

Report No. 108/11
PETITION 422-03
ADMISSIBILITY
CORY CLODOLIA TENICELA TELLO *et al.*
PERU
July 22, 2011

I. SUMMARY

1. On June 10, 2003, the Inter-American Commission on Human Rights (hereinafter also "the Inter-American Commission," "the Commission" or "the IACHR") received a petition lodged by Amadea Tello de Tenicela and Norma Juana Tenicela Tello (hereinafter also "the petitioners") on behalf of Cory Clodolia Tenicela Tello (hereinafter also "the alleged victim"), claiming that the Republic of Peru (hereinafter also "Peru," "the State" or "the Peruvian State") violated the rights enshrined in Articles 4, 5, 7, 8 and 13 of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention"). The petitioners stated that on October 2, 1992 Cory Clodolia Tenicela was detained in Huancayo, Department of Junín, by members of the Peruvian Army and that her fate and whereabouts remain unknown since then. They stated that only in July 2003 did the Office of the Provincial Prosecutor of Huancayo open an investigation into the disappearance of the alleged victim and that the judicial authorities did not take the necessary measures to determine her whereabouts, investigate the events and punish the perpetrators.

2. The State indicated that Ms. Tenicela Tello's alleged forced disappearance is under investigation in the context of a criminal case involving dozens of victims and defendants, which required a series of evidentiary proceedings. It maintained that the complexity of the facts resulted in a longer investigatory stage. It argued that criminal proceedings consistent with due process is under way. It asserted that as the domestic courts have not rendered a final judgment, the petition should be declared inadmissible pursuant to Articles 46(1)(a) and 48(1)(b) of the American Convention.

3. After examining the positions of the parties in the light of the requirements of admissibility set forth in Articles 46 and 47 of the Convention, the Commission concluded that it is competent to consider the petition regarding Articles 4, 5, 7 and 8 of the American Convention, in conjunction with Articles 1(1) and 2 of that instrument. Furthermore, in application of the principle of *iura novit curia*, the IACHR declared admissible Articles 3 and 25 of the American Convention and Articles I and III of the Inter-American Convention on Forced Disappearance of Persons. The Commission also concluded that the alleged violation of Article 13 of the Convention does not meet the admissibility requirement set forth in Article 47(b) of said treaty. Lastly, it decided to notify the parties of the instant Admissibility Report, to publish it and to include it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BY THE COMMISSION

4. On June 10, 2003, the initial petition was received and docketed as number 422-03. On April 21, 2008, the petitioners submitted an additional brief. On April 20, 2010, these documents were forwarded to the State with a period of two months to submit its response, in keeping with the IACHR's Rules of Procedure.

5. On July 6, 2010, the State requested an extension to submit its reply, indicating that the Office of the Public Prosecutor in charge of Ministry of Defense matters was preparing a report to be presented the IACHR. On July 30, 2010, the Commission informed that according to Article 30(3) of its Rules of Procedure, it could not grant an extension. On August 10, 2010, the State submitted its reply, which was forwarded to the petitioners on January 10, 2011.

III. POSITIONS OF THE PARTIES

A. The Petitioners

6. The petitioners stated that on October 2, 1992, Cory Clodolia Tenicela Tello, a merchant and a student at the *Universidad Nacional del Centro del Perú* (UNCP), was detained by Peruvian Army personnel in the City of Huancayo, Department of Junín, and that her fate and whereabouts is unknown since that date. They indicated that on October 14, 1992, Amadea Tello de Tenicela, the alleged victim's mother, filed a complaint with the Office of the Provincial Prosecutor of Junín and that on October 26, 1992 she lodged a *habeas corpus* petition with Huancayo's examining magistrate.

7. The petitioners indicated that on November 6, 1992 Ms. Tello de Tenicela requested information to the Thirty-First Infantry Division of Huancayo on the whereabouts of her daughter. They attached an official letter dated November 6, 1992 in which the head of the aforementioned military division, Brigadier General Carlos Torres Rodríguez, asked Peruvian National Police Headquarters for information about the alleged victim's possible detention.

8. The petitioners stated to have requested the mediation of International Committee of the Red Cross in order to request information from the Armed Forces on the whereabouts of Ms. Tenicela Tello. They indicated that this attempt, the *habeas corpus* petition and the complaints filed with judicial officials and the members of the Armed Forces were unsuccessful and that the Peruvian authorities have not taken due action to investigate the disappearance of the alleged victim. The petitioners attached reports published in Huancayo newspapers in October 1992 denouncing the disappearance and presumed execution of various UNCP students.

9. According to public information, in the second half of the 1980s and the early 1990s, UNCP faced the confrontation between security forces and irregular armed groups of the Communist Party of Peru - Shining Path and the Túpac Amaru Revolutionary Movement (MRTA). Also according to public information, the growing control exercised by the aforesaid insurgent groups over university facilities and the assassination of employees and students opposed to their interference led to military incursions and to the establishment of an Army base on the UNCP campus in 1992. In this context, several complaints were filed alleging the forced disappearance and extrajudicial execution of dozens of UNCP students and employees, supposedly by members of the Peruvian Army and the National Police.¹

10. The petitioners provided a copy of a ruling of the Office of the Fourth Provincial Prosecutor of Huancayo dated July 22, 2003 by which Cory Clodolia Tenicela Tello and 33 other victims were included in an investigation of the criminal offense of forced disappearance conducted by that office. The petitioners did not submit information regarding subsequent judicial activity, but they pointed out that the alleged victim's fate and whereabouts remain unknown and that the State has not clarified the circumstances of her disappearance. Finally, they alleged that Peru is responsible for the violation of the rights enshrined in Articles 4, 5, 7, 8 and 13 of the American Convention.

B. The State

11. The State indicated that, although Peruvian society experienced a period of political violence in the 1980s and 1990s, today "its authorities are working to investigate, try and punish the perpetrators of human rights violations, and its judicial bodies are evidence of legitimacy." It stressed that the IACHR notified it of the petition in April 2010, "when the domestic situation is totally different from the one described by the petitioners."

12. Like the petitioners, the State indicated that on July 22, 2003 the Office of the Fourth Provincial Prosecutor of Huancayo broadened an investigation on forced disappearance to include Cory

¹ Final report of the Truth and Reconciliation Commission, Vol. V, 2.21 *La Universidad Nacional del Centro*, pp 683-688 and 694. Available at www.cverdad.org.pe/ffinal/index.php.

Clodolia Tenicela Tello and 33 other victims. It reported that on March 5, 2010 the Office of the Third Criminal Prosecutor of Huancayo filed a formal accusation against Danilo Nicolás Gonzales Campana, Boris Adolfo Rojas Esquivel *et al.* with the crime of offense against personal liberty/kidnapping. It stated that on May 26, 2010 the First Criminal Court of Huancayo ordered a total of seventy-six proceedings for gathering evidence, without specifying their nature.

13. The State indicated that on May 28, 2010 “the First Criminal Court of Huancayo declared the proceedings to be COMPLEX owing, *inter alia*, to the subject matter, to the quantity of means of evidence to be used or collected, to the concurrence of events, and to the multiplicity of suspects and victims.” It indicated that on July 3, 2010 a summons had been published to the members of the family of Cory Tenicela Tello “advising them that a criminal charge has been brought for crimes against humanity, including murder, and asking them to appear and declare before the court.”

14. The State indicated that criminal proceedings for the alleged forced disappearance of Cory Tenicela were being conducted in accordance with due process for the purpose of shedding light on the events and trying and punishing the perpetrators. It argued that the complexity of the events justified the fact that the investigatory phase was ongoing. It pointed out that a final judgment on the alleged disappearance of Ms. Tenicela Tello have not been issued and asked the IACHR to declare the petition inadmissible under Articles 46(1)(a) and 48(1)(b) of the Convention.

15. Finally, the State indicated that the petitioners had not supported their claim of a violation under Article 13 of the Convention.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

16. The petitioners are empowered by Article 44 of the Convention to submit complaints to the Commission. The alleged victim is an individual 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.

17. 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.

18. 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.

19. Finally, the Commission is competent *ratione materiae* because the petition alleges the violation of the American Convention and as will be explained further, it describes facts that could constitute violations of rights protected by the Inter-American Convention on Forced Disappearance of Persons (ICFDP), which instrument of ratification was deposited by Peru on February 13, 2002.

B. Exhaustion of domestic remedies

20. 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.

21. 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.

22. In the instant case, the petitioners indicated that they lodged a *habeas corpus* petition with Huancayo's examining magistrate days after Ms. Tenicela Tello's alleged disappearance but that the judicial authorities did not carry out an effective investigation. In cases of alleged forced disappearance the Commission has determined that a *habeas corpus* petition satisfies the Admissibility requirement set forth in Article 46(1)(a) of the Convention.

23. The State maintained that the petition is inadmissible because the domestic court has not issued a final ruling in the criminal investigation expanded on July 22, 2003 to include the alleged victim and other 33 persons. It should be noted that the petition filed with the Commission alleges both forced disappearance and denial of justice as violations of rights protected by the American Convention. Therefore, what is at issue before this international body is not only the ineffectiveness of the *habeas corpus* petition but also the investigation currently underway in the First Criminal Court of Huancayo, for which reason this remedy must be analyzed in the present stage of the complaint. Eight years after the alleged victim was included among the injured parties, the case is still in the investigatory phase, and although it involves a large number of victims and suspects, the Commission has not received specific allegation or concrete information that would justify the delay in rendering a final judgment.

24. In the merits phase, the Commission will determine whether the Peruvian State has provided the family of the alleged victim access to a remedy with due guarantees in accordance with its obligations under Articles 8 and 25 of the American Convention. However, at the present stage of the proceedings, and without prejudging the merits of the case, the IACHR considers that, in view of the passage of more than 18 years since the alleged disappearance of Cory Clodolia Tenicela Tello without a determination of her fate and whereabouts or a final judgment establishing the truth and punishing the perpetrators, the information in the petition is sufficient to conclude that there has been unwarranted delay under Article 46(2)(c) of the American Convention.

C. Deadline for presentation of the petition

25. 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.

26. As indicated in paragraph 24 above, the Commission has concluded that there has been unwarranted delay in rendering a judgment as provided in Article 46(2)(c) of the American Convention. Given the ongoing nature of the Ms. Tenicela Tello's alleged forced disappearance, the failure to establish her fate and whereabouts, the failure to move beyond the investigatory phase in the criminal proceedings, the absence of determination of responsibilities and the alleged denial of justice, the Commission considers that the petition was presented within a reasonable time.

D. Duplication of proceedings and international *res judicata*

27. 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

28. 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 prejudice or rule upon the merits of the matter.

29. The Commission considers that Ms. Tenicela Tello's alleged forced disappearance and the situation of impunity surrounding the events could constitute violations of the rights of Cory Clodolia Tenicela Tello under 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, as well as her right pursuant to Article I of the Inter-American Convention on Forced Disappearance of Persons. Furthermore, the Commission considers that these events could constitute a violation of the rights of her family under Articles 5, 8 and 25 of the American Convention, in connection with the obligations established in Articles 1(1) and 2 of that instrument.

30. In the merits phase the Commission will examine whether the treatment of forced disappearance under the Peruvian law constitutes 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.

31. The Commission stresses that the petitioners have not alleged a violation of the rights enshrined in Articles 3 and 25 of the American Convention and Articles I and III of the Inter-American Convention on Forced Disappearance of Persons. These provisions were included in the instant report in application of the principle of *iura novit curia*.

32. As regards the alleged violation of Article 13 of the American Convention, the petitioners have not presented any specific argument or information that allow the IACHR to evaluate the possible infringement of said provision. This element of the petition is therefore inadmissible under Article 47(b) of said instrument.

33. Finally, inasmuch as the allegations raised in the complaint 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

34. 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 declare inadmissible the alleged violation of the right enshrined under Article 13 of the Convention, in view of Article 47(b) of the same treaty.
3. To notify the State and the petitioners of this decision.
4. To initiate proceedings on the merits of the matter.
5. 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 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.