

OPINION No. 17 / 2001 (PERU)

Communication addressed to the Government on 14 June 2001

Concerning Elmer Salvador Gutiérrez Vásquez

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

1. The Working Group on Arbitrary Detention was established by Commission on Human Rights resolution 1991/42. The mandate of the Working Group was clarified and extended by resolutions 1997/50 and 2000/36 and reconfirmed by resolution 2001/40. Acting in accordance with its methods of work, the Working Group forwarded the above-mentioned communication to the Government.
2. The Working Group regrets that the Government has not replied within the 90-day deadline.
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. According to the source of the communication, Elmer Salvador Gutiérrez Vásquez, who is a Peruvian national, a physical education teacher and the former head of the Single Education Workers' Trade Union of Peru (SUTEP), has been in detention in the Miguel Castro Castro prison since 17 February 1995. He is a member of the "Movimiento Clasista Magisterial" (Teachers' Class Movement) and was accused of treason against the State and sentenced to the maximum penalty of life imprisonment.
5. According to the information received, he was tried by "faceless judges" in military courts. When he allegedly committed the offences of which he is accused, Decree Law No. 25475 of 12 May 1992, which characterizes treason as a separate form of the offence of

terrorism, was not yet in force. Even though the military judge disqualified himself for that reason and in accordance with the principle of the non-retroactivity of criminal law, the Special Supreme Military Court decided not to refer the case to the ordinary courts and to hear it itself.

6. According to the complainant, the case law of Peruvian courts has established that, in accordance with the principle of *in dubio pro reo*, accusatory evidence for the prosecution given by informants must be rejected if it does not have a fundamental link with other conclusive evidence.

7. According to the information received, the alleged accessories, who were charged with the same offence, namely, alleged membership of the “Movimiento Clasista Magisterial”, were accused not of treason, but of terrorism, and were therefore tried by a special ordinary criminal court for cases of terrorism. In those proceedings, the court rejected the evidence given by informants and, on 23 August 1996, it acquitted and cleared the accused, Roberto Wilfredo Olaya Guerrero, Miguel Ángel Chumpitaz Soralliz and Uladislao Aristóteles Napoleón Reyes Montoya. The Supreme Court of the Republic upheld the acquittal.

8. It is also reported that, during the proceedings, the Special Supreme Military Court did not take the view that, during his imprisonment, Mr. Gutiérrez Vásquez was required to sign a statement under torture incriminating himself; that the court did not take account of the fact that the informants who had accused him, Elmer Acosta Bances and Roberto Palomino Quispe, withdrew their accusations twice and stated that they were put under pressure to accuse him by members of the National Department against Terrorism; and that he was convicted on the same day his lawyer gave his summation.

9. The source is of the opinion that different sentences were handed down by the ordinary courts and the military courts in connection with the same offences and the same evidence: acquittals in some cases and a conviction in the other, based on different charges, different characterizations of the same offences and different assessments of the same evidence. This is contrary to the principle of the unity of the jurisdiction of the courts and prejudicial to Mr. Gutiérrez Vásquez. The Supreme Court of Justice of the Republic acquitted his accessories and the highest military court convicted him.

10. In assessing whether Mr. Gutiérrez Vásquez was detained arbitrarily or not, the Working Group took account of the comments and observations it had made on some of the procedural rules applied by the military courts in the present case, particularly with regard to the administration of justice by “faceless judges”, in military courts, in general, and in the Special Supreme Military Court, in particular; and with regard to the so-called offence of treason.

11. With regard to the first point, the Working Group stated: “the State must [of course] protect its judges so that they can act without fear of reprisals. However, the Group also believes that such an exceptional and disproportionate measure ... should be accompanied by adequate safeguards and controls in order to ensure a fair trial and to establish the responsibility of the judges. Otherwise, the requirements of article 14 of the International Covenant on Civil and

Political Rights would not be met, as stated by the Human Rights Committee in its preliminary observations (CCPR/C/79/Add.67), its concluding observations (CCPR/C/79/Add.72) and its views on the communication concerning Victor Polay Campos (No. 577/1994)” (E/CN.4/1999/63/Add.2, para. 68).

12. With regard to the second point (the crime of treason), the Working Group found, during its visit to Peru, that the extreme vagueness of the law has caused serious conflicts of jurisdiction, which have led to arbitrary detention. The Working Group has been notified of cases in which the accused was acquitted for an act defined in one way by the police, only to be convicted for the same offence defined differently. In the case of María Elena Loayza Tamayo, the Inter-American Court of Human Rights stated that this procedure is contrary to the principle non bis in idem (E/CN.4/1999/63/Add.2, para. 51).

13. The Working Group had already stressed in its earlier reports (E/CN.4/1993/24, para. 32; E/CN.4/1994/27, para. 63; and E/CN.4/1995/31, para. 51) that the vague definition of “treason” was one of the main causes of arbitrary detentions.

14. Noting that Mr. Gutiérrez Vásquez was prosecuted and convicted of the crime of “treason” at a time when the legislation allowing “faceless judges” to sit in military courts had not yet been repealed, the Working Group renders the following opinion:

The deprivation of liberty of Mr. Elmer Salvador Gutiérrez Vásquez is arbitrary, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 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 stated this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in accordance with the standards and principles set forth in the Universal Declaration of Human Rights.

Adopted on 14 September 2001