included in the proposed basic principles and guidelines; however, on account of the particular circumstances Peru has experienced in recent years, it has to be recognized that the country still has a long way to go before attaining the state of balance desired by all.

United Nations Educational, Scientific and Cultural Organization

[Original: French]
[15 May 1995]

1. The final report submitted by Mr. Theo van Boven, Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, will, in all probability, be a milestone in the centuries-old combat to promote and protect human rights, especially if the conclusions and recommendations of his study are incorporated into an international instrument.

2. The Special Rapporteur may be interested in UNESCO's work in this sphere, at least as regards the following two points:

Decision 104 EX/3.3 of the Executive Board (Paris, 24 April-9 June 1978);

The question of the international responsibility of the State in respect of racism.

1. Decision 104 EX/3.3: Study of the procedures which should be followed in the examination of cases and questions which might be submitted to UNESCO concerning the exercise of human rights in the spheres of its competence, in order to make its action more effective: Report of the Working Party of the Executive Board

3. These procedures merit incorporation into the Special Rapporteur's study as the communications submitted to UNESCO concern the following:

Firstly, cases involving violations of human rights which are individual and specific;

Secondly, questions of massive, systematic or flagrant violations of human rights resulting either from a policy contrary to human rights, applied de jure or de facto by a State, or from an accumulation of individual cases forming a consistent pattern.

4. Communications relating to cases are normally considered in private session. Communications concerning questions are considered by the Executive Board and by the General Conference in public session.

5. The Committee on Conventions and Recommendations of the Executive Board, which is the principal body for considering communications, first of all decides on the admissibility of communications in private session. There are 10 conditions for admissibility; if one of them is not met, no further action is taken on the communication. The conditions are set out in paragraph 14 (a) of the decision. The authors of communications are responsible for demonstrating that the conditions have been met.

6. It would therefore be appropriate for the following Executive Board documents to be transmitted to the Special Rapporteur:

Decision 104 EX/3.3;

Study 146 EX/7 of 24 February 1995 concerning questions relating to the methods of work of the Committee on Conventions and Recommendations.

2. The problem of the international responsibility of the State in respect of racism

7. We believe that it would also be appropriate to transmit to the Special Rapporteur the text, in annex, of the UNESCO Declaration on Race and Racial Prejudice adopted by the General Conference at its twentieth session in Paris on 27 November 1978, as this instrument establishes the principle of the international responsibility of States for any form of racial discrimination. Thus, article 9.1 provides as follows:

"The principle of the equality in dignity and rights of all human beings and all peoples, irrespective of race, colour and origin, is a generally accepted and recognized principle of international law. Consequently, any form of racial discrimination practised by a State constitutes a violation of international law giving rise to its international responsibility."

International Committee of the Red Cross

[Original: English]

[20 April 1995]

1. We would like first of all to express our admiration for the quality of the study carried out by Mr. Theo van Boven, Special Rapporteur, on such a vast and complex subject. The ICRC has thoroughly examined the study, all the more so as it has, from the beginning, followed the progress of the work regarding a right to compensation. It has done so both within the framework of the Subcommission itself and at the seminar organized on the subject at Maastricht, Netherlands, in 1992. As Mr. van Boven points out in the introduction to his study, that seminar contributed greatly to the drawing up of the proposed basic principles and guidelines that make up chapter IX of the study.
2. The ICRC notes with satisfaction that Mr. van Boven's study also mentions the main rules of international humanitarian law regarding the obligation to provide compensation for violations of that law. We would suggest that the following sentence be included in the first section (General Principles) of the proposed basic principles and guidelines: "In situations of armed conflict, acts which violate international humanitarian law shall entail reparation in accordance with the relevant provisions of that law."
3. Taken as a whole, the proposed basic principles and guidelines provide a good basis for recognition of the rights of victims of gross violations of human rights. It is important that they be made known as widely as possible - in particular in situations of internal armed conflict or other internal violence - as soon as the final text is adopted.
4. It is also important to point out that the International Conference for the Protection of War Victims, held at Geneva in 1993, reaffirmed in its Final Declaration the principle of compensation as enshrined in international humanitarian law. Paragraph 7 of Part II stipulates that "States which violate international humanitarian law shall, if the case demands, be liable to pay compensation".
5. In line with the General Principles (No. 2: responsibility and measures against impunity), the above-mentioned Declaration stressed in the same paragraph that all States are obliged both to prosecute war crimes in order to ensure that they "do not go unpunished" and to "implement the provisions on the punishment of grave breaches of international humanitarian law".
6. The principle of compensation as provided for by international humanitarian law must be put into effect equally and without any discrimination, as must all humanitarian obligations. Therefore, whatever the party to which the perpetrators of the violations belong, compensation must be awarded to any victim entitled to it and must be commensurate with the harm inflicted. The proposed basic principles and guidelines represent a similar approach.
