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NOTE FROM THE SECRETARY GENERAL REQUESTING THE CONVENING OF A SPECIAL MEETING OF THE PERMANENT COUNCIL IN VIEW OF THE ATTACHED NOTE FROM THE GOVERNMENT OF PERU REGARDING APPLICATION OF ARTICLES 17 AND 18

OF THE INTER-AMERICAN DEMOCRATIC CHARTER

Washington, D.C., October 18, 2022

OSG/210-22

Excellency:

Jan Marten Willem Schalkwijk

Permanent Representative of Suriname to the OAS

 Chair of the Permanent Council

Washington, D.C.

Excellency:

On October 12, 2022, the General Secretariat received from the President of the Republic of Peru, His Excellency José Pedro Castillo Terrones, and from his Foreign Minister, Dr. César Rodrigo Landa Arroyo, the attached note requesting "the application of Articles 17 and 18 of the Inter-American Democratic Charter" "to preserve democratic institutions and the legitimate exercise of power.” The situations detailed in the document, according to the Peruvian government, have "constituted a process aimed at altering the democratic order and institutionality of Peru."

In accordance with the provisions of Article 18 of the aforementioned Inter-American Democratic Charter, I am transmitting this request from the Government of Peru to the Permanent Council so that it may take cognizance of the attached document, proceed to an analysis of the situation, and, to that end, arrange for visits and other steps deemed necessary.

For these reasons, I would like to request you to convene a special meeting of the Permanent Council.

I would like to avail myself of this opportunity to convey to Your Excellency renewed assurances of my highest consideration.

Excellency:

Jan Marten Willem Schalkwijk

Permanent Representative of Suriname to the OAS

Chair of the Permanent Council

Washington, D.C.

Lima, October 12, 2022

To the Honorable

Luis Almagro

Secretary General

Organization of American States (OAS)

Washington, D.C.

I am writing to you to request application of Articles 17 and 18 of the Inter-American Democratic Charter, which state: Article 17: “When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system”, and Article 18: “When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening.”

The Peruvian government has decided to activate this collective guarantee mechanism to preserve democratic institutionality and the legitimate exercise of power, taking into account that in recent months a series of events and situations have been occurring in Peru prompted by the Legislative Branch, the Public Prosecutors’ Office (Ministerio Público), and other constitutional bodies, which, in open contradiction with the constitutional provisions and the norms that regulate the separation of powers proper to the Rule of Law, have given rise to a process aimed at altering the democratic order and institutionality of Peru, fostering a form of coup d'état, whose deactivation and control inspired the drafting of Articles 17 and 18 of the Inter-American Democratic Charter as a preventive mechanism for the defense of democracy and the avoidance of a disruption of the Constitution.

The rationale underlying Articles 17 and 18, Mr. Secretary General, presupposes their application when certain facts or a succession of facts arise that place democratic institutionality at risk; and that violate the constituent elements of representative democracy established in Articles 3 and 4 of the Inter-American Democratic Charter.

On October 11, 2022, the Chief Public Prosecutor (*la Fiscal de la Nación*) filed constitutional complaint 307/2021-2026 against the President of the Republic as perpetrator of the crimes against public order (*tranquilidad pública*), in the form of criminal organization aggravated by his status as leader, contemplated in Article 317 of the Criminal Code; and as an accomplice of crimes against the public administration - crimes committed by public officials, in the modality of collusion, regulated in Article 384 of the Criminal Code. However, this is not the first event that seriously threatens democratic stability and the rule of law in Peru.

I submit for your consideration, Mr. Secretary General, a list of facts and situations that occurred even before President Castillo took office, where some sectors represented in Parliament with external ramifications continue to ignore his legitimate victory and conspire with the purpose of fine-tuning all legal mechanisms in order to carry out a plan aimed at undermining democracy in the country:

(a) **The electoral fraud discourse**: On this point, the facts are as follows:

**June 7, 2021**: Keiko Fujimori calls a press conference and denounces "systematic fraud" in the elections.

**June 14, 2021**: Lourdes Flores Nano denounces alleged voting records with false signatures. According to the *Ojo Público* portal, 13 renowned law firms participated in efforts to challenge electoral records to prevent Pedro Castillo from being declared the winner.

During the period between the second round and the proclamation of the official result (almost a month and a half), there were several demonstrations led by or with the participation of elected congressmen such as Alejandro Cavero, Jorge Montoya, Hernando Guerra García, and others.

**June 27, 2021**: Congressmen-elect Hernando Guerra Garcia and Jorge Montoya travel to Washington D.C. as part of a delegation, seeking to meet with the Secretary General of the OAS to denounce alleged fraud in the presidential elections.

**August 19, 2021**: The Congress approved the establishment of an investigative commission on the alleged fraud in the presidential elections. The Commission was chaired by opposition congressman Jorge Montoya.

This discourse openly collided with respect for an electoral process and authenticity that, in addition to being recognized in Article 176 of the national Constitution, has been upheld by the Inter-American Court of Human Rights in the case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008.

Therefore, on July 19, 2021, the OAS welcomed the proclamation of the election results and pointed out that any questioning of them should be resolved through institutional channels. In addition, on January 13, 2022, the Public Prosecutors' Office dismissed as many as six complaints of alleged falsification of signatures.

(b) **Three parliamentary committees to investigate the President**: In addition to the commission to investigate the alleged fraud, the following events took place:

**August 12, 2021**. The Commission of Inquiry into the 100 days of Pedro Castillo's government was created in Congress.

**July 15, 2022**: The Congress approved the report of the Oversight Commission recommending the constitutional denunciation of President Castillo.

(c) Demonstrations by congressmen calling for the removal of the President from office. Thus:

**December 13, 2021**: The then president of Congress (Alva Prieto) traveled to Spain and met with Spanish congressmen and senators. Congresswoman Noemi Villagrasa (PSOE) affirmed that Alva Prieto had demanded that the deputies of that country "issue a statement indicating that Peru has been captured by communism and that Pedro Castillo is a president who has no legitimacy." Deputy Antón Gómez-Reino (Unidas Podemos) expressed the same opinion.

**February 9, 2022**: According to the weekly Hildebrandt en sus 13, a meeting took place with a view to vacating the President. The meeting was attended by the then President of Congress, María del Carmen Alva, together with Congressmen Patricia Juárez (President of the Constitution Committee) and Hernando Guerra García, from Fuerza Popular; Jorge Montoya and Alejandro Muñante, from Renovación Popular; Norma Yarrow and José Williams, from Avanza País; Carlos Anderson (Podemos Perú), Lady Camones (Alianza para el Progreso - APP), and Luis Arriola (Acción Popular- AP). Political leaders such as Luis Galarreta, Jorge del Castillo, Úrsula Letona, and others, also participated.

(d) **Statements made by the heads of constitutional bodies that went beyond their spheres of competence**: Thus:

**February 8, 2021**: The Ombudsman (Defensor del Pueblo), regardless of his constitutional role of promoting democracy and compliance with the Constitution, called for the President's resignation on international television.

**October 11, 2022**: At the time of filing the constitutional complaint mentioned above, the Chief Public Prosecutor held a press conference in which she accused President Castillo of being part of a criminal organization.

(e) **Disdain for the legislative proposals presented by the Executive Branch**: Thus:

**October 19, 2021**: The Executive Branch submitted Bill 747/2021-PE, to avoid unreasonable use of presidential vacancy and the dissolution of Congress. So far, no action has been taken on the bill submitted.

**As of September 2022**: Congress has only approved 26% of the bills submitted by the Executive.

(f) **Attempts by Congress to restrict the powers of the Executive Branch**: Thus:

**October 21, 2021**: Law 31355 was published, approved at the insistence of Congress, which restricts the power of the Executive Branch to raise optional questions of confidence on constitutional amendments or draft laws.

**December 7, 2021**: Bill 918/2021-CR was presented to amend Article 117 of the Constitution, broadening the grounds for suspending or removing the President from office.

**January 22, 2022**: Due to the interest of the Executive in promoting a referendum for the population to express its will, the Congress of the Republic approved by insistence the Law that reinforces restrictions on calling a referendum in Peru, which was observed by the Executive Branch, because it impaired the right to political participation, violating the democratic regime.

**February 11, 2022**: The Congressional Constitution Committee approved the legal opinion that eliminates the mandatory question of confidence (voto de investidura). By doing so, the Congress itself restricts its capacity for political control for the sole purpose of preventing the Executive Branch from requesting a mandatory vote of confidence.

(g) **Obstruction of presidential powers to direct foreign policy**: Thus:

**July 14, 2022**: Congress did not approve the holding of the OAS General Assembly in Peru. The reason for the refusal was that gender-neutral bathrooms were to be provided at the Assembly. For members of Congress, this meant allowing LGTBIQ+ visitors. Under national and international pressure, the Congress reconsidered its vote and approved the holding of the Assembly.

**July 16, 2022**: Congress decided to dismiss the bill seeking adoption of the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance and the Inter-American Convention against All Forms of Discrimination and Intolerance.

**August 5, 2022**: Congress denied President Castillo permission to leave the country to travel to the presidential transfer of power in Colombia. That was an unprecedented decision.

**October 7, 2022**: Congress again denied President Castillo permission to travel, this time to the Vatican and Brussels.

Although it has been constitutionally established that Congress authorizes the travel of presidents abroad, Article 118, paragraph 11, also states that Peru's foreign policy and international relations are the exclusive competence of the Executive Branch. In this regard, the Congress of the Republic has the right to know where the President is and where he is going when he leaves the national territory and for how long, but it is not constitutionally empowered to exercise a veto (denial) that interferes with the constitutional competence to direct and represent foreign policy as general government policy in international forums.

(h) **Requests for presidential vacancy**: On this point, it is to be noted that:

**November 10, 2021**: A vacancy petition for moral incapacity was filed against President Castillo. This motion was not admitted; it only elicited 46 votes.

**March 8, 2022**. A second request for a declaration of vacancy against President Castillo was voted on in Congress. Unlike the first request, this one was put to a vote (with 76 votes) but (with 50 votes in favor) did not reach the required number of votes.

**October 3, 2022**: Congressman Edward Malaga-Trillo initiated a third vacancy request against President Castillo for alleged misuse of the presidential airplane. As the congressman himself pointed out, the objective is to disqualify the President.

In December 2021, during your visit to Peru, you yourself, Secretary General, went so far as to question the use of vacancy processes, as they affect the country's governability. That same month, the Inter-American Commission issued the communiqué "IACHR reiterates its concern over the lack of objective definition of the concept of presidential vacancy in Peru." Despite this recommendation, the Constitutional Court did not obtain the votes needed to define it in a ruling (Case 0002-2020-CC/TC).

(i) **Abuse of political control**: Up to October 2022, during the little more than 13 months of Castillo's administration, the Congress has carried out numerous political control actions against ministers, questioning 27 times and censuring 5 ministers, which is a record number in the past 20 years.

(j) **Constitutional charges**: On this point, the facts are as follows:

**February 11, 2022**: The Sub-Committee on Constitutional Accusations agreed by a majority to include in its agenda and prioritize the accusation against President Pedro Castillo for treason. The complaint was filed by a group of lawyers, headed by Lourdes Flores, and was subsequently declared admissible by the Sub-Committee on Constitutional Accusations.

**June 10, 2022**: The Sub-Committee on Constitutional Accusations declared that two constitutional accusations against Vice President Dina Boluarte, seeking to disqualify her for 10 years, were admissible. The Comptroller's Office had stated, without giving reasons, that omissions in her sworn declaration of interests constituted constitutional infractions and crimes. In July 2022, Congressman Jorge Montoya considered it essential to expedite the complaint filed.

**As of October 2022**: Additionally, there are 15 constitutional complaints against President Castillo that have not been qualified by the Congress of the Republic, including the one recently filed by the Chief Public Prosecutor.

These processes, situations, and facts amount to a clear effort by segments of the Legislative Branch, the Public Prosecutors' Office, and other constitutional bodies to disrupt democratic institutions in Peru.

The constitutional accusation presented on October 11, 2022 by the Chief Public Prosecutor is politically motivated, as part of a strategy to disrupt the democratic order. I will now establish, Mr. Secretary General, the legal analysis demonstrating why it violates the Constitution and international public law, especially hemispheric law:

* There are two constitutional options, in which the Congress of the Republic intervenes, and which allow for the permanent or temporary removal of the President:
* According to Article 113 of the Constitution, beyond objective situations (death, permanent physical incapacity, resignation, or unauthorized departure from the country), there are two cases in which the President may be permanently removed from office: (i) Vacancy due to permanent moral disability. (ii) Exceptional dismissal due to a constitutional accusation.
* Pursuant to Article 114 of the Constitution, the President of the Republic may also be suspended from office due to: (i) Temporary disability. (ii) Suspension due to submission to exceptional judicial process.
* The mechanism established to achieve the dismissal and suspension is that of a constitutional accusation for a crime committed in the course of duty (*delito de función*) and infringement of the Constitution, provided for in Articles 99 and 100 of the Constitution. Although this procedure applies to high-ranking government officials in office, in the specific case of the President of the Republic a special statute is established, as defined in Article 117 of the Constitution: "The President of the Republic may only be indicted, during his term, for treason; for impeding presidential, parliamentary, regional or municipal elections; for dissolving the Congress, except in the cases provided for in Article 134 of the Constitution, and for impeding its meeting or operation, or those of the National Electoral Jury and other bodies of the electoral system."
* In the complaint filed by the Chief Public Prosecutor, however, it is proposed that the Congress of the Republic should not apply the aforementioned constitutional article 117, based on “diffuse control of conventionality”, by virtue of the United Nations Convention against Corruption (UNCAC). It would also seek not to apply the provisions of Article 298 of the Criminal Code, according to which temporary suspension from office cannot be applied to elective positions (based on the popular vote). This control, developed by the jurisprudence of the Inter-American Court, since the case of Almonacid Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006, has also been recognized in domestic courts by the Constitutional Court, among others, in the judgment of Case 4617-2012- PA/TC.
* Although any public authority can exercise conventionality control (Gelman v. Uruguay, Merits and Reparations, Court Judgment of February 24, 2011), against a constitutional norm (Advisory Opinion of the Inter-American Court OC 4/84, Proposed amendment to the Political Constitution of Costa Rica related to naturalization, requested by Costa Rica, January 19, 1984), taking as a parameter international instruments that go beyond the hemispheric sphere, as they are part of the *corpus iuris* of international human rights law (Advisory Opinion OC 16/99, The right to information on consular assistance in the framework of the guarantees of due process of law, requested by the United Mexican States, October 1, 1999), it is impossible to declare the non-application of Article IU of the Constitution due to conventionality control for the following reasons:
* **Peru has been complying with international anti-corruption standards**. It has respected Article 30, paragraph 2 of the aforementioned UNCAC, according to which "Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention".
* The United Nations representative in Peru of the United Nations Office on Drugs and Crime, as the UNCAC Secretariat, states that the Convention, especially Article 25, does not oblige States to take measures to prevent the obstruction of justice in the investigation of corruption cases, but rather requires States to take legislative or other measures to establish as criminal offenses certain actions that intentionally interfere with a judicial or law enforcement official in relation to the offenses covered by the Convention. He further states that Article 30, cited above, as well as Article 25, are not self-executing norms, which means that **in any potential case, the authorities would be applying national legislation and not the Convention directly**. As such, the representative concludes that an attempt is not being made to apply the Convention, but to discuss an ongoing domestic case, which is highly political.
* The concept of “heteroexecutability” of the UNCAC is essential to refute the proposal of the Chief Public Prosecutor to exercise diffuse control of conventionality with respect to Article 117. A rule is heteroapplicable, following the jurisprudence of the Peruvian Constitutional Court itself, in Resolution 1893- 2009-PA/TC, when it necessarily requires a subsequent act of execution in order to be effective, that is, the effectiveness of this type of rule is dependent upon the performance of subsequent and specific acts of application, which in this specific case is the issuance of domestic laws.
* Thus, although there are general rules on the fight against corruption, the UNCAC recognizes the possibility for each State to establish the manner in which it will do so, always seeking to ensure the effectiveness of the mechanism used. **In Peru, at no time has the fight against corruption been impeded**. Rather, Peruvian law establishes that Presidents of the Republic shall be tried when their term of office ends, in accordance with due parliamentary procedure.
* Therefore, according to international parameters, there is no incompatibility between the Constitution and the Convention against Corruption, and therefore there is no way that Article 117 of the Constitution cannot be applied. Failure to apply it would have the **following consequences**:
* **President Castillo's right to equality would be impaired**. This right, recognized both in the American Convention and in the Constitution, according to which all are equal before the law, requires that we all be treated equally in equal situations. The actions of the Congress of the Republic and the Public Prosecutors' Office vis-à-vis the current President are different from those undertaken in the case of previous rulers. The Congress and the Public Prosecutors’ Office have created new concepts and more new ones continue to be promoted to carry out preliminary investigations, which generates greater political instability for President Castillo.
* Furthermore, trying a person who holds the office of President of the Republic, without the judge being authorized to do so, also implies a violation of his fundamental rights. As recognized by the Inter-American Court of Human Rights (Case of Magistrates of the Constitutional Tribunal vs. Peru, 2001) and the jurisprudence of the Constitutional Court (Case 0030-2010-PHC/TC), the rights of the accused must be respected in parliamentary proceedings, as is currently the case with President Castillo due to the constitutional complaint filed by the Chief Public Prosecutor. Therefore, **effective procedural protection** of President Castillo, established in paragraph 3 of Article 139 of the Constitution, **is clearly being impaired**, both in its material scope (the pronouncements or resolutions with which any type of process is terminated must have a modicum of justice or reasonableness, determined with respect for constitutional rights and values) or formal aspects (guarantees and rules that ensure a standard of fair or due participation during the sequel or development of any type of procedure or process).
* The mere fact of having filed the complaint implies an explicit **arbitrariness on** the part of the Chief Public Prosecutor, in coordination with the members of the opposition in Congress, who have acted outside the constitutional mandate of reasonable public action, ordered by Judgment 0090-2004-AA/TC of the Constitutional Tribunal.

As a corollary of this analysis, it may be noted that an inadequate use of conventionality control in order not to apply Article 117 of the Constitution would imply **an open violation of the democratic principle**, which governs both Peru and the entire region. President Castillo was elected by popular mandate, as required by Article 110 of the Constitution. Such election was carried out with full respect for the will of the people (Article 176 of the Constitution). Therefore, not applying Article 117 would affect the democratic principle, essential in our constitutional model, and recognized in Articles 3 and 43 of the Constitution.

In this regard, the Inter-American Court of Human Rights has specified that "representative democracy is a determining factor in the entire system of which the Convention forms part" (Advisory Opinion OC-6/86, The Expression "Laws" in Article 30 of the American Convention on Human Rights), which constitutes a 'principle' reaffirmed by the American States in the OAS Charter, a fundamental instrument of the inter-American system (Case of Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005).

All of this is embodied in the Inter-American Democratic Charter. For such reasons, "the effective exercise of democracy in the American States constitutes, then, an international legal obligation and those states have sovereignly consented that such exercise has ceased to be solely a matter of their domestic, internal, or exclusive jurisdiction" (Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations, and Costs, Judgment of February 8, 2018).

* Finally, the super-reinforced constitutional protection of the President of the Republic in the exercise of his functions reflects the intention of those writing the constitution to protect the functioning of the public administration through the person who represents the State and directs the general policy of the government, as expressed in paragraphs 2 and 3 of Article 118 of the Constitution. If the President were permanently subject to fiscal, judicial, or congressional investigations, he would neglect his essential functions and the performance of the State could be impaired (Article 44 of the Constitution), **affecting the governability of the State**. As with parliamentary immunity, the idea is to prevent external pressure from impairing the functioning and independence of a branch of government, as defined by the Constitutional Court in Ruling 0156-2012-PHC/TC.

In view of the gravity and urgency of the situation, the Government of Peru feels the urgent need to invoke the application of Articles 17 and 18 of the Inter-American Democratic Charter and request you, Mr. Secretary General, to take urgent steps conducive to dialogue between the various branches of government to resolve the political crisis affecting Peruvian democracy, while at the same time avoiding the occurrence of a new form of coup d'état. Articles 17 and 18 have already been applied on previous occasions, especially in the political crisis that threatened to alter the constitutional and democratic order in Bolivia in 2008, and that finally allowed a national agreement to be reached with the good offices of the OAS and the consequent stabilization of democratic life and the institutional and constitutional order.

I would like to thank you in advance for your willingness to move forward in this endeavor, and it is my pleasure to convey once again renewed assurances of my highest consideration.

José Pedro Castillo Terrones

President of the Republic of Peru

César Rodrigo Landa Arroyo

Minister of Foreign Affairs of the Republic of Peru

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