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# UNTOLD TRUTHS: THE EXCLUSION OF ENFORCED STERILIZATIONS FROM THE PERUVIAN TRUTH COMMISSION'S FINAL REPORT

JOCELYN E. GETGEN\*

**Abstract:** This Article argues that the exclusion of enforced sterilization cases from the Peruvian Truth Commission's investigation and Final Report effectively erases State responsibility and decreases the likelihood for justice and reparations for women victims-survivors of State-sponsored violence in Peru. In a context of deep cultural and economic divides and violent conflict, this Article recounts how the State's Family Planning Program violated Peruvian women's reproductive rights by sterilizing low-income, indigenous Quechua-speaking women without informed consent. This Article argues that these systematic reproductive injustices constitute an act of genocide, proposes an independent inquiry, and advocates for a more inclusive investigation and final report for future truth commissions whose goals include truth, accountability, and justice for all victims-survivors of state-sponsored violence. Leaders responsible for the enforced sterilization of more than 200,000 Peruvian women, including former President Alberto Ken'ya Fujimori, must be held accountable for past violations in order to fully realize future reconciliation and justice in Peru.

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*“[E]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed . . . .”*<sup>1</sup>

## INTRODUCTION

Does time heal all wounds? Can a transitioning democratic society move forward without fully facing the human rights violations that plague its past? Or can only truth and justice reconcile large-scale abuses? Difficult lessons from the recent past have taught societies and nations that legitimate democracies require political and personal accountability reinforced by the rule of law.<sup>2</sup> International human rights treaties thus impose upon states a duty to investigate, criminally prosecute, and punish perpetrators of crimes against humanity.<sup>3</sup> Although state actions taken in response to gross violations of human rights are never truly adequate when communities, families, and individuals suffer irreparable harms, inaction is invariably worse.<sup>4</sup> A state’s failure to respond appropriately and justly to gross human rights abuses can give victims the sense that their perpetrators emerged either victorious or with clean hands.<sup>5</sup>

The Peruvian government’s response to twenty years of human rights abuses from 1980 to 2000 included creating a truth commission with a broad mandate to “promote national reconciliation, the rule of justice and the strengthening of the constitutional democratic regime.”<sup>6</sup> By forming the Peruvian Truth and Reconciliation Commission (*CVR*),<sup>7</sup> the State initiated a process of achieving national reconciliation through an attempt to correct the historical record, provide a collective memory and preserve the possibility of criminal accountability and justice.<sup>8</sup>

<sup>1</sup> GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 328 (The New Press 2006) (1999) (quoting the IAC ANNUAL REPORT 193 (Sept. 26, 1986)).

<sup>2</sup> See JOHN BORNEMAN, *SETTLING ACCOUNTS: VIOLENCE, JUSTICE, AND ACCOUNTABILITY IN POSTSOCIALIST EUROPE* 3 (1997).

<sup>3</sup> See ROBERTSON, *supra* note 1, at 327–28.

<sup>4</sup> See MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* 15–16 (2002).

<sup>5</sup> See *id.* at 16.

<sup>6</sup> Supreme Decree 065–2001-PCM art. 1 (June 2, 2001) (Peru).

<sup>7</sup> *Comisión de la Verdad y Reconciliación*.

<sup>8</sup> See Amnesty Int’l, *Peru: The Truth and Reconciliation Commission—A First Step Towards a Country Without Injustice*, AI Index AMR 46/003/2004, 1–2 (Aug. 2004); PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 24–31 (2002) (discussing the basic objectives of a truth commission: “to discover, clarify, and for-

In many respects, the *CVR* is a model for future truth commissions that strive to end impunity, attend to the needs of victims, initiate state investigations and systemic reforms, gain a critical perspective to confront internal conflict, and condemn individuals and institutions for abuses.<sup>9</sup> Although this Commission serves as an ambitious and inclusive mechanism for accountability and truth-telling, it fails to provide a record and voice to more than 200,000 marginalized, indigenous Quechua-speaking women in Peru who were victims of a State-sponsored enforced sterilization campaign.<sup>10</sup> The exclusion of large-scale reproductive rights abuses committed against the poorest and most marginalized sectors of Peruvian society demonstrates a weakness of the *CVR*, impedes justice for these individuals, and provides further lessons for truth commissions of the future.<sup>11</sup> With large-scale human rights abuses occurring in conflicts and transitioning regimes around the world—the internal and international conflicts in Iraq, for example<sup>12</sup>—the transitional justice community must responsibly ensure that the collective memory includes all victims and that their voices are not

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mally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past”); MINOW, *supra* note 4, at 24–27. See generally RICHARD A. WILSON, *THE POLITICS AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001) (describing the truth-telling and reconciliation functions of the South African Truth and Reconciliation Commission).

<sup>9</sup> See COMISIÓN DE ENTREGA DE LA COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, HATUN WILLAKUY: VERSIÓN ABREVIADA DEL INFORME FINAL DE LA COMISIÓN DE LA VERDAD Y RECONCILIACIÓN 433–65 (2004); TRUTH AND RECONCILIATION COMM’N, FINAL REPORT, GENERAL CONCLUSIONS *passim* (2003) available at <http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php> [hereinafter FINAL REPORT].

<sup>10</sup> Amnesty Int’l, *supra* note 8, at 19–20. See generally FINAL REPORT, *supra* note 9. These women predominantly lived in rural areas in the Andes and Peruvian Amazon. Amnesty Int’l, *supra* note 8, at 20.

<sup>11</sup> See discussion *infra* Part III.

<sup>12</sup> See, e.g., M. Cherif Bassiouni, *Postconflict Justice in Iraq*, 33 HUM. RTS. 15 *passim* (2006) (highlighting the violent and widespread conflict in Iraq and advocating for a post-conflict justice strategy that includes prosecution of offenders, a victim compensation scheme, the creation of a historic commission, and revamping the Iraqi legal system); Jennifer Moore, *Collective Security with a Human Face: An International Legal Framework for Coordinated Action to Alleviate Violence and Poverty*, 33 DENV. J. INT’L L. & POL’Y 43 *passim* (2004) (finding a legal obligation to promote human security in certain international human rights documents and arguing that security will not be established until political and civil liberties and secure and basic economic and social needs are met); NGO Coordination Comm. in Iraq & Oxfam Int’l, *Rising to the Humanitarian Challenge in Iraq*, Briefing Paper 105, July 2007, available at [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/18\\_07\\_07\\_oxfam\\_iraq.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/18_07_07_oxfam_iraq.pdf) (calling for an increase in humanitarian assistance to the people of Iraq and estimating that eight million Iraqis are in need of emergency aid).

silenced in the future processes of truth and reconciliation.<sup>13</sup> Furthermore, with Peru's current step toward accountability and transitional justice—the trial of former President Alberto Ken'ya Fujimori—advocates and other members of civil society must push for reproductive justice for the victims-survivors of enforced sterilization in Peru in order to move toward truth, justice, and reconciliation for all.<sup>14</sup>

This Article argues that the exclusion of enforced sterilizations cases in the *CVR's* investigation and Final Report effectively erases State responsibility and greatly decreases the likelihood that Peru will seek justice for the victims of these violations of reproductive rights. Part I provides an overview of the sharp cultural and economic divides in Peruvian society, examines the history of violent conflict in Peru from 1980 to 2000, and recounts how healthcare providers violated Peruvian women's reproductive rights when they sterilized low-income, indigenous Quechua-speaking women either against their will or without informed consent through the State's Family Planning Program. Part II discusses the creation and implementation of the *CVR* through its executive mandate. Part III challenges the reasons for excluding these cases in the Commission's investigation and Final Report and also examines the effects of these omissions. Part IV proposes an independent inquiry with regard to these abuses and advocates for a more inclusive investigation and final report for future truth commissions whose goals include truth, accountability, and justice.

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<sup>13</sup> Cf. David M. Crane, *White Man's Justice: Applying International Justice After Regional Third World Conflicts*, 27 *CARDOZO L. REV.* 1683, 1684 (2006) (advocating for victims' central role in the truth, reconciliation, and justice process). See generally KADER ASMAL ET AL., *RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID'S CRIMINAL GOVERNANCE* (1997) (discussing the need for reconciliation through collective memory and corrective action); JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* (2004) (discussing the truth and reconciliation process of transitional justice in South Africa); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000) (discussing various concepts of transitional justice and the rule of law in times of political change); Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 *CORNELL INT'L L.J.* 837 (2005) (reviewing contemporary developments in transitional justice).

<sup>14</sup> See *supra* notes 8, 12; Fujimori on Trial: Accountability in Action, <http://fujimoriontrial.org> (last visited Nov. 24, 2008) (providing news and analysis regarding the Fujimori trial).

## I. THE PATHS TO VIOLENT CONFLICT

### A. *Indigenous Peoples in Peruvian Society*

*Tawantinsuyu*'s<sup>15</sup> destruction and Peru's birth began when the Spanish Conquistadors invaded Incan lands, captured the last Incan ruler, Atahualpa, and massacred thousands of Incan warriors in the Andean city of Cajamarca in 1532.<sup>16</sup> During the first one hundred years of colonial rule and oppression in Peru, the indigenous population in the Andes region plummeted from nine million to six hundred-thousand people.<sup>17</sup> From this swift defeat and near destruction of the highland indigenous peoples of Peru emerged the myth of the "vanquished race": that the Incas and their descendants lacked decision-making ability and individual initiative and, thus, "could or should be exterminated, 'civilized,' instructed, or saved."<sup>18</sup>

Spanish colonial rule guaranteed impoverishment and death for many indigenous Peruvians and perpetuated the fragmented and divided structures that continue to exist in Peruvian society today.<sup>19</sup> First, a geographical divide exists between the coastal region—predominately urban, white and Spanish-speaking—and the highlands—mostly rural, indigenous and Quechua-speaking.<sup>20</sup> In addition, the coastal region boasts an overwhelming majority of the nation's wealth and political power, and, as a result, political and economic programs in past regimes have largely ignored or neglected the needs of the indigenous peoples in the highlands and rainforest regions.<sup>21</sup> Moreover, there are racial and ethnic gaps that divide Peruvian society among groups of Spanish descent (*criollos*), mixed Spanish and indigenous descent (*mestizos*), indigenous of Andean origin who have moved to the urban cen-

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<sup>15</sup> *Tawantinsuyu* is the name of the pre-colonial Incan Empire. ENCYCLOPEDIA BRITANICA, SCURLOCK—TIRAH IX, 845 (15th ed. 1983).

<sup>16</sup> See THE PERU READER: HISTORY, CULTURE, POLITICS 81, 102–06 (Orin Starn et al. eds., 1995).

<sup>17</sup> *Id.* at 82.

<sup>18</sup> *Id.* at 81–82.

<sup>19</sup> See *id.* at 112; AMERICAS WATCH, PERU UNDER FIRE: HUMAN RIGHTS SINCE THE RETURN TO DEMOCRACY 1 (1992).

<sup>20</sup> AMERICAS WATCH, *supra* note 19, at 1; Carlos Iván Degregori, Comm'r, Peruvian Truth & Reconciliation Comm'n, Questions of Violence and Racism in a Diverse Society: The Findings of the Peruvian Truth and Reconciliation Commission, Address at Cornell Law School (Nov. 28, 2005) (transcript available with the author).

<sup>21</sup> AMERICAS WATCH, *supra* note 19, at 1.

ters of the country (*cholos*) and indigenous who continue to live a more traditional way of life in the highlands (*indígenas*).<sup>22</sup>

Although today indigenous groups are beginning to organize politically and socially to demand individual and collective rights from the State,<sup>23</sup> invidious discrimination and economic, cultural and social divides still exist at all levels of Peruvian society.<sup>24</sup> In Peru, indigenous peoples continue to be seen as second-class citizens, a racist view established through these divides, their situations of extreme poverty, and the inadequate access to basic health care and education.<sup>25</sup>

## B. *Twenty Years of Violent Internal Conflict in Peru*

### 1. Setting the Stage for State-Sponsored Violence

Before the Peruvian government committed more than 200,000 enforced sterilizations against indigenous Quechua-speaking women through its Family Planning Program during the 1990s, the internal conflict between insurgent groups and the State created an environment of fear in which few openly questioned government policies.<sup>26</sup> At first, violence in Peru erupted in 1980 when the Maoist armed government opposition group, the Shining Path,<sup>27</sup> initiated a political, “popular” war against the State.<sup>28</sup> At that time, Peru had begun its tran-

<sup>22</sup> See MARIA ELENA GARCÍA, MAKING INDIGENOUS CITIZENS: IDENTITY, DEVELOPMENT, AND MULTICULTURAL ACTIVISM IN PERU 27–29 (2005); Degregori, *supra* note 20.

<sup>23</sup> See generally GARCÍA, *supra* note 22 (discussing the issues surrounding indigenous mobilization and citizenship in Peru).

<sup>24</sup> See AMERICAS WATCH, *supra* note 19, at 1–3; ENRIQUE MAYER, THE ARTICULATED PEASANT: HOUSEHOLD ECONOMIES IN THE ANDES 322 (2002); Degregori, *supra* note 20.

<sup>25</sup> See AMERICAS WATCH, *supra* note 19, at 1–3; MAYER, *supra* note 24, at 322–23; Degregori, *supra* note 20.

<sup>26</sup> See Eduardo González Cueva, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 70, 71–72 (Naomi Roht-Arriaza & Javier Maricurtena eds., 2006); Degregori, *supra* note 20.

<sup>27</sup> *Sendero Luminoso*.

<sup>28</sup> See Steve J. Stern, *Introduction to Part III*, in SHINING AND OTHER PATHS: WAR AND SOCIETY IN PERU, 1980–1995, at 262–63 (Steve J. Stern ed., 1998); Degregori, *supra* note 20 (arguing that the CVR’s final report highlighted the political will of the Shining Path rather than digging deeper into the “structural violence” and poverty of the State). Although the CVR’s report acknowledged that these structural concepts formed the background of the conflict, the concepts alone were not seen as enough to explain the extent of the violence suffered. See Degregori, *supra* note 20. In addition, many social movements of the time used the structural factors and widespread poverty to justify violence. See *id.* The Shining Path actually argued that the State and the Peruvian people should not chastise the group for killing some reactionaries when many more multitudes of people were

sition from a military regime to a civilian democracy; however, the Maoist faction did not participate in the left's incorporation into the political system.<sup>29</sup> Instead of taking part in elections, Shining Path members launched their communist-Maoist campaign by attacking the voter registration office in Chuschi, a small town in the central highlands of the Ayacucho province, before dawn on Election Day in 1980.<sup>30</sup> This political spark ignited a fire in a country with great disparity between rich and poor, abject rural poverty, geographic exclusion in the Andes and Amazon regions, and invidious discrimination and racism among ethnic and racial groups.<sup>31</sup>

Next, the absence of a strong, unchallenged democratic transition, combined with the presence of the revolutionary movement of the Shining Path, caused the government to react with authoritarian rule and military force, which then served to escalate the initial outbreaks of violence.<sup>32</sup> Fernando Belaúnde's newly-elected government, in response to increasing social unrest, imposed states of emergency in departments throughout the country.<sup>33</sup> In addition, the Armed Forces used racial profiling and killed indiscriminately in areas of conflict with the Peruvian government's knowledge and acquiescence.<sup>34</sup> In this context, the Shining Path gained support and momentum as some rural peasant communities began to view the guerillas as the lesser of two evils during the beginning of the armed struggle.<sup>35</sup>

At first, certain peasant communities, such as those in the district of Chuschi, also backed the Shining Path's efforts because the Shining Path's short-term goals aligned with their own: to drive out enemies in their towns who were gaining power, to establish better-quality

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dying of hunger and malnutrition each day in Peru. *See id.*; González Cueva, *supra* note 26, at 71.

<sup>29</sup> Anna-Britt Coe, *From Anti-Natalist to Ultra-Conservative: Restricting Reproductive Choice in Peru*, 12 REPROD. HEALTH MATTERS 56, 59 (2004); *see* GUSTAVO GORRITI, *THE SHINING PATH: A HISTORY OF THE MILLENARIAN WAR IN PERU* 10–11 (Robin Kirk trans., The University of North Carolina Press 1999) (1990).

<sup>30</sup> GORRITI, *supra* note 29, at 17; Billie Jean Isbell, *Shining Path and Peasant Responses in Rural Ayacucho*, in *THE SHINING PATH OF PERU* 77, 89–90 (David Scott Palmer ed., 2d ed. 1994).

<sup>31</sup> *See* Degregori, *supra* note 20.

<sup>32</sup> *See id.*; González Cueva, *supra* note 26, at 71–72 (noting that “[t]he combined action of guerilla organizations, military units and local self-defense groups acting under the command, or with the acquiescence of the state” actually caused the bulk of the deaths that the CVR estimates occurred during the whole twenty-year period).

<sup>33</sup> *See* AMERICAS WATCH, *supra* note 19, at 6.

<sup>34</sup> *See* Degregori, *supra* note 20.

<sup>35</sup> *See id.* The slogan at the time was that the “Shining Path has one thousand eyes and one thousand ears,” while the State fights blindly. *Id.*



schools, and to end government corruption.<sup>36</sup> To some communities, the revolution and “New Peru” meant that they would finally free themselves from abusive bureaucrats and public officials and return to the consensus framework with which traditional authorities governed in the past.<sup>37</sup> In time, however, the Shining Path began to reorganize peasant communities toward its ideology of a “future without distinctions” in class or wealth and to assume authoritarian power over them; as a result, the Andean people came to see the Shining Path as nothing more than new oppressors.<sup>38</sup> “[I]nstead of becoming the revolutionary vanguard in the communities, Shining Path [was] perceived . . . as a new form of *ñaña*, the supernatural being that robs body fat” in Andean mythology to pay off a debt.<sup>39</sup> The Shining Path eventually lost what little peasant community support it had, and Andean citizens complied with military orders to organize civil defense patrols in order to resist the efforts of Shining Path insurgents.<sup>40</sup>

The Shining Path focused its class war in the countryside, the “principal theater” of its actions, and complemented these efforts by supporting armed strikes and mobilizations in the city.<sup>41</sup> At first, the Shining Path’s motives remained a mystery to most urban Peruvians; the cryptic messages—“Teng Hsiao-ping, son of a bitch”—wrapped around dead dogs hanging from streetlamps in Lima seemed to them to border on insanity.<sup>42</sup> Soon, however, the dynamite attacks and killings intensified, and the uprising turned into a bloodbath that could no longer be underestimated or ignored.<sup>43</sup>

While the Armed Forces devised new strategies to defeat the Shining Path, the nation’s social and political composition shifted under the structural factors of a modernizing Peru.<sup>44</sup> First, a significant number of Peruvians migrated from the rural areas to the cities, largely due to the development of a market economy, increased transportation, and as displaced persons of the armed conflict.<sup>45</sup> In addition, the relatively

<sup>36</sup> Isbell, *supra* note 30, at 89–90.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 90–92.

<sup>39</sup> *Id.* at 92.

<sup>40</sup> *See id.* at 79–80, 87.

<sup>41</sup> GORROTI, *supra* note 29, at 68.

<sup>42</sup> *Id.* at 76, 78.

<sup>43</sup> *See id.* at 94–95, 104. The Shining Path developed the idea of the “quota”: the willingness and expectation of its members to sacrifice their own lives when asked to do so by the party. *Id.* at 104.

<sup>44</sup> *See* Degregori, *supra* note 20.

<sup>45</sup> *See id.* The number of *desplazados* (internally displaced persons) exceeded 600,000 at the height of the armed conflict. *Id.*

independent media and political and social organizations proved that some level of democracy existed and fostered a rejection of the totalitarianism of the Shining Path movement.<sup>46</sup> Finally, in 1992, the Peruvian police antiterrorism unit captured Abimael Guzmán, the leader of the Shining Path, who subsequently negotiated peace accords with the Fujimori government and facilitated the fast demoralization and defeat of Shining Path sympathizers.<sup>47</sup>

Guzmán's capture followed Alberto Fujimori's election in 1990 and "self-coup" (*autogolpe*), which abruptly ended the rule of law in 1992.<sup>48</sup> Fujimori implemented a strategy to combat an economic crisis and government subversion; he suppressed civil liberties and eroded political institutions and notions of accountability.<sup>49</sup> Then, when faced with congressional opposition to his oppressive measures, he joined forces with the military, suspended the Constitution, censored the media, dissolved the National Congress, and incapacitated the judiciary.<sup>50</sup> Even after the capture of the leading subversives and the awareness of a crumbling insurgency, Fujimori's repressive authoritarian regime used public fear and isolated incidences of violence to justify continued human rights abuses and political suppression throughout the 1990s.<sup>51</sup>

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<sup>46</sup> See AMERICAS WATCH, *supra* note 19, at 3 (describing the media as investigators, "informal ombudsmen," and as a channel for opinion and information in Peruvian society); Degregori, *supra* note 20. In addition, the Shining Path did not have an alternative to offer the peasant populations after the destruction of the "old order." Degregori, *supra* note 20. Most significantly, the movement ignored the needs of the peasant families in the Andes. Degregori, *supra* note 20.

<sup>47</sup> See Degregori, *supra* note 20; González Cueva, *supra* note 26, at 72; see also Stern, *supra* note 28, at 297.

<sup>48</sup> See González Cueva, *supra* note 26, at 72; Stern, *supra* note 28, at 417; see also Interview with Eduardo González Cueva, Senior Associate, International Center for Transitional Justice, former Director, Public Hearings and Victims and Witnesses Protection Unit, Peruvian Truth and Reconciliation Commission, in N.Y., N.Y. (Oct. 27, 2005) [hereinafter González Cueva Interview].

<sup>49</sup> FINAL REPORT, *supra* note 9, § II(D); see CATHERINE M. CONAGHAN, FUJIMORI'S PERU: DECEPTION IN THE PUBLIC SPHERE 29, 252–53 (2005).

<sup>50</sup> See Kent Anderson, *An Asian Pinochet?—Not Likely: The Unfulfilled International Law Promise in Japan's Treatment of Former Peruvian President Alberto Fujimori*, 38 STAN. J. INT'L L. 177, 180–81 (2002); González Cueva, *supra* note 26, at 72.

<sup>51</sup> See Anderson, *supra* note 50, at 181; González Cueva, *supra* note 26, at 73; González Cueva Interview, *supra* note 48.

## 2. State-Sponsored Enforced Sterilizations Under the Family Planning Program: “Voluntary” Surgical Contraception (*Anticoncepción Quirúrgica Voluntaria*—AQV)

Three months after President Fujimori took office in 1990, he announced a “birth control policy” as a way to bring equal access to contraception for the nation’s poor.<sup>52</sup> At that time, however, high inflation, a lack of public funding, a focus on the internal conflict, and legal barriers in place against sterilizations forced the government to proceed slowly despite its support for reforms in family planning programs in Peru.<sup>53</sup> Fujimori’s reelection gave his regime a strong mandate for implementing its plans, and in 1995, Congress approved a modification of the National Population Law of 1985 to permit sterilization as a family planning method.<sup>54</sup> At the same time, Fujimori garnered support from feminists and advocates for the rights of women when, in 1995, he attended and spoke in Beijing at the Fourth International World Conference on Women.<sup>55</sup>

In 1996, after finding an inverse relationship between population growth and economic growth, Fujimori’s administration quietly implemented a demographic policy for population control.<sup>56</sup> A stable economy and widespread political support allowed Fujimori’s regime to openly confront the Catholic Church and its strong political positions with regard to reproductive rights and choice.<sup>57</sup> Additionally, interna-

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<sup>52</sup> CARLOS E. ARAMBURU, POLITICS AND REPRODUCTIVE HEALTH: A DANGEROUS CONNECTION 7 (2002), available at <http://www.ciced.org/Eng/Seminars/Details/Seminars/Bangkok2002/03BangkokAramburu.pdf>; Carlos Cáceres et al., *Sexual and Reproductive Rights Policies in Peru: Unveiling False Paradoxes*, in *SEX POLITICS: REPORTS FROM THE FRONT LINES* 127, 137 (Richard Parker et al. eds., 2006). The traditional demographic argument was coupled with the argument advocating for equal rights, which focused on individual and family rights. ARAMBURU, *supra*, at 8.

<sup>53</sup> See ARAMBURU, *supra* note 51, at 8.

<sup>54</sup> See *id.* at 7–8.

<sup>55</sup> See MARUJA BARRIG, THE PERSISTENCE OF MEMORY: FEMINISM AND THE STATE IN PERU IN THE 1990S, CIVIL SOCIETY AND DEMOCRATIC GOVERNANCE IN THE ANDES AND THE SOUTHERN CONE COMPARATIVE REGIONAL PROJECT 12–13 (1999).

<sup>56</sup> See SUBCOMISIÓN INVESTIGADORA DE PERSONAS E INSTITUCIONES INVOLUCRADAS EN ACCIONES DE ANTICONCEPCIÓN QUIRÚRGICA VOLUNTARIA [SUB-COMM’N TO INVESTIGATE PEOPLE AND INSTS. INVOLVED IN VOLUNTARY SURGICAL CONTRACEPTION PROC.], INFORME FINAL SOBRE LA APLICACIÓN DE LA ANTICONCEPCIÓN QUIRÚRGICA VOLUNTARIA 11 (2002) [hereinafter AQV]; Cáceres et al., *supra* note 52, at 138; Coe, *supra* note 29, at 61.

<sup>57</sup> See Coe, *supra* note 29, at 59 (asserting that when Fujimori first took power, he faced many challenges, including violent internal conflict, a weak economy, and inflation. To address these concerns, Fujimori needed the backing of the Catholic Church (which opposed modern contraceptive methods)); COMITÉ DE AMÉRICA LATINA Y EL CARIBE PARA LA DEFENSA DE LOS DERECHOS DE LA MUJER [LATIN AMERICAN AND CARIBBEAN COMMIT-

tional and domestic pressures existed to address the widening gap among socio-economic classes of Peruvians; thus, Fujimori's government promoted contraceptive services to "the most deprived sectors of society" in a stated effort to alleviate poverty on a massive scale.<sup>58</sup>

During this time, Fujimori continued to actively promote universal access to contraception for women.<sup>59</sup> His political discourse invoked principles of social justice and human rights; his rhetoric even included using the reproductive justice movement's language, stating that "poor women deserved the same opportunity as wealthier women to regulate their fertility, and [that] all women had the right to control their bodies and use contraceptives if they wished."<sup>60</sup> With Fujimori's control over Congressional action, the Ministry of Health soon drafted its first comprehensive reproductive health program.<sup>61</sup> Additional government measures—including creating agencies and passing laws—also stressed the importance of equality between men and women.<sup>62</sup>

The government's aggressive Family Planning Program focused on increasing the number of sterilizations performed on Peruvian women and specifically targeted the low-income, indigenous women at the margins of society.<sup>63</sup> Moreover, government officials determined annual numeric goals and targets for the sterilization programs and initiated an obligatory quota system for health care providers to meet as program employees in order to remain employed, obtain monetary compensation, or receive a promotion.<sup>64</sup> Later investigations revealed that health care provider practices included compensating women and subjecting them to aggression, intimidation, and

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TEE FOR THE DEFENSE OF WOMEN'S RIGHTS] (CLADEM) & CTR. FOR REPROD. L. AND POL'Y (CRLP), *SILENCE AND COMPLICITY: VIOLENCE AGAINST WOMEN IN PERUVIAN PUBLIC HEALTH FACILITIES* 36 (1999) [hereinafter CLADEM & CRLP].

<sup>58</sup> Amnesty Int'l, *supra* note 8, at 20. See Coe, *supra* note 29, at 59. A Program Manager at the Ministry of Health made the following statement in 1998:

The fertility rate among poor women is 6.9 children—they are poor and are producing more poor people. The president is aware that the government cannot fight poverty without reducing poor people's fertility. Thus, demographic goals are a combination of the population's right to access family planning and the government's anti-poverty strategy.

Coe, *supra* note 29, at 61–62.

<sup>59</sup> Coe, *supra* note 29, at 60; see Cáceres et al., *supra* note 52, at 138.

<sup>60</sup> Coe, *supra* note 29, at 60; see Cáceres et al., *supra* note 52, at 138–39.

<sup>61</sup> Coe, *supra* note 29, at 60.

<sup>62</sup> *Id.* at 61.

<sup>63</sup> *Id.* at 62; see Amnesty Int'l, *supra* note 8, at 20; Cáceres et al., *supra* note 52, at 138.

<sup>64</sup> See Amnesty Int'l, *supra* note 8, at 20; Cáceres et al., *supra* note 52, at 140; CLADEM & CRLP, *supra* note 57, at 63; Coe, *supra* note 29, at 62.

humiliation—all measures that did not include informed consent.<sup>65</sup> For example, health care providers denied women their fundamental rights to informed consent when professionals pressured women to undergo surgical sterilization during “Tubal Ligation Festivals” and at locations designated for food aid distribution.<sup>66</sup> Some providers offered women surgical sterilization as the only free method of contraception available.<sup>67</sup> Other health workers did not provide women with information regarding other available birth control methods and many times deliberately gave inaccurate information about the risks and consequences of surgical sterilization procedures.<sup>68</sup> Some women even reported that professionals in clinics and hospitals intimidated them as they sought medical attention for abortion complications.<sup>69</sup>

The practice of State-sponsored enforced sterilization also caused numerous deaths due to medical negligence and malpractice.<sup>70</sup> Human rights groups brought one illustrative case, *María Mamérita Mestanza Chávez v. Perú*, to the Inter-American Commission on Human Rights when a thirty-three-year-old, low-income, illiterate woman with seven children died after a coerced surgical sterilization procedure.<sup>71</sup> Health officials falsely accused Mestanza of violating the law by having more than five children and threatened to report her to the authorities if she did not submit to surgical sterilization.<sup>72</sup> Health care providers succeeded in coercing Mestanza to undergo a tubal ligation procedure and failed to examine her prior to the surgery.<sup>73</sup> Following the tubal ligation procedure, the health center released Mestanza

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<sup>65</sup> See Coe, *supra* note 29, at 62. Coe treads lightly on blame when talking about the abuses that occurred. See *id.* She shows how sterilization was promoted through services that withheld temporary methods of birth control, such as injections and birth control pills. *Id.* She does conclude by saying that “[b]latant deception, economic incentives and threats were also used,” but she does not mention the extent of the abuses. See *id.*

<sup>66</sup> See Cáceres et al., *supra* note 52, at 140; CLADEM & CRLP, *supra* note 57, at 63–64 (information taken from collective interviews of health care providers).

<sup>67</sup> See CLADEM & CRLP, *supra* note 57, at 63–64.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.* at 64.

<sup>70</sup> See Cáceres et al., *supra* note 52, at 140; Gonzalo E. Gianella, *¿Por qué Tendría que Haber Sucedido de Otro Modo? Notas Sobre Esterilizaciones y Genocidio en el Perú*, Ciberayllu, Aug. 30, 2004, <http://www.andes.missouri.edu/andes/Ciberayllu.shtml>.

<sup>71</sup> María Mamérita Mestanza Chávez v. Perú, Case 12.191, Inter-Am. C.H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 (2003). See CTR. FOR REPROD. RTS., BRIEFING PAPER: REPRODUCTIVE RIGHTS IN THE INTER-AMERICAN SYSTEM FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS 15 (2002), available at [http://www.reproductiverights.org/pdf/pub\\_bp\\_fr\\_interamerican.pdf](http://www.reproductiverights.org/pdf/pub_bp_fr_interamerican.pdf). [hereinafter CTR. FOR REPROD. RTS.].

<sup>72</sup> See CTR. FOR REPROD. RTS., *supra* note 71, at 15.

<sup>73</sup> See *id.*

even though they were aware that she suffered from serious complications as a result of the surgery.<sup>74</sup> A few days later, Mestanza's partner attempted to seek emergency medical care from physicians at the health center, but the physicians refused and reassured him that the effects of the anesthesia had not yet worn off.<sup>75</sup> As a result, Mestanza died in her home nine days after her surgical sterilization.<sup>76</sup>

Coerced and forced sterilization practices contradict Peru's constitutional and legal protections for its citizens.<sup>77</sup> At first, human rights activists and non-governmental organizations criticized the government's focus on high numeric goals that were bound to lead to abuses, as the practices were extremely secretive.<sup>78</sup> Later, women's advocacy groups documented the specific instances of abuse and sent their findings to the Public Ombudsman on Women's Rights.<sup>79</sup> Finally, in December 1997, *La República*, one of Peru's major newspapers, reported an independent investigation and detailed findings on the population policy implementation that shocked the public.<sup>80</sup>

Once the general public became aware of the extent of Fujimori's demographic policy, a heated debate ensued.<sup>81</sup> The Ombudsman's office released a report in 1998 of its findings of abuse and recommended reforms in the government's family planning programs.<sup>82</sup>

<sup>74</sup> *See id.*

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See* Coe, *supra* note 29, at 62. These acts could be considered genocide, as will be discussed herein. *See infra* notes 135–171 and accompanying text. The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide to include measures intended to prevent births within the group committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The difficulty with proving these sterilizations as genocide is proving the specific intent to destroy the Quechua people. *See* Genocide Convention, *supra*; *see also* Part III(B), *infra*, for further discussion.

<sup>78</sup> *See* Coe, *supra* note 29, at 63.

<sup>79</sup> *See id.* Today, groups of victims-survivors exist to provide support and document the abuses. *See* Emily Koren, *Contra Su Voluntad: The Involuntary Sterilizations of Peru's Family Planning Program* International Human Rights Advocacy Report 8 (May 22, 2008) (unpublished report, The Center for International Human Rights Advocacy at the University of Denver) (on file with the author). For instance, *La Organización de Mujeres Esterilizadas Contra Su Voluntad* (The Association of Women Sterilized Against Their Will) provides support to more than 1000 women members in the Cusco region. *Id.*

<sup>80</sup> *See* Coe, *supra* note 29, at 63. The title of the article was "Ligations in exchange for food." *Id.* at 63 n.38.

<sup>81</sup> *Id.* at 63.

<sup>82</sup> *Id.*; DEFENSORÍA DEL PUEBLO, SERIE INFORMES DEFENSORIALES NO. 7, ANTICONCEPCIÓN QUIRÚRGICA VOLUNTARIA I: CASOS INVESTIGADOS POR LA DEFENSORÍA DEL PUEBLO (1998).

Other organizations then backed the report and also pressured the Peruvian government to take action to reform its policies.<sup>83</sup> In March 1998, the Ministry of Health agreed to make changes and reform sterilization services; it eliminated the quotas and implemented new counseling guidelines, a consent form, a three-day waiting period before the procedure, a day to recover in a hospital after the surgery, and certification of health care facilities and physicians.<sup>84</sup> Additionally, in 2001, the Peruvian government agreed to settle the case pending in the Inter-American Commission on Human Rights by compensating María Mestanza's family and by taking responsibility for violating individual human rights, including the rights to life, physical integrity and humane treatment, equal protection, and the right to be free from gender-based violence.<sup>85</sup> As part of the settlement, the government promised to investigate other enforced sterilization cases and to punish those who had violated Peruvian and international law.<sup>86</sup> At the time of this writing, however, the Peruvian government has not fully complied with its commitments under the Mestanza settlement.<sup>87</sup>

## II. THE PERUVIAN TRUTH AND RECONCILIATION COMMISSION: ITS MANDATE AND FINDINGS

Soon after the government reformed its Family Planning Program, Peru's transition to democracy began in September 2000.<sup>88</sup> This regime change was not due, however, to public outrage at the atrocities committed during Fujimori's regime, but was largely the result of televised videos that uncovered a political corruption scandal and implicated high-level government and military officials, including the head of Peru's intelligence service, Servicio de Inteligencia Nacional (*SIN*), Vladimiro Montesinos.<sup>89</sup> Fujimori fled the country in November 2000 and resigned as president via fax from Japan.<sup>90</sup> Thus, unlike the Chil-

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<sup>83</sup> Coe, *supra* note 29, at 63.

<sup>84</sup> *Id.*

<sup>85</sup> CTR. FOR REPROD. RTS., *supra* note 71, at 16.

<sup>86</sup> *Id.*

<sup>87</sup> INTER-AM. COMM'N ON HUM. RTS., ANNUAL REPORT OF THE IACHR 2007: STATUS OF COMPLIANCE WITH THE RECOMMENDATIONS OF THE IACHR (2007), <http://www.cidh.org/annualrep/2007eng/Chap.2.htm>.

<sup>88</sup> See CONAGHAN, *supra* note 49, at 227-34.

<sup>89</sup> See *id.* at 228.

<sup>90</sup> See González Cueva, *supra* note 29, at 74. In the end, Congress did not accept Fujimori's letter of resignation and declared him morally unfit to serve as president. CONAGHAN, *supra* note 49, at 241.

ean or El Salvadoran transitions, Peru's was a total regime collapse without a negotiated arrangement, peace accord, or guarantee of impunity.<sup>91</sup> The peaceful transition to Valentín Paniagua's interim government and the favorable conditions for democratic transition—the complete collapse of authoritarian rule and the absence of a powerful insurgency—provided an opportunity to critically examine the past and to establish a legitimate democratic regime that would guarantee future individual and collective human rights—including reproductive rights—in Peru.<sup>92</sup>

In response to public and social group pressure, the newly-formed government established the Peruvian Truth and Reconciliation Commission (CVR)<sup>93</sup> in June 2001 to investigate human rights abuses committed during the twenty-year internal conflict.<sup>94</sup> The CVR—composed of ten men, two women, and one Quechua-speaker<sup>95</sup>—was responsible for determining the conditions that precipitated the violent conflict, assisting with judicial investigations, drafting reparations proposals, and recommending reforms.<sup>96</sup> Specifically, the CVR mandate charged the Commission with “clarifying the process, facts and responsibilities of the terrorist violence and human rights violations produced from May 1980 to November 2000, whether imputable to terrorist organizations or State agents, as well as proposing initiatives destined to affirm peace and harmony among Peruvians.”<sup>97</sup> This broad and inclusive directive included interpreting and writing the collective memory of the historical period and fact-finding in individual cases.<sup>98</sup> The mandate also allowed the Commission to determine the appropriateness of identifying perpetrators who violated criminal law on condition that the responsibilities for such actions would be presumptive and were meant to assist

<sup>91</sup> González Cueva, *supra* note 26, at 73–74. Fujimori, unlike Pinochet, was an exile without credibility or impunity. See ROBERTSON, *supra* note 1, at 332–39.

<sup>92</sup> See Supreme Resolution 304–2000-JUS. (2000) (Peru); González Cueva, *supra* note 26, at 74–76.

<sup>93</sup> *Comisión de la Verdad y Reconciliación del Perú*.

<sup>94</sup> See HAYNER, *supra* note 8, at 260.

<sup>95</sup> See Degregori, *supra* note 20. The one Quechua-speaker was Alberto Morote Sánchez, a former Rector of the University of Huamanga in Ayacucho. Comisión de la Verdad y Reconciliación, *Nuestra Labor: Comisionado*, <http://www.cverdad.org.pe/lacomision/nlabor/comisionado.php> (last visited Nov. 1, 2008); Sabrina Marian Reisinger, *Truth, Race and Reconciliation; Ayacucho and the Peruvian Truth and Reconciliation Commission* (Nov. 8, 2005) (unpublished M.S. thesis, Florida State University), <http://etd.lib.fsu.edu/theses/available/etd-11082005-203231/>.

<sup>96</sup> HAYNER, *supra* note 8, at 260–61.

<sup>97</sup> Supreme Decree 065–2001-PCM art. 1, *translated in* González Cueva, *supra* note 26, at 75.

<sup>98</sup> See Supreme Decree 065–2001-PCM art. 2; González Cueva, *supra* note 26, at 75.



the Public Prosecutor<sup>99</sup> and the courts in their constitutionally granted duties.<sup>100</sup>

One example of the expansive nature of the *CVR* mandate is the Commission's sweeping subject-matter jurisdiction.<sup>101</sup> The list of crimes included the phrase "and other serious injuries" after the crime of torture, and the phrase "[o]ther crimes and serious violations of the rights of individuals" to possibly include further abuses of State power, such as sex crimes, forced internal displacements, due process violations and genocide.<sup>102</sup> Similarly, the decree authorized the *CVR* to focus on "[v]iolations of the collective rights of the country's Andean and native communities."<sup>103</sup> Moreover, the mandate broadly defined personal jurisdiction to leave open the possibility to examine acts committed by State agents, members of "terrorist organizations" and members of paramilitary organizations.<sup>104</sup> This grant of jurisdiction was in direct opposition to Fujimori's 1995 amnesty laws and signified a possible end to the impunity that security forces had enjoyed under Fujimori's regime.<sup>105</sup>

The *CVR* embarked on the country's largest and most ambitious human rights project in Peruvian history and clarified the magnitude

<sup>99</sup> *Ministerio Público*.

<sup>100</sup> González Cueva, *supra* note 26, at 75, 80; González Cueva Interview, *supra* note 48.

<sup>101</sup> See Supreme Decree 065-2001-PCM art. 3. "The Truth Commission shall focus its work on . . .

- (a) Murders and kidnappings;
- (b) Forced disappearances;
- (c) Torture and other serious injuries;
- (d) Violations of the collective rights of the country's Andean and native communities;
- (e) Other crimes and serious violations of the rights of individuals."

*Id.*, translated in González Cueva, *supra* note 26, at 92.

<sup>102</sup> *Id.*; González Cueva, *supra* note 26, at 76 (noting that the question as to what law to apply was hotly debated in the Commission's Working Group). The Ministry of Justice included the application of International Human Rights Law and International Humanitarian Law. See González Cueva, *supra* note 26, at 76. The representatives of the security forces rejected the inclusion of the laws of war, as these laws would implicitly give the twenty-year conflict internal armed conflict status. See *id.*

<sup>103</sup> Supreme Decree 065-2001-PCM art. 3, translated in González Cueva, *supra* note 26, at 92.

<sup>104</sup> *Id.* arts. 1 & 3; González Cueva, *supra* note 26, at 76. Later talks would apply the "paramilitary groups" category to the several death squads that emerged during the two decades of conflict either indirectly or directly under the auspices of the Armed Forces. See González Cueva, *supra* note 26, at 76.

<sup>105</sup> See Law 26479 of June 14, 1995 (Peru); Law 26492 of June 28, 1995 (Peru); González Cueva, *supra* note 26, at 72-73; González Cueva Interview, *supra* note 48.

of the atrocities committed by and against fellow Peruvians.<sup>106</sup> The Commission's findings in its August 2003 Final Report included statistics showing that almost 70,000 people were killed or "disappeared," and of those, more than ninety percent came from the eight poorest Andean and Amazonian regions.<sup>107</sup> In addition, more than seventy percent of victims spoke Quechua as their native language.<sup>108</sup> Thus, the findings demonstrated that victims of the armed conflict were overwhelmingly low-income, rural, indigenous peasants with little or no political or economic power in Peruvian society.<sup>109</sup>

As for those responsible for the conflict and its outcomes, the CVR promoted a comprehensive and inclusive notion of accountability.<sup>110</sup> The Final Report found State limitations in protecting fundamental rights of its citizens and securing the public order, as well as breaches of the constitutional order and rule of law in numerous moments of crisis throughout the internal conflict.<sup>111</sup> Although the two terrorists groups—the Shining Path and the Túpac Amaru Revolutionary Movement (MRTA)—carried the bulk of the responsibility for systematic abuses and violence during the armed conflict, the Report also held state, political, and social entities responsible for many of the gross human rights violations.<sup>112</sup>

### III. TRUTH OMISSIONS FROM THE CVR'S FINAL REPORT

#### A. *Broad Mandate, Restricted Interpretation*

Even with the CVR's comprehensive and inclusive notions of accountability, various organizations criticized and questioned the Commission's decision to exclude cases of violations with ambiguous or tan-

<sup>106</sup> See Degregori, *supra* note 20. The CVR collected nearly 17,000 testimonies from across the country, conducted almost 2000 interviews and talked to the main national political and military leaders during the years 1980–2000. *Id.*

<sup>107</sup> See Degregori, *supra* note 20.

<sup>108</sup> *Id.* The Final Report also gives the astonishing statistic that according to the 1993 census, only sixteen percent of the Peruvian population were native Quechua-speakers. FINAL REPORT, *supra* note 9, at I(6). Also, the people from these regions together represent only nine percent of the income of all Peruvian families. Amnesty Int'l, *supra* note 8, at 15.

<sup>109</sup> See FINAL REPORT, *supra* note 9, at I(6); Degregori, *supra* note 20.

<sup>110</sup> See FINAL REPORT, *supra* note 9, *passim* (holding accountable the Shining Path, the MRTA, Peruvian police and Armed Forces, self-defense committees, the various government parties in power during the conflict, the Peruvian legislature and judiciary, trade organizations, the educational system, the Church, human rights organizations, and the media).

<sup>111</sup> See *id.* at I(10)–(11).

<sup>112</sup> See *id.* at II–V.

gential relations to the armed conflict in the Final Report.<sup>113</sup> Without a general policy to guide decision-making among the Commission's regional offices, Commissioners drew different lines as to which cases to investigate and publish under the mandate.<sup>114</sup> As a result, cases such as those of the enforced sterilizations during the Fujimori regime were not considered in the context of insurgency or counter-insurgency and thus were seen by some of the Commissioners as outside of the Commission's mandate and not included in the *CVR's* Final Report.<sup>115</sup>

Because the Executive gave the *CVR* a sufficiently broad mandate to include State-sponsored enforced sterilizations, the Commission's omission was a self-imposed, interpretive—albeit inattentive—restriction on the Commission's investigation and Final Report.<sup>116</sup> Of course, truth commissioners must make certain choices as to which cases commissions investigate and report as a result of time constraints, resource limits, insufficient information, unreliable evidence, repetition of wrongs already documented elsewhere, and political pressures.<sup>117</sup> Reports should not, however, exclude cases of gross human rights violations if the effects are to perpetuate discrimination, racism, and classism as well as to impede justice, including reproductive justice, for victims.<sup>118</sup> Rather, commissioners should make a careful and conscientious effort to investigate and report abuses committed against the most disenfranchised members of society, especially when their mandate so requires, but even when it is ambiguous.<sup>119</sup> In the case of the *CVR*, its

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<sup>113</sup> See Amnesty Int'l, *supra* note 8, at 19–20; interview with Carlos Iván Degregori, former Commissioner of the Peruvian Truth Commission, in Ithaca, N.Y. (Nov. 28, 2005) [hereinafter Degregori Interview].

<sup>114</sup> See *id.*

<sup>115</sup> See Gianella, *supra* note 70, at 3; Guilia Tamayo, *Metas que Matan*, <http://w3.desco.org.pe/publicaciones/QH/QH/qh111gt.htm> (last visited Oct. 10, 2008). During separate interviews, two of the Peruvian Truth Commission's Commissioners, Salomón Lerner Febres and Carlos Iván Degregori, stated that they did not think that these enforced sterilization cases were within the Truth Commission's mandate. However, after looking at the text of the mandate once more, each one remarked that these cases could have been included in the mandate and that they were overlooked due to a lack of time and resources. Degregori Interview, *supra* note 113; Interview with Salomón Lerner Febres, former President of the Peruvian Truth Commission, in Lima, Perú (June 15, 2006) [hereinafter Lerner Febres Interview].

<sup>116</sup> See Supreme Decree 065–2001-PCM; Degregori Interview, *supra* note 113; Lerner Febres Interview, *supra* note 115.

<sup>117</sup> See HAYNER, *supra* note 8, at 73.

<sup>118</sup> See *id.* at 24–31, 73; Amnesty Int'l, *supra* note 8, at 1–2, 19–20.

<sup>119</sup> See Supreme Decree 065–2001-PCM, *passim*; Amnesty Int'l, *supra* note 8, at 19–20.

mandate's broad language required an investigation of enforced sterilizations.<sup>120</sup> Priscilla Hayner argues that:

[T]he practice of rape and other sexual crimes should be fully acknowledged in a commission's report where it is believed such a practice was widespread. If a truth commission does not take special care in addressing this issue, it is likely that it will remain largely shrouded in silence and hidden from the history books—and also likely that few policy, educational, or reparatory measures will be put in place to assist past victims, increase the public understanding of the issue, or reduce the prevalence of sexual abuse in the future.<sup>121</sup>

In the cases of enforced sterilizations, the *CVR* did not make such a conscientious, inclusive effort.<sup>122</sup> As a result, impoverished, indigenous Quechua-speaking women continued to face multiple layers of discrimination—including social, racial, and gender discrimination—first as victims and later as unrecognized victims of State repression and denial of basic human rights during the twenty-year internal conflict.<sup>123</sup> Thus, the omission of enforced sterilization cases excluded women who were already members of socially and politically marginalized groups and greatly decreased their chances for truth, accountability, and justice in Peruvian society.<sup>124</sup>

The *CVR* Commissioners could give reasons for excluding enforced sterilization cases from their investigation and report, such as the mandate's restriction or the repetition of other investigations or reports, but none should outweigh the reasons to include such widespread, State-sponsored violations of reproductive rights as part of Peru's official collective memory.<sup>125</sup> First, Commissioners did not see enforced sterilizations as an included crime in the Truth Commission's mandate.<sup>126</sup> In contrast to the *CVR*'s inclusive mandate, the mandate of the South Afri-

<sup>120</sup> See Supreme Decree 065–2001-PCM, *passim*.

<sup>121</sup> HAYNER, *supra* note 8, at 78–79.

<sup>122</sup> See *id.*; FINAL REPORT, *supra* note 9, *passim*.

<sup>123</sup> See Amnesty Int'l, *supra* note 8, at 19–20.

<sup>124</sup> See *id.* at 1–2, 19–20; HAYNER, *supra* note 8, at 24–31; MINOW, *supra* note 4, at 24–27.

<sup>125</sup> See Degregori Interview, *supra* note 113; Lerner Febres Interview, *supra* note 115. In speaking with *CVR* Commissioners, they defended their non-inclusion of the enforced sterilizations cases by pointing to the separate investigations and reports written on the subject. See Degregori Interview, *supra* note 113; Lerner Febres Interview, *supra* note 115. This, however, is not a valid reason for exclusion because all cases of violence reported by the Commission required an independent and effective investigation as well. See Supreme Decree 065–2001-PCM arts. 1–3.

<sup>126</sup> See Degregori Interview, *supra* note 113; González Cueva Interview, *supra* note 48.

can Truth and Reconciliation Commission (TRC) did not cover all of the abusive practices of apartheid, especially with regards to detention without trial, racial segregation, and the practice of “forced removals” of blacks to barren lands.<sup>127</sup> Failing to include these and other apartheid practices in the final report, even where justified because the practices were already well-documented, “prevented many South Africans from seeing their own personal experience reflected in the commission’s work.”<sup>128</sup> Despite its restrictive mandate, the South African TRC held institutional hearings and found fault with some social and institutional structures of the apartheid system.<sup>129</sup> This limited investigation, however, did not counter the South African TRC’s inclusion of mostly extreme violence to the exclusion of a comprehensive investigation and report on the widespread State-sponsored systematic abuses committed against many Africans.<sup>130</sup> This exclusion, as a result, hindered the TRC’s goal to ensure social justice for the African majority.<sup>131</sup>

Unlike the South African TRC, however, the Peruvian *CVR*’s executive mandate did not limit the scope of investigations or reports to exclude enforced sterilizations.<sup>132</sup> In fact, it specifically endorsed a broad mandate which could have included systemic abuses such as coerced surgical sterilizations.<sup>133</sup> Although the *CVR*’s Final Report did recognize the rights of women and the gross violations of human rights—including finding rape to be an instrument of torture—committed against women largely by the Peruvian Armed Forces, it still fell short by excluding gross, systematic human rights abuses of enforced sterilizations against mainly low-income, indigenous Quechua women.<sup>134</sup> Because the decree did not make distinctions between those human rights violations directly related to insurgency or counter-insurgency measures and those violations tangentially related, the Commissioners should not have made such distinctions that have led to the exclusion of more than 200,000 cases of enforced sterilizations from the Commission’s Final Report.<sup>135</sup> In doing so, the Commission allowed Lima, the capital city and center of political discourse and pub-

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<sup>127</sup> See HAYNER, *supra* note 8, at 73; WILSON, *supra* note 8, at 34.

<sup>128</sup> HAYNER, *supra* note 8, at 73.

<sup>129</sup> See WILSON, *supra* note 8, at 35–36.

<sup>130</sup> See *id.* at 35.

<sup>131</sup> See *id.*

<sup>132</sup> Supreme Decree 065–2001-PCM art. 3.

<sup>133</sup> *Id.*

<sup>134</sup> See Amnesty Int’l, *supra* note 8, at 18, 19–20; FINAL REPORT, *supra* note 9, at III(A) (46).

<sup>135</sup> See Supreme Decree 065–2001-PCM arts. 1 & 3; Amnesty Int’l, *supra* note 8, at 19–20; González Cueva, *supra* note 26, at 78.

lic opinion, to remain “emotionally distant” from these victims of State-supported violence and helped to further alienate many victims from the CVR’s work.<sup>136</sup> In this regard, the CVR helps to perpetuate and legitimize physical, racial, and class divides in Peruvian society and impedes public support for accountability and reproductive justice through the rule of law.<sup>137</sup>

Additionally, the CVR Commissioners’ reasoning did not apply in all cases since they were inconsistent when they investigated and published other crimes Fujimori committed—largely in the context of political corruption and authoritarian rule—during his regime that may not directly relate to the insurgency or counter-insurgency.<sup>138</sup> Because incontrovertible evidence that demonstrated high levels of state and political corruption naturally affected Peruvians with economic and political power, public outrage and media coverage demanded that the CVR investigate and record those atrocities.<sup>139</sup> Therefore, those abuses of power became part of the historical record, and efforts today continue to push for accountability and criminal responsibility for the corruption crimes that Fujimori committed against Peruvians.<sup>140</sup> In the end, this inconsistency and selective treatment of cases demonstrates that, at least for the excluded victims of enforced sterilization, the truth-seeking process cannot be seen as “more than the reconfiguration of government pacts or domination between elites.”<sup>141</sup> As a result, in this version of reconciliation, the same speakers are speaking and the same voiceless victims are silenced.<sup>142</sup>

## B. *Enforced Sterilizations of Quechua Women as Genocide*

### 1. The Elements of Genocide

When a Congressional subcommittee investigated cases of enforced sterilizations and issued its report, it accused the Fujimori regime of committing genocide against the Quechua people through the

<sup>136</sup> Degregori, *supra* note 20.

<sup>137</sup> *See id.*

<sup>138</sup> *See* FINAL REPORT, *supra* note 9, at III(D); González Cueva, *supra* note 26, at 78.

<sup>139</sup> *See* CONAGHAN, *supra* note 49, at 229; KIMBERLY THEIDON, ENTRE PRÓJIMOS: EL CONFLICTO ARMADO INTERNO Y LA POLÍTICA DE LA RECONCILIACIÓN EN EL PERÚ 256 (2004).

<sup>140</sup> *See* Raúl Rosasco, *Y Después de la CVR ¿Qué?: Informe Seminal Sobre las Reacciones al Informe Final de la CVR y los Avances Respecto a sus Recomendaciones*, Nov. 14–20, 2005, at 3.

<sup>141</sup> THEIDON, *supra* note 139, at 256 (author’s translation).

<sup>142</sup> *Id.*

Family Planning Program.<sup>143</sup> There are arguments for and against classifying these cases of enforced sterilizations as acts of genocide, and these arguments will be discussed below.<sup>144</sup> Ultimately, however, the victims of these human rights abuses need an impartial, independent investigation to take these issues out of the political realm and into the discourse of individual and collective reparations as well as reproductive justice.<sup>145</sup>

First, the term “genocide” combines the Greek word *genos* (race or tribe) with the Latin suffix *-cide* (killing), and is the intentional killing, destruction or extermination of groups or members of a group.<sup>146</sup> The crime of genocide is recognized as part of customary international law and a part of *jus cogens*, the body of peremptory international norms.<sup>147</sup> In addition, Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 defines genocide as follows:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>148</sup>

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<sup>143</sup> *AQV*, *supra* note 56, at 108.

<sup>144</sup> *See infra* notes 135–171 and accompanying text.

<sup>145</sup> *See infra* Part III(D).

<sup>146</sup> ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 127 (2d. ed. 2008); KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 67–68 (2001).

<sup>147</sup> KITTICHAISAREE, *supra* note 146, at 67. Under customary international law, the United Nations summit in September 2005 adopted the Outcome Document, which affirms that every state is responsible for protecting its citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity. William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide*, 27 *CARDOZO L. REV.* 1703, 1703 (2006).

<sup>148</sup> Genocide Convention, *supra* note 77. The Convention does prohibit genocide in times of war, in times of peace and holds perpetrators (and other participants) of genocide criminally responsible, while holding the state responsible as well. *See id.*

The definition deliberately omits acts of cultural and political genocide, and the Convention provides an ineffective enforcement through domestic trials in the state where the genocide occurred.<sup>149</sup> Much progress, however, has occurred at the international level to prosecute and punish perpetrators of genocide. For example, the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) provide for criminal action against perpetrators of genocide.<sup>150</sup> The *ad hoc* tribunals in the former Yugoslavia, Rwanda, and Sierra Leone have tried individuals charged with genocide and have delivered landmark decisions that shape the evolving standards and norms for this crime against humanity.<sup>151</sup>

In order to prove genocide, victims must fall under one or more of the definition's enumerated groups.<sup>152</sup> To determine whether an enumerated group exists in a particular case, a court may analyze subjective criteria, objective criteria, or both.<sup>153</sup> In a subjective analysis, the court "tak[es] into account the relevant evidence and the political and cultural context of the society concerned" on a case-by-case basis.<sup>154</sup> For instance, in the case of Rwanda, the court examined the perceptions of Hutu and Tutsi members as well as Rwandan authorities adopted from colonial rule that Hutus and Tutsis belonged to two distinct ethnic groups.<sup>155</sup> Alternatively, the court may use objective facts that indicate a population is a group with a distinct identity, such as state recognition or customary practices.<sup>156</sup> In the case of Rwanda, the government required every citizen to carry identity cards displaying their ethnic identity as Hutu, Tutsi, or Twa, and the country's legislation at the time referred to citizens by their respective ethnic groups.<sup>157</sup>

<sup>149</sup> See CASSESE, *supra* note 146, at 130–32. Cultural Genocide is destroying a group's language or culture. *Id.* at 130. Political Genocide is exterminating a group based on political grounds. *Id.*

<sup>150</sup> *Id.* at 132.

<sup>151</sup> *Id.* See generally Prosecutor v. Jelišić, Case No. IT 95-10, Judgment (Dec. 14, 1999), *aff'd*, Case No. IT 95-10-A (July 5, 2001); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgment (May 21, 1999); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

<sup>152</sup> See KITTICHAISAREE, *supra* note 146, at 69.

<sup>153</sup> *Id.* at 70–71.

<sup>154</sup> *Id.* at 71 (citing Prosecutor v. Rutaganda, Case No. ICTR 96-3, Judgment, ¶ 55 (Dec. 6, 1999)).

<sup>155</sup> *Id.*

<sup>156</sup> See *id.* There were objective indicators in the Rutaganda case, such as identity cards carried by the Tutsi population as well as the fact that customary determination of group membership was patrilineal. *Id.*

<sup>157</sup> KITTICHAISAREE, *supra* note 146, at 71.



In addition, a perpetrator commits genocide through the definition's enumerated discriminatory acts or omissions with the necessary *mens rea*.<sup>158</sup> These acts or omissions, however, do not necessarily involve the actual extinction or annihilation of the group, and motive is not an element of the crime of genocide.<sup>159</sup> Thus, the individual accused of genocide must have either known or should have known that "his act [or omission] would destroy, in whole or in part [the] protected group."<sup>160</sup> In contrast to the crime against humanity of persecution, which requires a discriminatory intent, genocide requires that the prosecution prove the accused possessed the specific intent to destroy a particular group beyond a reasonable doubt.<sup>161</sup>

In order to prove genocidal intent, the prosecution must show that the accused wanted either to destroy a large number of group members or to exterminate a limited number of group members selected because their annihilation would greatly impact the group's survival.<sup>162</sup> Thus, killing or sterilizing a large number of women group members who are of child bearing age can be considered genocide even though they do not comprise a large percentage of the group's population.<sup>163</sup> Also, the accused must form his specific intent to commit genocide before acting in furtherance of the genocidal intent.<sup>164</sup>

Although the crimes committed must demonstrate genocidal intent, the prosecution can prove the element of intent by inferring from "facts such as words or deeds or a pattern of purposeful action that deliberately, consistently, and systematically targets victims on account of their membership of a particular group while excluding the members of other groups."<sup>165</sup> Evidence to construct genocidal intent may include the general context of other acts committed against the same group, the physical targeting of the group, the extent of bodily injury, the methodical nature of planning, and the scale of actual or attempted de-

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<sup>158</sup> *Id.* (citing *Akayesu*, Case No. ICTR 96-4-T, ¶ 497; *Jelisić*, Case No. IT 95-10, ¶ 62). Thus, failing to stop a massacre when the individual had the means and notice to stop it could be regarded as genocide. *See id.*

<sup>159</sup> *Id.* at 71, 76; *see* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 29 (2d ed. 2001).

<sup>160</sup> KITTICHAISAREE, *supra* note 146, at 72 (quoting *Akayesu*, Case No. ICTR 96-4-T, ¶ 520).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 73.

<sup>163</sup> *See id.*

<sup>164</sup> *Id.* (citing *Kayishema & Ruzindana*, Case No. ICTR 95-1-T, ¶ 91).

<sup>165</sup> KITTICHAISAREE, *supra* note 146, at 74.

struction of the group.<sup>166</sup> In the end, even though it is difficult to prove genocidal intent in the case of an individual backed by the State, proving the required specific intent for genocide is somewhat easier than originally anticipated through the use of circumstantial evidence.<sup>167</sup>

## 2. Applying the Elements of Genocide Under the Convention to the Case of Enforced Sterilizations in Peru

A strong case can be made that the enforced sterilizations of more than 200,000 low-income, indigenous Quechua-speaking women were acts of genocide.<sup>168</sup> First, the indigenous Quechua-speaking women are members of two protected groups enumerated in the definition of genocide since the Quechua people are a distinct racial and ethnic group in Peru.<sup>169</sup> The indigenous Quechua people objectively belong to a racial group since they share common, constant, and hereditary features, and are an ethnic group since they are “a community of persons linked by the same customs, the same language and the same race.”<sup>170</sup> Additionally, from a subjective analysis, the racial and ethnic divides among *criollos*, *mestizos*, *cholos*, and *indígenas* in Peruvian society also contribute to the notion that the Quechua people are a distinct cultural group.<sup>171</sup> Although the overt motive behind Fujimori’s Family Planning Program was to curb population growth and to alleviate poverty on a massive scale, it is clear that because motive is not an element of genocide, indigenous Quechua women would not lose their protected group status.<sup>172</sup> In other words, their protected status as members of a racial or ethnic group would override their status as a member of a particular social demographic.<sup>173</sup> Therefore, the motive of population control would not negate an intention to prevent births within the

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<sup>166</sup> *Id.*

<sup>167</sup> *See id.* at 74–75.

<sup>168</sup> *See* Genocide Convention, *supra* note 77, art. II; RATNER & ABRAMS, *supra* note 159, at 33–35.

<sup>169</sup> *See* Genocide Convention, *supra* note 77, art. II.

<sup>170</sup> *See* RATNER & ABRAMS, *supra* note 159, at 33 (quoting STÉFAN GLASER, DROIT INTERNATIONAL PÉNAL CONVENTIONNEL 111–12 (1970), *translated and quoted in* Study of the Question of the Prevention and Punishment of the Crime of Genocide, prepared by Nicodème Ruhashyamiko, July 4, 1978, UN Doc. E/CN.4/Sub.2/416, at 15–16).

<sup>171</sup> *See* Degregori, *supra* note 20.

<sup>172</sup> *See* Coe, *supra* note 29, at 56, 61; *cf.* RATNER & ABRAMS, *supra* note 159, at 35. These authors speak of “political groups” and do not speak specifically of poverty as a group. RATNER & ABRAMS, *supra* note 159, at 35. The same could be said for poverty as a status incidental to (and not overriding) a group’s protected status. *See* RATNER & ABRAMS, *supra* note 159, at 35.

<sup>173</sup> *See* RATNER & ABRAMS, *supra* note 159, at 33–35.

group.<sup>174</sup> As a result, one could prove that Fujimori's Family Planning Program intended to prevent births among the Quechua people, despite his alleged motives.<sup>175</sup>

Next, those individuals responsible for orchestrating enforced sterilizations against indigenous Quechua women arguably acted with the necessary *mens rea* to commit genocide since they knew or should have known that these coercive sterilizations would destroy, in whole or in part, the Quechua people.<sup>176</sup> Highly probative evidence with which one could infer genocidal intent would include the Family Planning Program's specific targeting of poor indigenous women and the systematic nature of its quota system, articulated in the 1989 Plan for a Government of National Reconstruction, or "Plan Verde."<sup>177</sup> Specifically, the Plan stated that it was necessary to quickly curb population growth and mandate treatment for the "surplus beings [through a] generalized sterilization use among those culturally backward and impoverished groups."<sup>178</sup> The Plan continued by arguing that because those individuals from the targeted areas possessed "incurable characters" and lacked resources, all that was left was their "total extermination."<sup>179</sup> Seeking out particular groups to sterilize in violation of reproductive rights and imposing upon health care providers an obligatory quota system which caused coercive practices demonstrate a destructive pattern on the part of government officials to prevent births within the

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<sup>174</sup> See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> KITTICHAISAREE, *supra* note 146, at 72 (quoting *Akayesu*, Case No. ICTR 96-4-T, ¶ 520).

<sup>177</sup> See *Historia de una Traición: Muchos Misterios Quedarán Revalados al Conocerse el Plan Militar que Se Consolidó el 5-IV-92*, at 9 (1993), [http://www.resistencia.org/documentos/el\\_plan\\_verde/historia\\_de\\_una\\_traicion.pdf](http://www.resistencia.org/documentos/el_plan_verde/historia_de_una_traicion.pdf) (last visited Oct. 24, 2008); Amnesty Int'l, *supra* note 8, at 20.

<sup>178</sup> *Historia de una Traición*, *supra* note 177, at 9 (author's translation). The Plan reads in Spanish:

Ha quedado demostrado la necesidad de frenar lo más pronto posible el crecimiento demográfico y urge, adicionalmente, un tratamiento para los excedentes existentes: utilización generalizada de esterilización en los grupos culturalmente atrasados y económicamente pauperizados . . . . Los métodos compulsivos deben tener solo carácter experimental, pero deben ser norma en todos los centros de salud la ligadura de trompas . . . . Hay que discriminar el excedente poblacional y los sectores nocivos de la población. Para estos sectores, dado su carácter de incorrigibles y la carencia de recursos . . . solo queda su exterminio total.

*Id.*

<sup>179</sup> *Id.* (author's translation).

indigenous Quechua-speaking population.<sup>180</sup> Moreover, under Fujimori's population control program, there existed a clear pattern of victims—namely poor, indigenous Quechua-speaking women—a high level of planning at the state level through the formal Family Planning Program, and a large number of victims considering that in 1993 only a fifth of Peru's population spoke Quechua or other native languages.<sup>181</sup>

On the other hand, there are legal and practical concerns with classifying the enforced sterilization of Quechua women as an act of genocide.<sup>182</sup> For example, one could argue that the State did not administer population control and family planning programs to Quechua women to the exclusion of other racial and ethnic groups from enforced sterilization procedures.<sup>183</sup> This argument is weak, however, because perpetrators of genocide can theoretically have the specific intent to destroy more than one protected group under the auspices of a single State-sponsored plan to eradicate poverty and curb population growth through sterilization procedures.<sup>184</sup> Also, as a practical matter, conservative groups in Peru and abroad who oppose contraception and reproductive choice for women have capitalized on the classification of the Voluntary Surgical Contraception program as an act of genocide.<sup>185</sup> As a result, international human rights advocates who promote accountability and justice for crimes against humanity and genocide must make strategic choices since their decisions and actions could negatively affect future reproductive rights, choice, and health among Quechua women who have already been victims of State-enforced sterilization campaigns.<sup>186</sup>

### *C. Enforced Sterilizations as Violations of Individual Human Rights*

Aside from the viable claim that the systematic enforced sterilizations against Quechua women constituted an act of genocide, these actions also implicate numerous violations of other human rights, includ-

<sup>180</sup> See *id.*; Amnesty Int'l, *supra* note 8, at 20.

<sup>181</sup> Amnesty Int'l, *supra* note 8, at 15.

<sup>182</sup> See *id.*, at 20; see *AQV*, *supra* note 56, at 108.

<sup>183</sup> See Amnesty Int'l, *supra* note 8, at 20. Indigenous Amazonian women were also among those who reported enforced sterilization procedures. *Id.*

<sup>184</sup> See KITTICHAISAREE, *supra* note 146, at 72–75.

<sup>185</sup> See *AQV*, *supra* note 56, at 108; Cáceres et al., *supra* note 52, at 143. Within a year of Toledo's election into presidency, a conservative Catholic Opus Dei physician was appointed as Health Minister of Peru, and later went on to become the country's Prime Minister. ARAMBURU, *supra* note 52, at 11.

<sup>186</sup> See Amnesty Int'l, *supra* note 8, at 20; *AQV*, *supra* note 56, at 108; Cáceres et al., *supra* note 52, at 143.

ing reproductive rights, under national, regional, and international law.<sup>187</sup> Legal instruments that obligate Peru to protect women against enforced sterilization include, but are not limited to, the Peruvian Constitution,<sup>188</sup> the American Convention on Human Rights (American Convention),<sup>189</sup> International Covenant on Civil and Political Rights (ICCPR),<sup>190</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>191</sup> and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>192</sup> The protective provisions enumerated within these instruments include those that protect the right to personal autonomy, privacy, bodily integrity, and autonomous decision-making in women's reproductive lives.<sup>193</sup>

For instance, the Peruvian Constitution guarantees all Peruvians the right to dignity; life; moral, psychological, and physical integrity; liberty and security of the person; and to be free from all forms of violence and from torture, inhuman, or degrading treatment.<sup>194</sup> Thus, the State has the duty to respect, protect, and fulfill these rights through national laws and legal mechanisms to investigate and punish violations. In the case of enforced sterilizations, the Peruvian government has enacted laws to protect women; however, these laws are not enforced and violators continue to enjoy impunity from punish-

<sup>187</sup> See, e.g., *infra* notes 188–192.

<sup>188</sup> CONSTITUCIÓN POLÍTICA DEL PERÚ [POLITICAL CONSTITUTION OF PERU] [hereinafter PERUVIAN CONSTITUTION].

<sup>189</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]. In addition, the Convention of Belem do Pará protects women against all forms of violence, including violence within the health care system. See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 [hereinafter Convention Belem do Pará].

<sup>190</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>191</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>192</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. The Declaration on the Elimination of Violence Against Women recognizes "that some groups of women, such as women belonging to minority groups, *indigenous women*, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women, and women in situations of armed conflict, are especially vulnerable to violence." Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, ¶ 7, U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (emphasis added).

<sup>193</sup> See *supra* notes 172–176.

<sup>194</sup> See PERUVIAN CONSTITUTION, *supra* note 188, at ch.1, arts. 1, 2-1, 2-24(a), 2-24(h).

ment.<sup>195</sup> Even though abuses such as enforced sterilizations have been documented, public authorities have dismissed the violations as isolated incidents, and health care professionals paternalistically defend their actions as beneficial to their patients and “intended to avoid greater injury to the patient.”<sup>196</sup> In light of these protections, women victims of enforced sterilizations have viable claims at the national level to remedy the wrongs committed against them.<sup>197</sup>

Many of these national protections, however, are unenforceable or inaccessible to the low-income women-victims of the Voluntary Surgical Contraception program.<sup>198</sup> Thus, complaints to regional or international human rights bodies are also valid and actionable claims.<sup>199</sup> The American Convention, for example, protects individuals’ rights to life; personal integrity; health; to provide free and informed consent; privacy; equality; and non-discrimination.<sup>200</sup> Public health care providers violated these rights when they performed unnecessary surgery on women-victims without obtaining informed consent, as well as when, in certain circumstances, they failed to perform preliminary examinations or to give post-operative care, which ultimately led to death and disability for women-victims.<sup>201</sup>

Under the ICCPR, Peru has committed itself to respect, protect and fulfill its citizens’ civil and political rights, including the rights to life, non-discrimination, gender equality, liberty, personal security,

<sup>195</sup> See, e.g., General Law on Health arts. 4, 6, 15, 26, 27 & 40 (promulgated by Legislative Decree No. 26842, July 15, 1997) (protecting rights to life and health); PERUVIAN PENAL CODE art. 376 (promulgated by Legislative Decree No. 635, Apr. 3, 1991) (abuse of authority). There is no crime of infliction of suffering on patients by health care providers. See CLADEM & CRLP, *supra* note 57, at 42–43.

<sup>196</sup> CLADEM & CRLP, *supra* note 57, at 43.

<sup>197</sup> See generally PERUVIAN CONSTITUTION, *supra* note 188; General Law on Health, *supra* note 195; PERUVIAN PENAL CODE, *supra* note 195.

<sup>198</sup> See CLADEM & CRLP, *supra* note 57, at 41–48. See generally CTR. FOR REPROD. RTS. & DEMUS: ESTUDIO PARA LA DEFENSA DE LOS DERECHOS DE LA MUJER, WOMEN OF THE WORLD: LAWS AND POLITICS THAT AFFECT THEIR REPRODUCTIVE LIVES, LATIN AMERICA AND THE CARIBBEAN 170–92 (1997); CTR. FOR REPROD. RTS. & DEMUS: ESTUDIO PARA LA DEFENSA DE LOS DERECHOS DE LA MUJER, WOMEN OF THE WORLD: LATIN AMERICA AND THE CARIBBEAN PROGRESS REPORT 2000, at 83–102 (2001) (reporting on the laws regarding reproductive health and lives of women in Peru).

<sup>199</sup> See American Convention, *supra* note 189, arts. 4, 5, 7, 11 & 24. In order for a complaint to be admissible, the applicant must prove that she has exhausted all local remedies or that special circumstances exist that make exhaustion of local remedies impossible. For a more complete explanation, see Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 MAX PLANCK Y.B. OF U.N.C. 341, 364–81 (2001); Velásquez Rodríguez, Inter-Am. Ct. H.R. (Ser. C) No. 4. (July 29, 1988).

<sup>200</sup> See American Convention, *supra* note 189, arts. 4, 5, 7, 11 & 24.

<sup>201</sup> See CTR. FOR REPROD. RTS., *supra* note 71, at 12–16.

and privacy, along with freedom from torture and cruel, inhuman or degrading treatment.<sup>202</sup> Additionally, the ICESCR protects the rights to non-discrimination, equality, and health.<sup>203</sup> Similarly, under the CEDAW, Peru guarantees rights to women that protect against enforced sterilization under Articles 5, 12, and 16, which are further articulated in General Recommendations 19, 21, and 24.<sup>204</sup> For example, in General Recommendation 19, the CEDAW Committee asks States to take measures to “prevent coercion in regard to fertility and reproduction.”<sup>205</sup> All of these State duties at international law give individual women-victims of enforced sterilizations the ability to hold the Peruvian government responsible for the human rights violations committed against them.

The Peruvian government officially acknowledged State responsibility for violations of international law under the American Convention when it settled the case of *María Mamérita Mestanza Chávez v. Perú*.<sup>206</sup> Specifically, the settlement agreement recognized State violations of the victim’s rights to life, physical integrity, humane treatment, equal protection of the law, and freedom from gender-based violence.<sup>207</sup> Although settlement agreements with the Inter-American Commission on Human Rights are not binding jurisprudence at international law, these recognitions of State responsibility are highly persuasive admissions to use in any further legal action at the regional or international levels.<sup>208</sup> Moreover, the Peruvian government undertook to investigate and punish those responsible for the violations as well as to reform legislation and create procedures to handle patient complaints within the health care system.<sup>209</sup> As a result, ongoing rights violations are occurring as long as

<sup>202</sup> See ICCPR, *supra* note 190, arts. 2, 3, 6, 7, 9 & 17.

<sup>203</sup> See ICESCR, *supra* note 191, arts. 2, 3 & 12.

<sup>204</sup> See Comm. on the Elimination of Discrimination Against Women [CEDAW], *Report of the Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 24*, ¶ 22, U.N. Doc. A/54/38/Rev.1 (Jan. 1, 1999); Comm. on the Elimination of Discrimination Against Women [CEDAW], *Report of the Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 21*, ¶ 22, U.N. Doc. A/49/38 (Jan. 1, 1994); Comm. on the Elimination of Discrimination Against Women [CEDAW], *Report of the Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19*, ¶ 22, U.N. Doc. A/47/38 (Feb. 19, 1993) [hereinafter CEDAW General Recommendation 19].

<sup>205</sup> CEDAW General Recommendation 19, *supra* note 204.

<sup>206</sup> See *María Mamérita Mestanza Chávez v. Perú*, Case 12.191, Inter-Am. C.H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 ¶¶ 1, 14 (2003).

<sup>207</sup> See *id.*; CTR. FOR REPROD. RTS., *supra* note 71, at 16.

<sup>208</sup> See American Convention, *supra* note 189, at art. 48.

<sup>209</sup> See CTR. FOR REPROD. RTS., *supra* note 71, at 16–17.

Peru fails to implement these changes and denies women-victims their rights at national, regional, and international law.<sup>210</sup>

#### D. *The Need for an Independent and Impartial Investigation*

The CVR Commissioners recognized that other bodies within Peru's government and civil society either had conducted or were in the process of conducting their own investigations and reports on the cases of enforced sterilizations.<sup>211</sup> Although a Congressional subcommittee and numerous activist groups investigated and published testimonies and cases condemning the State's Family Planning Program and its health care providers, members of each of these bodies had a specific political or social interest in advocating certain positions and conclusions.<sup>212</sup> In contrast, the CVR was in a unique and disinterested position to evaluate, as it could have based "conclusions and recommendations on a close study of the record, while standing as an independent institution separate from the systems under review."<sup>213</sup> Opinion polls in Lima confirmed the public confidence in the performance of the CVR and the positive impact the public saw the Final Report have on Peru.<sup>214</sup> In addition, most individuals opined that the government should implement the CVR's recommendations for reparations, reform, and justice.<sup>215</sup> The CVR's widespread public support and overall legitimacy helped create some institutional momentum to keep the possibility of criminal justice and accountability open for the future, but only for those cases investigated and reported.<sup>216</sup> Thus, the exclusion of State-sponsored enforced sterilizations in the Final Report effectively impeded future criminal judicial action for thousands of marginalized Quechua women in Peru.<sup>217</sup>

The conservative Congressional Committee members who submitted the final report on conclusions and recommendations in cases of State-led enforced sterilization campaigns have politicized these human rights abuses and have used human rights language to strategically restrict reproductive choice for Peruvian women through repeals of laws that make surgical sterilization a legal option for reproductive choice in

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<sup>210</sup> *See id.*

<sup>211</sup> González Cueva, *supra* note 26, at 83–89.

<sup>212</sup> *See* CLADEM & CRLP, *supra* note 57, at 7.

<sup>213</sup> *See* HAYNER, *supra* note 8, at 29.

<sup>214</sup> *See* Amnesty Int'l, *supra* note 8, at 27.

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*



Peru.<sup>218</sup> As mentioned above, these conservatives are utilizing their investigation and report on human rights abuses to recommend committing further human rights abuses against women.<sup>219</sup> During the Toledo regime, reproductive rights and health advances had nearly halted.<sup>220</sup> For example, new policy initiatives stress abstinence-only methods for sexually transmissible infection (STI) prevention and natural methods for family planning.<sup>221</sup> In addition, government agencies have stopped promoting gender equality and sexual education, and health officials have prevented access to services and information on modern methods of contraception.<sup>222</sup> These programs and future strategies have further subordinated women in Peruvian society and have increased reliance on natural reproductive methods and unsafe abortions.<sup>223</sup>

Including the cases of enforced sterilizations in the *CVR* Final Report or even creating a separate impartial truth commission investigating and reporting these State-sponsored abuses could have served to prevent claims of genocide from instilling fear and causing a conservative backlash in reproductive rights issues.<sup>224</sup> In addition, including these cases in the Commission's report could have created a legitimate independent declaration of human rights abuses as acts of genocide and as individual violations of reproductive choice and health.<sup>225</sup> Moreover, including these cases could have kept these human rights atrocities out of the political arena and in the hands of the victims who deserve retribution, reparations, and reconciliation.<sup>226</sup> Although including these abuses would not have guaranteed a tangible victory for the victims or their families, it would have constituted a moral, symbolic victory for low-income, rural Quechua women and a step forward in an uphill battle for recognition as Peruvian citizens.<sup>227</sup> Though the Peru-

<sup>218</sup> See *AQV*, *supra* note 56, *passim*; CLADEM & CRLP, *supra* note 57, at 7; Coe, *supra* note 29, at 65.

<sup>219</sup> See *AQV*, *supra* note 56, *passim*; CLADEM & CRLP, *supra* note 57, at 7; Coe, *supra* note 29, at 65.

<sup>220</sup> See Coe, *supra* note 29, at 65.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* For example, HIV prevention was part of a "Risk Reduction" program that also included malaria, dengue and other infectious diseases. *Id.*

<sup>223</sup> *Id.* Coe argues that U.S. policy shifts toward the far right have also threatened reproductive rights in Peru. *Id.*

<sup>224</sup> See Cáceres et al., *supra* note 52, at 144–48; *see also, supra*, notes 211–223 and accompanying text.

<sup>225</sup> See Amnesty Int'l, *supra* note 8, at 27; HAYNER, *supra* note 8, at 29. These are the two main arguments put forth by investigations and advocates. *See, e.g.,* Cáceres et al., *supra* note 52, at 147–48, 162–63.

<sup>226</sup> See CLADEM & CRLP, *supra* note 57, at 7.

<sup>227</sup> See Amnesty Int'l, *supra* note 8, at 19–20; *supra* notes 8 and 12.

vian government has issued a public apology for its mass sterilization campaign, excluding these cases from any commission of inquiry greatly reduces the possibility of individual accountability for the perpetrators and justice for the victims of enforced sterilizations in Peru.<sup>228</sup>

### CONCLUSION

A distinctive feature of truth commissions is their focus on victims, reconciliation, and healing as well as their reporting to create a framework to ensure transitional justice as a mechanism to deal with a nation's past human rights abuses.<sup>229</sup> One problem, however, is that truth-telling can never be comprehensive enough to encompass all of the competing perceptions of past events.<sup>230</sup> In addition, healing and justice—especially in the field of reproductive rights and justice—seem incompatible and unworkable where victims have no political power or economic means to reconcile and rebuild their communities.<sup>231</sup> Complex analyses by truth commissions, however, can produce a record and collective memory to prevent future human rights violations, and the exclusion of certain abuses creates a void in the attempt at finding truth, reconciliation, and justice for transitional states.<sup>232</sup>

For more than 200,000 indigenous Quechua-speaking women in Peru, time has not healed their wounds of the past. These individuals deserve a legitimate, independent, and thorough investigation of the human rights abuses committed against them. Even if a lack of resources impedes the possibility for adequate monetary reparations or legal action for reproductive justice, a good faith inquiry to uncover the truth and an acknowledgement of past wrongs would constitute an important symbolic victory for indigenous rights, reproductive rights, and human rights for the indigenous Quechua peoples of Peru. Restoring dignity and recognizing individual rights of Quechua women could succeed as a step toward bridging the economic, racial, and ethnic divides that continue to perpetuate inequality, discrimination, and hatred among Peruvians.

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<sup>228</sup> See *AQV*, *supra* note 56, at 108; Coe, *supra* note 29, at 65; *supra* notes 8 and 12. For a discussion on the issues and problems surrounding reparations and public apologies, see generally MINOW, *supra* note 4.

<sup>229</sup> See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 60–61 (1998).

<sup>230</sup> See *id.* at 62.

<sup>231</sup> See *id.* at 63.

<sup>232</sup> See *id.* at 78–79; Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 665 (2004).

Official acknowledgment of the truth is extremely powerful in the healing process, especially in an atmosphere previously dominated by official denial.<sup>233</sup> If this is the case, then no official acknowledgment of truth after official denial can be equally powerful in impeding reconciliation and healing. When truth commissions deprive certain individuals or groups of the opportunity to have their stories entered into the historical record, they effectively—even if inadvertently—deny victims access to the public and political discourse and leave victims disempowered in their struggle for justice and accountability. Future truth commissions, thus, should ensure that the marginalized victims in society do not remain silenced and alienated in the creation of the historical record and collective memory. When forgotten, history does have a tendency to repeat itself.

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<sup>233</sup>See HAYNER, *supra* note 8, at 27.