

EL SALVADOR

Open Letter on the Anti-Maras Act

Amnesty International shares the concerns that have been expressed by a number of Salvadorean institutions and non-governmental organizations regarding Decree 158 of 9 October, the Anti-Maras Act (AMA). This open letter sets out our concerns regarding this law and other related issues.

Amnesty International considers that the AMA contravenes not only the Constitution of the Republic, but also international instruments and treaties to which the El Salvador is a Party. We are also concerned that the independence of the judiciary is being undermined and judges attacked over decisions taken in regard to this legislation.

The AMA was deemed necessary because “levels of violence linked to groups of delinquents known as *Maras* or gangs make it essential to create a new, special, temporary law as a penal instrument for the said groups, with corresponding procedures and sanctions”¹.

We believe that the AMA is problematic in many respects, since it is based on mistaken, untenable premises such as the need to penalise people on the basis of their appearance and social background. The Constitution of the Republic of El Salvador guarantees, among others, the right to freedom, equality before the law, freedom of association and assembly. The AMA affects respect for these rights.

The AMA contravenes various international treaties and instruments which El Salvador has ratified. Article 144 of the Salvadorean Constitution states that international treaties ratified by El Salvador shall be deemed “laws of the Republic”. This article also states that a law cannot “modify or annul what has been agreed” in an international treaty and, finally, that where any conflict arises between common law and an international treaty the latter shall prevail.

This means that all authorities, particularly judges, faced with a law such as the AMA, which contradicts international treaties, are obliged to apply the latter. It is important to point out also that, according to Article 168.4 of the Constitution, one of the functions and **obligations** (our emphasis) of the President of the Republic is to ensure implementation of the international treaties.

The international treaties and instruments which the AMA infringes in general include the Universal Declaration of Human Rights, the International Covenant on Civil and Political

¹ Decree No. 158, Whereas clause III.

Rights, the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man and the United Nations Convention on the Rights of the Child.

Article 29 of the AMA breaches general standards of protection. In fact it introduces a sanction in the form of a fine for anyone “found wandering about without an identity document in (...) any settlement, without justified cause or who is not known by the inhabitants”. This sanction infringes Articles 7 and 22 of the American Convention on Human Rights, which protects the rights to personal freedom and free movement within the territories of the States Parties, as well as similar provisions in the International Covenant on Civil and Political Rights. The requirement of a “justified cause” to exercise freedom of movement, and/or to be “known” to the local residents in order to escape sanctions under the AMA in the case of someone not carrying identity documents, leaves application of the financial sanction, without reasonable cause, at the discretion of the authority.

As stated, the AMA definitely contravenes the Salvadorean Constitution and various international human rights treaties which El Salvador is obliged to apply. It follows, bearing in mind these constitutional obligations that government officials have the responsibility of opposing and questioning the provisions of this Act. This is clear from the following:

Firstly, the President of the Republic has an obligation to “implement and ensure implementation of the Constitution, the treaties, laws and other legal requirements”.²

The Attorney General shall “at the government’s initiative or at the request of one of the parties promote legal action to defend what is lawful”. In other words, it falls to the Attorney General to request the judicature to declare illegal the unconstitutional aims of the AMA³, even where – as is the case – they originate from the government.

The Attorney General is responsible for adopting the measures required to reject the government onslaught described, since it is his job to “safeguard the defence of the family and persons, and the interests of minors, and others lacking legal capacity”.⁴

The functions of the Office of the Human Rights Procurator are similar in that it shall “ensure respect for and the implementation of human rights”, “promote legal or administrative challenges to protect human rights”, and “issue opinions on bills affecting the exercise of human rights”⁵

From among these officials the Procurator General has expressed concern over the AMA and the issue of its constitutionality, and has indicated that it is incumbent upon the judiciary to

² Article 168, no.1 of the Constitution of the Republic of El Salvador

³ Article 193, no.2 of the Constitution of the Republic of El Salvador

⁴ Article 194, II. no.1 of the Constitution of the Republic of El Salvador

⁵ Article 194.I. no.1, 4 and 9 of the Constitution of the Republic of El Salvador

issue an opinion in this respect. On the other hand, the Office of the Human Rights Procurator has submitted a challenge of unconstitutionality to the Supreme Court of Justice.

It is worth noting, also, that both the President and, in general, all public officials are responsible for “material or moral harm they cause as a result of the violation of the rights enshrined” in the Constitution (articles 244 and 245).

Children

One issue of particular concern in terms of the provisions contained in the AMA is the treatment of minors. The AMA contains provisions relating to minors aged between 12 and 18, and foresees the possible application to them of legislation which applies to adults. The Act even includes a special procedure which applies to children under twelve years of age.

In fact, Article 2 of the AMA states that when a minor aged between 12 and 18 commits crimes or misdemeanours included in this law or in the Penal Code, and is deemed to have the discernment of an adult by the Attorney General’s Office, he will be classified “as an adult and the relevant legislation shall apply”. Moreover, such classification is an infringement of Article 35 of the Constitution which states that behaviour by minors such as crimes or misdemeanours will be dealt with by “special legal regime”, which obviously should not be as harsh as that applying to adults.

In diametrical opposition to Article 2 and other standards in the AMA the international consensus set out in the United Nations Guidelines for the Prevention of Juvenile Delinquency, Riyadh Guidelines,⁶ states rather that “The need for and importance of progressive delinquency prevention policies and the systematic study and the elaboration of measures should be recognized. . . . Such policies and measures should involve . . . Consideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood; . . . Awareness that, in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons” (Fundamental Principle 5).

In addition, very particular account should be taken of the Convention on the Rights of the Child, ratified by El Salvador, without reservations, on 10 June 1990, which should necessarily apply rather than the AMA, in accordance with article 144 above of the Constitution. This Act contradicts the Convention on the Rights of the Child (CRC) on points such as:

⁶ Adopted and proclaimed by the United Nations General Assembly in Resolution 45/112 of 14 December 1990.

- Article 3.1 of the CRC establishes that in terms of measures concerning children (persons under 18) taken, among others, by legislative bodies, public entities in general and the courts, “the best interests of the child shall be a primary consideration”. Contradicting this, the AMA places the supposed effectiveness of the fight against crime above the interests of children presumed to be offenders. This is seen in the above-mentioned Article 2, paragraph 3 of this Act, that establishes the category of persons “classified as an adult” to punish those described by the CRC as children, which is a clear infringement of the latter. What is more, the overall sense of the AMA is similar, that is to say, the “best interests of the child” is replaced by extremely repressive provisions.
- Article 16.1 of the CRC stipulates that children have the right not to suffer arbitrary interference in their “privacy”. However, Article 1 of the AMA considers that the features that characterize “*maras*” as delinquent include their members “use of signs or symbols as a means of identification”; the fact that they have scars or tattoos on their bodies and/or “they meet habitually”, for example. These features should not be grounds for criminalisation since all individuals in their private lives have the right – which the State cannot validly oppose – to be tattooed, for example, to adopt particular identity symbols, and obviously to meet habitually.

Bearing in mind that these facts or aspects are not grounds for criminalisation in other cases, Article 1 of the AMA also seems to be a violation of the Principle of equal protection enshrined in - among other instruments - Article 3 of the Salvadorean Constitution and Article 24 of the American Convention on Human Rights.⁷

- Article 37 (b) of the CRC states that “detention or imprisonment of a child” shall be a measure of last resort. However, in the AMA confinement is the mechanism of choice out of the different sanctions that will apply to children.
- In general, taken as a whole, the AMA infringes Article 4 of the CRC that obliges all States Parties to adopt “legislative (...) and other measures” for the implementation of the rights recognised in the International Convention.

In addition, the AMA contradicts the following inter-American instruments:

- The American Declaration of the Rights and Duties of Man, Article VII which states that all children have the “right to special protection, care and aid”.⁸

⁷ Ratified on 23 June 1978 by El Salvador

⁸ It should be noted that the Declaration has the same (legally) binding nature as an international treaty, as indicated not only by Inter-American doctrine but also the Inter-American Court of Human Rights.

- The American Convention on Human Rights, Article 19, declares the right of every child to “measures of protection required by his condition as a minor on the part of... the state”.

The Judiciary

The attacks launched against the judiciary by senior government officials also greatly concern Amnesty International.

One of the main planks of the Peace Agreements was the establishment of an independent judiciary to ensure the rule of law. The process of achieving the final objective of turning it into an effective corruption-free institution is still in train. Amnesty International is seriously concerned at the attitude of - and statements by - very senior members of the Executive about the judiciary in relation to implementation of the AMA. Such interference is an infringement of the Peace Agreements, the recommendations of the Truth Commission and standards and principles regulating the separation of powers at national and international levels. The recent attacks are not in any way conducive to the judiciary advancing as an institution along the road to a suitable standard of performance in terms of its functions, fulfilment of its duties and to appropriately serve the Salvadorean people.

Article 172 of the Constitution of El Salvador states that, in administering justice, magistrates and judges are “independent and subject exclusively to the Constitution and laws”. As a result no senior figure or authority may seek to influence decisions by judges, since to do so is a violation of the above-mentioned constitutional standard.

Article 185 of the Constitution states that “it is incumbent upon the courts, in cases in which they have to pass judgement, to declare as inapplicable any law or measure by other bodies which run contrary to the provisions of the Constitution”. As a result, it is not only a function but also a clear obligation for judges in El Salvador not to apply the AMA in so far as they believe it breaches or runs contrary to the constitutional standards. This obligation extends to application by them of international treaties over and above - and even in contradiction to - common law such as the AMA. To argue that the judiciary “must” choose to apply the AMA instead of the Constitution (and, therefore, the international treaties which El Salvador has ratified) would be tantamount to wishing that judges violate Article 185, which is an even greater insult to their essential independence.

Article 168.9 of the Constitution states that one of the functions and duties of the President of the Republic is to “provide members of the judiciary with such help as they require for the implementation of their decisions”. The criticism and attacks which have been made from the Executive branch by that important figure on members of the judiciary over their decisions relating to the AMA are a clear violation of this constitutional standard.

In addition, statements attributed to the President of the Republic, such as ‘at the end of the day, judges who say they cannot apply the law are siding with the criminal’⁹ and ‘we will fight until we overcome all obstacles thrown up by politicians and judges who are protecting these criminals’¹⁰ are inappropriate and set the general public against members of the judiciary. Worse than this, they may make them vulnerable by making them appear to be covering up crime, and this could even endanger the personal safety of judges. We call for an end to such statements and for members of the judiciary to be treated with due respect.

The Basic principles on the Independence of the Judicature¹¹ are extremely relevant here in terms of the international consensus which should be respected in El Salvador. Principle 2 states that judges shall resolve the matters brought before them “without improper influence (...), pressures, threats or interferences, direct or indirect, from any quarter or for any reason”. Principle 4 underlines that “There shall not be any inappropriate or unwarranted interference in the judicial process”. Principle 6 establishes that “The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly ...”, and Principle 3 underlines that “the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence” which is legally theirs.

Amnesty International therefore concludes that the comments on and criticism of members of the judiciary by the Executive and other authorities contravene the above-mentioned standards which, we insist, form part of the unequivocal consensus of the community of nations which was adopted by the United Nations.

Amnesty International believes that this situation would not have arisen if this controversial legislation - if deemed necessary - had been properly formulated and subject to careful scrutiny, bearing in mind the obligations to respect the Constitution and relevant international treaties. Everything indicates that this was not the case, which may give support to a growing body of opinion that the main reason behind promulgation of the AMA, and the introduction of the so-called Get Tough Initiative, *Plan Mano Dura*, was political and, particularly, for election’s purposes.¹²

However, and without elaborating on this type of interpretation, Amnesty International calls on the relevant authorities, particularly the Constitutional Division of the Supreme Court of Justice to make, as soon as possible, a definitive judgement about the issue of the “constitutionality” of the Anti-Maras Act, in order to avoid:

⁹ *Diario de Hoy*, 21 October 2003

¹⁰ *El Faro*, edition of 27 to 31 October 2003

¹¹ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹² Presidential elections will take place on 24 March 2004

- the serious consequences which may be caused by the application of a law that violates the Constitution and El Salvador's international obligations in the field of human rights;
- the repetition of the attacks against judges in order to force them to apply a law which, legally, is unsustainable;
- the possibility of the AMA being extended beyond the temporary period of six months.

Amnesty International is well aware of the high crime situation which has been affecting El Salvador for several years. However, we believe that the problem of juvenile delinquency cannot be dealt with by restricting treatment simply to the penal or punitive sphere without bearing in mind the general background.

Clearly, any effort to solve the issue of violence by *Maras* must begin with an analysis of the reasons behind it, including the economic, social, and educational problems, and the lack of opportunity and the availability of weapons. On that basis, then, strategies must be developed and implemented to resolve these issues. Until such time as these fundamental questions are tackled, initiatives such as the Get Tough Initiative and purely repressive legislation such as the Anti-Maras Act will only be a waste of resources, increase the population of already crowded prisons and are very unlikely to solve the problem.

Amnesty International urges the Salvadorean authorities to study and deal with the basic reasons for the high level of crime, including the problem of juvenile crime, and on that basis draw up and implement standards and policies that can lead to real, long-term solutions that do not undermine the rule of law.