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HUMAN RIGHTS COMMITTEE
Eighty-fifth session
17 October-3 November 2005

VIEWS

Communication No. 1126/2002

Submitted by:	Marlem Carranza Alegre (represented by counsel, Carolina Loayza Tamayo)
Alleged victim:	The author
State party:	Peru
Date of communication:	12 March 2002 (initial submission)
Document reference:	Special Rapporteur's rule 97 decision, transmitted to the State party on 14 October 2002 (not issued in document form)
Date of adoption of Views:	28 October 2005
Subject matter:	Trial and conviction of an individual under anti-terrorist legislation
Procedural issues:	Possible failure to exhaust domestic remedies following the annulment of the conviction and initiation of new proceedings

* Made public by decision of the Human Rights Committee.

Substantive issues:	Violation of the right to liberty and security of person and the guarantees of due process
Articles of the Covenant:	2, 7, 9, 10, 14 and 15
Articles of the Optional Protocol:	2, 5, paragraph 2 (b)

On 28 October 2005, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1126/2002. The text of the Views is appended to the present document.

[ANNEX]

Annex

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-fifth session

concerning

Communication No. 1126/2002*

Submitted by:	Marlem Carranza Alegre (represented by counsel, Carolina Loayza Tamayo)
Alleged victim:	The author
State party:	Peru
Date of communication:	12 March 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2005,

Having concluded its consideration of communication No. 1126/2002, submitted on behalf of Ms. Marlem Carranza Alegre under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ms. Marlem Carranza Alegre, a Peruvian citizen, currently imprisoned in the Chorrillos Women's Maximum Security Prison, Lima. She claims to be the victim of violations by Peru of articles 2, 7, 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights. She is represented by counsel, Carolina Loayza Tamayo.

1.2 The Optional Protocol entered into force for Peru on 3 January 1981.

Factual background

2.1 The author worked as a doctor in Casimiro Ulloa Emergency Hospital, Lima. On 16 February 1993 she was stopped in the street by individuals in civilian clothes who forced her into a vehicle for an unknown destination. Once in the vehicle the individuals identified themselves as members of the police and informed her that she was being detained in connection with the investigation of terrorist incidents. They handcuffed her and covered her head with her jacket. The author was then taken to premises which she later learned were those of the Department of Counter-Terrorism (DINCOTE).

2.2 The author was interrogated blindfolded. During interrogation she was threatened with the arrest of her family members and with the confiscation of her possessions and medical equipment; she was accused of treating terrorists and was hit on the head and lost consciousness. When she recovered her senses, the interrogation continued with blows, insults and threats, including the threat of rape. During the first days of her detention she was forced to remain standing for the entire day.

2.3 The police searched her home and claimed to have found a document establishing a link between her and the Sendero Luminoso terrorist organization. The author asserts that this document did not belong to her. She was accused of having treated "subversives" and coerced medical colleagues into doing the same. She was also urged under threat to denounce other persons who had allegedly "forced her" to perform those acts.

2.4 The author remained in solitary confinement for seven days, following which the police report was prepared. It concluded that the author was guilty of the offence of terrorism. On 24 February 1993 Lima's provincial criminal prosecutor No. 14 drew up a charge against the author, accusing her of being a member of "the subversive organization the Sendero Luminoso Communist Party of Peru, in the health section of the People's Aid Association, as an activist, trainer, organizer of support and contact". She was remanded in custody. On the same date the judge initiated pre-trial proceedings and ordered her to be detained.

2.5 The author was tried for an offence against the public peace/terrorism by the Special Criminal Division for terrorist affairs of the High Court of Lima (a "faceless" or concealed identity division), under Decree-Law No. 25475 of 5 May 1992, which established this offence. On 2 March 1994 the Division handed down a judgement sentencing the author to 20 years' imprisonment. The sentence was appealed and declared void by the Supreme Court on 8 June 1995, on the grounds that there had been irregularities in the proceedings in breach of the Code of Criminal Procedure.

2.6 On 16 October 1995 a new oral hearing took place before the Special (faceless) Criminal Division of the High Court of Lima, accusing the author of "being a member of the so-called health section of the department of support of the Peruvian People's Aid Association, one of the central bodies of the self-styled terrorist group, the Sendero Luminoso Communist Party of Peru". More specifically, she was accused of being a member of the leadership cell of the health section, of being in charge of it and of drawing up plans for the care and examination of persons wounded in terrorist actions in metropolitan Lima. She was sentenced to 25 years' imprisonment and a fine for the offence of terrorism under articles 4 (terrorism - acts of collaboration), 5 (membership of a terrorist organization) and 6 (incitement to commit acts of terrorism) of Decree-Law No. 25475. The author claims that these definitions of offences do not apply.

2.7 On 3 September 1997 the author filed a petition for annulment with the Supreme Court, contending that the conviction was based on legislation - Decree-Law No. 25475 of 5 May 1992 - which had not been in force when the acts with which she was charged allegedly took place, that is, between 1987 and the early months of 1992. At that time, the legislation applicable was the Criminal Code and Act No. 24953, which punished offences against the public peace/terrorism with maximum sentences of 15 and 25 years respectively for the alleged offence of association. In addition, pre-trial investigations were initiated against her for allegedly being an accessory to the offence of terrorism but she was convicted on a different charge, namely, that of being a "middle level cadre" of Sendero Luminoso. On 29 September 1997 the Court rejected the petition. Neither the author nor her counsel were notified of the judgement.

2.8 In October 1997, the author's father sought a pardon from the President of the Republic under Act No. 26655. Under this Act an ad hoc commission had been set up to propose that the President should grant a pardon to persons sentenced for the offence of terrorism contrary to fundamental standards of justice.

2.9 During the first few years of her detention in Chorrillos Maximum Security Prison, even before being convicted, the author was held in a cell 2.5 metres square, shared with five or six persons simultaneously, where she remained all day except for half an hour in the yard. During her periods in the yard she could not talk to other inmates. She did not have access to reading and writing materials. Her visiting rights were restricted to two immediate relatives per month for a total of 30 minutes in multi-person visiting rooms and without physical contact. The food was inadequate. As a result of all of this she had health problems and began to suffer from bruxism, facial paralysis, dermatitis, aggravated myopia, bronchial symptoms, etc.

2.10 The author maintains that she was subjected to the regime under Decree-Law No. 25475, in accordance with which:

> The determination of the unlawful act was made by officers of the DINCOTE police, and used as a basis to determine the competent court;
>
> The appointment of defence counsel was regularly made after the police investigation had taken place;

Counsel freely elected by the defendant could not have an interview with the defendant before the latter made a statement to the examining magistrate;

Neither defendants nor their counsel were shown the evidence against them. Nor was the defence permitted to challenge witnesses who had made statements during the police investigation;

Defendants had no access to any right of conditional release before the conclusion of proceedings;

A special ad hoc procedure was established and applied by a judge during the investigation phase and by faceless judges during the oral hearing, whereby procedural guarantees were not admitted;

Charge and evidence statements, records of hearings and judgements lacked the signature of the prosecutors and judges involved because of their faceless status;

During the first year of imprisonment, a regime of continuous solitary confinement was imposed on the accused, in addition to other restrictions.

2.11 The author declares that she has not made application to any other international body with regard to the subject matter of the communication.

The complaint

3.1 The author claims that the facts described are a violation of several provisions of the Covenant.

3.2 As the author asserted in her testimony before the Criminal Court on 10 March 1993, she was subjected to physical and mental torture during her detention by DINCOTE; she was also left without food and kept in solitary confinement for seven days. All the interrogations were accompanied by blows to the head, insults, threats and psychological pressure. The solitary confinement was permitted under article 12 (d) of Decree-Law No. 25475 and was absolute, even counsel being excluded. This constitutes a form of cruel and inhuman treatment damaging to an individual's physical, mental and moral well-being. According to the author, these facts are a violation of article 7 of the Covenant.

3.3 Article 9, paragraph 1, was also violated, since the author was detained arbitrarily, without a court order and without having been caught in flagrante delicto, these being requirements of article 2.24 (f) of the Constitution of Peru. Moreover, the legislation applied to her did not permit the judge to order the appearance of the detainee. Contrary to article 9, paragraph 3, of the Covenant, detention in custody was the general rule, with no exceptions. Furthermore, article 6 of Decree-Law No. 25659, which restricted the possibility of filing a remedy of habeas corpus in respect of persons under investigation for the offence of terrorism, was applied to her. This was a violation of article 9, paragraph 4, of the Covenant.

3.4 According to the author, the regime of deprivation of liberty applied to her on the basis of Decree-Law No. 25475 was inhumane and thus a violation of article 10 of the Covenant. It excluded, inter alia, the possibility of taking advantage of the benefits set out in the

Criminal Code and the Code of Criminal Enforcement. It furthermore provided that it was mandatory for the sentence to be served in a maximum security prison with continuous solitary confinement during the first year of detention and imposed severe restrictions on the system of visits.

3.5 The author further asserts that article 14, paragraph 1, was violated since she was tried by faceless courts, where the identity of the judges is kept secret and objection is impossible. The Decree-Law also lays down that both pre-trial proceedings for the offence of terrorism and the oral hearing must be conducted in specially designed premises within the criminal courts. According to the author, the secret nature of the oral hearing distorts it since its public nature is its fundamental characteristic and a guarantee of fairness.

3.6 Article 14, paragraph 2, was also violated, since Decree-Law No. 25475 eliminated the independence of the judge and of the Public Prosecutor's Office.[1] The judge was unable to take a decision on the basis of the evidence submitted as to whether or not there were grounds for initiating the pre-trial investigation: rather, the Decree "orders" the judge to initiate the investigation and issue an arrest warrant. Detention is compulsory; the judge no longer has the discretion to order a conditional release. With regard to the Public Prosecutor's Office, the Decree requires the senior prosecutor to issue a charge and evidence statement when the pre-trial investigation is concluded, with the consequent disappearance of any discretion in proceeding. Overall, this represents a violation of the right to be presumed innocent.

3.7 According to the author, there was a violation of article 14, paragraph 3, since as the police report attests, the author was not clearly notified in detail of the reason for her detention. She was furthermore unable to communicate with her counsel during the time she remained in solitary confinement, since article 12 (f) of the Decree-Law established that the defence lawyer could only intervene as from when the detainee made his statement before the Public Prosecutor. Article 13 of the Decree-Law also eliminated a fundamental defence mechanism by preventing individuals involved in the investigation from being called to testify as witnesses before a judge or court. The author's conviction was based exclusively on the police report, which means that the Public Prosecutor's Office did not prove the accusations; instead, the burden of proof was on the author.

3.8 The facts on which the detention and subsequent trial and sentencing of the author were based supposedly took place between 1987 and the early months of 1992. The complaint by the Public Prosecutor's Office, the initiation of proceedings and the subsequent sentence were, however, based on Decree-Law No. 25475, promulgated on 5 May 1992, which imposed heavier penalties. This is a violation of article 15 of the Covenant.

3.9 Article 15 was also violated by the fact that the author was sentenced for acts and offences other than those for which the criminal investigation was initiated. The Fourteenth Specialized Criminal Court of Lima opened an investigation for an alleged offence against the public peace/terrorism, as "collaboration", under article 4 (b) of the Decree-Law. As set out in the order to commence investigation, the alleged acts of collaboration consisted of surgical operations and the provision of surgical instruments, medical equipment, medicine, X-rays and

clinical analyses to the "terrorist" group. She was, however, sentenced for being a "middle level cadre" of Sendero Luminoso. The medical acts described were further criminalized as collaboration, although none of them is described as collaboration in article 321 of the Criminal Code, one of the applicable standards in force.

3.10 Lastly, the author maintains that any violation of any of the rights enshrined in the Covenant entails the violation of the State's obligation to respect those rights, embodied in article 2, paragraph 1.

The State party's observations on admissibility

4.1 In its observations of 22 December 2004[2] the State party reports that in January 2003 the Constitutional Court handed down a judgement in which it declared various procedural and criminal rules in anti-terrorist matters to be unconstitutional. As a result, the Government issued Legislative Decree No. 926 in February 2003 standardizing the annulment of proceedings for the offence of terrorism conducted before judges and prosecutors whose identity was concealed and where the prohibition of objection applied. It also issued Legislative Decree No. 922, according to which criminal proceedings for the offence of terrorism are to be conducted in accordance with the ordinary procedural arrangements of the Code of Criminal Procedure.

4.2 On 15 January 2003, the High Court of Lima issued a decision concerning the remedy of habeas corpus filed by the author against the Special Criminal Division of the High Court of Lima and the Supreme Court for violation of her personal liberty as a result of a breach of due process. The remedy was declared admissible and the criminal trial of the author consequently void since the fundamental principles of due process - a competent and established judge and the right to know whether the trial judge had jurisdiction - had been violated and since she had been sentenced by faceless judges. On 3 February 2003 the National Terrorism Division issued a writ ordering this decision to be implemented.

4.3 On 27 March 2003, the First Special Court for terrorist offences instituted pre-trial proceedings against the author for the offence of ordinary terrorism as provided in article 288-A and article 288-B, paragraph (a), of the 1924 Criminal Code, introduced by Act No. 24651; articles 319 and 320, paragraph 1, of the 1991 Criminal Code; and articles 2 and 5 of Decree-Law No. 25475, and issued a detention order. The proceedings were assigned to the National Terrorism Division and referred to the Office of the Second Senior Prosecutor specializing in terrorist offences. In a decision of 6 September 2004 the Prosecutor entered a charge of terrorism. The author was charged with belonging to a subversive organization, the Sendero Luminoso Communist Party of Peru, and with being a member of the cell management committee of the health section of the department of support of the People's Aid Association and therefore in charge of groups belonging to the organization. As a surgeon, she was responsible for recruiting doctors, organizing them and providing support activities consonant with the medical profession. The prosecutor requested a 30-year prison sentence, a fine and an accessory penalty of loss of civil rights.

4.4 The author's case is pending in the National Terrorism Division in the context of new criminal proceedings instituted in accordance with the new anti-terrorist legislation. The State party therefore considers that domestic remedies have not been exhausted and that the communication should be declared inadmissible.

The author's comments

5.1 The author states that she is being tried for the second time for the same acts, as a result of her quest for justice. A new trial, however, is not adequate reparation in cases of the violation of due process, particularly when this is owing to an act on the part of the State challenged.

5.2 This communication was submitted to the Committee when the author was serving a sentence resulting from a criminal trial against her in total violation of due process; this situation has been acknowledged by the Peruvian judiciary, which pronounced admissible the remedy of habeas corpus filed on her behalf in a decision in first instance on 2 December 2002 and in second instance on 15 January 2003. Furthermore, Legislative Decree No. 926, which provides for the annulment of trials by ordinary courts for the offence of terrorism, is accompanied by express State acknowledgement of the violation of due process and judicial guarantees, and hence of the right to liberty of persons detained, tried and sentenced for the offence of terrorism.

5.3 The lack of precision in the definition of the offence of terrorism in article 2 of Decree-Law No. 25475 is incompatible with the principle of legality enshrined in the Covenant, since the acts comprising the offence were described in the abstract and imprecisely, so that it is impossible to know exactly what specific behaviour constitutes this criminal offence.

5.4 The author asserts that she was accused of having treated and supplied medicines to "terrorists" and their family members. Not only are these two acts not illegal, they are lawful and ethically correct. The acts of participation in a surgical operation, treatment and provision of medicines do not form part of the crime of terrorism. A state of anxiety or terror is neither provoked, created nor maintained, deliberately or involuntarily, by medical acts, nor can they be assimilated to acts injurious to life, physical integrity, health or individual freedom and safety or to State or private property, nor do they constitute an attack on public or private safety.

5.5 In accordance with the estoppel principle enshrined in international law, the State is precluded from invoking its own acts. Consequently, it cannot contend that the author did not exhaust domestic remedies. In a recent judgement of 18 November 2004 handed down in the case of De la Cruz Flores, the Inter-American Court of Human Rights stated that a new trial was not sufficient to make reparation for violations of due process.

5.6 The author says that she has been detained for approximately 12 years, accused but not sentenced, in violation of article 9 of the Covenant. In July 2002, she applied to be granted semi-liberty, but this was declared inadmissible, initially by the Twenty-eighth Provincial Criminal Court of Lima and subsequently by the High Court, on the grounds that the period of detention under the Code of Criminal Procedure had not been completed, in that it ran as from the date of the order to commence investigation, i.e. 21 March 2003. The State party thus ignored the period spent by the author in prison due to its failure to ensure her fair trial. In other words, the State invokes its own acts in order to deny the author her right to trial within a reasonable time or to release, as article 9, paragraph 3, of the Covenant requires.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, in compliance with the provisions of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the requirement of the exhaustion of domestic remedies, the Committee takes note of the State party's assertion that the case is pending in the National Terrorism Division in the context of new criminal proceedings instituted in accordance with the new anti-terrorist legislation, and that, consequently, domestic remedies have not been exhausted. The Committee is pleased to observe the amendment of several procedural and penal rules of anti-terrorist legislation, particularly those that permit the annulment of proceedings for the offence of terrorism conducted before judges and prosecutors whose identity has been concealed and establish that criminal proceedings for the offence of terrorism will be conducted in accordance with the ordinary procedures for which the Code of Criminal Procedure provides. With reference, however, to article 5, paragraph 2 (b), of the Optional Protocol, the Committee observes that the author was arrested on 16 February 1993 and subsequently tried and sentenced under Decree-Law No. 25475 of 5 May 1992, and that she filed all the appeals permitted under that legislation against her sentence, including a petition for annulment to the Supreme Court. All of this was prior to her submitting her communication to the Committee. The fact that the legislation applied to the author and on which her communication was based was declared null and void several years later cannot be considered to her disadvantage. In the circumstances, it cannot be claimed that the author should wait for the Peruvian courts to take a new decision before the Committee can consider the case under the Optional Protocol. Further, the Committee observes that the application of remedies before the Peruvian courts was initiated in 1993 and has still not been concluded.

6.4 The author contends that she received a harsher sentence than was appropriate under the legislation applicable at the time the alleged acts were committed, thus constituting a violation of article 15 of the Covenant. The Committee considers, however, that the author has not furnished sufficient evidence for it to take a decision with regard to this contention, and therefore considers that this part of the communication should be considered inadmissible, under article 2 of the Optional Protocol, for lack of substantiation.

6.5 The Committee accordingly declares the communication admissible with regard to the alleged violations of articles 7, 9, 10 and 14 of the Covenant and proceeds to consider the merits of the complaint under article 5, paragraph 1, of the Optional Protocol, bearing in mind the information provided by the parties.

Consideration of the merits

7.1 The Committee regrets that the State party has not submitted observations on the merits of the case under consideration. It recalls that it may be inferred from article 4, paragraph 2, of the Optional Protocol that the State party must examine in good faith all the complaints made against it and provide the Committee with all the information at its disposal. Since the State party has not cooperated with the Committee in the matters raised, the author's claims must be given their due weight insofar as they are substantiated.

7.2 The author asserts that during the days she was held by DINCOTE she was subjected to torture, of which she provides details. As the State party provides no information to contradict these allegations, due weight must be given to them and it must be taken that the events occurred as described by the author. The Committee thus considers that there has been a violation of article 7 of the Covenant.

7.3 With regard to the author's contentions concerning the violation of her right to liberty and security of person, the Committee considers that her arrest and detention incommunicado for seven days and the restrictions on the exercise of the right of habeas corpus constitute violations of article 9 of the Covenant as a whole.

7.4 The author contends that the regime of deprivation of liberty applied to her under Decree-Law No. 25475 constitutes a violation of article 10 of the Covenant. The Committee considers that the conditions of detention in the Chorrillos Women's Maximum Security Prison described by the author, particularly those applied during her first year of detention, violated her right to be treated with humanity and with respect for the inherent dignity of her person and therefore breached the provisions of article 10 as a whole.

7.5 With regard to the author's complaints in relation to article 14, the Committee takes note of her allegations that the hearings at her trial were held in private and that the court comprised faceless judges who could not be challenged; that she was unable to communicate with her lawyer during the seven days she was held incommunicado; that the police officers involved in the investigation were not called as witnesses since this was not permitted under Decree-Law No. 25475; and that her lawyer was not able to challenge witnesses who had made statements during the police investigation. In the circumstances, the Committee concludes that article 14 of the Covenant, which refers to the right to a fair trial, was breached as a whole.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 9, 10 and 14, together with article 2, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy and appropriate compensation. In the light of the long period she has already spent in detention and the nature of the acts of which she stands accused, the State party should give serious consideration to terminating her deprivation of liberty, pending the outcome of the current proceedings. Such proceedings must comply with all the guarantees required by the Covenant.

10. Bearing in mind that, as a party to the Optional Protocol, the State party recognizes the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to offer an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Article 13: "For the investigation and trial of the terrorist offences referred to in this Decree-Law the following rules shall be observed: (a) Once the charge has been formalized by the Public Prosecutor's Office, the detainees shall be brought before the criminal judge, who shall give the order to commence investigation with an arrest warrant within a period of 24 hours, after the necessary security measures have been taken. During the investigation no form of release may be envisaged; there shall be no exceptions. (…) (d) On conclusion of the investigation, the file shall be transmitted to the President of the court in question, who shall transmit the proceedings to the chief prosecutor, who in turn shall appoint the senior prosecutor who must draw up the indictment within three days, being liable for failure to do so."

[2] The communication was transmitted to the State party on 14 October 2002. The State party had six months, i.e. until 14 April 2003, to give its reply on admissibility and merits. When no reply was received, reminders were sent on 15 September and 18 November 2004.
