

# No. 32/2010 (Peru)

## Communication addressed to the Government on 10 August 2010

Concerning: Luis Williams Polo Rivera

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

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights. Its mandate was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the Working Group's mandate in its decision 2006/102 and extended it for a further three-year period in Council resolution 15/18 of 30 September 2010. Acting in accordance with its methods of work, the Working Group forwarded the aforementioned communication to the Government.

2. The Working Group notes with regret that the Government has not provided the information required.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III).

4. The source states that Dr. Luis Williams Polo Rivera (also known as Luis William Polo Rivera or Luis Williams Pollo Rivera), a Peruvian citizen born on XX August XXXX and a resident of the town of Andahuaylas (Abancay Province), was arrested on 6 November 1992 by officers of the Counter-Terrorism Directorate (DINCOTE) of the national police who did not show him an arrest warrant.

5. Dr. Polo Rivera graduated as a physician and surgeon from the San Fernando Faculty of Medicine of the National University of San Marcos. In 1979 he specialized in traumatology and orthopaedics. He was an active member of the political party Alianza Popular Revolucionaria Americana, also known as Partido Aprista Peruano (PAP), which is the party in government today. The source recalls that hundreds of PAP leaders and activists were murdered by members of the Partido Comunista del Perú-Sendero Luminoso (Communist Party of Peru-Shining Path) (PCP-SL) during the 1980s and 1990s.

#### **The first arrest**

6. After being arrested, Dr. Polo Rivera was kept incommunicado on the premises of DINCOTE in Lima and not allowed access to a defence lawyer. During that time he was apparently interrogated

and tortured, as he told the RBC radio show *Cara y Sello*, hosted by the journalist Oscar Díaz. The beatings Dr. Polo Rivera received apparently left him with a fractured skull and broken ribs as well as injuries to his spine and weakening of his legs, making it necessary for him to use a wheelchair. Reportedly, his hands were tied behind his back, a hood soaked in paraffin was placed over his head and a rope was tied around his neck and pulled upwards.

7. Dr. Polo Rivera was accused of treason under Decree Law No. 25659 for providing medical care to a presumed member of PCP-SL, Mr. Blas Ccori Bustamante Polo, whose right leg he allegedly amputated. The trial was held before a military court presided over by "faceless" judges. The witnesses for the prosecution gave their evidence out of sight, from behind a screen. Dr. Polo Rivera had no opportunity to cross-examine them during the trial and was given only 10 minutes to prepare the statement for his defence.

8. During cross-examination, Mr. Blas Ccori Bustamante Polo stated that he was not sure that Dr. Polo Rivera was the doctor he had consulted. Nevertheless, at the end of the trial, Dr. Polo Rivera was found guilty of treason and sentenced to life imprisonment.

9. In 1993, Dr. Polo Rivera appealed to the civilian courts against the sentence handed down by the court of first instance. The sentence was overturned by the Special Division for Terrorist Offences, which found no legal or factual grounds to find him guilty. The civilian court also found inconsistencies in the statement made by Mr. Blas Ccori Bustamante Polo. Dr. Polo Rivera's innocence was then confirmed by the Supreme Court of Justice in November 1996, when it upheld his acquittal by the court of second instance.

10. However, two weeks after the final judgement of the Supreme Court, a judge of the Special Division for Terrorist Offences ordered the provincial prosecution service to file charges against Dr. Polo Rivera for the crime of collaborating with terrorists and crimes against public security. The judge's order was based on accusations made against Dr. Polo Rivera in another trial, also held before a military court, the trial of Ms. Igrid Medalit Rivera Gutiérrez and others.

#### **The second arrest**

11. Dr. Polo Rivera was not informed of the new charges until seven years later when he was arrested for the second time. On 26 August 2003, officers of the Intelligence Directorate (DIRIN) of the national police arrested him at his place of work, the public ESSALUD hospital of Andahuaylas in Abancay Province. He was not shown the corresponding arrest warrant on that occasion either.

12. The provincial prosecutor accused Dr. Polo Rivera, under Decree Law No. 25475, of the crime of collaborating with terrorists and of providing, on several occasions, medical treatment to members of PCP-SL and the affiliated organization Socorro Popular (Popular Aid). On 17 December 2003, Dr. Polo Rivera filed a plea for dismissal with the Special Division for Terrorist Offences of the Supreme Court of Justice on the grounds that the proceedings that had given rise to the accusations against him (the trial of Igrid Medalit Rivera Gutiérrez) had been rendered null and void by the higher court, which had found serious violations of the principles of legality and due process. Dr. Polo Rivera's plea challenged the cause of the action, in other words, its legal basis. The Division rejected the plea on the grounds that although the aforementioned proceedings had been rendered null and void, the evidence given by witnesses was valid in its own right and could consequently serve as the basis for initiating other proceedings.

13. Dr. Polo Rivera's new trial was held at the beginning of 2004. The defendant denied knowing the witnesses presented by the public prosecution service. He was refused the right to question them. During the trial, only one of the seven witnesses for the prosecution said that she could identify Dr. Polo Rivera. When she gave evidence, the witness, who was a "repentant" (a criminal who cooperates with the authorities in order to obtain a reduced sentence for themselves), wore a black tunic which left only her eyes and hands visible.

14. On 24 February 2004, Dr. Polo Rivera was sentenced to 10 years' prison and ordered to pay the sum of 1,000 soles oro (approximately US\$ 357) in civil damages for having been found guilty of collaborating with terrorists by providing medical services to subversive organizations. The sentence states that, on one occasion, Dr. Polo Rivera went to the home of the activist Elisa Mabel Mantilla Moreno, who had submitted her letter of surrender, to urge her not to abandon the terrorist organization.

15. According to the sentence, his collaboration with terrorists took place between 1989 and 1992. In 1989 he amputated the leg of a terrorist known as "Isaías". In 1991, he provided medical care for "Comrade Ana". In 1992, at the request of the head of the health division of Socorro Popular, he treated a female terrorist who had been shot in the lungs. That same year he also treated a female terrorist known as "Magaly" or "Comrade Ángela". On an unspecified date, he provided medical care in Canto Grande for a terrorist known as "Jorge", who had stepped on a mine as well as for another terrorist known as "Adrián".

16. The sentence was based on the statement made by the "repentant" who stated that Dr. Polo Rivera was known as "Comrade Raúl" and had, on several occasions, been present in a medical surgery from which she collected surgical equipment and medicines at the same time as a military leader of PCP-SL, "Comrade Eva". Dr. Polo Rivera filed for the sentence to be overturned.

17. The Permanent Criminal Division of the Supreme Court upheld the prison sentence but reduced the amount of the damages on the grounds that Decree Law No. 25475 had been applied *ex post facto*. In the opinion of the Division, the incriminating statements by co-defendants were sufficient evidence to set aside the constitutional presumption of innocence. The case was based on the cross-corroboration of evidence from different sources and which had been produced under very diverse circumstances. According to the source, the Permanent Criminal Division dismissed versions of events given by prosecution witnesses that cast doubt on Dr. Polo Rivera's guilt and on the identity of the person who had collaborated in committing acts of terrorism and focused its attention on the incriminating evidence alone after a biased reading of the testimonies.

18. The sentence handed down on 22 December 2004 by the Permanent Criminal Division of the Supreme Court marked the exhaustion of domestic remedies. In a decision handed down on 24 January 2005, the Special Division for Terrorist Offences ordered the enforcement of the final sentence and that Dr. Polo Rivera be duly notified; this was done on 4 February 2005.

19. According to the source, the detention of Dr. Polo Rivera is arbitrary for the following reasons: (a) Under both international and Peruvian law it is not forbidden for a physician to provide medical treatment. Under article 18 of the First Geneva Convention, and article 16 of Protocol I and article 10 of Protocol II thereto, the provision of medical services may not be criminalized even in times of war or during domestic insurgencies. This prohibition is also set forth in article 5 of the Code of Ethics of the Peruvian College of Physicians and in the Regulations in Times of Armed Conflict of the World Medical Association. Furthermore, article 7 of the Peruvian Constitution recognizes the right to health;

(b) International law establishes that acts related to medical treatment are immune from criminal prosecution *ab initio*. Dr. Polo Rivera has been convicted and is currently imprisoned for acts that do not constitute a crime;

(c) The source adds that the definition of the offence of collaborating with terrorists set forth in Decree Law No. 25475 and in the Criminal Code of 1991 is so vague that it undermines the principles of legality. That vagueness lends itself to extensive abuse by the public prosecution service;

(d) Both trials of Dr. Polo Rivera violated his right to due process and failed to uphold judicial guarantees. The anti-terrorist legislation created a judicial system that was based on exceptional legal measures and secrecy. Dr. Polo Rivera was convicted on the basis of a witness statement made during proceedings that were subsequently annulled. In violation of the principle of *non bis in idem* and the principle of *res judicata*, Dr. Polo Rivera was convicted of a crime of which he had already been acquitted;

(e) Dr. Polo Rivera was convicted on the evidence of a "repentant", in other words, a former criminal who was offered certain benefits in exchange for collaborating with the police. Dr. Polo Rivera had no opportunity to question her or any of the other witnesses presented by the prosecution. He was not given sufficient time to prepare his defence. His right to be presumed innocent was violated;

(f) The list of acts of collaboration with terrorists that constitute offences, set out in article 4, paragraphs (a) to (f) of Decree Law No. 25475, is only a non-exhaustive list of examples of typical acts of collaboration with terrorists. Exercising the medical profession is not specified as an act of

collaboration with terrorists. The interpretation of the law by the Supreme Court therefore violates the principle of legality.

20. According to the source, the detention of Dr. Polo Rivera represents a violation of his rights to liberty, safety of the person, physical and mental integrity, the presumption of innocence, judicial guarantees, adherence to the principle of legality, legal protection and due process.

21. The source adds that Dr. Polo Rivera suffers from diabetes mellitus and nephrotic syndrome, as well as progressive loss of sight and secondary hypertension. Because of this, the Inter-American Commission on Human Rights has requested that the State of Peru adopt precautionary measures, specifically the hospitalization of Dr. Polo Rivera. His imprisonment has prevented him from having surgery for a lumbar disc problem.

22. The fact that the Government did not reply to the Working Group's request when it was first made on 10 August 2010 or when it was reiterated on 11 November 2010 means that the Group must adopt its opinion solely on the basis of the information provided by the source.

23. The first issue to be addressed, from the Working Group's perspective, is whether the medical care provided by Dr. Polo Rivera, for which he was indicted, represented the legitimate exercise of the profession of attending persons in need, or was part of his active involvement in a terrorist organization through which he treated people whose activities placed them at grave risk of suffering injuries either as a result of their own actions or those of the State. According to the source, the activities for which Dr. Polo Rivera was indicted fall into the first category; according to the sentences of the court of first instance and the Permanent Criminal Division of the Supreme Court, they fall into the second.

24. Of course, the first arrest of Dr. Polo Rivera in 1992 is not the subject of this opinion. Suffice it to say that in that instance, he was illegally detained, tortured, kept incommunicado and in secret detention, and then sentenced to life imprisonment for treason without being able to exercise any of his rights to due process. That was why both the higher court - the Special Division for Terrorist Offences - and then the Supreme Court, in its ruling of 4 November 1996, declared that trial null and void and acquitted Dr. Polo Rivera with an order for his unconditional release. However, the proceedings of the annulled trial have a bearing on his subsequent deprivation of liberty and specifically on his second trial, which is the subject of this opinion.

25. Shortly after the sentence of the first trial had been overturned, a new action was brought against Dr. Polo Rivera. The court ordered his arrest, and the order was carried out by the Intelligence Directorate (DIRIN) of the national police on 26 August 2003, when he was working as a doctor at the public ESSALUD hospital in Andahuaylas in Abancay Province. In the new trial, Dr. Polo Rivera was accused of collaborating with terrorists and providing medical care to several members of PCP-SL. On 24 February 2004, he was sentenced to 10 years imprisonment and ordered to pay 1,000 soles oro as civil damages for the crime of collaborating with terrorists by providing medical care to members of subversive organizations, specifically amputating the leg of an injured man known as "Isaías", and providing medical care to "Ana"; "Magaly"; "Ángela"; "Jorge" and "Adrián", who are supposedly all terrorists.

26. Given that the Government has not provided any information on the matter, the Working Group is of the view that, in accordance with the source's report and the opinions submitted by it, the first hypothesis set out in paragraph 23 seems to be the correct one. There is no evidence to suggest that Dr. Polo Rivera treated sick people because he belonged to the subversive group or because the group needed him, and the burden of proof in these cases lies with the accuser.

27. Moreover, it is common for sick or injured persons engaged in clandestine activities to seek the assistance of professionals who can provide effective treatment and will observe the rules of confidentiality of the medical profession. Providing such assistance does not, however, constitute militant activism. In such cases, at most, the physician can be accused of not reporting to the appropriate authorities a matter that was possibly associated with a crime, but that would not necessarily constitute collaborating with someone to commit a crime.

28. The second issue that the Working Group must address is whether, in Dr. Polo Rivera's trial, all the rules of due process were observed, particularly those regarding fairness in the presentation of

evidence. The source contends that the norms of due process were violated, particularly in the admission and appraisal of the evidence submitted.

29. The source objects that the Special Division for Terrorist Offences accepted, as evidence, statements made in another trial against a third person, Ms. Ingrid Medalit Rivera, in which Dr. Polo Rivera had no part, and which, moreover, was also annulled because the proceedings were flawed. The Division's argument was that the annulment of the proceedings did not invalidate the evidence presented, an argument with which the Working Group concurs, provided that the evidence (and the statements made by witnesses in particular) had not also been declared invalid, something which it is not possible to ascertain on the basis of the information available to the Group. Moreover, the witnesses at that trial were hooded and anonymous, which means, objectively, that their testimony may be declared null.

30. The source claims that the defendant did not know the witnesses for the prosecution. That does not, of course, invalidate their testimony. What would invalidate their testimony, however, is the fact that the defendant's counsel was not given the opportunity to cross-examine them, particularly if the evidence of some of those witnesses was based on knowing the defendant.

31. The communication also makes the objection that a witness for the prosecution was a "repentant", the term used in Peru to refer to persons who have given up their allegiance to terrorist groups and been exempted from or received reduced sentences for having denounced other persons. The credibility of such persons as witnesses was thus undermined.

32. In the view of the Group, contrary to the claims made by the source, there has been no violation in this case of the principle *non bis in idem* referred to in article 14, paragraph 7, of the International Covenant on Civil and Political Rights, inasmuch as the acts of which the defendant is accused, although they are of the same kind as those for which he was indicted in the first trial, are not the same acts.

33. The facts presented in the preceding paragraphs constitute a violation of the rules of due process set forth in article 14, paragraph 1, of the International Covenant on Civil and Political Rights (all persons shall be equal before the courts and tribunals and shall be entitled to a fair and public hearing) and paragraph 3, subparagraphs (c) and (e) (all persons accused of a criminal offence shall, during their trial, be entitled, in full equality, to be tried without undue delay and to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them).

34. It may therefore be concluded that the trial did not respect the presumption of innocence to which all persons are entitled.

35. The Working Group considers the violations of human rights and in particular the violations of the rules of due process to be of such gravity as to give the deprivation of liberty of Dr. Luis Williams Polo Rivera an arbitrary character.

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

Dr. Luis Williams Polo Rivera's deprivation of liberty is arbitrary, being in contravention of articles 6, 7 and 11 of the Universal Declaration of Human Rights and articles 9, 10 and 14 of the International Covenant on Civil and Political Rights, and falling within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

37. Consequent upon the opinion rendered, the Working Group requests the Government of Peru to take the necessary steps to remedy the situation in conformity with the provisions set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Working Group believes that, taking into account the prolonged period during which Dr. Luis Williams Polo Rivera has been deprived of his liberty, the adequate remedy would be to immediately release him without this precluding the possibility of his receiving effective compensation for his arbitrary detention.

[Adopted on 25 November 2010]