

OPINION No. 11/2000 (PERU)

Communication addressed to the Government on 21 June 1999

Concerning Eleuterio Zárate Luján

The State is a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.
2. The Working Group expresses its appreciation to the Government for having provided the information requested promptly and in full.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
 - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).
4. The Group welcomes the prompt and complete response of the Government of Peru to its inquiry and the comments provided by the source.
5. According to the complaint, Eleuterio Zárate Luján was arrested at his home in Lima, Villa El Salvador district, on 3 July 1993 by agents of the National Counterterrorism Directorate (DINCOTE), Delta 3 Unit, who did not produce an arrest warrant. He was tried by the Peruvian military courts and sentenced to 25 years' imprisonment for treason, on the following grounds: (a) terrorist attack resulting in the death of the Deputy Mayor of Villa El Salvador, María Elena Moyano; (b) terrorist attack on the Fuji Restaurant; and (c) killing of a citizen considered to be a "soplón" (informer). The complaint maintains that the charges are not true, and that in any case the first two acts were committed by their perpetrators before the enactment of Decree-Law No. 25,659 of 13 August 1992, which therefore could not be applied against him without seriously infringing article 15 of the International Covenant on Civil and Political Rights.

6. The complaint also states that Mr. Zárate was tried by “faceless” courts, which are not independent and impartial, and that the alleged evidence against him is based on the testimony of “reformed terrorists”, which was not corroborated by other evidence as required by law. It states that an appeal was lodged before the Supreme Council of Military Justice, but that six months later it had still not been resolved. Mr. Zárate remained in detention through the submission of the communication on 12 April 1999.

7. In a report dated 22 September 1999 the Government maintains that Mr. Zárate was in an area of the country declared to be an emergency area when arrested; accordingly, under both Peruvian legislation and article 4 of the International Covenant on Civil and Political Rights, the judicial guarantee requiring a warrant in order for an arrest to be carried out was not in effect.

8. The Government adds that the Supreme Council of Military Justice of Peru, in a decision of 26 May 1999 - subsequent to the submission of the communication - annulled the sentence of the Supreme Special Military Tribunal of 2 June 1994 of 25 years’ imprisonment against Mr. Zárate, precisely because the acts in question had been committed before the entry into force of Decree-Law No. 25,659, characterizing certain forms of terrorism as treason. The first trial having been declared null and void, a new trial before an ordinary court was ordered and is under way.

9. The Government also maintains that, in any case, the military courts cannot be criticized as lacking independence and impartiality, and that there has been no exhaustion of domestic remedies, which is a requirement for proceedings before the Working Group.

10. That in fact, and only since 26 May 1999, Mr. Zárate is being tried for the offence of attacking the Fuji Restaurant, as he was cleared of the offence against María Elena Moyana and no mention is made of the offence against the person considered to be an “informer”.

11. The Group notes that from 3 July 1993 - the date of his detention - through the beginning of his ordinary court trial for the attack on the Fuji Restaurant, Mr. Zárate was deprived of liberty through the retroactive application of criminal legislation - Decree-Law 25,659 of 13 August 1992 - to an act committed earlier, i.e. the above-mentioned attack on the restaurant. Such deprivation of liberty constitutes a flagrant violation of article 15 of the International Covenant on Civil and Political Rights and of article 11, paragraph 2, of the Universal Declaration of Human Rights, and as such represents a case of arbitrary detention as set forth in category III of the Group’s methods of work, approved on numerous occasions by the Commission on Human Rights.

12. The Group also notes that, even under domestic legislation alone, the deprivation of liberty would still be considered arbitrary, as the Peruvian Constitution in force at the time of the detention also provided for the principle of the non-retroactivity of criminal legislation against an accused person.

13. In any case, the Group would like to make two remarks in response to the reply of the Government of Peru: (a) with regard to its statement that “the lack of impartiality or independence [of the military courts] must be proved objectively rather than by mere speculation of a subjective nature”, the Group notes the statement in its report on its visit to Peru in January

and February 1999, in reference to the military courts, to the effect that “Judges, especially military judges, show partiality in the treatment of accused persons” (E/CN.4/1999/63/Add.2, para. 136) and that the military justice sector “does not meet the requirements of General Comment No. 13 adopted by the Human Rights Committee to guarantee due process of law (para. 170); and (b) the public procedures established by the Commission on Human Rights in accordance with Economic and Social Council resolution 1235 (XLII) of 1967, like the procedure governed by Commission on Human Rights resolutions 1991/42 and 1997/50, are not subject to exhaustion of domestic remedies as a requirement for admissibility.

14. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Eleuterio Zárate Luján is arbitrary as being contrary to articles 11, paragraph 2, of the Universal Declaration of Human Rights and 15, paragraph 1, of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

15. Having rendered this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 17 May 2000