

REPORT No. 76/10
PETITION 11.845
ADMISSIBILITY
JEREMÍAS OSORIO RIVERA *et al.*
PERU
July 12, 2010

I. SUMMARY

1. On November 20, 1997, the Inter-American Commission on Human Rights (hereinafter also "the Inter-American Commission," "the Commission," or "the IACHR") received a petition presented by Porfirio Osorio Rivera and by the *Asociación Pro Derechos Humanos* (APRODEH) (hereinafter also "the petitioners") on behalf of Jeremías Osorio Rivera (hereinafter also "the alleged victim") which alleged a violation by the Republic of Peru (hereinafter also "Peru," "the State," or "the Peruvian State") of the rights enshrined in Articles 3, 4, 5, 7, and 8 of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention"), in connection with Article 1.1 of that instrument. The petitioners affirmed that Mr. Jeremías Osorio Rivera was detained by members of an Army patrol on April 28, 1991, in the province of Cajatambo, department of Lima, and that his whereabouts had been unknown since that date. They alleged that the complaints presented by the relatives of the alleged victim had proved fruitless and that a trial pursued under military jurisdiction was dismissed in a final ruling in February 1996. They indicated that the investigation was reopened in September 2004 but had not yet concluded. They noted that, although over 19 years has passed since the alleged forced disappearance of Mr. Jeremías Osorio Rivera, the judicial authorities has not clarified the facts, determined his whereabouts, punished those responsible, or provided others measures of reparation to his relatives.

2. The State described the judicial measures taken in connection with the alleged forced disappearance of Jeremías Osorio Rivera. It said that, since the investigation had been reopened in September 2004, the Office of the Public Prosecutor and the Judiciary had been taking a number of measures to ascertain the facts and punish those responsible. The State argued that the fact that several years have passed without a definitive judicial ruling under ordinary jurisdiction was due to the complexity of the case and of the crime under investigation. It indicated that the criminal trial has been held by impartial and independent bodies and required that the petition be shelved, concluding that the grounds for its presentation to the IACHR no longer existed.

3. After examining the positions of the parties in the light of the admissibility requirements set forth in Articles 46 and 47 of the Convention, the Commission concluded that it is competent to hear the complaint concerning the rights enshrined in Articles 3, 4, 5, 7, 8 and 25 of the American Convention, in relation to Articles 1.1 and 2 of that instrument; and in Articles I and III of the Inter-American Convention on Forced Disappearance of Persons. In addition, the Commission decided to notify the parties of this Report on Admissibility, publish it, and include it in its Annual Report.

II. PROCEEDINGS BEFORE THE COMMISSION

4. On November 20, 1997, the petition was received and registered under number 11.845. On April 13, 2009, the petition was transmitted to the State, with the request that the State reply within 90 days, in keeping with the Rules of Procedure of the IACHR then in force.

5. On February 12, 1998, the State presented its reply, which was transmitted to the petitioners on February 25 of that year. The petitioners transmitted additional pleadings on August 21, 1998, March 9, 2010, and May 14, 2010. For its part, the State presented additional communications on July 19, 1999, February 17, 2005, April 5, June 22 and 18, 2010.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

6. By way of context, the petitioners affirmed that, until April 1991, Mr. Jeremías Osorio Rivera, then 27 years of age, resided in the community of Cochas-Paca, province of Cajatambo, department of Lima, which was subjected to repeated incursions by the insurgent organization Shining Path. They said that Mr. Osorio Rivera and other members of the community raised the Peruvian flag every week in resistance and opposition to the acts of violence sponsored by that criminal organization.

7. The petitioners alleged that on April 28, 1991, Mr. Jeremías Osorio Rivera was detained by an Army patrol from the Counter-subversives Base at Cajatambo, whose members accused him of belonging to the Shining Path. They said the soldiers were stationed in the community of Cochas-Paca for two days, during which they subjected the alleged victim to physical mistreatment. They alleged that members of the local community witnessed various lesions on Mr. Osorio Rivera's face, and that, on one occasion, members of the patrol wrapped his head in a hood to hide the wounds. They asserted that on April 30, 1991, the Army patrol left the community, taking Mr. Jeremías Osorio Rivera with them, with his hands tied, on a horse belonging to members of the local community.

8. According to the petitioners, the commander of the Army patrol that set up camp in the community of Cochas-Paca, Lieutenant Juan Carlos Tello Delgado, presented a document, dated May 1, 1991, entitled "certificate of release," allegedly bearing the signature and fingerprint of Mr. Jeremías Osorio Rivera¹. They say this document was not signed by any military or judicial authority, and that, considering the circumstances under which it was produced, it could be inferred that the alleged victim was forced to sign it.

9. The petitioners affirmed that, in May 1991, the brother of the alleged victim, Porfirio Osorio Rivera, presented a complaint to the Provincial Criminal Court of Cajatambo, stating that the whereabouts of Jeremías Osorio Rivera had remained unknown since April 30, 1991. They indicated that the Provincial Criminal Court of Cajatambo opened a criminal investigation into the crimes of abuse of authority and violation of the right to personal freedom against then-Army Lieutenant Juan Carlos Tello Delgado. They said the inquiry was subsequently refused jurisdiction and sent to the military judicial authority, then was shelved on February 7, 1996, through a final ruling of dismissal by the Supreme Council of Military Justice.

10. According to the allegation, on June 14, 2004, Porfirio Osorio Rivera presented a complaint to the Office of the Special Prosecutor on Forced Disappearances, Extrajudicial Executions, and Exhumation of Clandestine Graves (hereinafter "the Office of the Special Prosecutor"), concerning the alleged forced disappearance of his brother Jeremías Osorio. They said that on September 24, 2004, the Office of the Special Prosecutor ordered that a preliminary investigation be opened, and that this was refused jurisdiction and referred to the Provincial Joint Prosecutor's Office of Cajatambo on June 8, 2005.

11. The petitioners affirmed that on October 26, 2005, the Office of the Provincial Prosecutor of Cajatambo lodged a formal accusation that a crime against humanity, forced disappearance, and a violation of the right to personal liberty had been committed against Jeremías Osorio Rivera. They stated that, at the request of Porfirio Osorio Rivera, the hearing of the case was transferred to the Fourth Supraprovincial Criminal Court, which handled the investigations phase and presented the case file to the National Criminal Court. They indicated that on October 30, 2007, the Office of the Second Superior National Criminal Prosecutor lodged an accusation against Juan Carlos Tello Delgado, requesting 20 years in prison and other sanctions. They allege that on April 29, 2008, the National Criminal Court instituted judicial proceedings, declaring that grounds existed to subject the accused to an oral trial.

¹ To their initial petition, received by the IACHR on November 20, 1997, the petitioners attached a copy of that document, which reads as follows:

THIS CERTIFIES THAT MR. OSORIO RIVERA JEREMIAS; WITH *LE* (Spanish acronym of Electoral Book) 15200671, BORN IN THE PROVINCE OF CAJATAMBO – DEPARTMENT OF LIMA, WAS RELEASED ON MAY 1, 1991, AT 7:00 A.M., AND WAS NOT SUBJECTED TO ANY KIND OF PHYSICAL OR PSYCHOLOGICAL MISTREATMENT. THIS CERTIFICATE IS ISSUED FOR ALL PERTINENT PURPOSES.

12. The petitioners affirmed that on December 17, 2008, the National Criminal Court issued an acquittal, alleging reasonable doubt as to the responsibility of Juan Carlos Tello Delgado for the acts of which he was accused. According to the allegation, the Criminal Court found that the disappearance of Jeremías Osorio Rivera had been proven, but found that the defendant, Juan Carlos Tello Delgado, had released him, and that this was demonstrated by the slip of paper, allegedly signed by Mr. Osorio Rivera, entitled "certificate of release." The petitioners said that a handwriting analysis conducted by the Criminology Directorate of the National Police at the beginning of 1991 had indicated that the fingerprint on that paper did not match that of Jeremías Osorio Rivera. They argued that the circumstances of his detention showed that any signature he might have affixed to the paper would have been coerced by the members of the Army patrol, and that it had not been evaluated by the National Criminal Court.

13. The petitioners said that on December 18, 2008, they presented, in their capacity as civil party to the proceedings, an appeal to void the acquittal issued by the National Criminal Court. They said that on February 23, 2009, the appeal was found admissible and placed before the Supreme Court of Justice. According to the information presented, as of May 2010 that Court had not set a date for consideration on the merits of the appeal.

14. The petitioners argued that, despite the reopening of investigations under ordinary jurisdiction in September 2004, the Peruvian Judiciary had not taken all necessary measures to ascertain the facts surrounding the alleged forced disappearance of Jeremías Osorio Rivera and to punish those responsible. They noted that the promulgation of Amnesty Laws 26479 and 26492 encouraged impunity, since their entry into force hindered the opening of investigations and the trial of soldiers allegedly involved.

15. Lastly, the petitioners cited and attached a document signed by a staff member of the Office of the Defender of the People on September 13, 2006, which certifies that Mr. Jeremías Osorio Rivera has been missing, by way of forced disappearance, since he was last seen in the province of Cajatambo, department of Lima, on April 30, 1991².

B. Position of the State

16. The State affirmed that the petition did not meet the requirement set forth in Article 46(1)(b) of the American Convention, since it had been presented to the IACHR more than six months after the notice of the final dismissal issued on February 7, 1996, by the Supreme Council of Military Justice. According to the State, notice of that dismissal had been given to Mr. Porfirio Osorio Rivera on September 25, 1996. The State provided a narrative similar to that of the petitioners concerning the actions of the Office of the Public Prosecutor and Judiciary surrounding the complaint presented on June 14, 2004, by Mr. Porfirio Osorio Rivera to the Office of the Special Prosecutor on Forced Disappearances, Extrajudicial Executions, and Exhumation of Clandestine Graves.

17. It indicated that the acquittal issued on December 17, 2008, by the National Criminal Court had given rise to the presentation of a motion to void, which was transmitted to the Second Provisional Criminal Chamber of the Supreme Court of Justice. It indicated that on December 31, 2009, the hearing of this appeal was transferred to the First Provisional Criminal Chamber, which, as of April 2010, had not set a date for consideration on the merits of the appeal.

18. As for the situation of impunity alleged by the petitioners, the State affirmed that the obligation to investigate supposed violations of fundamental rights "pertains to means, not to results." It argued that the impartial and independent actions of the judicial authorities since the complaint was presented by Mr. Porfirio Osorio Rivera on June 14, 2004, demonstrated that efforts had been made to investigate, prosecute, and punish those responsible for the alleged forced disappearance of Mr.

² Communication of the petitioners, received on March 9, 2010, attached, document entitled "Certificate of Absence by Forced Disappearance," issued on September 13, 2006, by the Office of the Defender of the People in Lima, record number 0193.

Jeremías Osorio Rivera. It added that the passage of many years without punishment of those possibly responsible for the actions is due to the inherent complexity of an investigation of forced disappearance, with the requirements involved in identifying perpetrators of this type of crime.

19. The State affirmed that “the grounds for the petition no longer exist because a judicial investigation is under way which will determine the responsibility of the alleged perpetrator and, therefore, the corresponding punishment.” Accordingly, and in the light of Article 48(1)(b) of the American Convention, the State requested the IACHR to archive the petition.

20. It alleged that the criminal proceedings initiated in September 2004 have not concluded, given that the Supreme Court of Justice has not issued a final resolution. In this sense, it asserted that the petition does not meet the requirement set forth in Article 46(1)(a) of the American Convention. As to the acquittal judgment issued by the National Criminal Court on December 17, 2008 in favor of Juan Carlos Tello Delgado, the State pointed out that the aforesaid decision was in line with the evidence produced during the trial, which it claimed were not sufficient to oppose the right of the defendant to be presumed innocent. Finally, it asserted that the CIDH is not entitled to act as a Court of Appeal and review the alleged breaches in the analysis of law and fact eventually incurred by the domestic tribunals regarding the supposed forced disappearance of Mr. Jeremías Osorio Rivera.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae* of the Commission

21. The petitioners are empowered by Article 44 of the Convention to submit complaints to the Commission. The alleged victim is a natural person who was under the jurisdiction of the Peruvian State on the date of the alleged events. For its part, Peru ratified the American Convention on July 28, 1978. Consequently, the Commission is competent *ratione personae* to hear the petition.

22. The Commission is competent *ratione loci* to hear the petition, since it contains allegations of violations of rights protected by the American Convention that allegedly took place within the territory of a state party to that treaty.

23. In addition, the Commission is competent *ratione temporis* because the obligation to respect and guarantee the rights protected by the American Convention was already in force for the State at the time of the events alleged in the petition.

24. Finally, the Commission is competent *ratione materiae* because, as will be explained further, the petition contains allegations of actions that could constitute violations of human rights protected by the American Convention and by the Inter-American Convention on Forced Disappearance of Persons, ratified by Peru on February 8, 2002.

B. Exhaustion of domestic remedies

25. Article 46(1)(a) of the American Convention provides that, in order for a petition presented to the Inter-American Commission under Article 44 of the Convention to be admitted, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. This requirement was established to allow national authorities the opportunity to consider alleged violations of protected rights and, if applicable, resolve such matters before they might be heard by an international body.

26. The prior exhaustion requirement applies when the national system truly provides available recourse to properly and effectively remedy the alleged violation. In that connection, Article 46(2) stipulates that such requirement shall not apply when the domestic law of the state concerned does not afford due process of law for the protection of the right in question, or if the alleged victim has been

denied access to the remedies under domestic law, or if there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

27. The precedents established by the Commission indicate that whenever an *ex officio* prosecutable crime is committed, the State is obliged to institute and pursue criminal proceedings and that, in such cases, this is the suitable channel to clarify the facts, prosecute the responsible parties, establish appropriate criminal penalties, and make possible other means of reparation. The facts described by the petitioners concerning the alleged forced disappearance of Jeremías Osorio Rivera, under Peruvian law, constitute criminal actions whose investigation and prosecution should be instituted by the State on its own initiative.

28. On the basis of the information presented up to this stage of the proceedings, the Commission notes that various proceedings were instituted in connection with the alleged forced disappearance of Jeremías Osorio Rivera. First, in May 1991, the brother of the alleged victim, Mr. Porfirio Osorio Rivera, presented a complaint to the Provincial Criminal Court of Cajatambo, which declined jurisdiction and referred it to the military forum. The information presented indicates that the criminal trial pursued under military jurisdiction was dismissed in a final decision of the Supreme Council of Military Justice on February 7, 1996.

29. The Commission has expressed its finding that military jurisdiction does not provide a suitable means of investigating, prosecuting, and punishing violations of human rights allegedly committed by members of the armed forces³. In addition, the Inter-American Court has stated that military criminal justice constitutes a suitable forum only for prosecuting members of the military for offenses or omissions which, by their nature, violate juridical rights of a military nature⁴. Thus, for the purposes of the admissibility requirement set forth in Article 46(1)(a) of the American Convention, the Commission concludes that the proceeding instituted under military jurisdiction to investigate the alleged forced disappearance of Jeremías Osorio Rivera did not constitute an effective remedy.

30. As for the investigations reopened under ordinary jurisdiction in September 2004, the information provided by the parties indicates that a motion to nullify presented by the civil party is now before the First Provisional Criminal Chamber of the Supreme Corte of Justice and no date has been set for its hearing of the case.

31. In the merits stage the Commission will examine whether, through the proceedings pursued under ordinary and military jurisdiction, the Peruvian State provided a remedy with due guarantees to the relatives of the alleged victim *vis-à-vis* the obligations set forth in Articles 8 and 25 of the American Convention. However, at the present stage of the proceedings, and without prejudging the merits of the matter, the IACHR finds that the passage of over 19 years since the alleged forced disappearance of Jeremías Osorio Rivera without the determination of his whereabouts, and without a final decision establishing what occurred and punishing all those responsible, is sufficient to conclude that an unwarranted delay has occurred, under the terms of Article 46(2)(c) of the American Convention.

C. Deadline for presentation of the petition

32. Article 46(1)(b) of the Convention provides that, in order for a petition to be declared admissible, it must have been presented within six months from the date on which the interested party was notified of the final decision that exhausted domestic remedies. This rule does not apply when the Commission finds that any of the exceptions to the exhaustion of domestic remedies enshrined in Article

³ IACHR, Report No. 47/08, Petition 864-05, Colombia, *Luis Gonzalo "Richard" Vélez Restrepo and family*, July 24, 2008, para. 74.

⁴ Inter-American Court of Human Rights, *Durand and Ugarte v. Peru Case*. Judgment of August 16, of 2000. Series C, No. 68, para. 117; *Almonacid Arellano et al. v. Chile Case*. Judgment of September 26, 2006. Series C, No. 154, para. 131; and *Palamara Iribarne v. Chile Case*. Judgment of November 22, 2005. Series C, No. 135, para. 124.

46(2) of the Convention applies. In such cases, the Commission must determine whether the petition was presented within a reasonable time, in keeping with Article 32 of its Rules of Procedure.

33. As indicated in paragraph 31 above, the Commission concluded that in this case an unjustified delay in the decision has taken place, in keeping with Article 46(2)(c) of the American Convention. Considering the continuing nature of the alleged forced disappearance of Mr. Jeremías Osorio Rivera, the lack of clarification as to his whereabouts, the lack of determination of responsibility, and the alleged denial of justice under the proceeding that was dismissed, and in the proceeding still in progress, the Commission finds that the petition was presented within a reasonable time.

D. Duplication of proceedings and international *res judicata*

34. Article 46(1)(c) of the Convention provides that the admission of a petition is subject to the requirements that the matter "is not pending in another international proceeding for settlement"; and Article 47(d) of the Convention stipulates that the Commission will not admit a petition that is substantially the same as one previously studied by the Commission or by another international organization. In this case, the parties have not cited the existence of either of those two circumstances, nor are they inferred from the case file.

E. Characterization of the facts alleged

35. For purposes of admissibility, the Commission must decide whether the petition describes events that could constitute a violation, as stipulated in Article 47(b) of the American Convention; and whether the petition is "manifestly groundless" or "out of order" according to section (c) of that Article. The standard for assessing those requirements is different from the one used to rule on the merits of a petition. The Commission must make a *prima facie* assessment as to whether the petition includes the basis for the possible or potential violation of a right guaranteed by the Convention, and not to establish the actual existence of a violation. This determination constitutes a summary examination that does not prejudge or rule upon the merits of the matter.

36. The Commission finds that the context in which Mr. Jeremías Osorio Rivera was allegedly captured by members of the Army, the alleged mistreatment and assaults to which he was subjected, his alleged forced disappearance, the knowledge of the complaints to that effect by military justice authorities for several years, and the alleged situation of impunity surrounding these events could constitute violations of the rights enshrined in Articles 3, 4, 5, 7, 8, and 25 of the American Convention, in relation to the obligations established in Article 1.1 of that instrument and, in virtue of the principle *iura novit curia*, of the rights established in Article I of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Jeremías Osorio Rivera. Also, the Commission finds that these actions could constitute violations of the rights enshrined in Articles 5, 8, and 25 of the American Convention in relation to the obligations established in Article 1.1 of that instrument, to the detriment of the relatives of Jeremías Osorio Rivera.

37. In the merits phase the Commission will examine whether the treatment of forced disappearance under domestic law and the alleged negative effects of the amnesty laws on the investigation of the facts constitute noncompliance with the obligation to take measures under domestic law, set forth in Articles 2 of the American Convention and III of the Inter-American Convention on Forced Disappearance of Persons.

38. Finally, inasmuch as these aspects of the petition do not appear to be obviously out of order or manifestly groundless, the Commission concludes that the petition satisfies the requirements set forth in articles 47(b) and (c) of the American Convention.

V. CONCLUSIONS

39. On the basis of the foregoing findings of fact and of law, and without prejudging the merits of the matter, the Inter-American Commission concludes that this case meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention; therefore

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the petition admissible as regards Articles 3, 4, 5, 7, 8, and 25 of the American Convention, in connection with the obligations established in Articles 1.1 and 2 of that instrument; and with Articles I and III of the Inter-American Convention on Forced Disappearance of Persons.

2. To notify the State and the petitioners of this decision.

3. To initiate proceedings on the merits of the matter.

4. To publish this decision and include it in the Annual Report of the Commission, to be presented to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 12th day of the month of July, 2010. (Signed: Felipe González, President; Paulo Sergio Pinheiro, First Vice-President; Dinah Shelton, Second Vice-President; María Silvia Guillén, José de Jesús Orozco Henríquez, Rodrigo Escobar Gil, and Luz Patricia Mejía Guerrero, members of the Commission).