

REPORT No. 113/11
PETITION 12.125
WILBERT APAZA VARGAS
ADMISSIBILITY
PERU
July 22, 2011

I. SUMMARY

1. On November 11, 1998, the Inter-American Commission on Human Rights (hereinafter also "the Inter-American Commission", "the Commission", or "the IACHR") received a petition filed by Wilbert Apaza Vargas (hereinafter, "the petitioner" or the "alleged victim"), on his own behalf. The petition alleges that the Republic of Peru (hereinafter, "the State" or "the State of Peru") violated human rights enshrined in the American Convention on Human Rights (hereinafter, "the American Convention" or "the Convention"). The petitioner claimed he was arbitrarily arrested in March 1995 and coerced to sign domicile seizure records and self-incriminating police statements. He stated that he was found guilty of the crime of terrorism in a trial heard by judges whose identities were not revealed and that he was not accorded his rights of due process.

2. The State reported on rulings made during the criminal prosecution of Mr. Wilbert Apaza Vargas, indicating that the alleged victim regained his freedom in October 2002 after receiving a presidential pardon. It asserted that Mr. Apaza's statements given to the police and during the pre-trial criminal proceedings were made in the presence of a representative of the Prosecutor's Office, in compliance with due process. As for the requirements of admissibility, the State maintained that the petition was filed following expiration of the six-month time frame stipulated in Article 46(1)(b) of the Convention.

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 is competent to examine the petition, and that the claim is admissible regarding the alleged violation of the rights enshrined in Articles 5, 7, 9, 10, 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 of the same instrument, and regarding Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. The Commission 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 Commission received the petition on November 11, 1998, and recorded it under number 12.125. The Commission forwarded the petition to the State on March 29, 1999, and granted the State ninety days to present its response, pursuant to IACHR Rules in force at that time.

5. On September 21, 1999, the State filed its response, which was forwarded to the petitioner on November 5, 1999. On December 11, 1999, the IACHR requested that the State file the latest information and copies of court proceedings from the criminal prosecutions of Mr. Apaza Vargas. On January 13, 2010, the State sent the requested information, which was forwarded to the petitioner on February 22, 2010.

6. Written communications from the petitioner were received on December 3, 2007, January, 23, 2008, November 19, 2009, February 24 and May 13, 2010, January 19, May 5, and June 17, 2011, soliciting information on the status of his petition and requesting that the IACHR adopt a prompt decision, without providing additional argumentation.

III. POSITIONS OF THE PARTIES

Preliminary Question

7. In the proceedings of this complaint the petitioner and the State reported on the criminal trial of the alleged victim, which was prosecuted pursuant to legislation on terrorism that was adopted in May 1992 and in force until January 2003. Prior to describing the positions of the parties the IACHR deems it necessary to refer to this legislative framework, within which the facts of the case were presented.

Legislative framework in which the criminal proceedings against the alleged victim were held

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 treason against the fatherland and giving the military justice system competence 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 new exceptional procedures for investigating, examining, and prosecuting individuals accused of terrorism or treason against the fatherland.

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,¹ holding closed hearings, solitary confinement during the first year of prison terms,² and summary deadlines for presenting charges and issuing judgments in the case of the crime of treason against the fatherland.³ In addition, these decrees denied suspects the assistance of a legal representative prior to their first statement to an agent of the Public Prosecution Service⁴ and restricted the attorney’s participation in the criminal proceedings, disallowed the recusal of judges or other judicial officers,⁵ established concealed identities for judges and prosecutors (“faceless courts”),⁶ prevented the summoning, as witnesses, of state agents who had participated in preparing the police arrest report.⁷

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*,⁸ and they only indicated minimum prison terms, without setting maximum penalties.⁹

12. On May 12, 1992, the Executive Branch 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

¹ Decree Law No. 25475, Art. 12(d).

² Decree Law No. 25475, Art. 20.

³ Investigations, prosecutions, and sentencing for treason against the fatherland were governed by Decree Laws Nos. 25708 and 25744.

⁴ 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.

⁵ Decree Law No. 25475, Art. 13.h.

⁶ With the enactment of Law 26671 on October 12, 1996, faceless judges and prosecutors were abolished.

⁷ Decree Law No. 25744, Art. 2.

⁸ Decree Law No. 25475, Art. 2.

⁹ Decree Law No. 25475, Art. 3.

the capture of chiefs, heads, leaders or principal members of terrorist organizations.¹⁰ 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.¹¹ The Repentance Law expired on October 31, 1994.¹²

A. Position of the petitioner

13. The petitioner claimed that in March 1995 he was unjustly arrested by agents of the National Police, along with his brothers, his sister-in-law, and a nephew who at the time was two years old. He stated that as a result of blackmail and threats against his relatives, he signed police affidavits acknowledging that he was a member of the insurgent group *Sendero Luminoso* [Shining Path]. He states that these affidavits were used in courts made up of “faceless judges” that sentenced him to twenty years in prison for the crime of terrorism. He asserted that in his first judicial declaration he retracted the content of the police affidavits and manifested his complaint that he had been subjected to physical and psychological torture, a complaint that was not given consideration by court authorities.

14. The petitioner maintained that at the time of his arrest in March 1995, there was no representative of the Prosecutor’s Office present, adding that police agents attempted to bribe him in exchange for his release. He stated that during the preliminary phase of the investigation he did not have access to an attorney of his own choosing.

15. The petitioner did not present detailed information about court rulings made while he was under criminal prosecution. According to the information contained in the petition file, during a pre-trial declaration of April 18, 1995, Mr. Apaza Vargas complained he had signed an affidavit of domicile seizure and police statements as a result of coercion, threats, and beatings by agents of the National Police. That information also shows that on April 22, 1996, the Special Criminal Chamber of the Superior Court of Justice in Lima sentenced Mr. Apaza Vargas to twenty years of imprisonment and other accessory penalties. That sentence was upheld by a writ of execution issued by the Supreme Court of Justice on October 7, 1997. According to the information that was filed, both criminal courts were made up of judges whose identities were not revealed.

B. Position of the State

16. The State asserted that on 22 March 1995, agents of the *Dirección Nacional Contra el Terrorismo* (National Anti-Terrorism Directorate of the National Police of Peru – DINCOTE), in the presence of a Special Military Prosecutor, conducted a raid of a house in the area known as Mariano Melgar, in Villa María del Triunfo, in the province and department of Lima, acting on information that the property served as lodgings for members of the Shining Path. The State indicated that police agents found blank voting booklets with various photographs of male individuals and “incriminatory evidence of the crime of terrorism”, so Mr. Apaza Vargas and three relatives were taken to DINCOTE facilities. It asserted that on April 6, 1995, a criminal case was opened against the alleged victim for the crimes of collaboration and affiliation with a terrorist organization, pursuant to Articles 4 and 5 of Decree Law No. 25475.

17. The State drew attention to the fact that all remedies under domestic law were exhausted upon issuance of the supreme writ of execution on October 7, 1997, while this petition was filed with the IACHR on November 11, 1998. Therefore, it requested that the petition be declared inadmissible due to noncompliance with the requirement stipulated in Article 46(1)(b) of the Convention.

18. According to the information presented by the State, on October 11, 2002, Supreme Resolution No. 220-2002-JUS was enacted by decree, whereby the President of the Republic granted a

¹⁰ Decree Law No. 25499, Articles 1.II.a and 1.III.

¹¹ Supreme Decree No. 015-93-JUS, Articles 8.a and 36.

¹² The Repentance Law was repealed by Law 26345 of August 30, 1994.

pardon to Mr. Apaza Vargas, pursuant to Law No. 26655 of August 16, 1996¹³. The information submitted indicates that the alleged victim was released from the Miguel Castro Castro Maximum Security Prison and that on November 5, 2002, the Tenth Criminal Court of Lima ordered his rehabilitation and the annulment of his criminal record.

19. The State asserted that the facts narrated in the petition do not characterize a violation of rights protected under the Convention, and requested that the IACHR declare the complaint inadmissible, pursuant to Article 47(b) of that same instrument.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

20. Article 44 of the American Convention entitles the petitioner to lodge complaints. The alleged victim is an individual who was under the jurisdiction of the Peruvian State at the time of the reported incidents. As for Peru, it ratified the American Convention on July 28, 1978. As a result, the Commission has jurisdiction *ratione personae* to examine the petition.

21. The Commission has jurisdiction *ratione loci* to hear the petition, because it alleges violations of rights protected by the American Convention occurring in the territory of a State party to this treaty.

22. Likewise, the Commission has jurisdiction *ratione temporis* because the obligation to respect and guarantee the rights protected by the American Convention was already in force for the State at time that the incidents alleged in the petition had occurred.

23. Finally, the Commission has jurisdiction *ratione materiae*, because, as explained in the section of characterization below, the petition alleges potential violations of rights protected by the American Convention.

¹³ This law created an “*Ad Hoc* Commission for the exceptional purpose of evaluating, clarifying, and proposing to the President of the Republic, the granting of pardons and the right to grace on behalf of those found guilty of the crime of terrorism or treason against the nation based on insufficient evidence that allows for the reasonable presumption that they were not in any way linked to terrorist elements, activities, or organizations”. See Law 26655 of 16 August 1996, Article 1, available on the website of the Congress of the Republic of Peru: www.congreso.gob.pe/ntley/Imagenes/Leyes/26655.pdf.

B. Exhaustion of remedies under domestic law

24. 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.

25. 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.

26. This petition alleges that provisions of the American Convention were violated as a result of the arrest and criminal prosecution of Mr. Apaza Vargas. According to the reports by the parties, the process that culminated in the imprisonment of the alleged victim was given a final ruling by the Supreme Court of Justice on October 7, 1997. Information in the file indicates that subsequent to that ruling the alleged victim requested that a presidential pardon be granted, pursuant to Law 26655. This information also indicates that on October 11, 2002, the alleged victim received the requested presidential pardon and was released. On November 5, 2002, the Tenth Criminal Court of Lima ordered his rehabilitation and the annulment of his prior criminal record. Considering that this ruling by the Tenth Criminal Court of Lima substantially changed the alleged victim's legal situation, the IACHR considers that the requirement stipulated in Article 46(1)(a) of the Convention was satisfied on November 5, 2002.

27. In addition to the foregoing, this petition claims that the alleged victim was subjected to blackmail and physical and psychological torture by agents of DINCOTE. The information contained in the file indicates that on April 18, 1995, Mr. Apaza Vargas denounced these facts to the Judge who oversaw the criminal investigation.

28. 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.¹⁴

29. The State of Peru did not submit information on investigations in respect to the acts of torture and other inhumane treatment to which the alleged victim was supposedly subjected. Therefore he was not accorded access to an effective remedy to rectify the alleged violations to his personal integrity.

30. Based on the foregoing considerations, the IACHR considers that the requirement stipulated in Article 46(1)(a) of the Convention has been satisfied.

C. Deadline for presentation of the petition

¹⁴ IACHR, Report N° 76/10, Petition 11.845, Peru, *Jeremías Osorio Rivera et. al.*, July 12, 2010, para. 27. IACHR, Report N° 77/10, Petition 12.154, Peru, *Luis Alberto Vega Paquillo*, July 12, 2010, para. 37. IACHR, Report N° 78/10, Petitions 621-03 and 1378-04, Peru, *Ramón Campos Esparza and Roberto Antonio Olórtegui Trinidad* respectively, July 12, 2010, para. 58.

31. 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.

32. According to the reports by the parties, the last action taken by domestic jurisdiction authorities regarding the legal situation of Mr. Wilbert Apaza Vargas occurred on November 5, 2002, the date on which the Tenth Criminal Court of Lima ordered his rehabilitation and the annulment of his prior criminal record. Given that the ruling was issued subsequent to the filing of the petition with this international body, the IACHR considers that the requirement stipulated in Article 46(1)(b) of the American Convention has been satisfied as it relates to the alleged violations of Convention rights resulting from the arrest and criminal prosecution of Mr. Apaza Vargas.

33. As for the allegations of torture and coercion by agents of the National Police mentioned in Paragraph 27, above, in the absence of information from the State of Peru about investigations initiated as of the date this report was received, the IACHR concludes that the petition was presented within a reasonable time period under the terms of Article 32 of its Regulation.

D. Duplication of procedures and international *res judicata*

34. Article 46(1)(c) of the Convention provides that the admissibility of petitions is subject to the requirement that the subject matter “is not pending in another international proceeding for settlement” and Article 47(d) of the Convention provides that the Commission shall consider the petition inadmissible if the petition or communication is substantially the same as one previously studied by the Commission or by another international organization. In the petition under consideration in the present report, the parties have not raised the existence of either of those two circumstances, nor are they evident from the case file.

E. Characterization of the alleged incidents

35. 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.

36. In view of the elements of fact presented by the parties, the IACHR considers that the circumstances that led to the arrest of the alleged victim, the alleged acts of aggression by police agents during his statements, and allegations regarding his criminal prosecution could characterize violation of the rights enshrined in Articles 5, 7, 9, 10, 8, and 25 of the American Convention, pursuant to Articles 1(1) and 2 of that same instrument, as well as Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. Furthermore, the IACHR considers that the effects of the facts mentioned in this paragraph and the regime to which Mr. Apaza Vargas was submitted during his imprisonment in the Miguel Castro Castro Prison could characterize a violation of the right enshrined in Article 5(1) of the Convention to the prejudice of his relatives.

37. The IACHR clarifies that the petitioner did not allege the violation of specific provisions of the American Convention. Therefore, the Articles cited in the foregoing paragraphs are included in this Report in view of the *iura novit curia* principle.

38. Finally, since it is not evident that the petitioner's 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

39. 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 5, 7, 9, 10, 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 notify this decision to the State and to the petitioners.

3. 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 22nd 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.