

PETITION TO:

UNITED NATIONS

WORKING GROUP ON ARBITRARY DETENTION

Mr. Malick El Hadji Sow (Senegal)
Ms. Shaheen Sardar Ali (Pakistan)
Mr. Roberto Garretón (Chile)
Mr. Aslan Abashidze (Russian Federation)
Mr. Mads Andenas (Norway)

**HUMAN RIGHTS COUNCIL
UNITED NATIONS GENERAL ASSEMBLY**

In the Matter of:
Dr. Luis Williams Pollo Rivera,
Citizen of Peru

v.

Government of the Republic of Peru

Petition for Relief Pursuant to Resolutions 1991/42, 1997/50, 2000/36, 2003/31, and 6/4 of the
Commission on Human Rights and the Human Rights Council

Submitted by:

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May 31, 2010

**MODEL QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING
ARBITRARY ARREST OR DETENTION¹**

I. IDENTITY OF THE PERSON DETAINED

1. **Family names:** Pollo Rivera (a/k/a/ Polo Rivera)
2. **First names:** Luis Williams (a/k/a/ Luis William)
3. **Sex:** Male
4. **Birth date or age (at the time of detention):** 19 August 1946
5. **Nationality/Nationalities:** Citizen of Peru
6.
 - (a) **Identity document (if any):** National Identity Document (Documento Nacional de Identidad—D.N.I.)
 - (b) **Issued by:** National Identification and Marital Status Registry (Registro Nacional de Identificación y Estado Civil—RENIEC)
 - (c) **On (date):** Unknown
 - (d) **No.:** 06241360
7. **Profession and/or activity (if believed to be relevant to the arrest/detention):**
Physician
8. **Address of usual residence:** At the time of his arrest in 2003, Dr. Pollo was domiciled in the city of Andahuaylas, Province of Abancay, Peru. After his arrest, he was placed in the Miguel Castro Castro Prison in Lima, Peru. Due to his deteriorating health, he was later transferred to the Dos de Mayo hospital in Lima, Peru, where he is currently confined.

II. ARREST

1. **Date of arrest:** 26 August 2003
2. **Place of arrest (as detailed as possible):** Dr. Pollo was arrested on the premises of the ESSALUD Hospital, Jirón Ayacucho 704, Andahuaylas, Peru.

¹ Lack of access to Petitioner has made it impossible to obtain all the information requested in the Working Group's model questionnaire. The Working Group has consistently stated that inability to provide all of the information requested in the model questionnaire "shall not directly or indirectly result in the inadmissibility of the communication." *See, e.g.*, Report of the Working Group on Arbitrary Detention, E/CN.4/1996/40 (15 Dec. 1996), Annex 1, para. 8. As such, the information in this Petition is based on information and documents provided by Petitioner's international counsel and family members. Petitioner himself has authorized this petition.

3. **Forces who carried out the arrest or are believed to have carried it out:** National Police of Peru, National Intelligence Directorate (Policía Nacional del Perú, Dirección Nacional de Inteligencia – DIRIN)
4. **Did they show a warrant or other decision by a public authority?** No
5. **Authority who issued the warrant or decision:** 13th Criminal Court for Terrorist Crimes, Lima (13° Juzgado Penal Para Delitos de Terrorismo de Lima)
6. **Relevant legislation applied (if known):** Decree Law (Decreto Ley) No. 25475

III. DETENTION

1. **Date of detention:** 26 August 2003 (same as “Date of Arrest” above)
2. **Duration of detention (if not known, probable duration):** Dr. Pollo has been detained continuously for over six years.
3. **Forces holding the detainee under custody:** Dr. Pollo is in the custody of the National Police of Peru, Directorate of Prison Security (Dirección de Seguridad de Penales), Division of Clinics and Hospitals (División de Clínicas y Hospitales).
4. **Places of detention (indicate any transfer and present place of detention):**
Upon his 26 August 2003 arrest, which is the subject of this petition, Dr. Pollo was incarcerated in Miguel Castro Castro Prison in Lima, Peru. Due to severe deterioration in Dr. Pollo’s health, in July 2005 he was transferred to the Dos de Mayo Hospital in Lima, Peru in accordance with precautionary measures granted by the Inter-American Commission on Human Rights. The Dos de Mayo hospital is located at:

Parque “Historia de la Medicina Peruana” s/n
Alt. Cdra. 13
Avenida Grau - Cercado de Lima
Lima, Peru
Tel: 328-00-28, Fax: 328-14-34
5. **Authorities that ordered the detention:** National Police of Peru, National Intelligence Directorate (Policía Nacional del Perú, Dirección Nacional de Inteligencia – DIRIN)
6. **Reasons for the detention imputed by the authorities:** Dr. Pollo was accused of collaborating with terrorism by allegedly providing medical services to members of the militant group Sendero Luminoso between the years 1989 and 1992.
7. **Relevant legislation applied (if known):** Decree Law (Decreto Ley) No. 25475

IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY

A. Statement of Facts

1. Background Information on Dr. Luis Williams Pollo Rivera

Dr. Luis Williams Pollo Rivera (“Dr. Pollo”) is a citizen of Peru. He studied medicine at the Universidad Nacional Mayor de San Marcos and in 1979 became a specialist in traumatology and orthopedics. Dr. Pollo has never been very politically active. For his entire adult life, he has belonged to the Alianza Popular Revolucionaria Americana (“APRA”) party, which did not participate in the violence that wracked Peru during the 1980s and 1990s. Dr. Pollo was never affiliated with the Communist Party of Peru, also known as Sendero Luminoso (“Shining Path”), Movimiento Revolucionario Tupac Amaru (“MRTA”), or any other armed political movement.² In fact, the APRA party to which Dr. Pollo belonged was an ideological adversary of Shining Path, and the members of the former were frequently targeted for assassination by the latter.³

Consistent with his party affiliation, Dr. Pollo declared as follows in a letter addressed to the Medical Association of Peru (Colegio Médico del Perú) dated 29 December 2003:

“I do not share attitudes [or] violent and crazy methods that would introduce contempt for life into the democratic order. . . . I have not participated in the killing of human beings, the detonation of car bombs, nor the kidnapping of anyone. . . . I do not belong, nor do I have any connection to or friendship with leaders or militants of the evil group Shining Path, as my political ideas are contrary to theirs, and I reject the insane, destructive ideology of Marxism, Leninism, Maoism, and *pensamiento Gonzalo* [Abimael Guzmán’s ideology].⁴

Notwithstanding his lack of affiliation with any armed political movement, in 1992, Dr. Pollo was charged with collaborating with terrorists under Decree Law No. 25659. The specific acts alleged involved providing medical treatment to purported Shining Path members or members of an affiliated organization known as Socorro Popular who were injured as a result of allegedly participating in armed activity against the state. Police officers of the National Counterterrorism Directorate (Dirección Nacional Contra el Terrorismo – DINCOTE) arrested Dr. Pollo, held him incommunicado, and denied him access to a defense attorney.⁵ While he was being interrogated during this first detention, DINCOTE agents tortured Dr. Pollo.⁶ He was beaten so severely that his ribs and skull were fractured. His hands were bound behind his back

² E-Mail from Carolina Loayza Tamayo, Counsel to Dr. Pollo in Peru, to Maran Turner, Executive Director, Freedom Now (22 July 2009) [hereinafter Loayza Tamayo E-mail] (on file with the authors).

³ See LEWIS TAYLOR, SHINING PATH: GUERRILLA WAR IN PERU’S NORTHERN HIGHLANDS, 1980–1997, at 104 tbl. 3 (2006).

⁴ Letter from Dr. Luis Williams Pollo Rivera to Dr. Patricio Wagner Grau, Dean of the Medical Association of Peru (Colegio Médico del Perú) (29 December 2003) [hereinafter Letter from Dr. Pollo to Dr. Wagner].

⁵ Loayza Tamayo E-mail, *supra* note 2.

⁶ Statements made by Dr. Pollo during a television interview hosted by Oscar Diaz, Cara y Sello, RBC, unknown date, available at <http://www.youtube.com/watch?v=nupWycLMqGs>.

and he was pulled upwards by a rope. Interrogators placed a hood soaked with water and kerosene over his head. The most serious result of this torture was lesions to Dr. Pollo's spinal column that caused chronic pain and weakness in his inferior extremities, thereby confining him to a wheelchair.⁷ Dr. Pollo was tried before a military tribunal comprised of masked judges who permitted prosecutorial witnesses to remain hidden behind a screen. He was sentenced to life imprisonment for the crime of treason against the homeland. However, after a lengthy appeal, the Specialized Chamber for Terrorist Crimes exonerated Dr. Pollo and overturned his conviction. The Supreme Court of Peru affirmed his acquittal in November 1996.⁸ In summary, Dr. Pollo's arrest and initial conviction was improper, and the Government of Peru grossly violated his rights.

Despite Dr. Pollo's acquittal, the Special Criminal Chamber of the Lima Superior Court of Justice ("Special Criminal Chamber") committed further abuses that eventually would result in Dr. Pollo's re-arrest. Two weeks after the Supreme Court handed down its decision affirming Dr. Pollo's acquittal, a faceless judge from the Special Criminal Chamber forwarded case file No. 113-95 to the Provincial Prosecutor with instructions to bring charges against Dr. Pollo for collaboration with terrorists and crimes against the public peace. The information leading to these charges arose from the trial of a third party (*see* Section IV.A.4 below). These charges did not reach Dr. Pollo until almost seven years later, in 2003, when he was arrested for the second time. The legal formulations of the charges against Dr. Pollo and the conduct imputed to him are impossible to determine exactly because securing copies of all relevant court documents prior to the filing of this petition proved impossible.⁹ Furthermore, the court documents at our disposal evince a high level of imprecision and confusion. Nevertheless, it is apparent that the principal charge against him was, once again, collaborating in the crime of terrorism by providing medical treatment to certain members of Shining Path or Socorro Popular.

2. Political and Legal Context of Justice in Peru

The 1980s and early 1990s were extremely turbulent times in Peru, fraught with political instability and violence brought on by the conflict between insurgent leftist groups and a government that grew progressively more autocratic and militaristic as the conflict persisted. Armed conflict began during the presidency of Francisco Belaúnde Terry (1980–1985) and continued throughout the first presidency of Alan García (1985–1990).¹⁰

During the administration of Alberto Fujimori (1990-2000), the government abandoned all but the shallowest pretense of the rule of law in order to pursue a newly aggressive strategy in its war against domestic terrorism. As a popular president, Fujimori resented the restrictions imposed on him by congress and the courts. In 1992, with the help of the military, Fujimori

⁷ Loayza Tamayo E-mail, *supra* note 2.

⁸ *Id.*

⁹ *See supra*, note 1.

¹⁰ *See* KIMBERLEY THEIDON, BEYOND THE TOOLKIT: RETHINKING THE PARADIGM OF TRANSITIONAL JUSTICE 3-8 (Rosalind Shaw, Lars Waldorf & Pierre Hazan eds., 2009); Jennifer L. McCoy, *Democratic Transformation in Latin America*, WHITEHEAD J. DIPL. & INT'L REL., Winter/Spring 2008, at 19. CRISTINA EQUIZABAL, HUMAN RIGHTS AND COMPARATIVE FOREIGN POLICY: FOUNDATIONS OF PEACE, Ch. 11 (David P. Forsythe, ed., 2000).

dissolved the legislative and judicial branches of the Peruvian government. Peru was suddenly thrust into a constitutional crisis during which Fujimori passed laws by decree.¹¹

Following Fujimori's presidency, and as a result of the political violence that reached its apex during his term, the Peruvian Truth and Reconciliation Commission ("TRC") was established in June 2001 to expose and examine the facts and causes of Peru's internal struggle. The TRC formally concluded its work on August 28, 2003 when it presented its final report to President Alejandro Toledo.¹²

The TRC Final Report explained that:

Unlike what happened with the governments of the 1980s, during the two administrations of Alberto Fujimori, and particularly after 5 April 1992, there was a functional linkage between political power and criminal conduct. From within the government a state structure was intentionally and progressively created that controlled the powers of the state as well as other key agencies and utilized formal/legal procedures to ensure impunity for acts violative of human rights at first and acts of corruption later.¹³

Of the insurgent groups that existed during this period of internal conflict in Peru, Shining Path was by far the most active and notorious. When the Peruvian police proved unable to counter the violence, the military intervened and vast areas of the country became subject to martial law. In the end, the TRC estimates that approximately 70,000 people died or disappeared as a result of Peru's decade-long internal conflict.¹⁴

As early as the mid-1980s, the forces of state order came to view constitutionalism and democracy as obstacles to their fight against armed subversion.¹⁵ Beginning in 1985, the city of Lima was officially in a state of emergency (*suspensión de garantías*), which gave the government the ability to violate individual rights guaranteed by the constitution.¹⁶ This state of emergency remained in effect until at least 2003.¹⁷ At the time of Dr. Pollo's first arrest in 1992, the government's battle against subversion was in what the TRC calls the "third phase."¹⁸ The arrest and capture of Abimael Guzmán, the leader of Sendero Luminoso, severely disrupted

¹¹ See THEIDON, *supra* note 10; McCoy, *supra* note 10; EQUIZABAL, *supra* note 10.

¹² COMISIÓN DE LA VERDAD Y RECONCILIACIÓN [TRUTH AND RECONCILIATION COMMISSION], INFORME FINAL, app. 2 at 13 (2003), available at <http://www.cverdad.org.pe/ifinal/index.php> [hereinafter TRC FINAL REPORT]. See also, THEIDON, *supra* note 10, at 3–20.

¹³ 3 TRC FINAL REPORT, *supra* note 12, at 59 (this and all other translations of documents in Spanish were done by the authors unless otherwise indicated).

¹⁴ TRC FINAL REPORT, app. 2, 13. The Truth and Reconciliation Commission estimated that a plurality (46%) of total deaths in Peru's internal conflict were attributable to Shining Path. For a full account of Shining Path's activities, see 2 TRC FINAL REPORT, at 13–135.

¹⁵ See 1 TRC FINAL REPORT *supra* note 12, at 230; THEIDON, *supra* note 10, at 3–8.

¹⁶ See Ley No. 24150, 8 Jun. 1985, as modified by Decreto Legislativo [D.Leg.] 749, 8 Nov. 1991. Despite the fact that the Constitution of 1979 contained articles providing for the temporary suspension of certain individual rights, those articles expressly reserved other rights as inviolable no matter the circumstances. The government in its actions, however, took no care to respect that important distinction. Thus, all constitutional guarantees were suspended de facto. *Id.* See also CONSTITUCIÓN POLITICA DEL PERÚ DE 1993, art 137.

¹⁷ Loayza Tamayo E-mail, *supra* note 2.

¹⁸ See 1 TRC FINAL REPORT, *supra* note 12, at 224.

Shining Path's hierarchy and demoralized many of Guzmán's followers. While Shining Path began its steady decline, the government faced the lengthy task of adjudicating the criminal cases of persons detained on the suspicion of terrorism. This third phase of the conflict saw the number of due process violations increase markedly even while forced disappearances and extrajudicial executions on the part of the state became less frequent.¹⁹

The prolonged state of emergency severely weakened Peru's democratic institutions and fostered a climate of lawlessness conducive to human rights violations in all ambits of state action.²⁰ The Peruvian government only changed the nature of its fight against terrorism when it realized that continued severe human rights violations, such as summary executions and forced disappearances, would no longer be countenanced domestically or internationally. However, these new tactics did not prevent human rights violations; they only altered the human rights being violated. Execution and disappearance gave way to arbitrary detention, hasty and sloppy trials, and the massive persecution of innocent persons and their sentencing to very long prison terms.²¹

Cases of treason or terrorism were removed from the jurisdiction of Peru's constitutional judiciary and transferred to military tribunals. The Peruvian court system was either impotent to defend constitutional and human rights or indifferent to them—or both. In all phases of the struggle between Shining Path and the Government of Peru, one of the most prominent features of the government's counter-insurgency program was the use of torture as a tool for interrogation and intimidation. Torture, arbitrary detention, and forced disappearance were labeled as "crimes of duty," and cases concerning such practices fell under the purview of military courts, which consistently overlooked any official wrongdoing. The inherent conflict of interest in having military tribunals try civilians wronged by soldiers and other state agents naturally translated into blanket immunity for military and police operatives.²²

The Truth and Reconciliation Commission's report draws special attention to gross legal deficiencies at the Prosecutor's office (*ministerio público*):

[I]ts agents [. . .] abdicated their duty to oversee that stringent respect for human rights was observed during arrests, and they were inattentive to the pleas of victims' family members. On the contrary, the duty to report crimes was disregarded, investigations were carried out reluctantly, forensic tasks were carried out ineptly, all of which led to a situation characterized by loss of control and impunity. Under the government of Fujimori, the Prosecutor's Office's submission to the imperatives of the executive branch was almost unlimited.²³

False or unreliable testimony pervaded trials involving terrorist crimes. Not only were confessions obtained under torture, but police often secured incriminating testimony from friends

¹⁹ See 1 TRC FINAL REPORT, *supra* note 12, at 222, 224–25.

²⁰ See generally 6 TRC FINAL REPORT, *supra* note 12.

²¹ See *id.*, at 222.

²² See 1 TRC FINAL REPORT, *supra* note 12, at 225–26.

²³ 9 TRC FINAL REPORT, *supra* note 12, at 126–27.

or family members of suspects under the guise of exchanging the detained person for such testimony, which was later used to prosecute the suspect.²⁴

3. First Arrest, Detention, and Trial

Although the present petition concerns Dr. Pollo's current detention ("Second Detention"), which began in 2003, it is necessary to examine the facts of his earlier arrest and detention in 1992 ("First Detention") in order to establish the violation of the principle of double jeopardy (*res judicata*)²⁵ and to demonstrate the pattern of due process violations committed as a result of these malicious prosecutions.

Dr. Pollo's First Detention began when DINCOTE agents arrested him on 6 November 1992. At the time, Dr. Pollo was working at the Dos de Mayo Hospital in Lima.²⁶ He was charged with treason against the homeland under Decree Law No. 25659 for allegedly amputating the right leg of Blas Ccori Bustamante Polo, a person who was alleged to have been a member of Shining Path.²⁷ After his arrest, he was transferred to DINCOTE offices in Lima, questioned, and tortured. Dr. Pollo described his torture in detail in an interview on Peruvian television.²⁸ As a consequence of having been tortured, Dr. Pollo incurred spinal injuries resulting in such pain and debility in his legs that he cannot move without a wheelchair (*see* Section IV.A.5 below).²⁹

Blas Ccori Bustamante Polo,³⁰ the man Dr. Pollo was accused of treating, had been arrested on 17 October 1992. He admitted to being a member of Shining Path and gave details about his participation in the group. By means of a photograph, he identified Dr. Pollo as the man who had operated on his leg after it had been injured in an attempted "terrorist attack." He further alleged that he convalesced for a month and a half in a house that was also used as a clinic.³¹ Later, however, Bustamante Polo stated during a hearing (*diligencia de confrontación*)

²⁴ See Human Rights Watch, Peru, *The Two Faces of Justice*, Vol. 7 No. 9, July 1995, at 12. ("After Carlos Delgado Altamirano was arrested on November 18, 1992, police told his wife and uncle that they would release him if they signed a statement asserting that Delgado had been a law student of Martha Huatay, a Shining Path leader, and former president of the Association of Democratic Lawyers, which defended many Shining Path members. Although Huatay never taught at Delgado's law school, the deposition was used to charge Delgado with terrorism. Delgado was eventually found innocent and, with his wife, fled Peru. Subsequently, the faceless prosecutor appealed the court's decision and sought Delgado's arrest again.")

²⁵ In Peru, the principle of double jeopardy is referred to as "*ne bis in idem*" and "*res judicata*". See, e.g., FRANCISCO JAVIER DE LEÓN VILLALBA, *ACUMULACIÓN DE SANCIONES PENALES Y ADMINISTRATIVAS: SENTIDO Y ALCANCE DEL PRINCIPIO "NE BIS IN IDEM"* 31 et seq. (Bosch, Barcelona, 1998).

²⁶ Pollo Rivera v. Peru, Admissibility Decision, Case 12.617, Inter-Am. C.H.R. Report No. 42/07, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 ¶ 17 (2007) [hereinafter Admissibility Decision].

²⁷ IMMIGRATION AND NATURALIZATION SERVICE (INS), UNITED STATES DEPARTMENT OF JUSTICE, PROFILE SERIES, PERU: HUMAN RIGHTS AND POLITICAL DEVELOPMENTS THROUGH DECEMBER 1994, at 96–97 (June 1995) [hereinafter INS].

²⁸ Statements made by Dr. Pollo during a television interview hosted by Oscar Díaz, Cara y Sello, RBC, unknown date, available at <http://www.youtube.com/watch?v=nupWycLMqGs>.

²⁹ Admissibility Decision, *supra* note 26, ¶ 20.

³⁰ There is no relation between Blas Ccori Bustamante Polo and Dr. Pollo.

³¹ Loayza Tamayo E-mail, *supra* note 2.

that he was not in fact certain Dr. Pollo was the physician he had referred to during his earlier questioning. He repeated these doubts again, very seriously, during his oral testimony at trial.³²

On 26 November 1992, a military tribunal sentenced Dr. Pollo to life imprisonment in proceedings that were fraught with procedural deficiencies, including the trier of fact being made up of masked judges, the allowance of a mere ten minutes for Dr. Pollo to prepare a defense, and the lack of opportunity for Dr. Pollo to cross-examine the witnesses who accused him of the crimes for which he was charged.³³ He filed a petition for review, which the military courts granted, and in 1993 the case was transferred to the courts of civilian jurisdiction (*fuero común*). On 7 November 1994, the civilian Specialized Chamber for Terrorist Crimes nullified the findings of the military court and acquitted Dr. Pollo of the charges, finding that there was no proof that the house mentioned by Bustamante Polo was ever used as a clinic and noting the inconsistencies in Bustamante Polo's statements.³⁴ On 4 November 1996, the Supreme Court affirmed the acquittal, declaring it "not null" (*no haber nulidad*).³⁵

4. Second Arrest, Detention, and Trial

Dr. Pollo's Second Detention is rooted in testimony elicited during the trial of several third-party defendants. The background and outcome of this trial is relevant to understanding how Dr. Pollo's Second Detention came about and is accordingly summarized herein. Ultimately, the verdict against the defendants in that third-party trial, in which Dr. Pollo was not a party and did not participate, was reversed because of procedural defects. Yet, testimony produced at that procedurally defective trial of other individuals was used as the foundation, seven years later, for the 2003 criminal complaint against Dr. Pollo that resulted in his Second Detention.

The material facts of that third-party trial are as follows. On or around 21 November 1996,³⁶ Igrid Medalit Rivera Gutiérrez and other defendants alleged to be members of Shining Path were tried before faceless judges in the 13th Criminal Court for Crimes of Terrorism for Lima and were found guilty of crimes of terrorism.³⁷ Because the Gutiérrez trial was held before faceless judges and without guarantees of fairness or due process, the verdict was subsequently overturned *ex officio* by the Supreme Court "for being extremely adverse to the interests of the State."³⁸ Nevertheless, testimony from this overturned criminal case would eventually lead to a new case against Dr. Pollo. The faceless judges ordered that an official copy of excerpts of the

³² *Id.*

³³ Admissibility decision, *supra* note 26, ¶18; INS, *supra* note 27. See also AMERICAS WATCH, HUMAN RIGHTS IN PERU: ONE YEAR AFTER FUJIMORI'S COUP, 27 (New York: Human Rights Watch, April 1993); *Casos Dudosos*, CARETAS, 21 Jan. 1993, at 40–48; AMNESTY INTERNATIONAL, PERU: HUMAN RIGHTS SINCE THE SUSPENSION OF CONSTITUTIONAL GOVERNMENT, 28 (May 1993).

³⁴ Loayza Tamayo E-mail, *supra* note 2.

³⁵ Admissibility Decision, *supra* note 26, ¶ 18; Loayza Tamayo E-mail, *supra* note 2.

³⁶ Loayza Tamayo E-mail, *supra* note 2. (Court records conflict as to the exact date.)

³⁷ See Special Criminal Chamber of the Lima Superior Court of Justice, Judgment of 21 Nov. 1996, File No. 113-95, at 5164 [hereinafter Special Criminal Chamber].

³⁸ Supreme Court of Peru, Order (*Ejecutoria*) of 8 Jun. 1998, File No. 46-97-Lima, at 4879–4887.

case be forwarded to the office of the Provincial Prosecutor in order to open a new separate criminal case against “William Pollo Rivera” on the charge of “Crimes Against Public Peace—Terrorism—(Acts of Collaboration).”³⁹

The new criminal action against Dr. Pollo did not begin until seven years later. On 26 August 2003, agents of the National Police of Peru, National Intelligence Directorate (Policía Nacional del Perú, Dirección Nacional de Inteligencia – DIRIN) arrested Dr. Pollo while he was working as a traumatologist at the ESSALUD Hospital in Andahuaylas, Peru. This Second Detention is the subject of this petition. The DIRIN agents claimed to have an arrest warrant but never produced it for verification.⁴⁰ The Provincial Prosecutor charged Dr. Pollo with Collaborating With Terrorism under Decree Law 25475 for allegedly providing medical treatment to Shining Path militants on several occasions.⁴¹

Dr. Pollo filed a petition to the National Terrorism Chamber (Sala Nacional de Terrorismo) on 17 December 2003, requesting his release and that the case against him be dismissed on the grounds that the evidence motivating the investigation was the product of a nullified judicial proceeding. The petition was denied. Though the Gutiérrez trial was nullified for outrageous violations of due process and legality, the National Terrorism Chamber held that the allegedly incriminating evidence from the nullified trial was not itself nullified and therefore could be used again.⁴²

Dr. Pollo was tried in early 2004. At trial, he stated that he had never met any of the witnesses whose testimony the prosecution used. The prosecution denied Dr. Pollo the right to cross-examine these witnesses. Of the seven witnesses, only one actually identified Dr. Pollo during the trial. She was an “*arrepentida*,”⁴³ and during her testimony she was covered almost entirely by a black tunic that left only her eyes and hands visible, making it impossible to identify her or adequately judge her credibility. Despite these gross procedural deficiencies, on 24 February 2004 the National Terrorism Chamber convicted Dr. Pollo of collaboration with terrorism, sentenced him to ten years in prison, and required him to pay civil damages of 1,000

³⁹ E-mail from Dr. Luis Williams Pollo Rivera (via Carolina Loayza Tamayo) to Christian Guevara, Freedom Now (18 Nov. 2009) (on file with authors).

⁴⁰ Loayza Tamayo E-Mail, *supra* note 2.

⁴¹ *Id.* See also Admissibility Decision, *supra* note 26, ¶ 22.

⁴² National Terrorism Chamber (Sala Nacional de Terrorismo), File No. 01-00, 19 Dec. 2003. See also Supreme Court of Peru, Order, *supra* note 38.

⁴³ *Arrepentidos* (meaning “repentant ones”) are former militants of armed subversive groups that turned themselves in or otherwise cooperated with Peruvian authorities in order to take advantage of the Repentance Law (*Ley de Arrepentimiento*), which provides lesser punishment in exchange for information and testimony. This law has become notorious for producing extremely unreliable testimony in terrorism trials. See U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Report of the Working Group on Arbitrary Detention Addendum: Report on the mission to Peru*, paras. 104, 106, 153, U.N. Doc. E/CN.4/1999/63/Add.2 (11 Jan. 1999) [hereinafter Country Report].

nuevo soles (Peruvian currency).⁴⁴ It is alleged that the following acts were “committed”, all of which Dr. Pollo denies ever took place.⁴⁵

- In 1988, treating “Isaías” for an injury to his left ankle that required amputation.
- In 1991, treating “Comrade Ana” who was wounded as a result of a mine detonation.
- In 1992, in San Gabriel, San Juan de Lurigancho, treating an unnamed terrorist who had received a lung injury from a firearm or mine.
- In 1992, in the district of La perla, Callao, treating a terrorist known as “Magaly” or “Comrade Ángela.”
- On an unknown date, in Canto Grande, treating “Jorge” for an injury to his right ankle, which he received after stepping on a mine.
- On an unknown date, treating a person known as “Adrián.”
- In 1991, convincing Elisa Mabel Mantilla Morena not to discontinue providing health services to Shining Path or members of its affiliates.⁴⁶

Dr. Pollo filed an appeal to the Permanent Criminal Chamber of the Supreme Court, seeking reversal of his conviction. The Permanent Criminal Chamber wholly disregarded and dismissed potentially exculpatory statements from witnesses and relied solely and selectively on those fragments of tainted evidence that could be used to support the conviction. In its judgment of 22 December 2004, the Permanent Criminal Chamber affirmed Dr. Pollo’s conviction and prison sentence, although it did reverse the civil damages penalty.⁴⁷ On 24 January 2005, the National Terrorism Chamber issued a writ of execution, of which Dr. Pollo (still in detention) was notified on 4 February 2005.⁴⁸

5. Decline of Dr. Pollo’s Health

As explained above, DINCOTE agents tortured Dr. Pollo while he was being interrogated during his first detention, causing permanent injuries to his spinal cord. Dr. Pollo had an MRI

⁴⁴ Admissibility Decision, *supra* note 26, ¶ 23.

⁴⁵ Permanent Criminal Chamber of the Supreme Court of Peru, Appeal for Nullity (*Recurso de Nulidad*) No. 1062-2004, 22 Dec. 2004, at second “whereas” clause [hereinafter Permanent Criminal Chamber].

⁴⁶ Isaías, Comrade Ana, Magaly or Comrade Ángela, Jorge and Adrián are code names. The legal names of these individuals were not disclosed.

⁴⁷ The lower court had erroneously imposed the civil penalty through the *ex post facto* application of D.L. 25475.

⁴⁸ Admissibility Decision, *supra* note 26, ¶ 23.

done of his spinal column in 2002. Surgery was recommended; however, he was unable to have the surgery due to his second arrest and detention.⁴⁹

The state agency charged with protection and defense of persons with disabilities⁵⁰ has officially recorded Dr. Pollo as having multiple medical conditions: non-specific paralytic syndrome (G83.9), non-insulin dependent diabetes mellitus (E11), and secondary hypertension (I15) with disabilities of communication, locomotion, and bodily control.⁵¹

In addition to the conditions outlined above, Dr. Pollo is currently suffering from the following maladies:

- Uncontrolled diabetes mellitus II
- Diabetic retinopathy causing progressive vision loss
- Spondylosis L3-L4
- Sacrolumbar spinal disk hernia T12-L1, L1-L2, L2-L3, L3-L4, L4-L5⁵²

Because of the intensive treatment he requires, and as compelled by the Inter-American Commission on Human Rights,⁵³ Dr. Pollo is currently being held at the Dos De Mayo hospital in Lima, Peru (*see* Section III.4 above).

B. Analysis

International law expressly prohibits the arbitrary detention of individuals, as provided in Article 9 of the Universal Declaration of Human Rights (“UDHR”) and Article 9.1 of the International Covenant on Civil and Political Rights (“ICCPR”), to which Peru became a party on 28 April 1978.⁵⁴ The detention of Dr. Luis Williams Pollo Rivera violates, among other provisions, Article 9 of the UDHR and Article 9.1 of the ICCPR. Moreover, Dr. Pollo’s detention violates Peru’s domestic laws and other instruments of international law discussed below. Dr. Pollo’s detention is arbitrary under the criteria of the Working Group’s Categories I and III.⁵⁵

⁴⁹ Loayza Tamayo E-mail, *supra* note 2.

⁵⁰ Registro Nacional de la Persona con Discapacidad del Consejo Nacional para la Integración de la Persona con Discapacidad.

⁵¹ Loayza Tamayo E-mail, *supra* note 2; *See also* Letter from Dr. Pollo to Dr. Wagner, *supra* note 4.

⁵² *Id.*

⁵³ *See* Admissibility Decision, *supra* note 26, ¶15.

⁵⁴ Universal Declaration of Human Rights Art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter Universal Declaration]; International Covenant on Civil and Political Rights Art. 9(1), 16 Dec. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁵⁵ The Working Group on Arbitrary Detention uses three categories to evaluate the basis of an alleged arbitrary detention. In Category I, the Working Group, applying relevant domestic law, determines whether there is any legal basis to justify the detention. In Category II, the Working Group assesses whether the detention (and deprivation of liberty) results from the petitioner’s exercise of certain rights or freedoms guaranteed by the ICCPR and UDHR. In Category III, the Working Group determines whether the total or partial non-observance of international norms

First, Dr. Pollo was not charged with a legally cognizable crime. The conduct that forms the basis of the Peruvian government’s prosecution and detention—the provision of medical care by a physician—is neither prohibited by Peruvian law nor otherwise criminal under any applicable standard. The provision of medical care not only does not constitute a crime, but also it is specifically immune from prosecution according to Peru’s domestic laws, its international obligations, and customary international law.⁵⁶ Second, Dr. Pollo’s detention does not comport with universally recognized principles of legality because he was charged under a law that did not criminalize his alleged conduct. Third, Dr. Pollo did not receive a fair trial before an impartial tribunal.

The Government of Peru thus distorted its domestic law in this action in a transparent attempt to legitimize an otherwise arbitrary detention that clearly violates the UDHR, the ICCPR, the American Convention on Human Rights (“ACHR”), the Geneva Convention, and universal principles of legality and the rule of law.

1. The Government’s detention of Dr. Pollo is arbitrary under Category I because providing medical treatment is immune from prosecution under international law.

The Peruvian government’s detention of Dr. Pollo as punishment for allegedly providing medical services is clearly contrary to international law. The provision of medical care is a privileged act that cannot be penalized, even in the context of war or domestic insurgency.⁵⁷ Peru consented to be bound by this precept of international law when it became a party to the Geneva Convention of 12 August 1949 and the Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (the “Additional Protocol”).⁵⁸ Under the Geneva Convention, Peru may make no law criminalizing the performance of a “medical act.”⁵⁹

The Additional Protocol states:

Article 10 - General protection of medical duties:

relating to the right to a fair trial renders the detention arbitrary. Working Group on Arbitrary Detention, Fact Sheet No. 26, at 4, *available at* <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>.

⁵⁶ *See, e.g.,* De La Cruz-Flores v. Peru, Judgment of 18 Nov. 2004, Inter-Am. Ct. H.R., paras. 90, 94–95, 102–03 & n.99 (citing Geneva Convention and numerous medical ethics codes; holding that State violated principle of legality “for penalizing a medical activity, which is not only an essential lawful act, but which it is also the physician’s obligation to provide”).

⁵⁷ *See generally* I Geneva Convention, Art. 18; Protocol I, Art. 16; Protocol II, Art. 10.

⁵⁸ Peru signed the Additional Protocol on 12 December 1977.

⁵⁹ The “medical act” is described by numerous documents that govern the conduct and ethics of the medical profession around the world. In the case of Peru, see Code of Ethics and Deontology of the Peruvian Medical Association [Código de Ética y Deontología del Colegio Médico del Perú], *available at* http://www.cmp.org.pe/documentos/doc_norm/codigo_etica_cmp.pdf (“Art. 12.- The medical act is any action taken by the physician in the exercise of the medical profession. Acts of diagnosis, therapy, and prognosis carried out by a physician in the treatment of patients, broadly understood, fall under this definition as do any acts derived therefrom. . .”). *See also* International Code of Medical Ethics, World Medical Association, *available at* <http://www.wma.net/en/30publications/10policies/c8/index.html> [hereinafter International Code of Medical Ethics].

Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom;

Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.

This prohibition is complemented by the ethical duty of physicians to provide non-discriminatory provision of medical aid. The World Medical Association's Regulation in Time of Armed Conflict states:

Medical ethics in time of armed conflict is identical to medical ethics in time of peace, as established by the International Code of Medical Ethics;

In an emergency, the physician must always give the required care impartially and without consideration to sex, race, nationality, religion, political affiliation, or any similar criteria;

The fulfillment of medical duties and responsibilities shall in no circumstance be considered an offense. The physician must never be prosecuted for observing professional confidentiality.

In addition, Article 5 of the Peruvian Law of Medical Labor⁶⁰ states:

The medical act is governed strictly by the Code of Ethics and Deontology of the Peruvian Medical Association (Colegio Médico del Perú) and international instruments ratified by the Peruvian Government. Physicians may not be deprived of their liberty for performing a medical act, no matter the circumstances of its realization, except under express judicial mandate or commission of a crime *flagrante delicto*.

The Constitution of Peru stipulates that “everyone has the right to protection of his health. . .”.⁶¹ More specifically, the above-referenced Code of Ethics and Deontology of the Peruvian Medical Association (Colegio Médico del Perú) contains the following statement in section 1: “The Right to health is based on principles of equity, solidarity, universality, and integrity of medical attention. The physician shall promote these principles and shall not differentiate between those to whom he will give care, without any kind of discrimination.”

Not only does Peruvian law protect the provision of medical treatment, it protects the physician-patient privilege as well. Therefore, the disclosure requirements that Peru's anti-terrorist or criminal legislation purports to impose on physicians directly contradicts Peruvian and international legal norms.⁶²

⁶⁰ Ley de Trabajo Médico, D.Leg. No. 559, 29 Mar. 1990, El Peruano.

⁶¹ CONSTITUCIÓN POLÍTICA DEL PERÚ 1993, Art. 7.

⁶² See the professional privilege included in the International Code of Medical Ethics, *supra* note 59. See also CONSTITUCIÓN POLÍTICA DE 1993, Art. 2.18; Code of Criminal Procedure (Código de Procedimientos Penales), Art.

It cannot be overstressed that, although Dr. Pollo was nominally charged with collaboration with terrorism, the alleged acts constituting the corpus of the crime were provisions of medical care and the court expressly accused Dr. Pollo of collaboration with terrorism by providing medical treatment. In its opinion, the Supreme Court summarized:

. . . the charges center around the accused's peripheral membership in an organization spun-off from Shining Path specifically dedicated to conscious and systematic support in the form of medication and medical care for the members of the organization who suffered a variety of lesions or illnesses as a consequence of their terrorist activity. . . as well as his guaranteeing that the members of the Health Sector of "Socorro Popular" , who were linked to various areas of the medical profession as in the case of the nutritionist Mantilla Moreno, gave support services to the organization, which was precisely the reason he intervened after Mantilla Moreno distanced herself from the organization to cease her support for or abetting "Socorro Popular".⁶³

Acts relating to medical treatment are immune to prosecution *ab initio* according to international norms by which Peru is bound. Moreover, Peruvian law expressly reflects this obligation to protect physicians from retaliation for exercising their professional and ethical duty. Simply put, Dr. Pollo should never have been charged for providing medical care, let alone arrested and detained for an elongated time period. As such, the government's prosecution of Dr. Pollo violates Article 15 of the ICCPR and Article 11.2 of the UDHR, which expressly prohibits an individual from being convicted for engaging in acts that did not constitute a criminal offense according to the general principles of law recognized by the community of nations.⁶⁴ Accordingly, absent any legal justification for detaining Dr. Pollo (providing medical services is no such grounds, and is a privileged act), the Working Group must classify Dr. Pollo's detention as arbitrary under Category I.

2. The Government's detention of Dr. Pollo is arbitrary under Category I and Category III because the law he was convicted under grossly deviates from universally recognized principles of legality.

The Peruvian Government prosecuted Dr. Pollo under laws that violate the universally recognized principle of legality embodied in Article 9 of the American Convention on Human Rights. Under this principle, laws must be clear, ascertainable, and published before the government may criminally prosecute someone under them. In this case, Dr. Pollo was charged under a law that did not criminalize his alleged conduct. The definition of the crime of collaboration with terrorism contained in Decree Law 25475 and in the Criminal Code of 1991 (Código Penal de 1991) is so vague as to defy the principle of legality.

Dr. Pollo's alleged conduct – the provision of medical treatment to Shining Path members or its affiliates on several occasions – does not explicitly fall within the definition of

141 (“[The following persons] shall not be obligated to testify: 1. clergymen, attorneys, physicians, notaries, and midwives with respect to those secrets that have been confided to them in the exercise of their profession.”).

⁶³ Permanent Criminal Chamber of the Supreme Court of Peru, Appeal for Nullity (*Recurso de Nulidad*) No. 1062-2004, 22 Dec. 2004, at second “whereas” clause.

⁶⁴ See Universal Declaration, *supra* note 54; see also ICCPR, *supra* note 54.

collaborating with terrorism as stated in either Decree Law 25475 or the Criminal Code of 1991. In violation of both the Peruvian Constitution and international law, Peruvian prosecutors and courts have taken advantage of vagueness in the law to cast Dr. Pollo's actions as a judicially-defined crime.

It is a universal principle of law that conduct prohibited in criminal statutes must be described precisely and exhaustively. The Inter-American Court of Human Rights and the European Court of Human Rights have affirmed this principle on numerous occasions.⁶⁵ The Peruvian Constitution itself embraces these restrictions on state power. In Article 2.24.a, it states explicitly: "No one is obligated to do what the law does not mandate nor impeded from doing what the law does not prohibit."⁶⁶ Moreover, Article 2.24.d states: No one may be tried or convicted for an act or omission which, when committed, was not previously classified by law, expressly and unequivocally, as a punishable offense, or be given a penalty not provided for by-law.⁶⁷ The Peruvian Penal Code, in support of this universal proposition, states in Article III: "The use of analogy is not permitted in designating an act as a crime, defining a state of danger, or determining the penalty or security measures that apply to them."⁶⁸

The Working Group has already had occasion to determine that the crimes of terrorism and collaboration with terrorism in Peru were defined vaguely, and it has drawn attention to the fact that such imprecision presents extensive opportunities for prosecutorial abuse.⁶⁹

Decree Law 25475,⁷⁰ under which Dr. Pollo was charged, defines collaboration with terrorism as follows:⁷¹

[Article 4.] Collaboration with terrorism

Any person who voluntarily obtains, procures, collects, or facilitates any type of goods or means or realizes acts of collaboration that in any way facilitate the commission of crimes

⁶⁵ See, e.g., *De La Cruz-Flores v. Peru*, at para. 79. *Ricardo Canese Case*, Judgment 31 August 2004, Inter-Am. Ct. H.R., Series C, No. 111, at para. 174; *Cantoral Benavides Case*, Judgment 18 August 2000, Inter-Am. Ct. H.R., Series C, No. 69, at para. 157; *Castillo Petruzzi et al. Case*, Judgment 30 May 1999, Inter-Am. Ct. H.R., Series C, No. 52, at paras. 114, 121. *Ezelin Case*, Judgment 26 April 1991, Eur. Ct. H.R., Series A. No. 202, at para. 45; *Müller et al. Case*, Judgment of 24 May 1988, Eur. Ct. H.R., Series A, No. 133, at para. 29.

⁶⁶ See also Penal Code of 1991, Art. II.

⁶⁷ CONSTITUCIÓN POLÍTICA DEL PERÚ 1993, Art. 2.24.d.

⁶⁸ Penal Code of 1991, Art. III. See also, Civil Code (Código Civil), Arts. II, V, 5, 214, 215, 216, 667.4, 1354; Penal Code of 1991, Arts. II, 151; Code of Criminal Procedure (Código de Procedimientos Penales), Art. 132; Law [Ley] 26689, Art. 2; Universal Declaration, *supra* note 54, Arts. 11.2, 29.2, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights Art. 15.1, 16 Dec. 1966, 999 U.N.T.S. 171; American Convention on Human Rights Art. 9, 21 Nov. 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143.

⁶⁹ Country Report, *supra* note 43, paras. 44, 125–150. See also INS, *supra* note 27, at 62–64.

⁷⁰ Decreto Ley 25475.

⁷¹ The definition of Collaboration with Terrorism contained in Decree Law 25475 is slightly more expansive, though substantially similar, to the earlier definition contained in the Penal Code of 1991.

contained in this Decree Law or the realization of the goals of a terrorist group shall be punished with deprivation of liberty for no less than twenty years.⁷²

Acts of collaboration are:

- a. Supplying documents and information about persons and property, facilities, public and private buildings and anything else that specifically contributes to or facilitates the activities of terrorist elements or groups.
- b. The transfer or utilization of any type of dwelling or other means capable of being used to hide persons or serve as a storage for arms, explosives, propaganda, supplies, medications, and other belonging related to terrorist groups or their victims.
- c. The knowing transportation of persons belonging to terrorist groups or connected to their criminal activities as well as the provision of any type of help that may aid their escape.
- d. The organization of classes or running of training centers for terrorist groups that function under any cover.
- e. The fabrication, acquisition, possession, theft, storage, or supplying of arms, munitions, explosive, suffocating, flammable or toxic substances or devices or any other type that may cause death or injury. Possession, and concealment of arms, munitions or explosives belonging to the Armed Forces or National Police of Peru constitute an aggravating circumstance.
- f. Any form of economic activity, help, or intervention done voluntarily with the aim of financing the activities of terrorist elements or groups.

Provision of medical care is not included on the above list. By its own account, the Supreme Court in its judgment of 22 December 2004 plainly violated the principle of legality when it explained: “[I]t should be noted that when the description (*tipo penal*) of the crime [of collaboration with terrorism] mentions ‘any act of collaboration’ or ‘[. . .] acts of collaboration in any way benefiting’ it is understood that the acts of collaboration that are listed below (five or six, depending on the law) are merely examples, that is, *they do not constitute an exhaustive enumeration*” (emphasis added).⁷³ The court continued: “[T]he acts imputed to the accused Polo Rivera or Pollo Rivera are found—in any case—in the first paragraph of the definition of the crime (*tipo penal*), as *there does not exist a specific provision that would cover what he did* as it is described in the fifth “whereas” clause.” (emphasis added).⁷⁴

The Supreme Court thus admitted to deviating from the principle of legality by judicially expanding the law’s reach. The court’s reasoning precisely demonstrates the dangers created by the vagueness of the statutes used to prosecute Dr. Pollo. Accordingly, the Working Group should determine that Dr. Pollo’s prosecution was unfounded, and thus his detention is arbitrary.

⁷² *Id.* at Art. 4.

⁷³ Permanent Criminal Chamber, *supra* note 45, at sixth “whereas” clause.

⁷⁴ Permanent Criminal Chamber, *supra* note 45, at sixth “whereas” clause.

3. **The Government's detention of Dr. Pollo is arbitrary under Category III because he was Denied The Right To A Fair Trial.**

As detailed above, at all relevant times, Peru's antiterrorism laws created a judicial regime based on legal "exceptionality" and secrecy. The Peruvian government used those laws and *ad hoc* procedures including, but not limited to, preventing his self-defense, in order to deny Dr. Pollo the right to a fair trial. Moreover, not only was the evidence the Peruvian government relied on to indict Dr. Pollo itself the product of a nullified trial, but the subsequent prosecution of Dr. Pollo was also procedurally defective. Thus, his current detention must be deemed arbitrary under the Working Group's Category III.

a. **The Government tried Dr. Pollo for a crime of which he had already been acquitted.**

The Government's prosecution of Dr. Pollo violated the principle of *non bis in idem* or the prohibition against double jeopardy (known in Peruvian law as *res judicata*) in contravention of the right to due process. This basic right, whereby the accused cannot be retried or punished a second time for an alleged crime already tried, is codified in Article 14.7 of the International Covenant on Civil and Political Rights and Article 8.4 of the American Convention on Human Rights. Additionally, it is implicit in Article 139.3 of the Constitution of Peru according to the jurisprudence of Peru's Constitutional Court.⁷⁵

Article 14.7 of the ICCPR states: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." Yet in his second trial, Dr. Pollo was accused of amputating in 1989 the leg of the Shining Path militant whose code name is "Isaías."⁷⁶ In response, Dr. Pollo argued the government was charging him with the same crime of which he had been acquitted in his first trial. That is, Dr. Pollo claimed that "Isaías" and Blas Ccori Bustamante Polo were the same person.⁷⁷

The prosecution offered no evidence to contradict Dr. Pollo's allegation that "Isaías" and Blas Ccori Bustamante Polo are the same person. Nevertheless, the court allowed the prosecution to continue its case without a showing of cause, effectively placing the burden of proof on Dr. Pollo to demonstrate the identity of "Isaías," which was an impossible burden because Dr. Pollo had no access to the witnesses against him and because the prosecution was relying on testimony that had been gathered through torture and other coercive and illegal means.

Because Dr. Pollo's conviction is based in part on the same act of medical treatment provided in 1988, for which Dr. Pollo was previously acquitted, the Government's Second Detention violates the principle of double jeopardy and is arbitrary.

⁷⁵ See Ramos Colque Case, Constitutional Tribunal of Peru, File No. 02050-2002-AA/TC, 28 Jun. 2003.

⁷⁶ Permanent Criminal Chamber, *supra* note 45.

⁷⁷ Loayza Tamayo E-mail, *supra* note 2. See also, INS, *supra* note 27, at 97.

b. Dr. Pollo’s detention is arbitrary because he was denied basic evidentiary and procedural rights, including the right to be tried by a competent, independent, and impartial tribunal.

The prosecution and detention of Dr. Pollo are arbitrary because he was denied fundamental evidentiary and procedural rights. The flaws that underpin Dr. Pollo’s current detention include: (i) the use of evidence procured before a faceless court for indictment; (ii) the use of unreliable evidence from repentant witnesses for indictment; (iii) a denial of the presumption of innocence; and (iv) a denial of time to prepare a defense and cross-examine witnesses. Although state parties to the ICCPR are entitled to derogate from treaty obligations during “states of emergency” in accordance with the terms of the ICCPR, no declaration of derogation was reportedly in force at the time of Dr. Pollo’s second arrest and trial.⁷⁸ As such, the Government of Peru had no legitimate privilege to suspend due process rights.

Impermissible Reliance on Faceless Judges and Repentant Witnesses

The second trial of Dr. Pollo sprang from legally invalid procedures. Although Doctor Pollo’s second trial was not conducted by a faceless court, the evidence used to indict him came from such anonymous proceedings against Ingrid Medalit Rivera Gutiérrez and other defendants alleged to be members of Sendero Luminoso (case file 113-95).⁷⁹ The Gutiérrez trial also included evidence gathered under Peru’s Repentance Act,⁸⁰ which gives criminal suspects leniency for confessing their crimes and naming collaborators or co-conspirators.

The evidence against Dr. Pollo was provided by an *arrepentida*, or “repentant witness,” known only by code no. A223001.⁸¹ As explained above, “repentant witnesses” were alleged former terrorists granted leniency for collaborating with the police. Their detainment constituted an overwhelming, perverse incentive to incriminate as many people as possible to obtain favorable treatment by the prosecutor’s office or relevant representative of the state. Witness A223001 implicated Dr. Pollo while testifying with her face and body completely covered by a tunic, and Dr. Pollo was denied the opportunity to cross-examine her.

The Working Group has recognized that the Repentance Act promotes a grave risk of false imprisonment. While the Repentance Act’s words and ideals do not conflict with international law, its implementation has resulted in the phenomenon known in Peru as “innocent prisoners,” that is, persons convicted with the help of testimony from repentant declarants (*arrepentidos*) for activities in which they had never participated.⁸² The Working Group recorded widespread allegations of the Repentance Act fostering unreliable information, as those

⁷⁸ “Any State Party...shall immediately inform the other States Parties to the present Covenant...of the provisions from which it has derogated and of the reasons by which it was actuated.” ICCPR, *supra* note 54, at Art. 4. When a party to the ICCPR calls a state of emergency, Article 4.3 requires that the state notify immediately the UN Secretary General.

⁷⁹ Loayza Tamayo E-mail, *supra* note 2. *See also*, Admissibility Decision, *supra* note 26, ¶ 22. Special Criminal Chamber, *supra* note 37, at 5164.

⁸⁰ Decree Law 25449, 12 May 1992.

⁸¹ Permanent Criminal Chamber, *supra* note 45, at fourth “whereas” clause.

⁸² Country Report, *supra* note 43, paras. 101, 153–154.

questioned bear false witness because of their understandable desire to avoid DINCOTE's harsh interrogation techniques. Moreover, it recognized the repeated criticism: "the most serious thing is that judges do not require proof of what the repenter has said."⁸³ The Working Group has denounced this practice as a violation of the right to a defense in accordance with article 14.3.e of the ICCPR.⁸⁴

In accord with the Working Group's findings, the Government of Peru now recognizes that the evidence gathered from repentant witnesses and presented to faceless judges is procedurally defective. Specifically, the Working Group has concluded that, without adequate safeguards and controls, findings of fact conducted by a faceless court would fail to meet the requirements of article 14 of the ICCPR.⁸⁵ In agreement with the Working Group's findings regarding faceless courts, the Peruvian legislature passed a law to remedy the notorious human rights abuses rife in such courts. Article 2 of Legislative Decree 926, published in *El Peruano* on 20 February 2003, declared that all criminal indictments in progress before the ordinary criminal jurisdiction with judges or prosecutors operating under a secret identity (i.e., faceless) were to be annulled *ex officio* by virtue of insufficiency of the prosecutor's indictment (*acusación fiscal*).⁸⁶

After the trial of Ingrid Medalit Rivera Gutiérrez – and before the second arrest of Dr. Pollo – the National Chamber for Terrorist Crimes gave effect to Legislative Decree 926 by declaring: (i) every action taken in case file 113-95 from page 4484 on to be without effect (*nulo*), and (ii) the prosecutor's accusation from p. 4331 to 4335 to be groundless (*insubsistente*).⁸⁷ This decision nullified the judgment of 21 November 1996,⁸⁸ dictated by faceless judges. Also null were the criminal complaint (*denuncia*) of the Provincial Prosecutor Ad-Hoc for Cases of Terrorism of 14 October 1999⁸⁹ and the "indictment" (*auto de apertura de instrucción*) of 5 November of 1999.⁹⁰

Even though Legislative Decree 926 nullified the Gutiérrez criminal complaint, indictment, and judgment, the Government ordered the second investigation of Dr. Pollo for collaboration with terrorism based on unreliable evidence from an entirely nullified proceeding. Thus, the entire second prosecution of Dr. Pollo is null *ipso jure*,⁹¹ and the National Terrorism

⁸³ *Id.*, at paras. 104-106.

⁸⁴ *Id.*, at para. 94.

⁸⁵ *Id.*, at paras. 65, 68.

⁸⁶ Pet.'s Mot. for Nullity and Release from Incarceration, National Terrorism Chamber of the Peruvian Supreme Court, File no. 01-00, 17 Dec. 2003, fourth clause.

⁸⁷ Special Criminal Chamber of the Lima Superior Court of Justice, Order, File no. 113-95, at 6308; Pet.'s Mot. for Nullity and Release from Incarceration, National Terrorism Chamber of the Peruvian Supreme Court, File no. 01-00, 17 Dec. 2003, fourth clause.

⁸⁸ Special Criminal Chamber, *supra* note 37, at 5152–5163.

⁸⁹ National Terrorism Chamber of the Peruvian Supreme Court, File no. 01-00 (391-99), at 1946–1949.

⁹⁰ *Id.*, at 1950–1951.

⁹¹ Pet.'s Mot. for Nullity and Release from Incarceration, National Terrorism Chamber of the Peruvian Supreme Court, File no. 01-00, 17 Dec. 2003, fifth clause.

Chamber's decision to allow the prosecution to continue necessarily violated Dr. Pollo's right to a fair trial.⁹²

Other Denials of the Right to a Fair Trial

Dr. Pollo was denied the right to be tried by a competent, independent, and impartial tribunal as required by Article 14.1 of the ICCPR and Article 10 of the UDHR and the right to be presumed innocent provided in Article 14.2 of the ICCPR and Article 11.1 of the UDHR.⁹³ Decree Law 25475, under which Dr. Pollo was prosecuted, introduced into the Peruvian legal order new procedures for the investigation and trial of alleged terrorist crimes. These procedures unduly favor the government's prosecutors and, as detailed below, produce unfair trials and result in the wrongful conviction of large numbers of innocent Peruvians.

Passed in 1992 after then-president Fujimori's dissolution of Congress,⁹⁴ Decree Law 25475 established both the elements (*tipicidad*) of various terrorist crimes and the procedures for detaining, investigating, and trying individuals charged with such crimes. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights offer several critical observations concerning this law and its use by the Peruvian government:

- The defense attorney was often assigned after the police investigation had already begun
- Because this appointed defender was assigned to many cases at once, he was not always able to meet with his clients prior to trial
- Judges used a novel *ad hoc* procedure during the "investigation" stage
- During the oral argument stage, judges were masked
- Interlocutory appeals or petitions for writs (*acciones de garantía*) were not allowed, including an action for a writ of habeas corpus⁹⁵
- If the accused chooses his own defense attorney, that attorney is not allowed to meet with him before he gives his statement (*declaración instructiva*)
- Neither the accused nor his lawyer is allowed to inspect the evidence against him
- The defense is not allowed to cross-examine witnesses who gave statements during the police investigation

⁹² National Terrorism Chamber, Order of 19 December 2003, File no. 01-00, at 2725–2726, third clause.

⁹³ ICCPR, *supra* note 54, at Arts. 14.1-.2; Universal Declaration, *supra* note 54, at Arts. 10, 11.1.

⁹⁴ President Fujimori and his council of advisors are the law's only signatories, as it was promulgated via executive fiat. Therefore, Decree Law 25475 lacks the necessary constitutional prerequisites to be binding, such as majority vote by the legislative branch prior to ratification by the executive branch.

⁹⁵ This is derived from Art. 6 of Law 25659. This part of the legislation was later modified, but effectively it remained impossible to get a writ of habeas corpus.

- Those accused of terrorism are not permitted bail
- Court documents created by faceless judges, including the verdict, are not signed.⁹⁶

The prosecution of Dr. Pollo was replete with these procedural shortcomings, chiefly, the denial of the right to cross-examine any witnesses who purportedly implicated him in alleged criminal activity. Under Article 14.3 of the ICCPR, an accused has the right to call witnesses and cross-examine witnesses testifying for the state.⁹⁷ Due to the limitations placed on Dr. Pollo's ability to create a meaningful defense, the trial against Dr. Pollo also renders his detention arbitrary.

Moreover, the prosecution of Dr. Pollo suffered from other insurmountable procedural hurdles because Fujimori's administration had passed other anti-terrorism laws in concert with Decree Law 25475, which further infringed on the human rights of defendants. Decree Law 25744, for example, gave DINCOTE the power to hold suspects incommunicado.⁹⁸ As the Working Group summarized the situation:

[T]rials for terrorism are based on the principles of exceptionality, summariness and secrecy. Proceedings are summary (investigations lasting not more than 50 days, trial lasting up to 15 days, proceedings before the Supreme Court lasting up to 15 days), with both automatic imprisonment and a prohibition on release during the investigation; trial in camera; limitation on the equal treatment of evidence; excessive weighting of the police investigation; restriction of the rights of the defense; until 1997, anonymity of judges; and lack of responsibility for legal actions and sentences.⁹⁹

These decree laws, as enforced against Dr. Pollo, denied him any presumption of innocence. The presumption of innocence is a universal principle of justice. Internationally, it is codified in, among other authorities, Article 14.2 of the ICCPR, Article 11.1 of the UDHR, and Article 8.2 of the ACHR.¹⁰⁰ In Peru, the right to be presumed innocent of criminal charges is established in Article 2.24.e. of the Constitution ("All persons are considered innocent until their responsibility has been judicially declared"). In spite of this provision, defendants in terrorism cases in Peru are often denied this right, a fact previously recognized by the Working Group.¹⁰¹

The trial court that convicted Dr. Pollo failed to presume him innocent and thereafter subjected him to additional unfairly prejudicial procedural barriers, including but not limited to tainted testimony from witnesses who were not permitted to be cross-examined. Thus, the trial

⁹⁶ Loayza Tamayo E-mail, *supra* note 2.

⁹⁷ ICCPR, *supra* note 54, at Art. 14.

⁹⁸ Decree Law 25744, 28 Sept. 1992, Arts. 1, 2.a. *See also*: DL 24150, 8 June 1985, Arts. 4, 5; DL 740, 8 Nov. 1991, (modifying DL 24150); DL 25475, 5 May 1992, Arts. 12.c, 12.d.

⁹⁹ Country Report, *supra* note 43, para. 69.

¹⁰⁰ The European Commission on Human Rights has also stated that in a criminal trial, the burden of proof must always lie with the prosecutor, and the accused must always be given the benefit of the doubt. *See* Barberá, Messegue, and Jabardo v. Spain, 1988 Eur. Ct. H.R., Series A. No. 146, at para. 77. *See also* Austria v. Italia, Report of 30 March 1963, 6 Y.B. Eur. Conv. on H.R. 782 (Eur. Comm'n on H.R.).

¹⁰¹ *See* Country Report, *supra* note 43, para. 137.

court failed to proceed with adequate guarantees of fairness, impartiality, and competence. Such denials of basic rights to due process warrant Dr. Pollo's immediate release.¹⁰²

V. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHORITIES, PARTICULARLY FOR THE PURPOSE OF ESTABLISHING THE DETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT TAKEN

Dr. Pollo files this petition before the Working Group having exhausted all internal domestic remedies available to him. As summarized below, throughout the second criminal case brought against Dr. Pollo, which is the subject of this petition, he has attempted to assert his rights, but to no avail.

On 17 December 2003 Dr. Pollo petitioned the National Terrorism Chamber to dismiss the case against him, alleging that it was “juridically stillborn” because the very evidence motivating the investigation was the product of a judicial proceeding (the 1996 Rivera Gutiérrez trial, held before faceless judges) that had been nullified. Furthermore, the report of 14 October 1999 by the Ad-Hoc Provincial Prosecutor for Cases of Terrorism was nullified, as was the order initiating the investigation of 5 November 1999.¹⁰³ Despite this lack of a legal basis for Dr. Pollo’s prosecution, his petition was denied.

Dr. Pollo filed additional petitions on 5 January 2004 challenging the case against him on the bases of double jeopardy (*res judicata - excepción de cosa juzgada*), lack of a cause of action (*excepción de naturaleza de acción*), and prescription (*excepción de prescripción*). None of these petitions was successful.

At trial Dr. Pollo provided sworn statements that impeached the prosecution’s witnesses and contradicted their testimony, which had been obtained through physical and psychological coercion under a legal regime notorious for suspending civil rights and torturing suspects.¹⁰⁴ But the court ignored all exculpatory witness statements and only considered the prosecution’s evidence.

Dr. Pollo also filed an appeal to the Permanent Criminal Chamber of the Supreme Court, seeking reversal of his conviction. Just as the trial court had done, the Supreme Court dismissed exculpatory evidence and relied solely on testimony that was the product of coercion. On 22 December 2004, the Permanent Criminal chamber affirmed Dr. Pollo’s conviction and prison sentence.

¹⁰² See Cantoral Benavides Case, Judgment, *supra* note 65, at seventh “whereas” clause.

¹⁰³ National Terrorism Chamber, Order Commencing Investigation (*Auto Apertorio de Instrucción*) of 5 Nov. 1999, Exp. 01-00 (391-99), at 1950–1941.

¹⁰⁴ See Section IV.A.2 above. Dr. Pollo himself was a victim of these same information-gathering techniques during his prior arrest, when the Government of Peru tortured him and rendered him paraplegic. See Sections IV.A.3 and IV.A.5, above.

Dr. Pollo filed a petition with the Inter-American Commission on Human Rights in 2005. On 23 July 2007, the Commission determined that the case is admissible to the Inter-American Commission on Human Rights.¹⁰⁵ Since that time, there has been no announcement regarding when a decision might be reached. While his case has been pending before this body, Dr. Pollo has spent more than five years arbitrarily deprived of his liberty.

VI. FULL NAME AND ADDRESS OF THE PERSON(S) SUBMITTING THE INFORMATION (TELEPHONE AND FAX NUMBER, IF POSSIBLE)¹⁰⁶

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¹⁰⁵ Report No. 42/07, Petition 156-05 Admissibility, Dr. Luis Williams Pollo Rivera, Jul. 23, 2007.

¹⁰⁶ If a case is submitted to the Working Group by anyone other than the victim or his family, such person or organization should indicate authorization by the victim or his family to act on their behalf. If, however, the authorization is not readily available, the Working Group reserves the right to proceed without the authorization. All details concerning the person(s) submitting the information to the Working Group, and any authorization provided by the victim or his family, will be kept confidential.