

Contents

Legislation – Access to justice for victims of widespread or systematic forced sterilization ... 1
Cases – Scope of International Humanitarian Law and Hostile Groups 2

Legislation – Access to justice for victims of widespread or systematic forced sterilization

- Supreme Decree declaring as a national interest and a priority the assistance to victims of forced sterilization that took place between 1995 and 2001 and setting up a victim registry, Supreme Decree No 006-2015-JUS, 5 November 2015 <<http://busquedas.elperuano.com.pe/normaslegales/decreto-supremo-que-declara-de-interes-nacional-la-atencion-decreto-supremo-n-006-2015-jus-1308828-2/>>

The Decree No 006-2015-JUS was enacted to establish an implementing legal framework to provide free legal assistance, psychological therapy and healthcare to the victims of forced sterilization that took place in Peru between 1995 and 2001, as well as establishing a victim registration system under the authority of the Ministry for Justice and Human Rights.² This registration system is part of the transitional justice measures adopted by the Peruvian State to bring justice to around 300,000 people, mainly peasant, indigenous women who were allegedly surgically sterilized without their consent under the Reproductive and Family Planning Programme, which was implemented to control population growth to meet economic development goals in the 1995-2001 period.³ A legal case involving over 2000 victims was re-opened for investigation last year and the facts are currently investigated as serious human rights violations constitutive of crimes against humanity.⁴

As for the registration of alleged forced sterilization victims, the Decree endeavours to promote access to justice via the provision of free legal assistance, psychological therapy and complete healthcare to those victims.⁵ The Ministry for Justice and Human Rights, particularly the Office of Public Counsel for Victims, has been tasked with the provision of free legal assistance nationwide to all those individuals who regard themselves as forced sterilization victims in order to file criminal complaints and, if applicable, to follow up the respective case and provide legal counselling.⁶ These actions are considered of a national interest and hold priority.⁷

The registration system is under the authority of the Ministry for Justice and Human Rights, particularly, the Office Public Counsel for Victims, and seeks to identify all of the affected persons as well as guarantee their access to justice.⁸ Those included on the registry are expected to benefit from complete healthcare services.⁹ In turn, the Ministry for Women

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² Supreme Decree No 006-2015-JUS, art 1.

³ See for further detail and analysis: J P Perez-Leon Acevedo, 'Justice for forced sterilization victims: Pending points in Peru's transitional justice agenda' (28 April 2016), <<https://www.hirondelle.org/index.php/en/rss/193-fondation-hirondelle/operations/justiceinfo-net/news/1457-justiceinfo-net-justice-for-forced-sterilization-victims-pending-points-in-peru-s-transitional-justice-agenda>>.

⁴ Ibid.

⁵ Supreme Decree No 006-2015-JUS, art 2.

⁶ Ibid art 4.

⁷ Ibid art 3.

⁸ Ibid art 5.

⁹ Ibid art 6.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 18, 2015
CORRESPONDENTS' REPORTS

and Vulnerable Populations is tasked to provide psychological care and social assistance to those registered and to do so nationally and efficiently, maximizing the available resources to offer the best possible care to forced sterilization victims.¹⁰

Last December, regulations were also adopted to flesh out the Decree dispositions.¹¹ Both articles 5.2.1 and 5.3 are particularly noteworthy as they provide for flexible and broad definitions of alleged victims and forced sterilization, respectively reading as follows: 'Alleged forced sterilization victim: individual who regards himself/herself as affected by a surgical sterilization procedure [...] conducted without his/her free and informed consent and that took place in the 1995-2001 period' and '[f]orced sterilization: surgical sterilization procedure conducted in a person against his/her will or without his/her free and informed consent'.

Cases – Scope of International Humanitarian Law and Hostile Groups

- Constitutional Tribunal of Peru, Judgment, File No 00022-2011-PI/TC, 8 July 2015 <<http://www.elperuano.com.pe/NormasElperuano/2015/08/22/1277296-1.html>>

The Constitutional Tribunal of Peru issued its judgment on the constitutional validity of diverse articles of the Legislative Decree No 1094 (Police and Military Criminal Code) and Legislative Decree No 1095 (Rules on the Deployment and Use of Forced by Armed Forces) brought by 6430 citizens.¹² These notes focus on two issues discussed by the Tribunal, namely, i) scope of application of IHL and ii) considerations on the definition of 'hostile group'.

i) Scope of application of IHL

The claimants argued that IHL is not applicable to upheavals and social conflicts and, thus, the so-called loose definition of 'hostile group' contained in the legislation would be unconstitutional as it enables the use of armed forces to suppress protests.¹³ To determine the admissibility of this claim, the Constitutional Tribunal discussed the scope of application of IHL.

The Constitutional Tribunal recalled that IHL is the legal framework which regulates humanitarian matters during armed conflicts and seeks to protect those who do not participate or no longer participate in the hostilities, as well as to lay down the rights and obligations of all parties to armed conflicts for the conduct of hostilities.¹⁴ IHL consists of a set of customary and conventional rules which endeavour to settle humanitarian problems stemming from armed conflicts via limits to methods or means of combat and protection of persons who do not participate or no longer participate in hostilities.¹⁵ Therefore, principles,

¹⁰ Ibid art 7.

¹¹ Ministerial Resolution No 0319-2015-JUS, (4 December 2015), <[http://www2.congreso.gob.pe/Sicr/TraDocEstProc/Contdoc03_2011.nsf/0/34716da6243b637705257f1400414c48/\\$FILE/NL20151207.pdf](http://www2.congreso.gob.pe/Sicr/TraDocEstProc/Contdoc03_2011.nsf/0/34716da6243b637705257f1400414c48/$FILE/NL20151207.pdf)>

¹² See respectively: Legislative Decree No 1094 (*Police and Military Criminal Code*) (2010), <http://www.justiciaviva.org.pe/webpanel/doc_int/doc02092010-154648.pdf>; Legislative Decree No 1095 (*Rules on the Deployment and Use of Forced by Armed Forces*) (2010), <[http://www2.congreso.gob.pe/sicr/cen/docbib/con2_uibd.nsf/4E2FCC17050A1136052577910065602D/\\$FILE/DECR_LEGISLATIVO_PR_1095.pdf](http://www2.congreso.gob.pe/sicr/cen/docbib/con2_uibd.nsf/4E2FCC17050A1136052577910065602D/$FILE/DECR_LEGISLATIVO_PR_1095.pdf)>.

¹³ Constitutional Tribunal of Peru, Judgment, (File No 00022-2011-PI/TC, 8 July 2015), [355].

¹⁴ Ibid [358].

¹⁵ Ibid.

guidelines and prohibitions under IHL shall be respected by governments, including their militaries, opposition armed groups, and any other party to the armed conflict.¹⁶

Considering that violence launched against military objectives is not forbidden by IHL, IHL prohibits acts against civilians and civilian objects (principle of distinction) and, thus, neither indiscriminate nor disproportionate attacks are acceptable.¹⁷ Even though military operations are in principle conducted by armed forces, the police or security forces could also participate in the said operations and are responsible for guaranteeing the internal order.¹⁸

Quoting a decision of the International Criminal Tribunal for the former Yugoslavia in *Tadic*, the Constitutional Tribunal found that an armed conflict takes place when there is armed force between States or a protracted armed conflict between governmental authorities and organized armed groups or between these groups within a State.¹⁹ Under the 1949 Geneva Conventions and their two 1977 Additional Protocols, there are two kinds of armed conflict, namely, international and non-international.²⁰

Due to the circumstances of the case, the analysis of the Constitutional Tribunal focuses on non-international armed conflicts.²¹ An internal armed conflict involves the struggle between groups within the same state and may be between armed forces – as a result of rebellion within them – or between armed forces and armed groups or between armed groups.²² The existence of an internal armed conflict is not determined by the parties to an armed conflict but by a factual assessment of the intensity and duration of the armed violence (being sustained and concerted military operations) between identifiable parties (armed forces, dissident armed forces, or armed groups) to bring about military hostilities in the territory of a State (territorial control).²³ Two categories of internal armed conflict have been identified according to their intensity and applicable legal framework, namely: i) internal armed conflicts regulated by Common Article 3 and which require the presence of both armed violence and certain level of organization on the part of the non-state armed groups as well as that the conflict occurs in the territory of a State Party to the Geneva Conventions; and ii) internal armed conflicts regulated by Additional Protocol II which require the presence of the following elements for its application: the presence of state armed forces among the parties to the conflict, ‘and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.²⁴

Additional Protocol II lays down a difference between internal armed conflicts and social upheavals as it sets forth its inapplicability to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts’.²⁵

¹⁶ Ibid.

¹⁷ Ibid [359].

¹⁸ Ibid.

¹⁹ Ibid [360], citing *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chambers, Case No IT-94-1-AR72, 2 October 1995) [70].

²⁰ Constitutional Tribunal of Peru, Judgment, (File No 00022-2011-PI/TC, 8 July 2015), [360].

²¹ Ibid [362].

²² Ibid.

²³ Ibid. [363].

²⁴ Ibid [364]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 1(1) (‘Additional Protocol II’).

²⁵ Constitutional Tribunal of Peru, Judgment, File No 00022-2011-PI/TC, 8 July 2015, [365]; Additional Protocol II, art 1(2).

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 18, 2015
CORRESPONDENTS' REPORTS

Bearing in mind the previous legal framework, the Constitutional Tribunal went on to examine the use of force by armed forces. Participation of armed forces in keeping the control of internal order is not common in Peru and requires that the President declares a state of emergency, since control of the internal order primarily corresponds to the police forces.²⁶

Following the International Committee of the Red Cross (ICRC), the Constitutional Tribunal considered that social disturbances and tensions are internal violence situations involving diverse social actors who are to some extent organized in upheavals of a temporary nature.²⁷ Notwithstanding the presence of violent acts of certain level of seriousness or duration and even violent clashes, those acts do not strictly meet the threshold of an level of organization corresponding to an internal armed conflict.²⁸

To be qualified as an armed group, the respective actor to an internal armed conflict must meet certain requirements such as: i) to consist in a sufficient number of persons; ii) to possess a sufficient degree of organization and be under an identifiable responsible command; iii) the type of weaponry or other military material used, as well as the kind of force employed, must be suitable for engaging in military hostilities; iii) to exercise control over some portion of the national territory; iv) to possess sufficient capability of planning, coordinating and carrying on military hostilities; and v) to be able to express a common position, negotiate and achieve agreements such as cease fire or peace.²⁹

In the Constitutional Tribunal's understanding, the aforementioned factors mean that organized armed groups involve non-state armed forces and consist of persons tasked to participate in the hostilities, directly participating in hostilities through the assumption of a continuous combatant function.³⁰ To consider that these groups are directly participating in the hostilities, the Tribunal considered that the following is required:

- '1. [T]he act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)'.³¹

ii) Considerations on the definition of 'hostile group'

Among other provisions, a part of Article 3.f of the Legislative Decree No 1095 (Rules on the Deployment and Use of Forced by Armed Forces) was constitutionally impugned. Article 3.f, including its impugned portion (in italics), reads as follows: 'Hostile group - Plurality of individuals in the national territory that meet three conditions: i) minimal organization; ii) capacity and decision to protractedly face the State using fire arms, *sharp knives or weapons decisive in quantity*; and iii) participation or collaboration in the hostilities' [emphasis added].

With regard to the constitutionality of the definition of the 'hostile group', the Constitutional Tribunal found that such provision does not explicitly recognize all elements

²⁶ Constitutional Tribunal of Peru, Judgment, File No 00022-2011-PI/TC, 8 July 2015, [366].

²⁷ Ibid [367].

²⁸ Ibid.

²⁹ Ibid.[368], citing H Gasser, 'Un minimum d'humanité dans les situations de troubles et tensions internes: proposition d'un Code de conduite' (1988) 70(769) *International Review of the Red Cross* 39.

³⁰ Constitutional Tribunal of Peru, Judgment, File No 00022-2011-PI/TC, 8 July 2015, [369].

³¹ Ibid [369], citing N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009).

constitutive of an armed group.³² However, the Constitutional Tribunal found that the said elements stem from a systematic interpretation of the impugned articles because, by recognizing the application of IHL provisions 'when the actions of armed forces in a state of emergency are oriented to conduct military operations to face the capacity of a hostile or an element thereof [...]', it is possible to conclude the compatibility of the national definition of hostile group with that under international law.³³ Thus, the Constitutional Tribunal considered that the deployment of armed forces, in the exceptional context of an emergency, with the objective to face an 'armed group', can only take place after verifying that such a group meets the above-mentioned conditions.³⁴

The Tribunal held that social upheavals and internal tensions should *prima facie* be regulated under domestic law, which foresees situations of states of emergency, and in accordance with international human rights law.³⁵ Having said that, in situations of insufficient international protection of victims of internal upheavals and internal tensions, and in the context of deployment of an large number of police forces and even armed forces to re-establish the order, it is admissible that the said legal framework be complemented with IHL fundamental provisions to strengthen and clarify the standard of protection of the human being under the principle of humanity.³⁶

The mere participation of armed forces does not transform a situation of internal tension into an armed conflict, which is consistent with the case law of the International Criminal Tribunal for Rwanda as illustrated in *Musema*:

Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State.³⁷

The above-discussed scope of an armed conflict is consistent with Article 1(2) of Additional Protocol II, quoted above, which excludes other forms of violence such as tensions and internal upheavals from its material scope of application.³⁸ Under no circumstances, can protests, large demonstrations, riots and upheavals be considered as scenarios of armed conflict.³⁹ Thus, the groups or collectives that participate in such protests cannot be considered as hostile groups and military force cannot be employed against them.⁴⁰ Therefore, qualification of any of those cases as an internal armed conflict is unconstitutional.⁴¹

Although the interpretation of the term 'hostile group' depends on the contours of the definition of 'armed group' as developed under IHL, the Constitutional Tribunal pointed out that the wording of a part of Article 3.f of the Legislative Decree No 1095 is not compatible with IHL.⁴² The phrase 'sharp knives or weapons decisive in quantity' is incompatible with

³² Constitutional Tribunal of Peru, Judgment, File No 00022-2011-PI/TC, 8 July 2015, [370].

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid* [371].

³⁶ *Ibid.*

³⁷ *Prosecutor v Musema (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-13-A, 27 January 2000), [248].

³⁸ Constitutional Tribunal of Peru, Judgment, File No 00022-2011-PI/TC, 8 July 2015, [373].

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid* [374].

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 18, 2015
CORRESPONDENTS' REPORTS

the requirement under IHL according to which the type of weapons or other military equipment used, as well as the kind of force used, should be suitable to for engaging in military hostilities.⁴³ Therefore, weapons such as 'sharp knives' or those 'decisive in quantity' do not endow individuals carrying them with an armed power objectively higher than that of the police, as the latter are authorized to carry fire weapons and are trained.⁴⁴ Additionally, since any use of force is temporary and exceptional, it is disproportionate to authorize armed forces to suppress a group of persons who, due to the kind of weapons used, are incapable of engaging in 'military hostility[ies]'.⁴⁵ In these cases, the police will be always competent to take control of the internal order.⁴⁶

Therefore, the Constitutional Tribunal found the portion of the provision referring to 'sharp knives or weapons decisive in quantity' under Article 3.f of the Legislative Decree No 1095 unconstitutional and, thus, the rest of Article 3.f remains as follows: 'Hostile group.- Plurality of individuals in the national territory that meet three conditions: i) minimal organization; ii) capacity and decision to protractedly face the State using fire weapons; and iii) participation or collaboration in the hostilities'.⁴⁷

Additionally, the Constitutional Tribunal concluded that Articles 3.f and 5.1 of the Legislative Decree No 1095, concerning 'hostile groups' must be interpreted according to Article 1.1 of the Additional Protocol II and Common Article 3 as to the regulation of an 'armed group'.⁴⁸

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⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid [375].

⁴⁶ Ibid.

⁴⁷ Ibid [376].

⁴⁸ Ibid.