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PERU

OFFICE OF THE OMBUDSMAN AND MINISTRY OF JUSTICE PREPARE LEGISLATIVE BILLS TO PARDON PRISONERS UNJUSTLY CONVICTED OF TERRORISM OR TREASON

INTRODUCTION

According to a statement issued by the Government of Peru in August 1995, at least 5000 persons have been “convicted and sentenced” for crimes of terrorism or treason since new and wide-ranging anti-terrorism legislation came into effect in May 1992.¹ Between May 1992 and the beginning of July 1996 Amnesty International has declared 133 of these prisoners to have been unjustly charged with, or convicted for, such crimes. In addition, over the same period Amnesty International has documented at least a further 900 cases of persons whom Peru’s non-governmental human rights organizations, affiliated to the *Coordinadora Nacional de Derechos Humanos* (CNDDHH), National Coordinating Committee for Human Rights, claim have also been unjustly imprisoned on similar charges.² By the beginning of July 1996 at least 600 of these persons remained in prison.

The purpose of this special report submitted by Amnesty International to the United Nations (UN) Human Rights Committee, in anticipation of the Committee’s impending review of the Government of Peru’s third periodic report, is to highlight the main provisions contained in two legislative bills recently prepared by Peru’s Office of the Ombudsman and by the Ministry of Justice.

Both bills propose a mechanism by which a commission would recommend to the President of Republic granting a pardon to those persons convicted of terrorism or treason. However, the bill by the Office of the Ombudsman is significantly wider in scope than the bill by the Ministry of Justice. The bill prepared by the Office of the Ombudsman (reproduced in full, in

¹ The statement was made in a written communication by the Minister of Foreign Relations, Francisco Tudela, dated 21 August 1995, and directed to the UN Special Rapporteurs on extrajudicial, summary or arbitrary executions, on torture, and on the independence of the judiciary, and the Chairman of the Working Group on Enforced and Involuntary Disappearances.

² The CNDDHH is a an independent organization which brings together 47 non-governmental human rights groups in Peru.

English and Spanish, in Appendices 1 and 2 respectively), in addition to making provision for a commission to recommend the granting of a pardon, would also be charged with recommending the presidential exercise of the right of mercy, the adoption of special judicial review procedures, and the strengthening of judicial guarantees for terrorism-related cases . On the other hand, the essence of the bill prepared by the Ministry of Justice (reproduced in full, also in English and Spanish, in Appendices 3 and 4 respectively), confines its provisions exclusively to a commission recommending the granting of a pardon.

This report by Amnesty International also includes a brief statement about the background leading up to the preparation of the two bills.

MAIN PROVISIONS OF THE TWO LEGISLATIVE BILLS

Bill by the Office of the Ombudsman

The first of the two bills was drafted by the Office of the Ombudsman. In essence, this bill makes provision for the setting up of an Ad-hoc Commission charged with:

(i) proposing to the President of the Republic **the granting of a pardon** to those persons convicted for crimes of terrorism or treason, on the basis of insufficient evidential proof which could allow the Ad-hoc Commission to presume that such persons could not have had links with terrorist individuals, activities or organizations (Article 1);

(ii) proposing to the President of the Republic **the exercise of the right of mercy** for those persons who find themselves subject to judicial proceedings for crimes of terrorism or treason, on the basis of insufficient evidential proof which could allow the Ad-hoc Commission to presume that such persons could not have had links with terrorist individuals, activities or organizations (Article 2);

(iii) recommending legislative measures designed to adopt **an extraordinary judicial review procedure** for those cases of terrorism or treason which concluded with verdicts of guilt and for which, in the opinion of the Ad-hoc Commission, there could remain doubts about the links which convicted persons could have had with terrorist individuals, actions or organizations (Article 8).

(iv) possibly recommending legislative measures designed to **strengthen judicial guarantees** in terrorism and treason trials ³ (Article 8).

The bill prepared by the Office of the Ombudsman was submitted by the Ombudsman, Dr Jorge Santistevan y de Noriega, to the Minister of Justice, Dr Carlos E. Hermoza Moya, on 10 June 1996.

Bill by the Ministry of Justice

³ Amnesty International believes this provision has been included in the bill prepared by the Office of the Ombudsman by way of a recognition that Peru's anti-terrorism laws fail to comply with Peruvian and international fair trial standards. Amnesty International has drawn the attention of the United Nations Human Rights Committee to the fact that all terrorism-related trials in Peru fail to adhere to fair trial standards as enshrined in international human rights instruments. See *Peru: Reforms of anti-terrorism laws fail to match international human rights standards*, AI Index: AMR 46/06/95, October 1995 .

The second of the two bills was prepared by the Ministry of Justice. In essence, this bill only makes provision for the setting up of a Special Commission charged with:

(i) proposing to the President of the Republic **the granting of a pardon** to those persons convicted of terrorism or treason, on the basis of procedures to be established for such a benefit (Article 1).

The Minister of Justice submitted the bill prepared by his Ministry to the Ombudsman in a communication dated 21 June 1996. In his communication (reproduced in full, in English and Spanish, in Appendices 5 and 6 respectively) the Minister of Justice described his Ministry's bill as "an alternative Legislative Bill" to the one he received from the Ombudsman.

Ministry of Justice's rejection of the legislative bill by the Office of the Ombudsman

Prior to the Ministry of Justice preparing its legislative bill, the bill by the Office of the Ombudsman was reviewed and analysed by the Technical Advisors of the Directorate of the Ministry of Justice, in a report submitted to the Vice-Minister of Justice, Dr Hernán Nopo Odar.

In their report, the Technical Advisors first draw attention to the promulgation of Law N° 26329 in June 1995, by which a Special Commission was created and charged with proposing to the President of the Republic the granting of the right of mercy to prisoners awaiting trial. The Technical Advisors also drew attention to Supreme Decree N° 09.95-JUS, promulgated on 1 December 1995, which made provision for this Special Commission to apply the provisions enshrined in Law N° 26329 to prisoners awaiting trial on charges of terrorism. ⁴ Law N° 26329 and Supreme Decree N° 09.95-JUS are reproduced in full, in Spanish only, in Appendices 9 and 10.

Supreme Decree N° 09.95-JUS confined its provisions exclusively to those prisoners who "have been the object of criminal charges based on their situation of having no identification documents", "*han sido objeto de imputación criminal debido a su situación de indocumentados*" (Article 1).

Amnesty International believes the provisions enshrined in Law N° 26329 and Supreme Decree 09.95-JUS are not, in essence, designed to address the situation faced by those hundreds of prisoners for whom Amnesty International and the human rights groups affiliated to the CNDDHH claim have been unjustly charged with, or convicted of, crimes of terrorism or treason.

In their report, the Technical Advisors went on to analyse the legislative bill prepared by the Office of the Ombudsman. In particular, the Technical Advisors analysed articles 1 and 4 of the bill. In its analysis the Technical Advisors stated, *inter alia*, that the frame of reference which would guide the work of the Ad-hoc Commission proposed by the Office of the Ombudsman would imply "a repudiation of [...] a judicial truth enshrined under the concept of *res judicata*"⁵ and

⁴ See paragraphs 1.2 and 1.3 of the report prepared by the Ministry of Justice Technical Advisors, in Appendix 7 (English translation) and Appendix 8 (Spanish photocopy).

⁵ The concept of *res judicata* signifies that "the sum and substance of the whole rule is that the matter once judicially decided is finally decided." See *West's Law & Commercial Dictionary*, 1985, West Publishing Company, page 1351.

“would amount to an interference in decisions which are eminently judicial”. The Technical Advisors report (reproduced in full, in English and Spanish, in Appendices 7 and 8 respectively), concluded that the bill of the Office of the Ombudsman “is non viable”.⁶

BACKGROUND TO THE TWO LEGISLATIVE BILLS

Over the past two years the Peruvian authorities, including President Alberto Fujimori, have publicly acknowledged that there are persons in Peru’s prisons who have been unjustly convicted of terrorism or treason. The Government of Peru first recognized the existence of this problem before the United Nations, in a *Note verbale* submitted on 12 August 1994 to the Office of the UN Centre for Human Rights in Geneva, during the 46th Session of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities.⁷

As recently as 1 July 1996, President Fujimori once again made public reference to the problem, in a speech delivered in Lima, Peru, to the *Foro Internacional de la Defensoría del Pueblo*, International Forum on the Office of the Ombudsman, organized by the Office of the Ombudsman. On this occasion President Fujimori made reference to 150 prisoners unjustly accused of terrorism or treason who have been freed, and spoke of at least 80 others whose cases were being evaluated but who at present remain in prison. President Fujimori also made reference to his Government working closely with the Office of the Ombudsman and the legislature in order to find a formula which would result in the prompt release of prisoners unjustly convicted of terrorism or treason.

The above declarations have been made in the context of numerous reports submitted to the Government of Peru by international and Peruvian human rights organizations, urging the authorities to make provision for a comprehensive and effective solution to the problem. These reports include those published at different times by Amnesty International and by the CNDDHH. Both Amnesty International and the CNDDHH have addressed the problem in reports submitted to the UN Human Rights Committee, in anticipation of the forthcoming session by the UN Human Rights Committee charged with reviewing the Government of Peru’s third periodic report.

President Fujimori’s acknowledgement of the problem was also been made in the context of at least seven bills designed to resolve the problem and submitted to Congress’ Justice Commission over the past 18 months. None of these bills, one of which was prepared by the Ministry of Justice in July 1995, three by parliamentarians attached to *Cambio 90-Nueva Mayoría*, the government party, and three by parliamentarians attached to opposition parties, have been debated by the Congress of the Republic.

APPENDIX 1

⁶ See Ministry of Justice Technical Advisors’ Report N° 144-JUS/AT, dated 11 June 1996 and submitted to the Vice-Minister, Dr Hernán Ñopo Odar.

⁷ The *Note verbale* was published by the UN Economic and Social Council, with the reference E/CN.4/Sub.2/1994.51, on 15 August 1994.

*BILL BY THE OFFICE OF THE OMBUDSMAN*⁸

BACKGROUND

Despite the anti-terrorism legislation having allowed for significant improvements in the fight against subversion, its application -- inadequate on occasions -- has resulted in the trial and conviction of persons for crimes of terrorism and treason based on insufficient evidential proof. This insufficient evidential proof could allow for the presumption, within reason, that such persons could not have had links with terrorist individuals, activities or organizations.

Despite the legislation on repentance⁹ having allowed for the compilation of valuable information which led to the identification and capture of terrorists, it is presumed, within reason, that this legislation could also have resulted in persons who neither participated in terrorist acts or organizations, nor had links to subversive groups, being accused by those persons who benefited from such legislation.

The problem of those persons whose situation is described above has been recognized by the Executive and the Legislature. At present there are several bills before Congress' Justice Commission which aim to promptly resolve the problem.

It follows from the above that it would be recommendable, in relation to the policy of fighting terrorism, to take steps which would lead to the existence of balanced and rectifying mechanisms necessary for upholding human rights.

Given that the President of the Republic has the power to grant pardons, commute sentences and exercise the right of mercy when the circumstances justify them, and given the reasons outlined above:

BILL

The Congress of the Republic has approved the following Law:

ARTICLE 1 Establish an Ad-hoc Commission charged with evaluating, qualifying and proposing to the President of the Republic, as an exception, the granting of a pardon to those persons convicted of the crimes of terrorism or treason, on the basis of insufficient evidential proof which could allow the Commission to presume, within reason, that such persons could not have had links with terrorist individuals, activities or organizations.

⁸ **The translation is by Amnesty International.**

⁹ **The legislation on repentance refers to the Repentance Law which came into effect in May 1992. This law included among its provisions clauses which benefitted members of the armed opposition who supplied information leading to the capture of other alleged members of the armed opposition. The benefits available consisted of either the exemption, reduction or remission of their sentence. In November 1994 the Repentance Law was repealed.**

ARTICLE 2 The Commission will also propose to the President of the Republic, as an exception, the exercise of the right of mercy enshrined in article 118, section 21, of the Political Constitution of Peru, for those persons who find themselves subject to proceedings for crimes of terrorism or treason, on the basis of insufficient evidential proof which could allow the Commission to presume, within reason, that such persons could not have had links with terrorist individuals, activities or organizations.

ARTICLE 3 The Commission, made up of three members, will include the representative of the President of the Republic, who will preside over it; the Ombudsman, and the Minister of Justice.

ARTICLE 4 The Ad-hoc Commission will establish the criteria to be used for the fulfilment of the aims of the present law. For those cases for which the Ad-hoc Commission proposes a pardon or the exercise of the right of mercy, it must uphold the factual and legal bases for their recommendation in writing.

ARTICLE 5 The following institutions have the right to present cases to the Ad-hoc Commission for evaluation: the Ministry of Justice; the Human Rights and the Justice Commissions of the Congress of the Republic; the Roman Catholic Church; the National Evangelical Council of Peru; and the National Coordinating Committee for Human Rights.

ARTICLE 6 The Commission will exercise the following powers for the purpose of fulfilling its functions:

- Have access to the files lodged in the civilian and military justice systems.
- Have access to those persons subject to proceedings or convicted on charges of terrorism and treason.
- Have access to public and private documents which the Commission considers relevant to the case.
- Have the right to interview any person or authority whose testimony the Commission considers decisive in relation to the case.

ARTICLE 7 The Supreme Court of Justice, the Public Ministry, the Ministries of Defence, Interior, and Justice, and the Supreme Council of Military Justice, will give all the necessary support to the Ad-hoc Commission for the fulfilment of its functions. In order to facilitate such cooperation, each of these institutions will name a High Level coordinator to be accountable before the Commission.

ARTICLE 8 In addition to the functions outlined in articles 1 and 2, the Commission will recommend legislative measures designed to adopt an extraordinary review procedure before the Supreme Court of Justice, for those cases of terrorism or treason which concluded with verdicts of guilt and in which, in the opinion of the Commission, there could remain doubts as to the links convicted persons could have had with terrorist individuals, actions or organizations. Likewise, the Commission could recommend legislative measures designed to strengthen judicial guarantees in terrorism and treason trials.

FINAL AND TRANSITIONAL PROVISIONS

FIRST.- The representative of the President of the Republic must be named within 15 calendar days following the publication of this law. The Commission will commence to function on the day following its instalment, and will remain in force for 90 calendar days, extendable only once for a further 90 days.

SECOND.- The Ad-hoc Commission will approve its Regulations within a period of 10 days from its instalment.

THIRD.- The Office of the Ombudsman will function as the Technical Secretariat of the Ad-hoc Commission, furnishing it with the infrastructure and necessary resources for its functioning. In order to comply with this purpose, the Ad-hoc Commission may seek the collaboration of, and reach agreements with, national and international bodies.

FOURTH.- This law will come into effect the day following its publication in the Official Gazette "*El Peruano*".

APPENDIX 2

PHOTOCOPY OF BILL BY THE OFFICE OF THE OMBUDSMAN

*APPENDIX 3**BILL BY THE MINISTRY OF JUSTICE*¹⁰

LAW N°

THE PRESIDENT OF THE REPUBLIC

WHEREBY:

the Congress of the Republic has approved the following Law:

THE CONGRESS OF THE REPUBLIC:

Has approved the following law:

Article 1. - Establish a Special Commission charged with reviewing, identifying and proposing to the President of the Republic, as an exception, the granting of a pardon to those persons convicted of terrorism and treason, on the basis of procedures to be established for such a benefit.

Article 2. - The Special Commission will have a period of [] for complying with the purposes of this law.

Article 3. - The Commission to which article 1 refers will consist of:

- The Ombudsman, who will preside over the Commission.
- The Minister of Justice or his representative.
- An acting Judge from the Supreme Court of Justice.

Article 4. - The proposals made by the Special Commission are not binding on the President of the Republic. An unfavourable opinion, or the absence of an opinion, by the Special Commission, does not preclude the granting of a pardon as referred to in article 1.

Article 5. - The following institutions have the right to submit proposals for their evaluation by the Special Commission: the Minister of Justice, the Human Rights and Justice Commissions of the Congress of the Republic, and the National Coordinating Committee for Human Rights.

Article 6. - The Judiciary, the Public Ministry and the Military Justice system will provide, under responsibility, all the necessary facilities whereby the files and all the documentation which the Commission believes necessary, are made available in order to comply with this law and its Regulations.

Inform the President of the Republic for its promulgation.

¹⁰ The translation is by Amnesty International.

APPENDIX 4

PHOTOCOPY OF BILL BY THE MINISTRY OF JUSTICE

*APPENDIX 5**COMMUNICATION BY THE MINISTER OF JUSTICE TO THE OMBUDSMAN*¹¹

Ministry of Justice

[Stamp of the Secretariat to the Office of the Ombudsman, stating that the communication was received on [] June 1996.]¹²

Miraflores, 21 June 1996

COMMUNICATION N° 334-96-JUS/DM

Doctor
JORGE SANTISTEVAN DE NORIEGA
Ombudsman

[CITY OF] LIMA. -

Dear Ombudsman:

It is my pleasure to write to you in relation to your Fax dated 10 June 1996, to which you attached a Bill which makes provision for establishing an Ad-hoc Commission, by way of an exception, charged with reviewing, identifying and proposing to the President of the Republic the granting of a pardon to those persons who find themselves convicted of the crimes of terrorism or treason.

In relation to this Bill, I attach a copy of Report N° 144-96-JUS/AT and an alternative Bill prepared by the Cabinet of Advisors of this Ministry.

I would like to thank you for your kind consideration in this matter.

Yours sincerely,

[Stamp by the Office of the
Minister, Ministry of Justice]

Carlos E. Hermoza Moya
Minister of Justice

¹¹ The translation is by Amnesty International.

¹² The actual date is illegible.

APPENDIX 6

*PHOTOCOPY OF COMMUNICATION BY THE MINISTER OF JUSTICE TO THE
OMBUDSMAN*

APPENDIX 7**REPORT BY THE MINISTRY OF JUSTICE TECHNICAL ADVISORS**¹⁸

Ministry of Justice
Office of Technical Advisors

REPORT N° 144-96-JUS/AT

To: Dr Hernán Ñopo Odar
Vice-Minister of Justice

Subject: Draft legislative Bill on the establishment of an Ad-hoc Commission charged with evaluating, classifying and proposing to the President of the Republic the granting of a pardon for the crimes of Terrorism and Treason

Ref: Dispatch Sheet N° 657-96-JUS/VM dated 11- 06 - 96

Date: Miraflores, 11 June 1996

Mr. Vice-Minister, it is our pleasure to send you the following report:

1. BACKGROUND

- 1.1 The Ombudsman has sent to the Ministerial Office a draft Legislative Bill on the establishment of Commission which, *inter alia*, is charged with evaluating, qualifying and proposing to the President of the Republic, as an exception, the granting of a pardon to those persons convicted of the crimes of terrorism or treason, on the basis of insufficient evidential proof which could allow the Commission to presume, within reason, that such persons could not have had links with terrorist individuals, activities or organizations.
- 1.2 Under Law N° 26329 a High Level Special Commission is established, charged with qualifying and proposing to the President of the Republic, by way of exception, the granting of the right to mercy for those persons subject to proceedings in which the period spent on the judicial investigation has exceeded by twice the maximum period allowed by law. This Commission is made up of: one representative of the President of the Republic, one representative of the Ministry of Justice, and one representative of the Human Rights and Pacification Commission of the Democratic Constituent Congress.
- 1.3 In Supreme Decree N° 09-95-JUS, dated 03 December 1995, the guidelines were set down by which the Commission established by Law N° 26329 had to conduct its work.

¹³ The translation is by Amnesty International.

2. ANALYSIS

2.1 Article 1 of the draft bill establishes that the Ad-hoc Commission will propose the granting of a pardon, on the basis of insufficient evidential proof which could allow for the presumption, within reason, that the convicted person could not have had any kind of link with terrorist individuals, activities or organizations. We consider that such a frame of reference is inconvenient, in view of the fact that it implies a repudiation of the reasoning which led to a judicial sentence and, by the same token, a judicial truth enshrined under the concept of *res judicata*.

The final decision of the jurisdictional body would be seriously affected, rendering the Ad-hoc Commission as a *supra* jurisdictional body which would question the decision of the judge and, by the same token, would amount to an interference in decisions which are eminently judicial.

2.2 In relation to article 3 of the draft bill regarding the members of the Commission, we believe that the Minister of Justice should be represented by a high level official.

2.3 Article 4 of the draft bill states that the Ad-hoc Commission, in proposing a pardon or the exercise of the right of mercy, must uphold the factual and legal bases for their recommendation in writing. Actually, the norm proposed fails to take into account that a pardon is an act of generosity which the Political Constitution of Peru invests in the President of the Republic; therefore, this act is not invested with the obligation of laying out the bases for it, but only with the obligation of abiding by the law in relation to its restrictions.

3. CONCLUSION

On the basis of the above, this Office of Technical Advisors declares the draft Bill to be **non-viable**.¹⁴

Whereby we inform you, Mr. Vice-Minister.

Dr Mariella Chiriboga Mendoza

Dr José Montoya Vera

Dr Edgardo Gonzales Campos

Dr Martha Mantilla Falcón

[Stamp of the Office of Technical Advisors of the Directorate of the Ministry of Justice]

¹⁴ **The emphasis is by the Ministry of Justice Technical Advisors.**

APPENDIX 8

*PHOTOCOPY OF REPORT BY THE MINISTRY OF JUSTICE TECHNICAL
ADVISORS*

APPENDIX 9

PHOTOCOPY OF LAW N° 26329

APPENDIX 10

PHOTOCOPY OF SUPREME DECREE N° 09.95-JUS