

Forced Sterilizations as a Crime Against Humanity

***Amicus Curiae* Brief of the War Crimes Research Office at American
University Washington College of Law**

**Submitted to the Despacho de la Tercera Fiscalía Superior Penal De Lima
Señor Fiscal Luis Landa Burgos**

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I. INTRODUCTION

From 1996 to 2000, the government of Peru carried out the Programa Nacional de Salud Reproductiva y Planificación Familiar (PNSRPF), which aimed to provide Peruvians with greater access to family planning strategies, including AQV (Anticoncepción Quirúrgica Voluntaria).¹ AQV consists of permanent contraceptive methods, such as tubal ligations and vasectomies.² Although AQV formally required voluntary participation, the Peruvian government now acknowledges that thousands of Peruvian citizens were forcibly sterilized.³ Chilling accounts have emerged of women locked in rooms or tied down in order to sterilize them; women sterilized while under anesthesia for other procedures and thus unable to consent; and women who were tricked into consenting through misinformation, including being told that sterilization was “temporary.”⁴ Although the exact number of forcibly sterilized victims remains unknown, as of September 2017, the government has recognized that at least 4,740 women and 133 men were forcibly sterilized under the PNSRPF.⁵ This figure, however, reflects victims from just 13 of the 25 regions of Peru,⁶ and thus the true number of victims is undoubtedly much higher.

Compelling evidence suggests that forced sterilizations under the PNSRPF constitute crimes against humanity. Since at least the post-World War II era, international criminal tribunals have recognized that crimes against humanity may include acts of forced sterilizations. For example, in “the Medical Case,” Nuremberg prosecutors tried and obtained convictions for crimes against humanity

¹ ALEJANDRA BALLÓN, MEMORIAS DEL CASO PERUANO DE ESTERILIZACIÓN FORZADA 27 (2014).

² *Id.*

³ Ministerio de Justicia y Derechos Humanos, Oficio N° 970-2017-JUS-DGDP, Cuadro N° 02, Víctimas Registradas (Oct. 2, 2017) (recognizing nearly 5000 victims of forced sterilization) (on file with the author).

⁴ *See infra* pp. 9-12.

⁵ Ministerio de Justicia y Derechos Humanos, Oficio N° 970-2017-JUS-DGDP, Cuadro N° 02, Víctimas Registradas (Oct. 2, 2017) (on file with the author).

⁶ *Id.*

against several individuals who had conducted forced medical experiments on patients, including forced sterilizations.⁷

Peru recognized forcible sterilization as a human rights violation in a 2003 friendly settlement before the Inter-American Commission of Human Rights (IACHR) and promised to investigate cases of forced sterilizations.⁸ As the Peruvian courts recently reaffirmed in the El Frontón case, crimes against humanity have no statute of limitations, and thus criminal charges for such crimes may be brought long after the crimes are committed.⁹ Moreover, as the prosecutor's office recognized in that case, the content of crimes against humanity comes from international law, the particular elements of which can be discerned by looking to the jurisprudence of international criminal tribunals such as those in Nuremberg, Rwanda, and the former Yugoslavia.¹⁰

This *amicus* brief examines whether forced sterilizations in Peru rise to the level of crimes against humanity as defined under customary international law. Using the jurisprudence of international criminal courts, including the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC), this *amicus* brief defines the elements required for an act to constitute a crime against humanity and then applies those elements to the facts in Peru. Based on the customary international law definition of crimes against humanity,

⁷ The Medical Case, I TRIALS OF WAR CRIMINAL BEFORE THE NUERNBERG MILITARY TRIBUNALS 8, 13, 16 (1946-1949) (including forced sterilizations in indictments for crimes against humanity), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-I.pdf; The Medical Case, II TRIALS OF WAR CRIMINAL BEFORE THE NUERNBERG MILITARY TRIBUNALS 171, 223, 226, 228 (1946-1949) (judgment finding defendant Gebhardt guilty of crimes against humanity for his role in forced sterilizations), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-II.pdf; *id.* at 235, 238, 241 (finding defendant Brandt guilty of crimes against humanity for his role in forced sterilizations); *id.* at 277-79, 281 (finding defendant Brack guilty of crimes against humanity for his role in forced sterilizations).

⁸ María Mamérita Mestanza Chávez v. Peru, Inter-Am. Comm'n H.R., Report No. 71/03, (ser. L) Petition No. 12.191, at ¶ 14 (Oct. 22, 2003), <http://cidh.org/annualrep/2003eng/Peru.12191.htm>.

⁹ See *Caso El Frontón: PJ lo considera como delito de lesa humanidad*, EL COMERCIO (Oct. 18, 2017), <https://elcomercio.pe/politica/caso-fronton-judicial-considera-delito-lesa-humanidad-noticia-466831>.

¹⁰ *Id.* (the prosecution in the El Frontón case said that crimes against humanity are determined by looking at the tribunals at Nuremberg, Rwanda, and Yugoslavia, as well as the ICC). The Rome Statute of the ICC did not enter into force until 2002, and thus is inapplicable to crimes committed before that date.

this *amicus* brief concludes that forced sterilizations committed under the PNSPRF appear to rise to the level of crimes against humanity.

II. PROCEDURAL HISTORY

The antecedents of the current case date back to 1999, when the family of María Mamérita Mestanza Chávez lodged a petition with the Inter-American Commission on Human Rights (“IACHR”) alleging that Peru had violated her rights by forcing her to undergo a sterilization that ultimately resulted in her death.¹¹ In 2003, the petitioners in that case and the Peruvian government reached a friendly settlement in which Peru recognized forced sterilization as a human rights violation and promised to investigate other reported cases of forced sterilizations.¹²

Consistent with that promise, several criminal investigations have taken place over the past 15 years. In 2002, former Congressman Héctor Hugo Chávez Chuchón filed a criminal complaint against several high-level government officials for crimes related to forced sterilizations performed during the PNSRPF.¹³ After the friendly settlement in the María Mamérita Mestanza Chávez case, the Fiscalía de la Nación ordered the investigation into her case be combined with the investigation into 2002 complaint.¹⁴ In 2003, Congresswoman Dora Nuñez Dávila filed a constitutional complaint against the former President Alberto Fujimori for genocide, torture, and other crimes related to forced sterilizations.¹⁵ That complaint was dismissed in 2004, and the combined María Mamérita Mestanza Chávez and Héctor Hugo Chávez Chuchón complaints were dismissed in 2009.¹⁶ Under pressure from the IACHR, the combined María Mamérita Mestanza Chávez and Héctor Hugo Chávez Chuchón

¹¹ See María Mamérita Mestanza Chávez v. Peru, *supra* note 8, at ¶¶ 1, 6.

¹² *Id.* ¶¶ 4, 14.

¹³ Segunda Fiscalía Penal Supraprovincial, Investigación Preliminar N° 29-2011, Resolución Fiscal N° 16, at 2 (July 27, 2016) (describing the increasing amount of complaints filed) [hereinafter Resolución Fiscal N° 16].

¹⁴ BALLÓN, *supra* note 1, at 105.

¹⁵ Resolución Fiscal N° 16, *supra* note 13, at 2; BALLÓN, *supra* note 1, at 104.

¹⁶ Resolución Fiscal N° 16, *supra* note 13, at 2.

investigation was re-opened in 2012,¹⁷ but nearly all of the charges were again dismissed in 2014.¹⁸ The following year, however, La Tercera Fiscalía Superior Penal Nacional determined that the complaint had been well-founded in part and ordered the Segunda Fiscalía Penal to conduct additional procedures.¹⁹ In response to that order, in 2015, the Segunda Fiscalía Penal conducted further investigations.²⁰ The following year, the Fiscal de la Tercera Fiscalía Superior Penal Nacional indicated that the focus of that investigation should be whether crimes against humanity occurred and the persons responsible.²¹ In response to this order, prosecutor Marcelita Gutiérrez Vallejos produced a report in July 2016 concluding that forced sterilizations in Peru did not constitute crimes against humanity and closed the case again.²² DEMUS (Estudio Para la Defensa de los Derechos de la Mujer) and its partner organizations appealed the decision to close the case to the Fiscal de la Tercera Fiscalía Superior Penal Nacional, Luis Landa Burgos, who now must decide whether the Prosecutor's Office will re-open the case or affirm the dismissal.

III. REQUIREMENTS FOR CRIMES AGAINST HUMANITY

Under customary international law, the contextual elements of a crime against humanity are: i) an attack, ii) directed against any civilian population, iii) that was widespread or systematic, iv) a nexus between the acts of the accused and the attack, and v) the accused knew or intended his or her acts to be part of the attack.²³ The enumerated acts include murder, torture, rape, persecution, and

¹⁷ BALLÓN, *supra* note 1, at 105-06; Resolución Fiscal N° 16, *supra* note 13, at 3-4.

¹⁸ Resolución Fiscal N° 16, *supra* note 13, at 5-7. Charges of homicide, exposición a peligro de persona dependiente con circunstancia agravante, and encubrimiento real y contra la administración pública were permitted to go forward against a handful of individuals. *Id.*

¹⁹ *See id.* at 8-9.

²⁰ *Id.* at 8.

²¹ *Id.* at 9.

²² *See id.* at 42-56, 106.

²³ Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement, ¶¶ 506-07 (SCSL Trial Chamber May 18, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf>; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 472 (ICTY Trial Chamber Mar. 24, 2016), <https://www.legal-tools.org/doc/173e23/pdf/>; Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgement ¶¶ 93-99 (ICTY Appeals Chamber Dec. 17, 2004), http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf; Prosecutor v. Blagojević, Case No. IT-02-60-T,

other inhumane acts of a similar character, amongst others.²⁴ As explained above, it is well established that forced sterilizations may rise to the level of crimes against humanity, provided that the contextual elements are met. The following sections therefore examine these contextual elements, including both the relevant law and their application to the facts in Peru.

A. ATTACK

Under customary international law, an attack is defined as “a course of conduct involving the commission of acts of violence.”²⁵ Such acts of violence are not limited to the use of armed force but may encompass any mistreatment of the civilian population.²⁶ As described in more detail above, since at least the post-World War II era, forced sterilizations have been recognized as acts of violence that may constitute part of an attack for purposes of crimes against humanity.²⁷ Indeed, the Peruvian government has acknowledged that forced sterilizations may constitute crimes against humanity under international law.²⁸

Judgement, ¶ 541 (ICTY Trial Chamber Jan. 17, 2005), http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf.

²⁴ Updated Statute of the Int’l Crim. Trib. for the Former Yugoslavia, art. 5 (2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Statute of the Int’l Crim. Trib. for Rwanda, art. 3 (2007), http://legal.un.org/avl/pdf/ha/ictr_EF.pdf.

²⁵ See Blagojević Trial, Judgment, *supra* note 23, at ¶ 543; Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgement, ¶¶ 916-18 (ICTR Appeals Chamber Nov. 28, 2007), <http://www.legal-tools.org/doc/4ad5eb/>; Prosecutor v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Judgement, ¶ 178 (ECCC Trial Chamber Aug. 7, 2014), <http://www.legal-tools.org/doc/4888de/>; see also Taylor Trial Judgment, *supra* note 23, at ¶ 506 (defining attack as “a campaign, operation or course of act”). In some instances, even non-violent acts, such as imposition of a system of apartheid, may constitute a crime against humanity. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 581 (ICTR Trial Chamber Sept. 2, 1998), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

²⁶ Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgement, ¶ 86 (ICTY Appeals Chamber June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>; Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgement, ¶ 144 (ICTY Trial Chamber Feb. 26, 2009), <https://www.legal-tools.org/doc/9eb7c3/pdf/>; Blagojević Trial Judgment, *supra* note 23, at ¶ 543; Karadžić Trial Judgment, *supra* note 23, at ¶ 473; Nuon Trial Judgment, *supra* note 25, at ¶ 178; Nahimana Appeal Judgment, *supra* note 25, at ¶ 918.

²⁷ See The Medical Case, II TRIALS OF WAR CRIMINAL BEFORE THE NUERNBERG MILITARY TRIBUNALS 171, 177 (1946-49) (judgment of the Nuremberg military tribunal describing the charges of war crimes and crimes against humanity for, *inter alia*, forced sterilizations that caused thousands of victims “great mental and physical anguish”), https://www.loc.gov/tr/frd/Military_Law/pdf/NT_war-criminals_Vol-II.pdf; *id.* at 223, 226, 228 (finding defendant Gebhardt guilty of crimes against humanity for his role in forced sterilizations); *id.* at 235, 238, 241 (finding defendant Brandt guilty of crimes against humanity for his role in forced sterilizations); *id.* at 277-79, 281 (finding defendant Brack guilty of crimes against humanity for his role in forced sterilizations).

²⁸ E.g., CONGRESO PERUANO, SUBCOMISIÓN INVESTIGADORA DE PERSONAS E INSTITUCIONES INVOLUCRADAS EN LAS ACCIONES DE ANTICONCEPCIÓN QUIRÚRGICA VOLUNTARIA (AQV), INFORME FINAL SOBRE LA APLICACIÓN DE LA

The government of Peru has repeatedly admitted that thousands of women were forcibly sterilized under the PNSRPF between 1996 and 2000. In 2001, for example, the Peruvian Congress established an Investigative Sub-Commission (“Congressional Investigative Sub-Commission”) to investigate individuals and institutions involved in sterilizations performed between 1990 and 2000.²⁹ In its final report, issued the following year, the Congressional Investigative Commission confirmed that forced sterilizations were conducted under the PNSRPF, including through the use of “psychological violence” and “pressure.”³⁰ The Ministry of Health (MINSA) also created a commission in 2001, the Special Commission on AQV Activities (“MINSA Special Commission”), in order to investigate complaints of abuses under the PNSRPF.³¹ Like the Congressional Investigative Commission, the MINSA Special Commission concluded that forced sterilizations had occurred.³² And in 2015, recognizing that “compulsory” sterilizations had taken place, the Peruvian government issued Decree No. 6 of 2015, which created a registry of forced sterilization victims (known by its Spanish acronym “REVIESFO”)³³ to formally recognize and provide legal and medical benefits to victims of forced sterilization.³⁴ As of September 2017, the REVIESFO has registered 4,740 female

ANTICONCEPCIÓN QUIRÚRGICA VOLUNTARIA 102-03 (June 2002), https://1996pnsrpf2000.files.wordpress.com/2011/07/peru_informe_final_aqv.pdf [hereinafter Congressional Investigative Sub-Commission Final Report]; MINSA, COMISIÓN ESPECIAL SOBRE ACTIVIDADES DE ANTICONCEPCIÓN QUIRÚRGICA VOLUNTARIA (AQV), INFORME FINAL 134 (July 2002) [hereinafter MINSA Special Commission Final Report], <https://1996pnsrpf2000.files.wordpress.com/2011/07/informe-final-comision-especial-aqv.pdf>.

²⁹ Congressional Investigative Sub-Commission Final Report, *supra* note 28, at 3 (finding the evidence supports the alleged commission of crimes against individual liberty, against life, the body, health, conspiracy to commit a crime, and genocide).

³⁰ *Id.* at 103, 106.

³¹ MINSA Special Commission Final Report, *supra* note 28, at 7.

³² *Id.* at 133, 136-37 (confirming that individuals had died due to “forced sterilizations,” publicly recognizing the women who agreed to testify before the commission so that “forced sterilizations” would not occur again, and forwarding the report to the Ministerio Público to investigate those responsible for “forced sterilizations”).

³³ REVIESFO stands for “Registro de Víctimas de Esterilizaciones Forzadas.” See *infra* note 34.

³⁴ Decreto Supremo N° 006-2015-JUS, preamble & arts. 1-7 (2015),

<http://busquedas.elperuano.com.pe/normaslegales/decreto-supremo-que-declara-de-interes-nacional-la-atencion-decreto-supremo-n-006-2015-jus-1308828-2/>; see also Peruvian Ministry of Human Rights and Justice, Registro de Víctimas de Esterilizaciones Forzadas - REVIESFO, <https://www.minjus.gob.pe/defensapublica/interna.php?comando=1036> [hereinafter REVIESFO].

and 133 male victims of forced sterilizations.³⁵ However, thus far, victims have been registered from only thirteen³⁶ of the 25 regions in Peru.³⁷ The total number of victims recognized on the registry is thus certain to rise as victims are registered from the other regions of Peru.

Testimonies by forced sterilization victims support the conclusions of the Peruvian government and underscore the severity of the crimes to which these victims were subjected. Many of the testimonies are strikingly similar, showing a pattern of violent conduct and physical force. For instance:

- Esperanza Huayama Aguirre was among a number of women who went to a local health clinic in Huancabamba for a general check up. After entering the clinic, she and the other women realized that sterilizations were being performed, as there were a number of women complaining about severe post-operation pain. When Esperanza and the other women tried to leave, they were locked in a room with thirty to forty other women. During her checkup, the doctor told Esperanza she was “sick” and put her under anesthesia. The doctor was in the midst of performing the sterilization when Esperanza’s anesthesia started to wear off, at which time she screamed “No! Let me die with my unborn child!” The doctor gave her more anesthesia and completed the sterilization. Esperanza was four months pregnant when she was sterilized and, due to the operation, gave birth to a stillborn baby.³⁸
- Micaela Flores was one of more than a dozen women who agreed to go to a clinic in Cuzco for a free medical checkup. After they arrived, however, they heard women screaming and tried to run. The health personnel locked the doors to prevent the women from escaping. When Ms. Flores tried to resist, the medical personnel tied her hands and feet. Ms. Flores was placed under anesthesia and sterilized without her consent.³⁹

³⁵ Ministerio de Justicia y Derechos Humanos, Oficio N° 970-2017-JUS-DGDP, Cuadro N° 02, Víctimas Registradas (Oct. 2, 2017) (on file with the author).

³⁶ *Id.* (thus far, victims have been enrolled from Ayacucho, Cajamarca, Cusco, Huancavelica, Huanuco, Junin, La Libertad, Lima Centro, Lima Este, Lima Sur, Moquegua, Piura, and San Martin).

³⁷ See Portal del Estado Peruano, http://www.peru.gob.pe/directorio/pep_directorio_poderes.asp?cod_poder=7 (listing 25 regions).

³⁸ Summary of interview with Esperanza Huayama Aguirre in BALLÓN, *supra* note 1, at 193-203; see also Esperanza: “Me practicaron la esterilización... por eso perdí a mi bebé,” LA REPÚBLICA (Jan. 26, 2014), <http://larepublica.pe/politica/767887-esperanza-me-practicaron-la-esterilizacion-por-eso-perdi-a-mi-bebe>.

³⁹ Javier Lizarzaburu, *Forced sterilization haunts Peruvian women decades on*, BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-latin-america-34855804>; 2,000 Peruvians Were Allegedly Subjected to Forced Sterilization under Fujimori Presidency, *Says Report*, FOXNEWS (Feb. 15, 2012), <http://www.foxnews.com/health/2012/02/15/2000-peruvians-were-allegedly-forced-sterilization-under-fujimoris-presidency.html>; *Perú: El caso de 2.000 esterilizaciones forzadas*, RÁDIO MALVA (Feb. 6, 2014), <https://radiomalva.org/2014/02/06/peru-el-caso-de-2-000-esterilizaciones-forzadas-en-peru-no-esta-cerrado/>.

- Sabina Huillca had just given birth when a nurse placed her on a stretcher and tied her hands and feet. Ms. Huillca asked for her newborn daughter, but instead she was placed under anesthesia. When she woke up, the doctor was stitching her stomach and she started screaming, realizing that she had been sterilized.⁴⁰
- Florenica Huayllas Vásquez went to a medical post for treatment for her anemia. When she arrived, she was told they were actually planning to sterilize her. She told the medical personnel she did not want to be sterilized and that it was unnecessary because she was already on birth control. Before she could try to escape, they tied her hands together, placed her under anesthesia and sterilized her.⁴¹

Many women were unconscious and under anesthesia following a cesarean section or other procedure when they were forcibly sterilized without their knowledge or consent.⁴² For example:

- Victoria Vigo was 33 weeks pregnant when she went to the hospital because she was not feeling well. Dr. Nicolás Angulo Silva performed an emergency cesarean section on Ms. Vigo, during which he also sterilized her. When Victoria's premature baby died a few days later, Ms. Vigo was devastated. Her pain was compounded when one doctor tried to console her, telling her she was young and could have more children, but then another doctor said she could no longer conceive because she had been sterilized.⁴³

⁴⁰ Summarized from information provided in Lizazaburu, *supra* note 39.

⁴¹ Movimiento Amplio de Mujeres, Summary of testimony provided to the Congressional Human Rights Commission, Ministry of Health, and Attorney General, entitled Testimonios de 12 campesinas de Anta entregados a la Comisión de Derechos Humanos del Congreso de la República, al Ministerio de Salud, y al Fiscal de la Nación, at 11 (Sept. 2001) [hereinafter Testimonios de 12 campesinas]; https://1996pnsrpf2000.files.wordpress.com/2011/07/mam_testimonios-mujeres-de-anta-aqv.pdf. Ms. Vásquez's husband allegedly consented to the procedure. *Id.* It is indisputable that one person cannot consent to the sterilization of another. *See, e.g.*, Centro de Derechos Reproductivos, Presento *amicus curiae*, Expediente 29-2011, at 13 (Feb. 28, 2017) (consent must be from the "patient") [hereinafter CDR *Amicus Curiae*]. Many other women also were illegally sterilized based on their husband's consent. *See, e.g.*, Testimonios de 12 campesinas, *supra*, at 10 (Venancia Titto Quispe refused to be sterilized, but they gave her anesthesia and sterilized her anyway after her husband signed the consent form).

⁴² *See, e.g.*, Testimonios de 12 campesinas, *supra* note 41, at 12 (Hilaria Huamán Huillca was undergoing an operation to remove gauze that the doctor had left in her following a cesarean section when she was sterilized without her consent); Defensoría del Pueblo, La aplicación de la anticoncepción quirúrgica y los derechos reproductivos II, Informe N° 27, at 20 (1999) ("A" was told that they were taking samples for analysis when they gave her anesthesia; she never consented to be sterilized), <https://1996pnsrpf2000.files.wordpress.com/2014/09/informe-27-1999-aqv.pdf>; *id.*, at Índice 10-15 (1999) (SPR DBP, and VVE were sterilized during cesarean sections); Defensoría del Pueblo, La aplicación de la anticoncepción quirúrgica y los derechos reproductivos III, Informe N° 69, at 89-92 (2002) (MCV, MVSZ, CVF, ECG, and DRJ were sterilized during cesarean sections), <https://1996pnsrpf2000.files.wordpress.com/2014/09/informe-69-2002-aqv.pdf>; Sophie Davies, *Peruvian activists fight for forcibly sterilized women*, REUTERS (Dec. 14, 2016), <http://www.reuters.com/article/us-peru-women-sterilisation/peruvian-activists-fight-for-forcibly-sterilized-women-idUSKBN1430JQ?il=0>.

⁴³ Defensoría del Pueblo Informe N° 27, *supra* note 42, at Índice 14-15; Jane Chambers, "Me esterilizaron en contra de mi voluntad": las amargas historias de las víctimas de las esterilizaciones forzadas en el Perú de Alberto Fujimori, BBC (Mar. 28, 2017), <http://www.bbc.com/mundo/noticias-america-latina-39413935>.

- Sonia Poma Ramos went to the hospital for a cesarean section. Prior to the procedure, Sonia cried to the doctor, Jorge Fuentes Avila, begging him not to sterilize her. During the cesarean, Dr. Avila performed the sterilization anyway.⁴⁴
- Ines Condori went to the hospital for a checkup after the birth of her fourth child. Condori was given an injection and woke up hours later in severe pain. Alluding to the fact she had just been sterilized, the hospital staff told her that she would no longer have children and would be “young again.”⁴⁵

Other women were subjected to severe and often repeated threats – including imprisonment and/or having to pay extra taxes or fines – if they refused to be sterilized.⁴⁶ Faced with these threats, many women felt they had no option but to undergo the sterilization procedure in order to provide for their families and keep them intact. For example:

- Maria Mamérita Mestanza Chávez lived with her husband and seven children in Cajamarca. Health workers from Encañada visited her house on at least seven separate occasions, during which they claimed that it was illegal to have more than five children and threatened Maria and her husband with fines and imprisonment if she did not undergo a sterilization operation. She died several days after receiving the operation.⁴⁷
- Concepción Bellido Guillen already had four children when healthcare workers came to her village and told residents that anyone who had more than four children had to pay a tax. In addition, the healthcare personnel claimed that the Peruvian state would pay for the education of only two children. Concepción wanted more children, but knew that her family could not afford to pay such a tax. She therefore reluctantly submitted to the sterilization operation.⁴⁸

⁴⁴ Summarized from information provided in *Casos de esterilización quirúrgica en Huancavelica*, at 1 (1997-1998), copied by DEMUS from the files of the Fiscalía pursuant to a request under the Ley de Transparencia y su Reglamento (copy on file with the author).

⁴⁵ Summarized from information provided in Davies, *supra* note 42.

⁴⁶ BALLÓN, *supra* note 1, at 259, 262 (Marcelina Carhuas Baldeon de Urquizo underwent sterilization procedure because she was told that would be fined if she had another child); *id.* at 230-31, 233, 239 (Concepción Bellido Guillen underwent sterilization procedure because she was told she would have to pay a tax if she had more children); Defensoría del Pueblo Informe N° 27, *supra* note 42, Índice at 19 (describing case of CHM, who did not have enough money to pay certain medical fees after her child was born, so the doctor said that instead of paying the fees one of the parents could undergo sterilization instead); MINSA Special Commission Final Report, *supra* note 28, at 129.

⁴⁷ María Mamérita Mestanza Chávez v. Peru, *supra* note 8, at ¶¶ 10-12; Defensoría del Pueblo Informe N° 27, *supra* note 42, Anexo N° 9 (interview with the victim’s husband J.S.).

⁴⁸ Summary of interview with Concepción Bellido Guillen in BALLÓN, *supra* note 1, at 230-42.

Some women were intentionally misled in order to trick them into getting sterilized. For example, some women were told that they were signing a consent form for medicine or another procedure, when in fact they were signing a consent form for sterilization. Because they could not read, however, they did not know that the health care workers had lied to them.⁴⁹ Other women were given false or incomplete information that prevented them from making a free and informed choice. For example, many victims were not told that sterilization was permanent and that they would not be able to have more children later.⁵⁰ Many were not told that there were other temporary forms of contraception that they could choose instead.⁵¹ Few were told of the risks of the procedure.⁵² And even when health workers did attempt to provide complete information, many of the women sterilized were Quechua speaking and/or illiterate and did not understand what the Spanish-speaking health care workers were trying to explain, nor did they understand the informational brochures or consent forms, which were provided to them only in Spanish.⁵³ As the Peruvian government has recognized, the absence of free and informed consent constitutes forced sterilization.⁵⁴

⁴⁹ See, e.g., Defensoría del Pueblo Informe N° 27, *supra* note 42, at 92-94 (case of EYC); see also Casos de esterilización quirúrgica en Huancavelica, *supra* note 44, at 1 (after Gregoria Condori Riveros explicitly refused to undergo sterilization, her doctor had her sign a blank form that he told her was for a uterine cleaning she needed to remove the placenta that had remained in her uterus after giving birth; during the uterine cleaning, the doctor sterilized her).

⁵⁰ See, e.g., Defensoría del Pueblo Informe N° 27, *supra* note 42, at Índice 22 (consent form signed by ATH did not indicate that the effects of sterilization are permanent and that the patient would not be able to have more children); MINSÁ Special Commission Final Report, *supra* note 28, at 76-77 (victims were told that the effects of sterilization would wear off after 10 years, at which time they could have more children); *id.* at 129 (same).

⁵¹ See, e.g., Defensoría del Pueblo Informe N° 27, *supra* note 42, at 20; CLADEM, NADA PERSONAL: REPORTE DE DERECHOS HUMANOS SOBRE LA APLICACIÓN DE LA ANTICONCEPCIÓN QUIRÚRGICA EN EL PERÚ, 1996-1998, at 97, 100 (1999), https://1996pnsrpf2000.files.wordpress.com/2011/07/cladem_nada-personal.pdf.

⁵² See, e.g., Defensoría del Pueblo Informe N° 27, *supra* note 42, at 94-96 (DRT was not told of the risks of the procedure).

⁵³ CHRISTINA EWIG, SECOND-WAVE OF NEOLIBERALISM: GENDER, RACE, AND HEALTH SECTOR REFORM IN PERU 148 (2010) (finding that many of the women targeted for sterilization came from poor communities and only spoke Quechua, so they did not understand the procedures as explained in Spanish or give their informed consent to be sterilized); Germán Málaga, *Las esterilizaciones forzadas, los derechos reproductivos y el consentimiento informado*, REVISTA PERUANA DE MEDICINA EXPERIMENTAL Y SALUD PÚBLICA (2013) (“más del 65% de las mujeres esterilizadas eran analfabetas o tenían primaria incompleta, y gran parte de ellas eran quechua hablantes, es decir, difícilmente pudieron entender los consentimientos informados”), <http://www.rpmesp.ins.gob.pe/index.php/rpmesp/article/view/294/2196>; BALLÓN, *supra* note 1, at 35; Chambers, *supra* note 43 (“Los hombres y mujeres que fueron objeto del programa de esterilización fueron por lo general de origen humilde, hablantes indígenas de quechua, muchos de los cuales firmaron un documento escrito en español que no entendían”); *Víctimas de esterilización forzada piden a relatora de la ONU que interceda por ellas*, LA REPÚBLICA (June 10, 2017) (“Nunca, nunca las mujeres quechua hablantes hemos sido consultadas ni hemos dado nuestro

In addition to admitting that forced sterilizations were carried out under the PNSRPF, the Peruvian government also has repeatedly confirmed that these forced sterilizations were committed as part of a government-mandated program to dramatically increase the number of sterilizations. Although the PNSRPF contained a range of family planning methods, numerous government reports indicate that sterilization was privileged over other methods.⁵⁵ For example, the Peruvian Ministry of Health (MINSA) concluded, based upon verified oral and written directives originally emitted from MINSA itself, that starting in September 1995 the Family Planning Policy “privileged” the offering of tubal ligations and vasectomies.⁵⁶ In addition, one of the indicators used by the government to measure the success of the Peru’s social programs was the number of women who opted for permanent contraceptive methods (i.e., sterilization).⁵⁷ No other contraceptive methods were included in the indicators.⁵⁸ These governmental efforts to privilege sterilizations succeeded: the number of sterilizations conducted by the Ministry of Health in Peru jumped from 34,307 in 1995 to 88, 075 in 1996 and 120,056 in 1997.⁵⁹

consentimiento, nunca nos preguntaron. Como no sabíamos leer ni escribir las enfermeras nos hacían firmar un papel.”), <http://larepublica.pe/politica/884480-victimas-de-esterilizacion-forzada-piden-relatora-de-la-onu-que-interceda-por-ellas>.

⁵⁴ REVIESFO, *supra* note 34 (esterilización forzada “Es un procedimiento quirúrgico, realizado a varones o mujeres en contra de su voluntad o sin su consentimiento libre e informado”) (emphasis added). Other organizations agree that consent must be free and informed. See, e.g., Comisión de Expertos, Colegio Médico del Perú, Actividades Anticoncepción Quirúrgica Voluntaria, Informe Final, at 9 (1998) (in order to have free and informed consent, a person must be informed about all methods of contraception) [hereinafter Medical College Final Report]; CDR *Amicus Curiae*, *supra* note 41, at 14, 16-17.

⁵⁵ See, e.g., MINSA Special Commission Final Report, *supra* note 28, at 40, 42, 62; MINSA, Sistematización de los Casos Paradigmáticos por la Aplicación de la Anticoncepción Quirúrgica como Política de Población en el Perú, 1995-2000, at 11, 24, 29, 104 (July 2006) [hereinafter MINSA 2006 Report]; Medical College Final Report, *supra* note 54, at 20; Congressional Investigative Sub-Commission Final Report, *supra* note 28, at 106-07; Defensoría del Pueblo, Anticoncepción Quirúrgica Voluntaria I, Informe N° 7, at 27 (1998), https://1996pnsrpf2000.files.wordpress.com/2011/07/defensoria_informe_7.pdf; Defensoría del Pueblo Informe N° 27, *supra* note 42, at 104.

⁵⁶ MINSA 2006 Report, *supra* note 55, at 102, 105; *id.* at 11 (President Fujimori personally gave directives to medical personnel to emphasize AQV).

⁵⁷ EWIG, *supra* note 53, at 111-12 (2010) (describing executive branch internal report issued by the Comisión Interministerial de Asuntos Sociales in August 1997).

⁵⁸ *Id.*

⁵⁹ Resolución Fiscal N° 16, *supra* note 2, at 22. Although these numbers initially appear to be lower, in absolute terms, than some of the other forms of contraception, *id.* at 23, sterilizations cannot be meaningfully compared with other forms of contraception in this way. An individual can only be sterilized once (and once sterilized, no longer needs any other form of

In order to achieve these increased numbers of sterilizations, the Peruvian government created numerical quotas for sterilizations, and obligated doctors and health care personnel to meet these quotas. The existence of these quotas has been repeatedly confirmed by numerous governmental entities, including the Congressional Investigative Sub-Commission⁶⁰ and MINSA,⁶¹ as well as by NGOs and others.⁶² High-ranking government officials made it clear to medical personnel that these quotas were obligatory.⁶³ They also closely monitored progress on achieving these quotas and pressured medical personnel to meet them.⁶⁴ For example, Dr. Yong Motta, who served as President Fujimori's personal advisor, was in weekly contact with medical personnel to set sterilization quotas and often made telephone calls to Regional Health Directors to pressure them to meet the quotas.⁶⁵ Dr. Yong Motta and President Fujimori also held multiple meetings with regional health directors and other medical personnel to promote the use of sterilizations and indicate the required quotas,⁶⁶ and

contraception), whereas an individual who uses the pill must use 13 packs of pills throughout the year and an individual who receives condoms often receives several at once.

⁶⁰ Congressional Investigative Sub-Commission Final Report, *supra* note 28, at 106.

⁶¹ MINSA Special Commission Final Report, *supra* note 28, at 6, 24, 130; MINSA 2006 Report, *supra* note 55, at 102.

⁶² See, e.g., CLADEM, NADA PERSONAL, *supra* note 51, at 50-52, 55, 57, 58, 65-66; *Denuncian que obligan a médicos a realizar ligaduras de trompas*, EL COMERCIO (Nov. 7, 1996) (the president of the Instituto de Investigación y Prevención de Enfermedades de la Mujer reported that doctors in hospitals run by the Ministry of Health and IPSS are obligated to perform sterilizations), <https://1996pnsrpf2000.files.wordpress.com/2012/10/el-comercio-7-de-noviembre-de-1996.pdf>.

⁶³ See, e.g., MINSA Special Commission Final Report, *supra* note 28, at 65 (Resolución Ministerial No. 465-99 SA/DM, which was signed by Vice Minister Alejandro Mesarina, states that the PNSRPF directives are obligatory and that health personnel who do not meet them will be sanctioned); *id.* at 69-70 (President Fujimori and Dr. Yong Motta told medical personnel that they viewed family planning as a priority and that the medical personnel had to meet their quotas); *id.* at 107 (the Special Commission concluded that there was executive interference regarding the compulsory application of AQV); BALLÓN, *supra* note 1, at 271, 273-75 (testimony of health worker Eddie Antonio Garcia Donaires stating that the PNSRPF was “medio punitivo, o sea que obligaba prácticamente al personal se le obligaba al personal a que traiga personas para que se ligen”); *Se ofreció premiar a quienes realizaran más esterilizaciones*, EL COMERCIO (Feb. 11, 1998) (communication sent to medical personnel specified that ACV “tiene carácter obligatorio”); CLADEM, NADA PERSONAL, *supra* note 51, at 60 (communication to all health care workers in Huancavelica indicating that obtaining patients for AQV “tiene carácter obligatorio”).

⁶⁴ MINSA Special Commission Final Report, *supra* note 28, at 101, 106; MINSA 2006 Report, *supra* note 55, at 11, 42, 74; BALLÓN, *supra* note 1, at 36 (President Fujimori met directly with sub-regional health directors to promote sterilizations); Congreso de la República, Comisión de Salud, Población, Familia y Personas con Discapacidad, Subcomisión Encargada de Investigar el Programa de Anticoncepción Quirúrgica Voluntaria (AQV), Durante el Gobierno de Alberto Fujimori, at 21, 23 (Apr. 18, 2002) (there was pressure from the “Palacio de Gobierno” to meet the quotas).

⁶⁵ BALLÓN, *supra* note 1, at 36; Congressional Investigative Sub-Commission Final Report, *supra* note 28, at 107.

⁶⁶ Congressional Investigative Sub-Commission Final Report, *supra* note 28, at 83, 107; BALLÓN, *supra* note 1, at 36, 63.

attended weekly meetings to monitor progress toward the quotas.⁶⁷ Medical entities were asked for weekly reports on their progress toward the quotas,⁶⁸ and when these weekly reports were not sent promptly, the medical directors would often get a call asking for the report.⁶⁹ Medical personnel also were required to conduct self-evaluations of their sterilization activities.⁷⁰ Using a form provided by MINSA, health care workers were asked to evaluate whether their activities were contributing to the established quotas by indicating the sterilization quota for the health establishment in which they worked, the estimated number of sterilization candidates, the number of patients brought in for sterilization procedures, and the number of patients actually sterilized.⁷¹

To meet these national quotas, regional health offices and other sub-national units issued communications to their employees, and to other health offices, containing explicit per person or per month quotas. For instance, the sub-regional health director for Huancavelica issued a communication to health care personnel in his sub-region, informing them of their individual quotas and that at the end of the year they would be evaluated by the number of patients brought in for sterilizations.⁷² Medical supervisors and family planning coordinators frequently communicated with these regional health offices and other sub-national offices to indicate whether or not a specific office was close to meeting

⁶⁷ BALLÓN, *supra* note 1, at 36, 63. President Fujimori also received written reports on progress toward the sterilization quotas. See, e.g., MINSA Special Commission Final Report, *supra* note 28, at 101.

⁶⁸ MINSA 2006 Report, *supra* note 55, at 74; Medical College Final Report, *supra* note 54, at 5.

⁶⁹ MINSA Special Commission Final Report, *supra* note 28, at 58-59; see also *id.* at 106 (written memo to a medical director stating that he had failed to comply with the weekly reporting requirement).

⁷⁰ MINSA, *Manual de Normas y Procedimientos para Actividades de AQV*, Anexo 3 (1996) [hereinafter MINSA AQV Manual], <https://1996pnsrpf2000.files.wordpress.com/2011/07/manual-de-normas-y-procedimientos-para-actividades-de-a-q-v-ministerio-de-salud.pdf>.

⁷¹ *Id.*

⁷² See, e.g., CLADEM, NADA PERSONAL, *supra* note 51, at 60; see also *id.* at 55 (aviso by the Hospital of Acobamba requiring all hospital staff to obtain patients for AQV); *id.* at 56 (similar memo issued in Huancabamba); *id.* at 56 (finding that community health liaisons in Ashaninka near the Apurimac River needed to obtain five individuals to be sterilized each month); MINSA Special Commission Final Report, *supra* note 28, at 110 (same); Defensoría del Pueblo Informe N° 27, *supra* note 42, at Índice 80 (providing content of memoranda requiring staff in Piura to obtain patients for AQV); CONGRESO PERUANO, COMISIÓN DE SALUD, POBLACIÓN, FAMILIA Y PERSONAS CON DISCAPACIDAD, SUBCOMISIÓN ENCARGADA DE INVESTIGAR EL PROGRAMA DE ANTICONCEPCIÓN QUIRÚRGICA VOLUNTARIA (AQV), TRANSCRIPCIÓN DE VIDEO N° 4 at 5 (MAY 18, 2002) [hereinafter Congressional Investigative Sub-commission Video Transcript].

their quota or the number of sterilizations expected as part of the Family Planning Campaign that particular month.⁷³

Doctors and health care workers were forced to meet these quotas or face significant negative consequences. At the time, many doctors and health care workers were employed on temporary contracts, and risked having their employment contracts terminated or not renewed if they refused or failed to sterilize enough patients.⁷⁴ Other consequences included: having their names reported to higher-level medical authorities;⁷⁵ receiving personal threats from hospital management and other higher ranking medical officials;⁷⁶ negative remarks on or during personnel evaluations;⁷⁷ and threats of legal action.⁷⁸ For instance:

- A nurse from Ica who did not meet her quota was forced to undergo the sterilization procedure herself so that she would not lose her job. Despite her sacrifice, she was removed from her post.⁷⁹
- “M,” a health professional, testified that when he did not meet his quota, he started to be harassed. During his mid-year evaluation, the regional director of Cusco called him out for not fulfilling his PNSRPF quotas. Two months later, he was falsely accused of stealing a check from the health institution and was fired.⁸⁰

⁷³ MINSA Special Commission Final Report, *supra* note 28, at 105-08, 110-11.

⁷⁴ Congressional Investigative Sub-commission Video Transcript, *supra* note 72, at 2, 5 (MAY 18, 2002) (testimony of Dr. Daniel Benites, the former Regional Health Director for Hauncavelica, indicating that medical personnel were required to find patients for AQV or their contracts would be rescinded); Congressional Investigative Sub-Commission Final Report, *supra* note 28, at 70 (Ulises Jorge, advisor to the vice-minister of health, had advised regional health directors to leave their positions if they were not capable of meeting the sterilization quotas); Defensoría del Pueblo Informe N° 27, *supra* note 42, at Indice 80 (noting memorandum to medical staff in Piura indicating that those who failed to meet their quotas would have their contracts suspended); CLADEM, NADA PERSONAL, *supra* note 51, at 41, 56-57; MINSA Special Commission Final Report, *supra* note 28, at 54, 65; EWIG, *supra* note 53, at 152; BALLÓN, *supra* note 1, at 63; Medical College Final Report, *supra* note 54, at 6.

⁷⁵ MINSA Special Commission Final Report, *supra* note 28, at 107.

⁷⁶ See, e.g., CLADEM, NADA PERSONAL, *supra* note 51, at 57; MINSA Special Commission Final Report, *supra* note 28, at 43-44, 53.

⁷⁷ MINSA Special Commission Final Report, *supra* note 28, at 43-44; Defensoría del Pueblo Informe N° 27, *supra* note 42, at Indice 80.

⁷⁸ MINSA Special Commission Final Report, *supra* note 28, at 65.

⁷⁹ Summary of interview described in CLADEM, NADA PERSONAL, *supra* note 51, at 58.

⁸⁰ Summary of interview described in CLADEM, NADA PERSONAL, *supra* note 51, at 57 & n.35.

In addition to these consequences, doctors and other medical personnel were incentivized to conduct sterilizations through a variety of rewards for those who met or surpassed their quotas.⁸¹ These rewards included cash bonuses,⁸² use of a “company car” from the health ministry,⁸³ promotions to a higher positions,⁸⁴ and prizes such as clothing, briefcases, or computers.⁸⁵

The Peruvian government’s prioritization of sterilization over other forms of contraception,⁸⁶ and its adoption of quotas, sanctions, and incentives to increase the number of sterilizations,⁸⁷ appears to have precipitated the widespread and systematic recourse to forced sterilizations. Medical personnel were obligated to find patients that could be sterilized and to conduct a set number of sterilizations,⁸⁸ quotas that were met by using physical force and misinformation.⁸⁹ As the Peruvian Defensoría has recognized, such quotas can lead to abuses,⁹⁰ and indeed several groups that have investigated this issue have concluded that the abuses under the PNSRPF were the result of the quotas and pressure placed on medical personnel.⁹¹ These abuses were not inadvertent. As discussed in greater detail in the *mens rea* section below, there was significant evidence, beginning as early as 1996, that the PNSRPF was resulting in forced sterilizations.⁹² Despite this evidence, the Peruvian government not only continued the program, but publicly declared that it would not halt the program.⁹³ Taken

⁸¹ Congressional Investigative Sub-Commission Final Report, *supra* note 28, at 106; CLADEM, NADA PERSONAL, *supra* note 51, at 53 (describing a communication directed at all health personnel in Huancavelica stating that there would be rewards for the institutions that got the best results in six different categories related to bringing people in to undergo sterilizations).

⁸² MINSA Special Commission Final Report, *supra* note 28, at 62 (medical personnel earned 30 to 40 soles per patient sterilized); CLADEM, NADA PERSONAL, *supra* note 51, at 41, 57, 63 (noting that generally, health care workers received a reward of 10 to 30 soles per patient brought in for sterilization); EWIG, *supra* note 53, at 152.

⁸³ *Se ofreció premiar a quienes realizaran más esterilizaciones*, EL COMERCIO (Feb. 11, 1998); CLADEM, NADA PERSONAL, *supra* note 51, at 41.

⁸⁴ CLADEM, NADA PERSONAL, *supra* note 51, at 41.

⁸⁵ *Id.*; MINSA Special Commission Final Report, *supra* note 28, at 60, 65.

⁸⁶ *See supra* pp. 13.

⁸⁷ *See supra* pp. 14-17.

⁸⁸ *See supra* pp. 14-15; *see also* BALLÓN, *supra* note 1, at 271, 273 (testimony of medical personnel); *id.* at 80.

⁸⁹ *See supra* pp. 9-12.

⁹⁰ Defensoría del Pueblo Informe N° 27, *supra* note 42, at 31 (conclusión 9).

⁹¹ *See, e.g.*, Medical College Final Report, *supra* note 54 at 21; CLADEM, NADA PERSONAL, *supra* note 51, at 48.

⁹² *See infra* pp. 31.

⁹³ *See infra* pp. 32-33.

together, such evidence indicates that these crimes were not the inadvertent or accidental result of well-intentioned but flawed policies, but rather an intentional decision to sterilize a large portion of the population through any means necessary, even force. This intentional mistreatment of the population plainly constitutes an attack.

B. ATTACK MUST BE DIRECTED AGAINST A CIVILIAN POPULATION

To constitute a crime against humanity under customary international law, an attack must be primarily directed at the civilian population.⁹⁴ This requirement has two components: (1) the victims must have been predominantly civilians, rather than military personnel or other combatants; and (2) there must have been a collective attack against a “population,” as opposed to a series of isolated crimes.⁹⁵ As explained in more detail below, both of these elements are indisputably met with respect to forced sterilizations in Peru.

i. Civilian Status

Under international law, special protections are extended to civilians, who may not be the intended target of an attack even during periods of conflict.⁹⁶ The “civilian” requirement is therefore intended to determine whether civilians – as opposed to combatants participating in an armed conflict – were the primary object of the attack.⁹⁷ All persons who are not members of the armed forces or

⁹⁴ Taylor Trial Judgment, *supra* note 23, ¶ 507; Karadžić Trial Judgment, *supra* note 23, ¶ 474; Kunarac Appeal Judgment, *supra* note 26, ¶ 91; Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 302, 305 (ECCC Trial Chamber July 26, 2010), <https://www.legal-tools.org/doc/dbdb62/pdf/>; Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 638 (ICTY Trial Chamber May 7, 1997), <https://www.legal-tools.org/doc/0a90ae/pdf/>.

⁹⁵ International courts have identified other factors – such as the means and method of the attack and the extent to which the attacking force complied with the laws of war – that are relevant where an attack is carried out during an armed conflict in an area where both civilians and soldiers are present. *See, e.g.*, Nuon Trial Judgment, *supra* note 25, at ¶ 184; Kaing Trial Judgment, *supra* note 94, at ¶¶ 308-09; Kunarac Appeals Judgment, *supra* note 26, at ¶ 91.

⁹⁶ Prosecutor v. Prlić, Case No. IT-04-74-T, Judgment Vol. 1, ¶ 185 (ICTY Trial Chamber May 29, 2013), <http://www.legal-tools.org/doc/2daa33/>; Kaing Trial Judgment, *supra* note 94, ¶ 308; Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, ¶ 115 (SCSL Trial Chamber Aug. 2, 2007), <http://www.rscsl.org/Documents/Decisions/CDF/785/SCSL-04-14-T-785.pdf>; Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 81 (SCSL Trial Chamber Mar. 2, 2009), <https://www.legal-tools.org/doc/7f05b7/pdf/>.

⁹⁷ Kunarac Trial Judgment, *supra* note 26, at ¶ 425. This requirement grew out of the international humanitarian law requirement to distinguish between the civilian population and combatants to armed conflicts, and thus is most relevant to

otherwise recognized as combatants are considered civilians under international law.⁹⁸

Here, there are no allegations that the victims of forced sterilization in Peru were combatants in an armed conflict. To the contrary, they were mothers,⁹⁹ housewives,¹⁰⁰ and farmers.¹⁰¹ They were forced to undergo sterilizations in hospitals and health centers,¹⁰² not on a battlefield.¹⁰³ As described in greater detail in the next section, they were selected based on characteristics such as sex and location,¹⁰⁴ not based on any perceived involvement with an armed force.¹⁰⁵ It is thus indisputable that the victims of forced sterilization in Peru were civilians and meet the civilian requirement.

ii. Population

The “population” element requires that crimes be of a collective nature, rather than single or isolated acts which might be crimes but which do not rise to the level of crimes against humanity.¹⁰⁶ The term “population” thus does not require that the entire population of a geographical area have been

situations of armed conflict. *See, e.g.*, Kaing Trial Judgment, *supra* note 94, at ¶ 308; Tadić Trial Judgment, *supra* note 94, at ¶¶ 639-43.

⁹⁸ Kaing Trial Judgment, *supra* note 94, at ¶ 304; Prlić Trial Judgment Vol. 1, *supra* note 96, at ¶ 187; Nuon Trial Judgment, *supra* note 25, at ¶ 185; Kunarac Trial Judgment, *supra* note 26, at ¶ 425; Prosecutor v. Fofana, Case No. SCSL-04-14-A, Judgment, ¶ 259 (SCSL Appeals Chamber May 28, 2008), <http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf>; Prosecutor v. Krajisnik, Case No. IT-00-39-T, Judgment, ¶ 706 (ICTY Trial Chamber Sept. 27, 2006), <http://www.icty.org/x/cases/krajisnik/tjug/en/krajjud060927e.pdf>.

⁹⁹ *See, e.g.*, *supra* notes 40 (Sabina Huillca), 45 (Ines Condori), 47 (Maria Mamérita Mestanza Chávez), 48 (Concepción Bellido Guillen) & accompanying text.

¹⁰⁰ *See, e.g.*, Defensoría del Pueblo Informe N° 27, *supra* note 42, at 15.

¹⁰¹ *See, e.g., id.*; BALLÓN, *supra* note 1, at 154, 159.

¹⁰² Defensoría del Pueblo Informe N° 27, *supra* note 42, at 12-13.

¹⁰³ *See* Karadžić Trial Judgment, *supra* note 23, at ¶¶ 4109, 4165, 4244 (concluding that civilians were deliberately targeted where the attack occurred on houses, in residential areas, and at markets); Prosecutor v. Perišić, Case No. IT-04-81-T, Judgment, ¶ 344 (ICTY Trial Chamber Sept. 6, 2011) (concluding that civilians were attacked based on the fact that “the attack occurred in a civilian area with no military activities in the vicinity”), <http://www.legal-tools.org/doc/f3b23d/>; *id.* at ¶¶ 365, 404.

¹⁰⁴ *See infra* pp. 20-22.

¹⁰⁵ *See* Prosecutor v. Popović, Case No. IT-05-88-T, Judgment Vol. I, ¶ 779 (ICTY Trial Chamber June 10, 2010) (finding that victims were civilians where, *inter alia*, they “were not selected based on their perceived involvement in . . . any armed force”), <http://www.legal-tools.org/doc/481867/pdf>.

¹⁰⁶ Tadić Trial Judgment, *supra* note 94, at ¶ 644; Kaing Trial Judgment, *supra* note 94, at ¶ 302; Kunarac Trial Judgment, *supra* note 26, at ¶ 422; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 80 (ICTR Trial Chamber June 7, 2001), <https://www.legal-tools.org/doc/6164a4/pdf/>.

subjected to the attack.¹⁰⁷ Rather, “[i]t is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to . . . [show] the attack was in fact directed against a civilian ‘population,’ rather than against a limited and randomly selected number of individuals.”¹⁰⁸

To determine whether a “population” was targeted, international criminal courts frequently evaluate the “scale of the attack,” meaning the number of individuals affected.¹⁰⁹ Although there is no set number of victims that must be affected, the International Criminal Tribunal for the former Yugoslavia (ICTY) has held that “several thousand victims” plainly satisfies the requirement that the attack be directed against a “population” rather than “against a limited number of individuals.”¹¹⁰ As described in detail above, as of September 2017, the Peruvian government has recognized nearly 5,000 victims of forced sterilizations.¹¹¹ Under international jurisprudence, such a large number of victims is plainly not “limited” and meets the population requirement.

In addition, although there is no requirement under customary international law that an attack be based on discriminatory motives¹¹² or that the perpetrators have had a discriminatory intent,¹¹³

¹⁰⁷ Tadić Trial Judgment, *supra* note 94, at ¶ 644; Kaing Trial Judgment, *supra* note 94, at ¶ 303; Taylor Trial Judgment, *supra* note 23, at ¶ 507; Karadžić Trial Judgment, *supra* note 23, ¶ 475; Prosecutor v. Stanišić, Case No. IT-03-69-T, Judgement Vol. I, ¶ 964 (ICTY Trial Chamber May 30, 2013), <http://www.legal-tools.org/doc/066e67/pdf>; Nuon Trial Judgment, *supra* note 25, at ¶ 182.

¹⁰⁸ Kordić Appeal Judgment, *supra* note 23, at ¶ 95; *see also* Kaing Trial Judgment, *supra* note 94, at ¶ 303; Taylor Trial Judgment, *supra* note 23, at ¶ 507; Karadžić Trial Judgment, *supra* note 23, at ¶ 475; Stanišić Trial Judgment Vol. I, *supra* note 107, at ¶ 964; Nuon Trial Judgment, *supra* note 25, at ¶ 182.

¹⁰⁹ *See, e.g.*, Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶ 627 (ICTY Trial Chamber July 31, 2003), <http://www.legal-tools.org/doc/32ecfb/pdf>; *see also* Prosecutor v. Prlić, Case No. IT-04-74-T, Judgement Vol. 3, ¶ 647 (ICTY Trial Chamber May 29, 2013), <http://www.legal-tools.org/doc/28c19c/pdf>.

¹¹⁰ Prlić Trial Judgment Vol. 3, *supra* note 109, at ¶ 647 (“several thousand victims” sufficient to constitute civilian population).

¹¹¹ *See supra* pp. 8-9.

¹¹² Fofana Appeal Judgment, *supra* note 98, at ¶¶ 262-63; Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement, ¶ 184 n. 267 (ICTY Appeals Chamber Sept. 17, 2003), <https://www.legal-tools.org/doc/46d2e5/pdf>; Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 260 (ICTY Trial Chamber Mar. 3, 2000), <http://www.legal-tools.org/doc/e1ae55/>; Prosecutor v. Im Chaem, Case No. 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), ¶ 63 (ECCC Office of the Co-Investigating Judges July 10, 2017), <http://www.legal-tools.org/doc/167aad/>; Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgment and Sentence, ¶ 672 (ICTR Trial Chamber Jan. 22, 2004), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-99-54a/trial-judgements/en/040122.pdf>.

international criminal courts often consider evidence of targeting of particular groups when evaluating whether an attack was directed at a civilian population.¹¹⁴ Such targeting may be based on any definable characteristic, including but not limited to national, political, ethnical, racial, or religious grounds.¹¹⁵

With respect to forced sterilizations in Peru, substantial evidence – including findings by Peruvian government entities – indicates that forced sterilizations were targeted at the poor, rural, and often indigenous female population, particularly in the jungle and mountainous regions of the country. For example, MINSA concluded that the Peruvian government’s sterilization campaign was aimed at poor, indigenous women living in rural zones, particularly in the jungle and mountainous sierra regions of the country, and that most of the victims shared these characteristics.¹¹⁶ An investigation by the Peruvian Ombudsman’s Office also found that government quotas were set only for fertile women, but not men, confirming that women were the primary targets for sterilizations.¹¹⁷

Academics, NGOs, and foreign institutions investigating the PNSRPF have also concluded that the program targeted poor, rural, indigenous women. For example, USAID, which provided support to the Peruvian government to expand family planning services, and members of the U.S. Congress

¹¹³ See, e.g., Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgement and Sentence, ¶ 2166 (ICTR Trial Chamber Dec. 18, 2008), <https://www.legal-tools.org/doc/6d9b0a/pdf/>; Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgement, ¶ 359 (ICTR Trial Chamber Dec. 13, 2006), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-01-66/trial-judgements/en/061213.pdf>.

¹¹⁴ Prosecutor v. Tadić, IT-94-1-A, Judgment, ¶ 297 (ICTY Appeals Chamber July 15, 1999) (“in most cases, crimes against humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons”), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

¹¹⁵ Nuon Trial Judgment, *supra* note 25, at ¶ 189. To the extent the targeting is based on a definable characteristic of the group, not all of the victims need share the targeted characteristic, so long as many of them do. Prosecutor v. Bisengimana, Case No. ICTR-00-60-T, Judgement and Sentence, ¶ 56 (ICTR Trial Chamber Apr. 13, 2006) (concluding that ethnic Tutsis were targeted were most of the victims were Tutsis), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-00-60/trial-judgements/en/060413.pdf>; see also Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, Judgement and Sentence, ¶ 477 (ICTR Trial Chamber July 15, 2004) (“the attack as a whole, but not the individual offence, must be committed on these particular grounds”), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-01-71/trial-judgements/en/040715.pdf>.

¹¹⁶ MINSA Special Commission Final Report, *supra* note 28, at 6, 89, 131; MINSA 2006 Report, *supra* note 55, at 14, 29, 36, 40, 43, 44, 53, 102.

¹¹⁷ Defensoría del Pueblo Informe N° 7, *supra* note 55, at 28.

concluded that the program targeted poor, rural and/or indigenous women.¹¹⁸ CLADEM, an international women’s NGO, following an extensive investigation of AQVs in Peru, similarly concluded that poor, rural, indigenous women were targeted by the program.¹¹⁹ And an independent econometrics analysis of sterilization data in Peru concluded that women sterilized because of the government sterilization campaign were more likely to live in rural areas, particularly the mountain and jungle regions of Peru.¹²⁰

The scale of the crimes – which numbered in the thousands – and the substantial evidence of targeting of poor rural indigenous women confirms that a “population” was affected by forced sterilizations in Peru, and that these were not isolated or random cases. Accordingly, this element of crimes against humanity is met.

C. ATTACK MUST BE WIDESPREAD OR SYSTEMATIC

An attack against a civilian population must also be widespread or systematic.¹²¹ This requirement is disjunctive, meaning that the attack may be either widespread or systematic in nature, but need not be both.¹²² Only the attack itself must be widespread or systematic; there is no corresponding requirement that each act or that the acts of a particular perpetrator likewise be

¹¹⁸ *E.g.*, United States Agency for International Development, *USAID’s Partnership with Peru Advances Family Planning*, (2006) (poor, indigenous women were targeted), <https://www.usaid.gov/sites/default/files/documents/1864/peru-508.pdf>; The Peruvian Population Control Program, Hearing before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives, 105th Congress (Feb. 25, 1998) at 37 (statement of Representative Chris Smith, noting that sterilization campaigns were primarily conducted in poor and rural areas), https://chrissmith.house.gov/uploadedfiles/1998.02.25_the_peruvian_population_control_program.pdf.

¹¹⁹ CLADEM, *NADA PERSONAL*, *supra* note 51, at 56, 70, 116, 124.

¹²⁰ Tanya Byker & Italo A. Gutierrez, RAND Labor & Population Working Paper, *Treatment Effects Using Inverse Probability Weighting and Contaminated Treatment Data: An Application to the Evaluation of a Government Female Sterilization Campaign in Peru* 30 (Sept. 2016), https://www.rand.org/content/dam/rand/pubs/working_papers/WR1100/WR1118-1/RAND_WR1118-1.pdf.

¹²¹ Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, at ¶ 98 (ICTY Appeals Chamber July 29, 2004), <https://www.legal-tools.org/doc/88d8e6/pdf/>; Prosecutor v. Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, ¶ 109 (ICTY Appeals Chamber July 20, 2005), <http://www.icty.org/x/cases/deronjic/acjug/en/der-aj050720.pdf>; Bisengimana Trial Judgment, *supra* note 115, at ¶¶ 41, 43; Kaing Trial Judgment, *supra* note 94, at ¶ 300; Taylor Trial Judgment, *supra* note 23, at ¶¶ 505, 511.

¹²² Kunarac Appeal Judgement, *supra* note 26, at ¶ 97; Akayesu Trial Judgment, *supra* note 25, at ¶ 579; Nahimana Appeal Judgment, *supra* note 25, at ¶ 920; Karadžić Trial Judgment, *supra* note 23, at ¶ 477; Taylor Trial Judgment, *supra* note 23, at ¶ 511; Bisengimana Trial Judgment, *supra* note 115, at ¶ 43.

widespread or systematic.¹²³ As described below, the forced sterilization attack in Peru was both widespread and systematic, and thus satisfies this element of crimes against humanity.

i. Widespread

The term “widespread” “refers to the large-scale nature of the attack and the number of victims.”¹²⁴ International criminal courts routinely conclude that an attack was large-scale where crimes were committed across multiple locations throughout a country and/or over an extended period of time.¹²⁵ Likewise, such courts have held that an attack was widespread where it resulted in hundreds or thousands of victims.¹²⁶

As described above, the attack in Peru was both large-scale and resulted in thousands of direct victims. The Peruvian government’s forcibly sterilized victim registry (REVIESFO), as of September 2017, has recognized nearly 5,000 forcibly sterilized victims from 13 of the 25 regions in Peru.¹²⁷ Reports on forced sterilizations in Peru, including those by the Peruvian ombudsman, academics, and NGOs, further corroborate that forced sterilizations took place in at least 19 regions of Peru,¹²⁸

¹²³ Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgement, ¶ 215 (SCSL Trial Chamber June 20, 2007), <https://www.legal-tools.org/doc/87ef08/pdf/>.

¹²⁴ Kunarac Appeal Judgment, *supra* note 26, at ¶ 94; Kordić Appeal Judgment, *supra* note 23, at ¶ 94; Kaing Trial Judgment, *supra* note 94, at ¶ 300; Taylor Trial Judgment, *supra* note 23, at ¶ 511; Blaškić Appeal Judgment, *supra* note 121, at ¶ 101.

¹²⁵ See, e.g., Sesay Trial Judgment, *supra* note 96, at ¶¶ 953, 955 (finding attack was widespread where it took place “in various locations throughout the country”); Karadžić Trial Judgment, *supra* note 23, at ¶ 2444 (finding attack was widespread where crimes occurred in 20 municipalities); Prosecutor v. Bagosora, Case No. ICTR-98-41-A, Judgement, ¶ 390 (ICTR Appeals Chamber Dec. 14, 2011) (rejecting defense argument that the widespread requirement had not been met where the trial court had found that crimes had been committed across the country of Rwanda), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-98-41/appeals-chamber-judgements/en/111214.pdf>; Stanišić Trial Judgment Vol. I, *supra* note 107, at ¶ 971 (finding attack was widespread where it was committed over the course of many years, with a concentration of crimes over a two year period); Prlić Trial Judgment Vol. 3, *supra* note 109, at ¶ 646 (finding attack was widespread where it was committed in 8 cities over a period of two years and resulted in thousands of victims).

¹²⁶ See, e.g., Sesay Trial Judgment, *supra* note 96, at ¶ 955 (finding that an attack was widespread where “hundreds of civilians . . . were victims”); Prlić Trial Judgment Vol. 3, *supra* note 109, at ¶ 646 (finding attack was widespread where, *inter alia*, it resulted in thousands of victims).

¹²⁷ See *supra* pp. 8-9.

¹²⁸ Defensoría del Pueblo Informe No. 27, *supra* note 42, at 16 (chart indicating that the Ombudsman had received reports of forced sterilizations from 19 regions).

including: Piura,¹²⁹ Cajamarca,¹³⁰ Ayacucho,¹³¹ Huancavelica,¹³² San Martín,¹³³ and Cusco.¹³⁴

In assessing whether an attack was widespread, international criminal courts also consider the “consequences of the attack upon the *targeted population*,” not just upon the direct victims.¹³⁵ Thus, the number of individuals affected by Peru’s forced sterilization campaign was immeasurably higher than the nearly 5,000 victims recognized by Peru, as the sterilizations often had an effect on the victim’s spouses and other family members. For instance, many women reported that after being sterilized they were no longer able to work because of the physical pain caused by complications or scars from the sterilization surgery, thereby adversely affecting their economic prospects and those of their families.¹³⁶ Moreover, husbands of forcibly sterilized women often abandoned their wives.¹³⁷ In addition, indigenous communities frequently rejected and ostracized sterilized women, compelling the women, and oftentimes their children, to move to the city.¹³⁸

¹²⁹ See, e.g., Defensoría del Pueblo Informe N° 7, *supra* note 55, at 16; BALLÓN, *supra* note 1, at 149-165.

¹³⁰ See, e.g., María Mamérita Mestanza Chávez v. Peru, *supra* note 8, at ¶ 11.

¹³¹ See, e.g., BALLÓN, *supra* note 1, at 205, 230-242; Defensoría del Pueblo Informe No. 27, *supra* note 42, at 15.

¹³² Defensoría del Pueblo Informe No. 27, *supra* note 42, at 15.

¹³³ *Id.* at 16.

¹³⁴ *Id.* at 15.

¹³⁵ See, e.g., Karadžić Trial Judgment, *supra* note 23, at ¶ 477 (emphasis added); Kaing Trial Judgment, *supra* note 94, at ¶ 301 (same).

¹³⁶ BALLÓN, *supra* note 1, at 41 (finding that the sterilization procedure and resulting scars and pain eradicated an important cultural practice by making it almost impossible for women, who must hold looms across their stomachs, to teach future generations how to weave and produce traditional textiles); *id.* at 154 (victim could no longer work as a farmer because of the pain).

¹³⁷ Quipu Project, Testimony #105/115 (testimony of female victim describing how her husband refused to support her after the AQV), <https://interactive.quipu-project.com/#/es/quipu/listen/11?currentTime=44&view=knot&tag=lifefter>; *id.*, Testimony #109/115 (testimony of female victim describing how her husband abandoned her after the AQV), <https://interactive.quipu-project.com/#/es/quipu/listen/7?currentTime=39&view=knot&tag=lifefter>; Beatriz Jiménez, *Alrededor de 400.000 mujeres, esterilizadas sin su consentimiento*, EL MUNDO (Dec. 14, 2009) (noting that many sterilized women have been rejected by their spouses), <http://www.elmundo.es/america/2009/12/15/noticias/1260845670.html>; BALLÓN, *supra* note 1, at 34, 280.

¹³⁸ *Víctimas de esterilización forzada piden a relatora de la ONU que interceda por ellas*, LA REPÚBLICA (June 10, 2017), <http://larepublica.pe/politica/884480-victimas-de-esterilizacion-forzada-piden-relatora-de-la-onu-que-interceda-por-ellas>; Jiménez, *supra* note 137 (noting that many sterilized women have been rejected by their spouses and communities), <http://www.elmundo.es/america/2009/12/15/noticias/1260845670.html>.

ii. Systematic

Systematic refers to “the organised nature of the acts of violence and the improbability of their random occurrence.”¹³⁹ “Patterns of crimes – that is non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.”¹⁴⁰ Other factors considered by international criminal courts include the participation of officials or high-level authorities and whether the crimes were committed pursuant to or in furtherance of a state policy.¹⁴¹

a. Patterns of Crimes

The crimes committed in Peru during the PNSRPF followed a common pattern. All of the crimes were of the same nature – forced sterilizations.¹⁴² The victims were almost exclusively women.¹⁴³ The crimes were committed predominately in poor, rural areas, especially in the mountain and jungle regions of Peru, as described in more detail earlier.¹⁴⁴ And the testimonies of the victims, which were described in more detail in the attack section, reveal common patterns of violence and threats.¹⁴⁵ For example, many women described being physically forced to undergo sterilizations, including women who were locked in a room and sterilized.¹⁴⁶ Many other women report being sterilized after a cesarean while still under anesthesia and therefore unable to consent.¹⁴⁷ Still others were threatened with imprisonment and fines to coerce their consent.¹⁴⁸ The consistency of these

¹³⁹ Kunarac Appeal Judgment, *supra* note 26, at ¶ 94; Kordić Appeal Judgment, *supra* note 23, at ¶ 94; Blaškić Appeal Judgment, *supra* note 121, at ¶ 101; Kaing Trial Judgment, *supra* note 94, at ¶ 300; Bagosora Appeal Judgment, *supra* note 125, at ¶ 389; Taylor Trial Judgment, *supra* note 23, at ¶ 511.

¹⁴⁰ Kunarac Appeal Judgment, *supra* note 26, at ¶ 94; *see also* Blagojević Trial Judgment, *supra* note 23, at ¶ 545; Blaškić Appeal Judgment, *supra* note 121, at ¶ 101; Kordić Appeal Judgment, *supra* note 23, at ¶ 94.

¹⁴¹ Sesay Trial Judgment, *supra* note 96, at ¶¶ 78-79; Kunarac Appeal Judgment, *supra* note 26, at ¶¶ 95, 98; Kaing Trial Judgment, *supra* note 94, at ¶ 301; Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 53 (ICTY Trial Chamber Dec. 14, 1999), <http://www.icty.org/x/cases/jelistic/tjug/en/jel-tj991214e.pdf>.

¹⁴² *See supra* pp. 8-12.

¹⁴³ *See supra* pp. 8-9, 21.

¹⁴⁴ *See supra* p. 21.

¹⁴⁵ *See supra* pp. 8-12.

¹⁴⁶ *See supra* p. 9.

¹⁴⁷ *See supra* pp. 10-11.

¹⁴⁸ *See supra* p. 11.

patterns strongly supports the conclusion that these crimes were committed as part of a systematic attack.

b. Existence of a State Policy and the Participation of Officials or Authorities

Although not required under customary international law, the existence of a state policy or plan may be used as evidence of the systematic nature of an attack.¹⁴⁹ The underlying aim of the state policy need not be illegitimate; rather the key question is whether crimes were committed in pursuit of that policy.¹⁵⁰ In assessing whether a state policy existed, international criminal courts have considered the scale and uniformity of the attack,¹⁵¹ whether critical aspects of the attack were planned centrally,¹⁵² whether substantial public or private resources were dedicated to the plan,¹⁵³ and the participation of high-level officials in the definition and establishment of the plan.¹⁵⁴

As described in more detail earlier, the Peruvian government adopted a policy to increase the number of sterilizations, which it implemented through a coordinated program of quotas, sanctions for health workers that failed to meet those quotas, and incentives.¹⁵⁵ As concluded above, these quotas, and the pressure placed on health personnel to meet them, led to the use of force.¹⁵⁶ The decision by public officials to continue the program despite significant evidence of such force strongly suggests

¹⁴⁹ Blaškić Appeal Judgment, *supra* note 121, at ¶¶ 100, 120; Prosecutor v. Semanza, Case No. ICTR-97-20-A, Judgement, ¶ 269 (ICTR Appeals Chamber May 20, 2005), <http://www.legal-tools.org/doc/a686fd/>; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 69 (ICTR Trial Chamber Dec. 6, 1999), <https://www.legal-tools.org/doc/f0dbbb/pdf/>; Kunarac Appeals Judgment, *supra* note 26, at ¶ 98.

¹⁵⁰ See, e.g., Fofana Appeal Judgment, *supra* note 98, at ¶ 247 (rejecting the defense's contention that the legitimate aim of a policy precludes determination that actions in support of that policy rose to level of crimes against humanity).

¹⁵¹ Blaškić Trial Judgment, *supra* note 112, at ¶¶ 750-51.

¹⁵² Sesay Trial Judgment, *supra* note 96, at ¶¶ 957, 1997.

¹⁵³ Akayesu Trial Judgment, *supra* note 25, at ¶ 580; Blaškić Trial Judgment, *supra* note 112, at ¶ 203; Jelisić Trial Judgment, *supra* note 141, at ¶ 53.

¹⁵⁴ Blaškić Trial Judgment, *supra* note 112, at ¶ 203; Jelisić Trial Judgment, *supra* note 141, at ¶ 53.

¹⁵⁵ See *supra* pp. 13-17.

¹⁵⁶ See *supra* p. 17.

that forced sterilizations were not an accidental result of the program, but rather an intentional policy to sterilize a large number of women through any means necessary, including force.¹⁵⁷

The sterilization program was planned, organized, and closely supervised by high-level public officials in the central government,¹⁵⁸ including the President and his personal advisor. In 1995, President Fujimori urgently requested that Congress amend Peruvian law to permit sterilizations.¹⁵⁹ In addition, as described above, both the President and his advisor Dr. Yong Motta were in weekly contact with medical personnel to set sterilization quotas, made frequent calls to and held meetings with Regional Health Directors to promote the use of sterilizations and indicate the required quotas, and attended weekly meetings to monitor progress on the quotas.¹⁶⁰ President Fujimori also directly approved requests for sterilization supplies.¹⁶¹ Vice Minister Alejandro Mesarina signed a resolution stating that PNSRPF directives were obligatory and that health personnel who failed to meet them would be sanctioned.¹⁶² Based on this and other evidence, MINSA concluded that the PNSRPF was designed and monitored directly by President and various Ministers of Health.¹⁶³

Finally, the PNSRPF was prepared, funded and implemented using a significant amount of both public and private resources. During the time period of the PNSRPF, the Peruvian government “increased funding for family planning and expanded the Ministry[of Health]’s network of health

¹⁵⁷ See *supra* pp. 17-18.

¹⁵⁸ See, e.g., MINSA Special Commission Final Report, *supra* note 28, at 129 (“Los directores de salud señalaron que las decisiones que provenían del nivel central tenían que ser obedecidas.”); Simeon Tegel, *Las esterilizaciones forzadas en Perú de la época Fujimori podrían tener el juicio que merecen*, VICE NEWS (Dec. 22, 2015) (“El líder aprobó una campaña sin precedentes de ligadura de trompas”), <https://news.vice.com/es/article/esterilizaciones-forzadas-peru-epoca-fujimori-podrian-tener-juicio-merecen>.

¹⁵⁹ MINSA 2006 Report, *supra* note 55, at 7; Lizaraburu, *supra* note 39.

¹⁶⁰ See *supra* pp. 14-15.

¹⁶¹ MINSA Special Commission Final Report, *supra* note 28, at 44, 46, 74.

¹⁶² *Id.* at 65 (Resolución Ministerial No. 465-99 SA/DM, which was signed by Vice Minister Alejandro Mesarina, states that the PNSRPF directives are obligatory and that health personnel who do not meet them will be sanctioned).

¹⁶³ *Id.* at 129; see also Resolución Fiscal N° 16, *supra* note 13, at 19 (confirming that in 1995, the executive branch of the government conceived and executed the family planning program).

facilities providing family planning services.”¹⁶⁴ Sterilization, like other family planning services, was provided for free under the PNSRPF, meaning that the government and/or donors absorbed the entire cost of AQVs.¹⁶⁵ In addition, the PNSRPF received financial support from large international and foreign aid organizations such as the United States Agency for International Development (USAID) and the United Nations Population Fund (UNFPA).¹⁶⁶

iii. Conclusion

Overall, the large number of forcibly sterilized victims from numerous regions of Peru, and the consequences that the victims and their families suffered, is compelling evidence of the widespread nature of the attack. In addition, the attack contains the requisite elements to be considered systematic in nature: it followed a consistent pattern, as evidenced by victims’ similar stories and conclusions made in government investigative reports; and it was committed in furtherance of a state policy, as demonstrated by, among other things, the setting of quotas developed and supervised by high-level members of the Peruvian government; and the use of substantial funding from public government sources and international and foreign donors.

D. NEXUS

Under customary international law, crimes against humanity require a nexus between the acts of the accused and the attack on the civilian population.¹⁶⁷ That is to say, “[t]he acts of the accused must constitute part of the attack,” rather than an isolated crime.¹⁶⁸ The factors that international

¹⁶⁴ United States Agency for International Development, *USAID’s Partnership with Peru Advances Family Planning* (2006), <https://www.usaid.gov/sites/default/files/documents/1864/peru-508.pdf>.

¹⁶⁵ CLADEM, NADA PERSONAL, *supra* note 51, at ¶ 71, 79; BALLÓN, *supra* note 1, at 174, 175 (testimony of health center director that AQVs were free in Piura); *id.* at 177, 191 (testimony of obstetrician that post-surgical medicine was provided to AQV patients for free).

¹⁶⁶ MINSA Special Commission Final Report, *supra* note 28, at 23.

¹⁶⁷ Kaing Trial Judgment, *supra* note 94, at ¶ 318; Taylor Trial Judgment, *supra* note 23, at ¶ 512; Karadžić Trial Judgment, *supra* note 23, at ¶ 478; Kunarac Appeals Judgment, *supra* note 26, at ¶ 99.

¹⁶⁸ See Kunarac Appeals Judgment, *supra* note 26, at ¶¶ 99-100; see also Kaing Trial Judgment, *supra* note 94, at ¶ 318; Karadžić Trial Judgment, *supra* note 23, at ¶ 478. As the Kunarac Court described, the nexus element is sometimes

criminal courts often consider when determining whether a nexus exists include: “similarities between the perpetrator’s acts and the acts occurring within the attack; the nature of the events and the circumstances surrounding the perpetrator’s acts; [and] the temporal and geographic proximity of the perpetrator’s acts with the attack.”¹⁶⁹ In particular, where an individual’s acts were “undertaken in furtherance of, and pursuant to, [state] policies and plans,” courts have concluded that those acts formed part of the attack.¹⁷⁰

As discussed in greater detail in the attack section,¹⁷¹ the attack in this case consists of the widespread and systematic use of forced sterilizations against civilians. The crimes committed as part of this attack all share similar characteristics:

- they consist of forced sterilizations (or acts to plan, support, or supervise such sterilizations);
- they were geographically proximate, as they all occurred in Peru, with an emphasis on poor, rural, and/or indigenous areas;¹⁷²
- they were temporally proximate, occurring during the time period of (or in the planning for) the PNSRPF; and
- they were committed in furtherance of, and pursuant to, the PNSRPF.¹⁷³

Although the specific acts and modes of liability of the alleged perpetrators is not specified in the Prosecution’s analysis,¹⁷⁴ the acts that are likely under investigation are either acts of forced

described as including a second element related to the knowledge of the accused. Kunarac Appeals Judgment, *supra* note 26, at ¶ 99. That requirement is addressed in the *mens rea* section below. *See infra* p. 30.

¹⁶⁹ *See* Prosecutor v. Brima, Case No. SCSL-04-16-T, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, ¶ 42(d) (Mar. 31, 2006), <http://www.rscsl.org/Documents/Decisions/AFRC/469/SCSL-04-16-T-469.pdf>; Taylor Trial Judgment, *supra* note 23, at ¶ 512.

¹⁷⁰ *See* Prosecutor v. Khieu, Case No. 002/19-09-2007-ECCC/SC, Appeal Judgement, ¶ 751 (ECCC Supreme Court Chamber Nov. 23, 2016), <https://www.legal-tools.org/doc/e66bb3/pdf/>.

¹⁷¹ *See supra* pp. 7-17.

¹⁷² *See supra* pp. 21-22.

¹⁷³ *See supra* pp. 13-18.

¹⁷⁴ *See generally* Resolución Fiscal No 16, *supra* note 13.

sterilization or acts of planning, support, implementation, and supervision of the state program that resulted in forced sterilizations. If the acts of the accused fit these circumstances then it is likely that the acts are not random and unconnected, and thus the nexus element is satisfied.

E. *MENS REA*

Under customary international law, an accused must have knowledge of the attack and that his acts comprised part of the attack.¹⁷⁵ The accused only has to understand the overall context in which his or her acts occurred; he or she does not need to have known of the details of the attack.¹⁷⁶ In addition, the motives “of the accused for taking part in the attack are irrelevant” and the accused “need not share the purpose or goal behind the attack.”¹⁷⁷ Nor is there any requirement that an accused have a willful disregard for human dignity or an intent to punish or intimidate the victims of the attack.

The specific evidence of knowledge on the part of an accused depends on the facts of each case; there is no list of evidentiary criteria which must be satisfied.¹⁷⁸ Although the knowledge of the alleged perpetrators is not specified in the Prosecution’s analysis,¹⁷⁹ the facts described below demonstrate that there was widespread knowledge of the forced sterilizations carried out under the PNSRPF, particularly among high-level public officials. In light of how pervasive this public knowledge was, it is highly unlikely that an accused would not have known of the attack or that his or her actions in support of the sterilization program were part of that attack.

¹⁷⁵ Kordić Appeal Judgment, *supra* note 23, at ¶¶ 99-100; Kaing Trial Judgment, *supra* note 94, at ¶ 319; Taylor Trial Judgment, *supra* note 23, at ¶ 515; Blagojević Trial Judgment, *supra* note 23, at ¶ 548. In addition, the accused must have the *mens rea* for the enumerated crime, namely forced sterilization. See Kordić Appeal Judgment, *supra* note 23, at ¶ 99. As this amicus brief concerns only the requirements of crimes against humanity in general, and not specific enumerated crimes, it does not analyze the elements of forced sterilization.

¹⁷⁶ Kaing Trial Judgment, *supra* note 94, at ¶ 319; Kunarac Appeal Judgment, *supra* note 26, at ¶ 102; Sesay Trial Judgment, *supra* note 96, at ¶ 90; Fofana Trial Judgment, *supra* note 96, at ¶ 121; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 133 (ICTR Trial Chamber May 21, 1999), <https://www.legal-tools.org/doc/0811c9/pdf/>; Blagojević Trial Judgment, *supra* note 23, at ¶ 548.

¹⁷⁷ Kordić Appeal Judgment, *supra* note 23, at ¶ 99; see also Kunarac Appeal Judgment, *supra* note 26, at ¶ 103; Sesay Trial Judgment, *supra* note 96, at ¶ 90; Fofana Trial Judgment, *supra* note 96, at ¶ 121; Blagojević Trial Judgment, *supra* note 23, at ¶ 548.

¹⁷⁸ Blaškić Appeal Judgment, *supra* note 121, at ¶ 126; Sesay Trial Judgment, *supra* note 96, at ¶ 90.

¹⁷⁹ See generally Resolución Fiscal No 16, *supra* note 13.

Concerns about forced sterilizations under the PNSRPF began surfacing in 1996, shortly after implementation of the program began.¹⁸⁰ These concerns were raised by and to a variety of high-level public officials, including the Defensor del Pueblo, the President and other members of the Peruvian Congress, and the Minister of Health,¹⁸¹ prompting the Ministry of Health to begin an investigation and to promise to sanction those responsible.¹⁸²

By mid-July 1996, the existence of sterilization quotas and abuses committed in efforts to meet them became public information.¹⁸³ In response, the United States Agency for International Development (USAID) had more than 80 contacts with Peruvian government officials, including the Minister of Health, the Minister of Women's Advancement and Human Development, and a presidential advisor, to express opposition to these quotas and concern that the program had the potential for abuse.¹⁸⁴ Indeed, the United States was so concerned about Peru's sterilization program that it refused to support parts of the PNSRPF related to sterilizations as early as July 1996.¹⁸⁵

Between 1996 and 1998, dozens of newspaper articles reported allegations of forced sterilizations conducted as part of the PNSRPF.¹⁸⁶ As the Prosecutor has acknowledged, several

¹⁸⁰ The Peruvian Population Control Program, *supra* note 118, at 1-2.

¹⁸¹ See, e.g., Carlos Ramos, *Defensoría vería caso de ligaduras*, EL SOL (July 2, 1996) (expressing concern about the use of prizes to coerce patients to submit to sterilizations), <https://1996pnsrpf2000.files.wordpress.com/2012/10/el-sol-2-de-julio-de-19961.pdf>; *Esterilización debe ser opción libre y sin condicionamiento*, EL PERUANO (July 2, 1996) (during a discussion with the President of the Peruvian Congress, Martha Chávez, the Defensor del Pueblo expressed concern about reports of the use of incentives to coerce patients to submit to sterilizations); *Gobierno alienta esterilización en zonas de bajo nivel cultural*, LA REPÚBLICA (July 8, 1996) (Legislator Lourdes Flores Nano expressed concern that sterilization campaigns were being conducted without providing complete information to the patients); *Ministro negó política de incentivos a cambio de esterilizaciones*, GESTION (July 19, 1996), <https://1996pnsrpf2000.files.wordpress.com/2012/10/gestiocc81n-19-de-julio-de-1996.pdf>.

¹⁸² *Ministro negó política de incentivos a cambio de esterilizaciones*, GESTION (July 19, 1996), <https://1996pnsrpf2000.files.wordpress.com/2012/10/gestiocc81n-19-de-julio-de-1996.pdf>.

¹⁸³ See, e.g., *Sigue afán de esterilización*, EL SOL (July 12, 1996), <https://1996pnsrpf2000.files.wordpress.com/2012/10/el-sol-12-de-julio-de-1996.pdf>

¹⁸⁴ The Peruvian Population Control Program, *supra* note 118, at 6, 7.

¹⁸⁵ *Id.* at 2, 6, 9, 11, 18, 46, 66.

¹⁸⁶ See, e.g., *Obispo insiste: Hay ligaduras de trompas*, EL SOL (Sept. 4, 1996) (describing allegations that 600 individuals were sterilized without their consent); *Denuncian que obligan a médicos a realizar ligaduras de trompas*, EL COMERCIO (Nov. 7, 1996), <https://1996pnsrpf2000.files.wordpress.com/2012/10/el-comercio-7-de-noviembre-de-1996.pdf>; *Esterilización obligatoria al descubierto*, LA REPÚBLICA (Dec. 7, 1997), <https://1996pnsrpf2000.files.wordpress.com/2012/10/la-repucc81blica-7-de-diciembre-de-1997.pdf>; *Piden que se*

complaints were also filed with the Ombudsman's Office in 1997 and 1998.¹⁸⁷ The allegations of abuses became so widespread that the Peruvian Ombudsman, the Medical College of Peru, and the Ministry of Health all began investigations into the allegations.¹⁸⁸ In addition to information available through these public reports and USAID communications, many high-level officials had information about the PNSRFP, including the use of quotas, from internal government communications. As already described above, these officials set quotas, mandated that they were obligatory, and closely monitored progress on achieving them.¹⁸⁹

Despite these pervasive reports of abuses, from 1996 to early 1998, the Peruvian government continued the sterilization program. Indeed, even as calls for investigations increased in late 1997 and early 1998, the Peruvian government publicly refused to halt the sterilization program.¹⁹⁰ Even after the Defensoría's report, in which the Defensoría concluded that involuntary sterilization violates fundamental rights and that the Peruvian government and that quotas were leading to abuses in the

investigue el programa de esterilización que impone el gobierno, LA RÉPUBLICA (Dec. 8, 1997), <https://1996pnsrpf2000.files.wordpress.com/2012/10/la-repucc81blica-8-de-diciembre-de-19971.pdf>; *Defensoría investiga denuncias sobre esterilizaciones masivas*, LA RÉPUBLICA (Dec. 11, 1997), <https://1996pnsrpf2000.files.wordpress.com/2012/10/la-repucc81blica-11-de-diciembre-de-1997.pdf>; *Me quisieron engañar*, EL COMERCIO (Dec. 20, 1997), <https://1996pnsrpf2000.files.wordpress.com/2012/10/el-comercio-20-de-diciembre-de-1997.pdf>; Ministerio de Salud; *Campaña publicitaria de Salud es "infame"*, LA RÉPUBLICA (Jan. 20, 1997), <https://1996pnsrpf2000.files.wordpress.com/2012/10/la-repucc81blica-20-de-enero-de-1998.pdf>; *Hay cuatros investigaciones en curso relacionadas con campañas de esterilización*, EL COMERCIO (Jan. 31, 1998).

¹⁸⁷ Resolución Fiscal N° 16, *supra* note 13, at 23.

¹⁸⁸ Defensoría del Pueblo Informe N° 27, *supra* note 42 (issued in 1998); Medical College Final Report, *supra* note 54 (issued in 1998); *Ministerio de Salud investigará abusos en prácticas de esterilización*, EL COMERCIO (Jan. 17, 1998), <https://1996pnsrpf2000.files.wordpress.com/2012/10/el-comercio-17-de-enero-de-1998.pdf>.

¹⁸⁹ *See supra* pp. 14-15; *see also* MINSA Special Commission Final Report, *supra* note 28, at 101-04 (listing reports sent from the Minister of Health to the President); Anexo No. 9, Oficios Firmados por el Ministro de Salud Marino Costa Bauer, <https://1996pnsrpf2000.files.wordpress.com/2014/09/seis-oficios-de-ministro-marino-costa-bauer-a-fujimori-informe-de-cumplimiento-de-metas.pdf>.

¹⁹⁰ *See e.g., Programa de planificación familiar no se ha paralizado*, EL PERUANO (Feb. 27, 1998), <https://1996pnsrpf2000.files.wordpress.com/2012/10/el-peruano-27-de-febrero-de-1998.pdf>; *Ministro de salud afirma que no suspenderán las esterilizaciones*, LA REPÚBLICA, (Apr. 8, 1998); *Ministro asegura que no se suspenderá programa de planificación familiar*, EL COMERCIO (Apr. 8, 1998).

program, was issued in 1998,¹⁹¹ MINSA took another year before issuing new regulations incorporating the Defensoría's recommendations.¹⁹²

International criminal courts have recognized that an accused's *mens rea* can be shown by evidence that information about the crimes was common knowledge and that the accused held a public position and was involved in implementation of the attack.¹⁹³ With respect to Peru, the extensive evidence presented above demonstrates that there was widespread knowledge of the abuses carried out under the PNSRPF as early as 1996. Despite this knowledge, high-ranking public officials chose to move forward with the program. Even after a series of investigations was launched, the government waited another year before implementing the recommendations coming out of those investigations. As such, there can be little doubt that, at least by mid-1996 and certainly in 1997 and 1998, members of the government implementing the PNSRPF chose to continue the program despite knowledge of the attack.

V. CONCLUSION

Thousands of women were forcibly sterilized under Peru's PNSRPF, in what appears to amount to a crime against humanity under customary international law. Indeed, as the foregoing analysis demonstrates, forced sterilizations in Peru meet all of the elements of a crime against humanity:

- **there was an attack**

¹⁹¹ Defensoría del Pueblo Informe N° 7, *supra* note 55, at 31-32.

¹⁹² See Resolución Fiscal N° 16, *supra* note 13, at 24 (MINSA issued Resolution 465-99-SA/DM in September 1999). There does not appear to have been any investigation into why the government did not respond when allegations of abuse first arose in 1996. Significantly, however, there is evidence that the government had earlier recognized that the only way to increase sterilizations was through force and that it created a secret plan to implement forced sterilizations. See MINSA Special Commission Final Report, *supra* note 28, at 73-74. According to MINSA, in 1994, a group of 25 members of the armed forces was tasked with creating a program to slow the national birthrate. *Id.* They ultimately determined that a program of "forced sterilizations" should be put in place, with particular emphasis on poor and "culturally backward" groups. *Id.* at 74. There is extensive evidence that the military was involved in the sterilization program in Peru, including purchasing and providing sterilization supplies. See, e.g., *id.* at 44, 47-48, 49, 74, 102.

¹⁹³ Blaškić Trial Judgment, *supra* note 112, at ¶ 259; Blagojević Trial Judgment, *supra* note 23, at ¶ 553.

As the Peruvian government has admitted, thousands of individuals were forcibly sterilized under the PNSRPF. These victims were physically forced to submit to sterilizations against their will, including by being locked in rooms and tied up; operated on without their knowledge or consent while under anesthesia for another medical procedure; subjected to severe and repeated threats; and given false or incomplete information. These forced sterilizations were committed as part of a government-mandated program to dramatically increase the number of sterilizations, a goal which was pursued by obligating doctors and health care workers to meet sterilization quotas. These quotas, and the sanctions medical personnel were subjected to if they failed to meet them, appear to have precipitated the widespread and systematic recourse to forced sterilizations. Such abuses were not inadvertent – despite significant evidence of forced sterilizations as early as 1996, the government refused to halt the program.

- **directed against a civilian population**

It is undisputed that the victims of forced sterilizations under the PNSRPF in Peru were civilians, not members of the armed forces or other combatants. The nearly 5,000 victims are plainly sufficient to constitute a population, rather than a limited number of individuals, and, although targeting is not required, there is evidence that the PNSRPF targeted poor, rural, and indigenous women.

- **that was widespread and systematic**

The attack was widespread, affecting nearly 5,000 direct victims (and many more indirectly) in at least 13 regions in Peru. In addition, the attack was systematic, as the crimes followed a common pattern in both the nature of the attack and the types of

victims and the crimes were perpetrated in pursuit of a state program that was planned, organized, and closely supervised by high-level public officials and supported by significant public and private resources.

- **there is a nexus between the acts of the accused and the attack**

Acts of an accused that share characteristics with the crimes in the attack – forced sterilizations committed in furtherance of and pursuant to the PNSRPF from 1996 to 2000 in Peru – are likely to meet the nexus requirement.

- **and the accused knew or intended his or her acts to be part of the attack.**

As early as 1996, concerns were raised about forced sterilizations under the PNSRPF by and to numerous high-level public officials. After the existence of sterilization quotas and abuses committed in efforts to meet them became public information, USAID withdrew sterilization-related support to the PNSRPF and contacted Peruvian government officials more than 80 times to express opposition to these quotas and concern that the program had the potential for abuse. The allegations of abuses became so widespread that the Peruvian Ombudsman, the Medical College of Peru, and the Ministry of Health all began investigations into the allegations. Yet despite these pervasive reports of abuses, from 1996 to 1998, the Peruvian government continued the sterilization program and indeed publicly refused to halt the sterilization program. As such, there can be little doubt that members of the government implementing the PNSRPF chose to continue the program despite knowledge of the attack.

As a crime against humanity, there is no statute of limitation to prosecuting acts of forced sterilization in Peru under the PNSRPF. The Tercera Fiscalía Superior Penal De Lima should re-open the investigation into these crimes and permit prosecutions to proceed.