

DECISION No. 43/1995 (PERU)

Communication addressed to the Government of Peru on 4 May 1994.

Concerning: Alfredo Raymundo Chaves, Saturnino Huañahue Saire, David Aparicio Claros, Meves Mallqui Rodríguez, María Salomé Hualipa Peralta and Carmen Soledad Espinoza Rojas, on the one hand, and the Republic of Peru, on the other.

1. With reference to the above-mentioned communication, in respect of which the Government of Peru did not forward a reply within 90 days, the Working Group in its decision No. 44/1994 decided to keep the above-mentioned cases pending until it received further information.

2. On 18 April and 31 August 1995, the Working Group received new and full information from the source. On 20 October 1995, the Government informed the Working Group that the persons concerned had been acquitted by the Special Court of the Peruvian Navy, in case 058-TP-93-Lima, and that the judgement was under review. In the light of the additional information, the Working Group is in a position to take a new decision.

3. The Working Group considers that:

(a) Alfredo Raymundo Chaves, Saturnino Huañahue Saire, David Aparicio Claros, Meves Mallqui Rodríguez, María Salomé Hualipa Peralta and Carmen Soledad Espinoza Rojas were detained between July and September 1993 after the murder, on 29 June 1993, of local leader Américo Padilla.

(b) Judicial proceedings concerning the offence of high treason were initiated in August 1993 before the military courts, as a result of which a judgement acquitting all the detainees was rendered by the Special Military Judge and upheld by the Navy Council.

(c) Following the third examination provided for by law, the Supreme Council of Military Justice annulled all the decisions taken and referred the case back to the court of first instance.

(d) In the new trial, by a decision of 14 March 1995, Carmen Soledad Espinoza Rojas, María Haulipa Peralta, Meves Mallqui Rodríguez and David Aparicio Claros were again acquitted and a decision taken in favour of their immediate release, which is subject to confirmation in second instance by the Navy Council and then, in third instance, by the Supreme Council of Military Justice. Alfredo Raymundo Chaves and Saturnino Huañahue Saire were also acquitted on the charge of high treason, but their trial in an ordinary court was ordered in view of evidence of their involvement in the offence of terrorism.

(e) The new trial of Alfredo Raymundo Chaves and Saturnino Huañahue Saire has still not begun, since confirmation of the first-instance judgement of 14 March is awaited.

(f) There has also been no review by the Navy Council and by the Supreme Council of Military Justice of the question of the unconditional release of Carmen Soledad Espinoza Rojas, María Haulipa Peralta and David Aparicio Claros.

(g) The Working Group notes that these facts are not contested by the Government of Peru, and indeed appear to be confirmed, except in regard to Meves Mallqui Rodríguez, who is said not to have been held in detention.

(h) The Code of Penal Procedure distinguishes between release on bail, which entitles the accused to his liberty - subject to monetary or personal surety - while proceedings are under way, and unconditional release, which is ordered when the non-culpability of the accused is fully demonstrated.

(i) Release on bail, for offences under ordinary law, involves a procedure that may not exceed six days, and if granted and appealed by another party to the proceeding, it is allowed immediately, without the outcome of the appeal being awaited. In proceedings before the military courts, the rules differ in respect of the grounds for release from custody.

(j) Unconditional release in proceedings relating to offences under ordinary law, and warranted because innocence is "fully" demonstrated, does not involve any procedure and is effected immediately without approval of the appeal court being awaited.

(k) The so-called "emergency legislation" modifies these precepts in various ways:

(i) Release on bail is not allowed in any case, not even when an acquittal is pending approval;

(ii) Unconditional release - also not provided for in the original text of emergency law 25,475 of 6 May 1992 - has again been accepted, following the amendment of law 26,248 of 24 November 1993, although with one very serious restriction: the decision granting unconditional release - where non-culpability is fully demonstrated - must be sent for review to the higher court, but "release from custody shall not be effected until the review has been completed".

(l) While it is reasonable that for the offences of terrorism and high treason the rules governing release on bail with security should be more strict, it is contrary to the International Covenant on Civil and Political Rights, as will be seen, for such provisions to be suppressed altogether.

(m) More serious is the continued detention of persons in custody for more than two years after deprivation of liberty, and for more than eight months after a decision in first instance calling for their unconditional release on the ground that "their non-culpability is fully demonstrated".

(n) Delay in effecting the release of individuals for more than eight months after a judge finds them innocent cannot be considered normal. On the contrary, the ordinary laws provide for release on bail to be granted after a very short procedure and for unconditional release to be ordered immediately. What the emergency law provides are dilatory procedures for granting freedom to persons of whose innocence the judge is fully convinced, without setting any deadline for completing a review of that decision.

(o) Preventive detention must not be the general rule and is provided for solely as a means of guaranteeing the accused's appearance for trial. Furthermore, principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "a person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial". In addition, principle 39 states: "Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review".

(p) Almost two years have passed since the detention and eight months since the ordering of judicial proceedings against Alfredo Raymundo Chaves and Saturnino Huañahue Saire, and yet the trial ordered on 14 March 1995 has still not begun; furthermore, in respect of David Aparicio Claros, Meves Mallqui Rodríguez, María Salomé Hualipa Peralta and Carmen Soledad Espinoza Rojas, there is a judgement absolving them of all responsibility, which also dates from 14 March 1995 and has still not been confirmed.

(q) Under such circumstances, the deprivation of liberty of the persons referred to in the communication cannot but be described as arbitrary, considering that there has been a judicial decision in favour of four of them, calling for their release, and that a regular hearing in respect of the other two has not yet begun.

(r) This finding is confirmed by article 9 of the International Covenant on Civil and Political Rights, which provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement". In this instance, after more than 24 months of deprivation of liberty, an order for the unconditional release of four persons and an order to initiate formal proceedings for the others remain in abeyance.

(s) The provision of the Covenant that a person shall be brought without delay before a judge requires promptness not only at the initial moment of detention, but at all subsequent stages, especially if a judicial decision - albeit in first instance - has already established the detainee's innocence. In such cases there is even greater urgency, since the abstract presumption of innocence is coupled with the concrete presumption.

4. In the light of the above the Working Group decides:

(a) To file the case of Meves Mallqui Rodríguez, who is not, and has not been, held in detention.

(b) The detention of Alfredo Raymundo Chaves, Saturnino Huañahue Saire, David Aparicio Claros, María Salomé Hualipa Peralta and Carmen Soledad Espinoza Rojas is declared to be arbitrary, being in contravention of articles 3, 10 and 11 of the Universal Declaration of Human Rights, and of articles 9, 10, 11 and 14 of the International Covenant on Civil and Political Rights, to which the Republic of Peru is a party, and falling within category III of the principles applicable in the consideration of the cases submitted to the Working Group.

5. Consequent upon the decision of the Working Group declaring the detention of the above-mentioned persons to be arbitrary, the Working Group requests the Government of Peru to take the necessary steps to remedy the situation in order to bring it into conformity with the provisions and principles incorporated in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

Adopted on 30 November 1995.