

**REPORT NO. 109/11**  
PETITION 1194-04  
ADMISSIBILITY  
MARCO ANTONIO ABARCA RUPAY  
PERU  
July 22, 2011

**I. SUMMARY**

1. On November 9, 2004, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission", "the Commission", or "the IACHR") received a petition on behalf of Marco Antonio Abarca Rupay (hereinafter also "the alleged victim"), presented in his own name and by Linda Libertad Pardo Cartagena (hereinafter "the petitioners")<sup>1</sup> which alleged a violation by the Republic of Peru (hereinafter also "Peru", "the State", or "the State of Peru") of rights enshrined in the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention"). The petitioners alleged that Mr. Abarca Rupay was detained in February 1993, tried and sentenced to life imprisonment under decree laws related to the offenses of terrorism and high treason enacted during Alberto Fujimori's government. They maintained that these decrees and resulting criminal trials are contrary to the American Convention. They pointed out that the alleged victim remained incommunicado for several weeks in DINCOTE facilities, and was subjected to torture and inhuman conditions of detention, without being provided with adequate medical attention. According to the petitioners, such circumstances contributed to the deterioration in Mr. Abarca Rupay's health, who eventually died on January 14, 2006.

2. The State maintained that the alleged irregularities in the treason trial which took place throughout the nineties have substantially altered in view of the adoption at the beginning of 2003 of a new legislative framework in matters relating to terrorism. It stressed that this new framework and accompanying criminal trials are in accordance with the rights and guarantees set out in the American Convention and the Political Constitution of Peru. It added that the complaint does not satisfy the requirement set out in Article 46(1)(a) of the Convention and that the facts as related by the petitioners do not appear to represent a violation of the said instrument.

3. After having considered the position of the parties in the light of the requirements for admissibility set out in Articles 46 and 47 of the Convention, the Commission concluded that it was competent to examine the petition, and that the claim was admissible regarding the alleged violation of the rights enshrined in Articles 5, 7, 9, 8 and 25 of the American Convention, in relation to Articles 1.1 and 2 of the same instrument. By virtue of the *iura novit curia* principle, the IACHR declared admissible and will examine the potential violation of the rights set out in Article 4 of the American Convention, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. On the other hand, the IACHR declared inadmissible the alleged violation of the right set out in Article 24 of the Convention. Finally, it decided to notify the parties of the present Admissibility Report, to publish it and include it in its Annual Report to the General Assembly of the OAS.

**II. PROCEEDINGS BEFORE THE COMMISSION**

4. The petition was received on November 9, 2004 and registered under number 1194-04. On December 20, 2004, February 2 and March 16, 2005 and June 12, 2009, the petitioners submitted additional information. The relevant part of this documentation was sent to the State on May 3, 2010, with a period of two months to present a response, in accordance with the IACHR's Rules. On July 7, 2010, the State presented its response and on August 26, 2010, the petitioners sent an additional brief.

5. In the petition received on November 9, 2004, the petitioners indicated that Mr. Marco Antonio Abarca Rupay failed to receive adequate medical attention despite presenting signs of lymphatic

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<sup>1</sup> Mrs. Linda Libertad Pardo Cartagena joined as a co-petitioner on June 12, 2009.

leukemia. In consequence, they requested that the IACHR should grant a precautionary measure in terms of Article 25 of its Rules. On December 21, 2004, the IACHR requested information from the State of Peru about the treatment given to Mr. Abarca Rupay. On January 5, 2005, the State pointed out that since April 2004, Mr. Abarca Rupay "had access to the chemotherapy sessions required to counteract his illness." The State maintained that prior to the request for precautionary measures before the IACHR the alleged victim had not presented suit or any remedy in the domestic jurisdiction.

6. In light of a Report by the Special Institute for Neoplastic Diseases, according to which the alleged victim presented with quite advanced symptoms of leukemia, on January 26 2005, this international instance again addressed the State of Peru and requested that, "on humanitarian grounds, the State consider Mr. Marco Antonio Abarca Rupay's state of health and survival prognosis, in terms of a possible substitution of preventative detention for another means of compliance which would permit him easier access to hospitalized medical treatment and to be joined by his immediate family". On February 4, 2005, the State presented up-to-date information on the medical treatment which was being provided to him. In addition, it stressed that in a session which took place on October 24, 2004, the Commutation and Compassionate Amnesty Commission had unanimously agreed to recommend that the President of the Republic should not grant Mr. Abarca Rupay a pardon on humanitarian grounds, "since within the prison, the inmate could continue to receive treatment, which would not be affected."

### III. POSITIONS OF THE PARTIES

#### *Preliminary considerations*

7. Throughout the processing of the current petition, the State and the applicants described a first trial conducted by military judges during the 1990s and a second trial held by ordinary courts. The former proceedings were held under decree laws applicable to terrorism, enacted during the administration of President Alberto Fujimori. In January 2003, the Peruvian State adopted a new legislative framework that caused the voiding of a number of trials conducted for the crimes of terrorism and high treason. Before setting out the positions of the parties, the IACHR deems it to be appropriate addressing the two legal frameworks within which the incidents described by the parties took place.

#### *Antiterrorist legislation in force from May 1992 to January 2003*

8. Decree Law No. 25475, dealing with different forms of the crime of terrorism, was enacted in May 1992. In August of that year, Decree Law No. 25659 was enacted, criminalizing the offense of high treason and giving the military justice system jurisdiction over the prosecution of that crime. Those decrees, along with decrees Nos. 25708, 25744, 25880, and other complementary provisions, equipped the Peruvian legal system with exceptional procedures for investigating, examining, and prosecuting individuals accused of terrorism or high treason.

9. The decrees that made up what was known as the "antiterrorist legislation" had the stated purpose of reining in the escalation of targeted killings against officers of the judiciary, elected officials, and members of the security forces, as well as of disappearances, bombings, kidnappings and other indiscriminate acts of violence against the civilian population in different regions of Peru, attributed to outlawed insurgent groups.

10. Among other changes, these decrees allowed the holding of suspects incommunicado for specified lengths of time,<sup>2</sup> holding closed hearings, solitary confinement during the first year of prison terms,<sup>3</sup> and summary deadlines for presenting charges and issuing judgments in the case of the crime of high treason.<sup>4</sup> In addition, these decrees denied suspects the assistance of a legal representative prior to

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<sup>2</sup> Decree Law No. 25475, Art. 12(d).

<sup>3</sup> Decree Law No. 25475, Art. 20.

<sup>4</sup> Investigations, prosecutions, and sentencing for high treason were governed by Decree Laws Nos. 25708 and 25744.

their first statement to an agent of the Public Prosecution Service<sup>5</sup> and restricted the attorney's participation in the criminal proceedings, disallowed the recusal of judges or other judicial officers,<sup>6</sup> established concealed identities for judges and prosecutors ("faceless courts"),<sup>7</sup> prevented the summoning, as witnesses, of state agents who had participated in preparing the police arrest report.<sup>8</sup>

11. As for their provisions of material law, these decrees allowed for the possibility of applying more than one criminal offense to actions of a similar or identical nature; they did not differentiate between different levels of *mens rea*;<sup>9</sup> and they only indicated minimum prison terms, without setting maximum penalties.<sup>10</sup>

12. On May 12, 1992, the Executive Branch of Government passed Decree-Law 25499, also called the Repentance Law, which regulated the reduction, exemption, remission or mitigation of imprisonment sentences for persons charged or convicted for the crime of terrorism who provided information leading to the capture of chiefs, heads, leaders or principal members of terrorist organizations.<sup>11</sup> By means of Supreme Decree No. 015-93-JUS of May 8, 1993, the Executive Branch adopted the Regulations for the Repentance Law, which provided, among other measures, the secrecy or change of identity for the repentant persons making the statement.<sup>12</sup> The Repentance Law expired on October 31, 1994.<sup>13</sup>

### ***Antiterrorist legislation in force as of January 2003***

13. On January 3, 2003, a series of provisions contained in the terrorism decree-laws enacted during the Fujimori administration were ruled unconstitutional by the Constitutional Court.<sup>14</sup> That decision ruled Decree Law 25659 unconstitutional and ordered accusations for the crime of high treason as defined therein to be tried as terrorism, as provided for in Decree Law 25475. In addition, it annulled the provisions that prevented the recusal of judges and the subpoena of officers involved in the police arrest report as witnesses and the provisions that allowed civilians to be tried by military courts. At the same time, absolute incommunicado detention and solitary confinement during the first year of prison terms were also ruled unconstitutional.

14. With reference to the crime of terrorism, the Constitutional Court upheld the legality of Article 2 of Decree Law No. 25475, but ruled that it would apply solely to willful acts; it also established interpretative guidelines for the subsumption of a punishable action in the definitions of the offense.

15. With regard to statements, arrest warrants, technical and expert opinions given before faceless judges, the Constitutional Court ruled that they were not automatically tainted and that the regular civilian judges hearing the new charges would have to verify their worth as evidence,

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<sup>5</sup> The right to the assistance of freely chosen defense counsel from the very onset of criminal proceedings was later established by Article 2 of Law No. 26447.

<sup>6</sup> Decree Law No. 25475, Art. 13(h).

<sup>7</sup> With the enactment of Law 26671 on October 12, 1996, faceless judges and prosecutors were abolished.

<sup>8</sup> Decree Law No. 25744, Art. 2.

<sup>9</sup> Decree Law No. 25475, Art. 2.

<sup>10</sup> Decree Law No. 25475, Art. 3.

<sup>11</sup> Decree Law No. 25499, Articles 1.II.a and 1.III.

<sup>12</sup> Supreme Decree No. 015-93-JUS, Articles 8.a and 36.

<sup>13</sup> The Repentance Law was repealed by Law 26345 of August 30, 1994.

<sup>14</sup> Resolution of the Constitutional Court of January 3, 2003, File No. 010-2002-AI/TC, unconstitutionality suit filed by Marcelino Tineo Silva and other citizens.

conscientiously and in conjunction with other substantiating elements as set down in regular criminal procedural law.<sup>15</sup>

16. Between January and February 2003, the Executive Branch<sup>16</sup> issued Legislative Decrees Nos. 921, 922, 923, 924, 925, 926, and 927,<sup>17</sup> with the aim of bringing the country's laws into line with the Constitutional Court's judgment of January 3, 2003. In general terms, those decrees ordered the voiding of all judgments and trials conducted before the military courts or faceless judicial officers, together with the referral of all such proceedings to the National Terrorism Chamber, further named National Criminal Chamber, which was created within the Supreme Court of Justice and charged with distributing the new trials to the Specialized Criminal Courts. The new antiterrorist legislation also provided for partially open hearings during oral proceedings<sup>18</sup> and prohibited the imposition of harsher sentences than those that had been handed down in the voided trials.<sup>19</sup>

17. With reference to steps taken during criminal investigations and examination proceedings before faceless civilian or military judicial officers, Article 8 of Legislative Decree No. 922 upheld the validity of examination proceeding commencement deeds, police statements given in the presence of a representative of the Public Prosecution Service, technical reports, search records, statements given to the National Police, and statements made by persons who applied to the benefits of Repentance Law ("*arrepentidos*"). Finally, Article 3 of that Legislative Decree ruled that the voiding of proceedings held by faceless judges would not trigger automatic release from prison, which could take place only if the Public Prosecution Service declined to press charges or if the judiciary refused to commence examination proceedings.

#### **A. The Petitioner's position**

18. The petitioners maintained that on February 24, 1993, Mr. Abarca Rupay was arrested in the city of Lima, handcuffed, blindfolded, forced into the trunk of a vehicle, and transferred to DINCOTE facilities, where he remained incommunicado for 30 days. They indicated that he was tortured in order to admit being a member of the insurgent group Shining Path, being plunged into a water tank and subjected to hanging and beatings. They add that whilst with the DINCOTE, two policemen hurled the alleged victim from a first floor cell onto the public street, causing serious injuries and a loss of consciousness. They indicate that after being transferred to a hospital in the city of Lima, this incident was recorded as attempted suicide.

19. The petitioners alleged that Marco Antonio Abarca Rupay was temporarily detained in the Miguel Castro Castro Maximum Security Prison, thereafter being transferred to the Yanamayo-Puno Penitentiary, secluded from the alleged victim's close family at an altitude of almost 4,000 meters above sea level. They pointed out that in the Yanamayo Penitentiary, the alleged victim started to show signs of osteoporosis and osteomilitis, and despite suffering from intense pain, was only treated in the prison's infirmary, where he received tranquilizers and painkillers. They stressed that the lack of adequate medical treatment and extreme detention conditions at the Yanamayo Penitentiary contributed to the deterioration in his health.

20. The petitioners indicated that towards the end of 2003, the alleged victim was transferred to the Miguel Castro Castro Penitentiary, where he began to present with migraines, nausea, loss of

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<sup>15</sup> Resolution of the Constitutional Court of January 3, 2003, File No. 010-2002-AI/TC, unconstitutionality suit filed by Marcelino Tineo Silva and other citizens, grounds paragraph No. 159.

<sup>16</sup> On January 8, 2003, the Congress of the Republic of Peru enacted Law 27913, whereby it delegated the power to legislate on terrorism-related matters to the Executive Branch.

<sup>17</sup> Legislative Decree 927 regulated the criminal law enforcement in matters of terrorism. It was derogated by the Law 29423 of October 14, 2009, which rendered inapplicable the requests for reduction of prison sentence, partial liberty and conditional parole by persons convicted of terrorism.

<sup>18</sup> Legislative Decree No. 922, Art. 12(8).

<sup>19</sup> Legislative Decree No. 922, fifth complementary provision.

hearing and digestive problems. They stressed that after a blood sample indicated chronic anemia, a doctor he trusted mentioned that it might be a case of leukemia, and therefore required to undergo new tests. They added that on March 29, 2004, Mr. Abarca Rupay was taken to the Dos de Mayo hospital in Lima, where he was diagnosed with acute lymphatic leukemia.

21. The petitioners annexed a medical report from the Institute of Neoplastic Diseases dated June 10, 2004, which certified that Mr. Abarca Rupay was suffering from acute lymphatic leukemia of the B cells with an "approximately 20 to 25% possible chance of survival". They added that after intensive oncological treatment, on November 18, 2005, the alleged victim obtained a discharge certificate for being in a terminal condition. They emphasized that despite showing signs of fairly advanced cancer and being exposed to a high risk of contracting infections, Mr. Abarca Rupay failed to obtain a humanitarian reprieve so that he could be freed to undergo treatment and could be in closer proximity to his immediate family. They indicate that only in November 2005, when he was already in a terminal condition, did his prison regime change from deprivation of liberty to a reporting requirement, until he eventually died on January 14, 2006.

22. The petitioners pointed out that despite being in State custody, the costs of the laboratory tests, blood transfusions, diet and medicines were borne by the alleged victim's immediate family. In this respect, they include a note sent to the INPE director stamped as being received on June 24, 2004, in which Mrs. Linda Libertad Pardo complained about this situation and requested that INPE intervene so that her partner, Mr. Marco Antonio Abarca Rupay, could obtain a pardon on humanitarian grounds. In accordance with information received, on October 26, 2004, the Commutation and Compassionate Amnesty Commission recommended to the President of the Republic that the right to a pardon on humanitarian grounds should not be granted, considering that the deprivation of liberty would not affect the continuity of his treatment.

23. According to the information presented, after being arrested on February 24, 1993, Mr. Abarca Rupay was tried for the crime of high treason and sentenced to life imprisonment by courts of the military jurisdiction. The said information indicates that at the start of 2003, the military trial was declared null and void and that a new trial was commenced against him for the crime of breach of the peace - terrorism, which did not come to a close due to the death of Mr. Abarca Rupay on January 14, 2006.

24. The petitioners allege that the State of Peru is responsible for the violation of the rights enshrined in Articles 1.1, 2, 5, 7, 8, 9, and 24 of the American Convention. Lastly, they maintained that the conditions of imprisonment imposed upon Mr. Abarca Rupay and the alleged lack of adequate medical treatment contributed to the deterioration of his health and subsequent death.

## **B. Position of the State**

25. The State argued that the immediate family of the alleged victim has not either sought compensation or formulated an administrative or criminal complaint against the staff of INPE for the alleged omission in affording Mr. Abarca Rupay timely medical treatment. It stressed that the petitioners have not presented written evidence "in which they requested at national headquarters medical treatment different to that which Mr. Abarca Rupay received in a timely and constant way." From the foregoing, it concluded that the aims of the petition relating to an alleged omission by INPE staff in affording adequate and timely medical treatment to Mr. Abarca Rupay do not fulfill the requirement set out in Article 46(1)(a) of the Convention.

26. The State detailed Mr. Abarca Rupay's medical history from December 2002, indicating that he received adequate attention, and that from the time he was diagnosed with leukemia, the prison authorities facilitated his transfer and treatment in the Special Institute for Neoplastic Diseases (INEN). They added that "Mr. Abarca Rupay's death occurred at his home as a result of the serious illness from which he was suffering, and in spite of the medical attention provided, the patient proved to have a reduced chance of recovery, as stated in the Medical Report dated July 7, 2004."

27. The State pointed out that thanks to measures taken by the Miguel Castro Castro Penitentiary administration, the INEN “approved the application of a social tariff in favor of the inmate consisting of a 30% reduction in the costs of hospital treatment and supplementary tests, from the month of December 2004, and that since that date, the alleged victim's family have assumed the costs of treatment without relying on or requesting aid from the INEN social assistance unit.”

28. The State indicated that when the complaint was lodged with the IACHR in November of 2004, the criminal trial against the alleged victim for the crime of terrorism was still pending a final decision. In this regard, it maintained that the petition was filed with the Commission without Mr. Abarca Rupay having exhausted domestic remedies with respect to the alleged breaches of due process. Also with regard to that aspect of the petition, the State argued that “the subject matter of the claim was removed as a consequence of Mr. Abarca Rupay's death, considering that Article 78.1 of the Criminal Code states that death of the accused brings criminal proceedings to a close.”

29. The State argued that when the IACHR notified it of the current petition on May 3, 2010, the “irregularities occurring in the nineties during the trials of civilians for the crime of high treason in the military courts had already been satisfactorily corrected...” It stressed that the legislative decrees on terrorism enacted between January and February 2003 are in conformity with the 1993 Political Constitution and the American Convention. Based on its own interpretations of judgments of the Inter-American Court of Human Rights, it stressed that this court had not questioned the validity of the anti-terrorist legislation currently in force in Peru.

30. Finally, the State pointed out that the petition does not present colorable claims on the rights protected in the American Convention and requested that it be declared inadmissible by virtue of Articles 47(b) and (c) of the said instrument.

#### **IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY**

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

31. The petitioners are entitled, under Article 44 of the Convention, to file complaints. The alleged victim is an individual who was under the jurisdiction of the Peruvian State on the date of the alleged incidents. In addition, Peru ratified the American Convention on July 28, 1978. Consequently, the Commission has competence *ratione personae* to examine the petition.

32. The Commission has competence *ratione loci* to hear the petition, in that it describes violations of rights protected by the American Convention that allegedly took place within the territory of a state party thereto.

33. In addition, the Commission has competence *ratione temporis*, since the general obligation of respecting and ensuring the rights protected by the American Convention was already in force for the State on the date on which the incidents described in the petition allegedly occurred.

34. Finally, the Commission is competent *ratione materiae*, as the petition alleges the violation of the American Convention and sets out facts which, if proved, may constitute a violation of the American Convention to Prevent and Punish Torture, whose instrument of ratification was deposited by Peru on March 28, 1991.

##### **B. Exhaustion of remedies under domestic law**

35. Article 46(1)(a) of the American Convention provides that, for admission of a petition lodged with the Inter-American Commission in accordance with Article 44 of the Convention, remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. This requirement is aimed at enabling national authorities to be apprised of

the alleged violation of a protected right and, if appropriate, to have the opportunity to settle the matter before it is heard by an international body.

36. Article 46(2) of the Convention provides that the requirement of the prior exhaustion of domestic remedies does not apply when:

- a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

37. The present petition refers to acts of torture, inhuman detention conditions and other violations of Marco Antonio Abarca Rupay's personal integrity allegedly committed by DINCOTE agents in the months subsequent to this initial detention in February 1993. According to what is alleged, these events had been reported to the judicial authorities of the military courts and ordinary jurisdiction conducting the trials against the alleged victim.

38. In previous reports the Commission has established 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 remedy to clarify the facts, prosecute the responsible parties, establish appropriate criminal penalties, and make possible other means of reparation. The facts described by the petitioner concerning acts of torture and other alleged violations to his personal integrity constitute criminal conduct under domestic law whose investigation and prosecution should be instituted by the judicial authorities on their own initiative, and therefore these are the proceedings which constitute an adequate remedy in the present petition.<sup>20</sup>

39. The State of Peru did not submit information on the investigations instituted in respect to the alleged acts of torture and inhuman detention conditions to which the alleged victim had been subjected. Therefore it is alleged that he was not accorded access to an effective remedy to rectify the alleged violations to his personal integrity.

40. In addition to the alleged acts of torture and inhuman detention conditions, the petition outlines that Mr. Abarca Rupay did not receive adequate medical treatment, which contributed to the deterioration in his health and subsequent death. The State maintained that this aspect of the petition does not satisfy the requirement of the prior exhaustion of domestic remedies, since the alleged victim's immediate family failed to claim compensation or present a criminal complaint or administrative claim against the INPE staff.

41. In accordance with the information received by the IACHR, since his incarceration in the Yanamayo Penitentiary, the alleged victim showed a number of illnesses. This information also indicates that in June 2004, his immediate family complained to the headquarters of the INPE about an alleged failure of the administration at the Miguel Castro Castro maximum-security penitentiary to provide him with adequate medical treatment and to offset the costs of his ongoing leukemia treatment. In the same way, this information shows that after lodging a request for a pardon on humanitarian grounds with the Commutation and Compassionate Amnesty Commission, the alleged victim reported that he was suffering from fairly advanced lymphatic leukemia, with a prognosis of less than a 25% chance of recovery. Regarding these claims, the Commission observes that the remedies pursued on behalf of Mr. Abarca Rupay had the purpose of obtaining a better treatment and life conditions, including when his illness was in a terminal stage. Therefore, the applicant filled the available administrative remedies that entitled the state to adopt an adequate response. The judicial remedies described by the State are related

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<sup>20</sup> IACHR, Report Nº 76/10, Petition 11.845, Peru, *Jeremías Osorio Rivera et. al.*, July 12, 2010, para. 27. IACHR, Report Nº 77/10, Petition 12.154, Peru, *Luis Alberto Vega Paquillo*, July 12, 2010, para. 37. IACHR, Report Nº 78/10, Petitions 621-03 and 1378-04, Peru, *Ramón Campos Esparza and Roberto Antonio Olórtegui Trinidad* respectively, July 12, 2010, para. 58.

to juridical interests not linked to the amelioration of Mr. Abarca Rupay's treatment and life's condition. In this sense, the Commission concludes that the allegations referred in this paragraph satisfy the requirement set forth in Article 46(1)(a) of the American Convention.

42. Lastly, the current petition sets out the violation of other provisions of the American Convention derived from the detention and criminal trials undertaken against the alleged victim. The State maintained that the complaint was lodged before this international instance in November 2004, while a final decision was still pending before the Peruvian courts. In this sense, it pointed out that the petition failed to satisfy the requirement of prior exhaustion of domestic remedies. Regarding these submissions, the IACHR reiterates its doctrine according to which the analysis on compliance with the requirements set out in Articles 46 and 47 of the American Convention must be made in the light of the situation at the time when a ruling on the admissibility or otherwise of the petition takes place.<sup>21</sup>

43. The available information shows that after the nullification of the criminal trial for high treason before the military authorities, Mr. Abarca Rupay was subjected to a second trial for the offense of terrorism, which was not completed due to his death on January 14, 2006, and the resulting discharge of the criminal trial. In this sense, the IACHR considers the requirement set out in Article 46(1)(a) of the Convention satisfied, with respect to the alleged violation of human rights derived from the criminal trials undertaken against Mr. Abarca Rupay.

### **C. Deadline for presentation of the petition**

44. 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 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.

45. As regards the allegations on torture and inhuman detention conditions to the prejudice of Mr. Marco Antonio Abarca Rupay referred to in paragraph 37 above, faced with a lack of information provided by the State on the initiation of investigations up to the date of adopting the current report, the IACHR concludes that the petition was presented within a reasonable time in terms of Article 32 of its Rules.

46. In relation to the alleged omission by the prison authorities to provide prompt and adequate medical treatment to the alleged victim, as well as to the alleged breaches of rights enshrined in the Convention deriving from the criminal trials conducted against him, the current petition was received prior to Mr. Abarca Rupay's death and resulting discharge of the criminal trial undertaken against him. In this sense, the IACHR considers that the claims referred to in paragraphs 40 and 43 above satisfy the requirement set out in Article 46(1)(b) of the American Convention.

### **D. Duplication of procedures and international *res judicata***

47. Article 46(1)(c) of the Convention provides that the admissibility of a petition must meet the requirement that the subject of the petition "is not pending in another international proceeding for settlement"; and Article 47(d) of the Convention stipulates that the Commission shall consider inadmissible any petition or communication if it is substantially the same as one previously studied by the Commission or by another international organization. The parties have not put forward the existence of any of these two circumstances, nor can they be inferred from the case file.

### **E. Characterization of the alleged facts**

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<sup>21</sup> IACHR, Report No. 108/10, Petition 744-98 et. al., *Orestes Auberto Urriola Gonzáles et. al.* (Peru), August 26, 2010, para. 54, Report No. 2/08, Petition 506-05, *José Rodríguez Dañín* (Bolivia), March 6, 2008, para. 56 and Report No. 20/05, Petition 714-00, *Rafael Correa Díaz* (Peru), February 25, 2005, para. 32.

48. For the purposes of admissibility, the Commission must decide whether or not the petition states facts that tend to establish a violation of rights as stipulated in Article 47(b) of the American Convention and whether or not the petition is “manifestly groundless” or “obviously out of order,” according to subparagraph c) of the same article. The rule governing evaluation of these particulars is different from the one required to decide on the merits of a complaint. The Commission must conduct a *prima facie* evaluation to examine whether the complaint substantiates the apparent or potential violation of a right guaranteed by the Convention and not to establish the existence of a violation. This review is a summary analysis that does not involve any prejudgment or advanced opinion on the merits of the case.

49. The Commission considers that the circumstances surrounding the detention of the alleged victim on February 24, 1993, the alleged acts of torture by DINCOTE agents, and the prison conditions described by the petitioners could constitute colorable claims on the violation of the rights enshrined in Articles 5 and 7 of the American Convention, in conjunction with Articles 1.1 and 2 of the same instrument; and by virtue of the principle *iura novit curia*, of the rights set forth in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, all to the prejudice of Marco Antonio Abarca Rupay. In addition, the IACHR considers that the impact of the events referred to in this paragraph, his allegedly being kept incommunicado in DINCOTE facilities and the criminal punishment regime to which Mr. Abarca Rupay was subjected during his isolation at the Yanamayo Penitentiary constitutes a colorable claim on the violation of the right enshrined in Article 5.1 of the Convention to the prejudice of his immediate family.

50. Should it be proved that Mr. Abarca Rupay did not receive prompt and adequate medical treatment which contributed to the deterioration in his health and subsequent death, this may constitute a failure, to his prejudice, of the obligation to guarantee the rights set out in Articles 4 and 5 of the American Convention.

51. In relation to the allegations about the criminal trials undertaken against the alleged victim, as well as submissions of incompatibility of the legislative framework applied with the American Convention, the IACHR considers that, should they be proved, they could constitute colorable claims on the violation of the rights enshrined in Articles 9, 8, and 25 in relation to Articles 1.1 and 2 of that Treat, all to the prejudice of Marco Antonio Abarca Rupay.

52. The IACHR makes it clear that the petitioners have not alleged the violation of the rights set forth in Articles 4 and 25 of the American Convention, and therefore their inclusion into the current report is made in application of the *iura novit curia* principle.

53. In relation to the alleged violation of the right enshrined in 24 of the American Convention, the IACHR considers that the petitioners have not submitted sufficient elements to indicate a potential breach of such provisions.

54. Finally, since it is not evident that the petitioners’ claim is groundless or out of order, the Commission concludes that it satisfies the requirements laid down in Articles 47(b) and (c) of the American Convention.

## **V. CONCLUSIONS**

55. Based on the considerations of fact and law set forth above, and without prejudice to the merits of the case, the Inter-American Commission concludes that the petition satisfies the requirements for admissibility set out in Articles 46 and 47 of the American Convention, and therefore

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,**

#### **DECIDES:**

1. To declare the petition admissible with regard to Articles 4, 5, 7, 9, 8 and 25 of the American Convention, in connection with the obligations established in Articles 1(1) and 2 of the same

instrument, and with regard to Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

2. To declare inadmissible the alleged violation of the right enshrined in Article 24 of the American Convention.

3. To notify this decision to the State and to the petitioners.

4. To make this report public, and publish it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 22<sup>nd</sup> day of July 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Paulo Sérgio Pinheiro, Felipe González, and María Silvia Guillén, Commission Members.