

OEA/Ser.L/V/II.166
Doc. 191
30 November 2017
Original: Spanish

REPORT No. 160/17
PETITION 531-07
REPORT ON ADMISSIBILITY

FRANKLIN NIMA CURAY
PERU

Approved by the Commission at its session No. 2110 held on November, 30 2017.
166th Special Period of Sessions.

Cite as: IACHR, Report No. 160/17, Petition 531-07. Admissibility. Franklin Nima Curay. Peru.
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 FRANKLIN NIMA CURAY
 PERU
 NOVEMBER 30, 2017

I. INFORMATION ABOUT THE PETITION

Petitioner:	Zozimo M. Gonzalez Esteban
Alleged victim:	Franklin Nima Curay
State denounced:	Peru
Rights invoked:	No alleged articles are specified

II. PROCEDURE BEFORE THE IACHR²

Date on which the petition was received:	April 30, 2007
Date on which the petition was transmitted to the State:	October 8, 2010
Date of the State's first response:	December 23, 2010
Additional observations from the petitioning party:	May 6, 2011
Additional observations from the State:	February 3 and August 8, 2011
Date on which the petitioner was notified of the possible archiving of the petition:	October 12, 2016
Date on which the petitioner responded to the notification regarding the possible archiving of the petition:	October 27, 2016

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention on Human Rights (deposit of ratification instrument: July 28, 1978) ³

¹ In accordance with Article 17.2.a of the IACHR Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, a Peruvian national, did not participate in the discussion or the decision on this matter.

² The observations presented by each party were duly transmitted to the opposing party.

³ Hereinafter "the Convention" or "the American Convention."

IV. ANALYSIS OF DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i> :	No
Rights declared admissible	Articles 7 (Personal Liberty), 8 (Fair Trial), 9 (Freedom from Ex Post Facto Laws), 24 (Equal Protection) and 25 (Judicial Protection) of the American Convention, in relation to its Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes; March 23, 2007
Timeliness of the petition:	Yes; April 30, 2007

V. ALLEGED FACTS

1. The petitioner indicates that on November 17, 1999 Franklin Nima Curay (or “the alleged victim”) was sentenced to life imprisonment on the charges of sexual assault and indecent assault on a boy aged five years when the offense was committed. The Supreme Court of Justice confirmed this resolution on January 14, 2000. He asserts that then he requested a conversion of the sentence and that the on-Duty Criminal Chamber of the Tenth Criminal Court of the Superior Court of Justice of Callao converted the life sentence to twenty-five year’s imprisonment, in view of Law 27,472, which repealed the Legislative Decree in force until then. He submits that in 2006, after another change in the legislation, life imprisonment was reestablished for the offense at issue as a result of the enforcement of Law 28,704, which also forbade the grant of some prison benefits⁴.

2. The petitioner claims that on August 23, 2006 the alleged victim requested the prison benefit of day parole but the Fourth Judge of the Specialized Criminal Court of the Superior Court of Justice of Callao found it out of order in view of Law 28,704, which was in force at the time of the request and forbade the award of such benefit to prisoners charged with the offense of sexual assault on a minor. The Specialized Court claimed that the criminally enforceable procedural rules applicable are those in force when the request is filed and not those effective when the offense is committed. On January 16, 2007, the petitioner filed an appeal against the “lack-of-merit” resolution, and on March 2, 2007, the on-Duty Criminal Chamber of Callao ratified the impugned decision, claiming that procedural rules are governed by the *tempus regit actum* principle, under which the applicable criminal law is the law in force when an act takes place, that is to say, when the request of the prison benefit is lodged. Lastly, he filed an appeal for nullification against this decision and on March 10, 2007, the Second Superior Criminal Chamber found the appeal out of order, which was notified on March 23 of the same year.

3. The petitioner explains that when the alleged victim was sentenced, in 1999, in the Peruvian Criminal Code there were no restrictions concerning the applicability of prison benefits. He claims that the applicable law should be the law that was effective when the offense was committed, instead of Law 28,704 of April 6, 2006, which was in force when the benefit of day parole was requested. Moreover, he asserts that when the benefit was requested, the alleged victim had already served a third of his prison term, which the legislation in force then required for day parole eligibility. He submits that under the principle of freedom from *ex post facto* laws the applicable law is the one imposing the lighter punishment on the guilty person. He claims that the rulings imposed by the courts that reject his request involve a discriminatory attitude on the part of the judicial authorities, because day parole and sentence reduction have been awarded in cases

⁴ The IACHR notes that, at the time of the commission of the crime, the Code of Criminal Enforcement Act N. 654, Article 48 - Semi-liberty, was in force and provided that: “Semi-liberty allows the sentenced person to leave the Penitentiary Establishment for purposes of work or education, when he has fulfilled the third part of the sentence and if there is no pending process with arrest warrant. [...] This benefit is not applicable to the offenses established in Articles 296, 297, 301, 302 and 319 to 323 of the Penal Code”(crimes related to drug trafficking).

similar to his, like in a case of sexual assault on a fourteen year old girl that was settled by the Superior Court of Justice of Lima in 2004. Based on the foregoing, the petitioner asserts that the acts by the State violate the right of due process, lawfulness and the principle of freedom from *ex post facto* laws.

4. The State claims in its first observations that the petition is inadmissible since the facts were examined by the domestic courts, and the Commission is not entitled to act as a fourth instance. In a subsequent communication, the State requests that its first reply be not considered in light of its lack of “precision,” and submits that the petition is inadmissible, as the domestic remedies have not been yet exhausted and the acts described are not a violation of the rights enshrined in the Convention.

5. As to the exhaustion of remedies, it indicates that the alleged victim could have filed the remedy of *habeas corpus*, which has not been lodged. As to the purported violation of due process, the State asserts that it has respected the right to appeal, that throughout the whole proceedings the alleged victim had a lawyer and that it lawfully undertook the criminal proceedings.

6. As to the facts, the State submits that in this particular case the judge applied the most favorable law by converting the alleged victim’s sentence and by reducing his life imprisonment to twenty-five year’s imprisonment. It claims that the subsequent restriction to access prison benefits does not constitute a violation of rights, since rules concerning the access to benefits like day parole must be immediately enforced because of their procedural nature. Likewise, it points out that the Peruvian Constitutional Court has addressed the nature of penitentiary benefits in reiterated jurisprudence, arguing that:

[...] the penitentiary benefits can be considered subjective rights of the inmates, certainly conditioned, because their application does not proceed automatically by the mere fact that the person who requests it is deprived of his liberty, but is subject to requirements established by law, and even if they were complied with by the convicted person, they are not a decisive factor for granting them, since their granting will be left to the judicial evaluation of whether the convicted person is fit to be reinstated in society, given that the justification of the prison sentences is to protect society against crime [STC 212002-HCITC, fundamento 11].

7. In this regard, it asserts that the differentiated treatment in the grant of prison benefits may be based on the seriousness of the offense which the alleged victim was charged with. From this viewpoint, considering the seriousness of the legal rights affected by the commission of a criminal offense, a lawmaker is entitled to undertake a differentiated assessment of the criminal punishment that such behavior might deserve and a differentiated treatment concerning the grant of prison benefits. In this train of thoughts, it claims that it is logical, proportional, reasonable and non-discriminatory that Law 28,704 has excluded the award of prison benefits to prisoners charged with certain offenses.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

8. The petitioner submits that on August 23, 2006 he filed a request of the prison benefit of day parole and that on January 16, 2007 it was ruled out of order. Subsequently, he filed an appeal but, on March 2, 2007, the on-Duty Criminal Chamber of Callao confirmed the impugned judgment. Finally, he lodged an appeal for nullification but on March 10, 2007 the Second Superior Criminal Chamber declared it inadmissible, its decision being notified on March 23, 2007. For its part, the State asserts that the domestic remedies have not been exhausted, as the alleged victim has not filed the remedy of *habeas corpus*.

9. Regarding the State’s observation, the Commission has formerly established that the requirement concerning the exhaustion of domestic remedies does not mean that alleged victims are obliged

to exhaust every available remedy.⁵ In this case, the petitioner requested the benefit of day parole and, as it was rejected, he lodged several remedies, which were examined and dismissed by the courts. As the State heard the claims contained in this petition and the remedy filed was appropriate, the Commission believes that the alleged victim exhausted the domestic remedies when the sentence of March 10, 2007, notified on March 23, 2007, was issued, pursuant to Articles 46.1.a of the Convention. Given that the petition was lodged on April 30, 2007, the petition meets the requirement set forth in Article 46.1.b of the Convention.

VII. COLORABLE CLAIM

10. The facts described in this petition concern the alleged legal prohibition enforced after a penalty was imposed, to grant prison benefits to persons sentenced for certain offenses, and said law's purported incompatibility with the right of personal liberty. Since the facts alleged here are not manifestly groundless and must be analyzed in the merits stage, the Commission believes that the claims are admissible as regards Articles 7 (Personal Liberty), 8 (Fair Trial), 24 (Equal Protection)⁶ and 25 (Judicial Protection) of the Convention in accordance with its Articles 1.1 and 2. Likewise, based on the information available, the Commission believes that Law 28,704 also must be analyzed in the light of Article 9 (Freedom from Ex Post Facto Laws) of the Convention⁷.

11. Lastly, as to the State's observation concerning a fourth instance, the Commission notes that by declaring this petition admissible, it does not seek to replace the domestic authorities' competence. In fact, the Commission will analyze in the merits stage whether the domestic judicial proceedings conformed to the rights of due process and judicial protection and ensured the alleged victims' right of access to justice under the terms of the American Convention.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 7, 8, 9, 24 and 25 of the American Convention, in relation to its Articles 1.1 and 2;

2. To notify the parties of this decision;

3. To continue with the analysis on the merits; and

4. To publish this decision and include 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 30th day of the month of November, 2017. (Signed): Margarette May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño (dissenting opinion), Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners.

⁵ See IACHR, Report No. 26/08, Petition 270-02, Admissibility, César Alberto Mendoza *et al.*, Argentina, March 14, 2008, par. 72.

⁶ See *mutatis mutandi* IACHR, Report No. 8/15, Petition 1413-04 *et al.*, Admissibility, Gloria Beatriz Jorge Lopez *et al.*, Peru, January 29, 2015, par. 341.

⁷ See, *mutatis mutandi*, IACHR, Report No 8/15, Petition 1413-04 *et al.*, Admissibility, Gloria Beatriz Jorge López *et al.*, Peru, January 29, 2015, par. 341. In this report the IACHR noted that: "Based on the available information, the Commission considers that application of Legislative Decree 895, as well as Law 29423, could characterize a violation of the principle of non-retroactivity of the less favorable law established in Article 9 of the Convention. Moreover, in view of the fact that these laws established more severe criminal and prison systems for persons tried and convicted for crimes of terrorism, the Commission will examine in the merits stage if this legal framework violated the right to equality before the law established in Article 24 of the Convention."