

REPORT No. 3/12
PETITION 12.224
ADMISSIBILITY
SANTIAGO ANTEZANA CUETO *ET. AL.*
PERU
January 27, 2012

I. SUMMARY-

1. On November 12, 1998, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or “the IACHR”) received a petition lodged by the National Committee of Family Members of Detainees, Disappeared Persons, and Refugees – CONFADER-Peru and by the Human Rights Commission – COMISEDH (hereinafter also “the petitioners”)¹ on behalf of Santiago Antezana Cueto (hereinafter also “the alleged victim”), alleging violation by the Republic of Peru (hereinafter also “Peru”, “the State” or “the Peruvian State”) of rights established in Articles 1, 4, 5, 7, 8 and 25 of the American Convention on Human Rights (hereinafter also “the American Convention” or “the Convention”). The petitioners asserted that Santiago Antezana was detained by soldiers on May 7, 1984 in the district of Anta, province of Acobamba, department of Huancavelica. They stated that he was taken to a Counter-Insurgency Base in the area, where he was allegedly tortured, and that no information had been available as to his whereabouts since May 14, 1984. They pointed out that, even though 27 years had elapsed since the disappearance of Santiago Antezana and despite complaints filed by family members with both the *Ministerio Público* (Public Prosecutor’s Office) and the Judiciary, criminal investigations were still at the preliminary stage.

2. In its initial communications, the State argued that the petition should be declared inadmissible by virtue of Article 46(1)(b) of the American Convention. Subsequently, it maintained that the complaint lodged with the IACHR had not been moved forward by the petitioners for several years and should therefore be archived pursuant to Article 48(1)(b) of the Convention. In writs submitted since May 2011, Peru has provided general information regarding activities carried out by the Office of the Attorney General relating to the exhumation and identification of human remains and investigation of cases of forced disappearance. However, it has not presented specific observations regarding the criminal investigation currently under way into the alleged forced disappearance of Santiago Antezana Cueto.

3. After examining the position of the parties in light of the admissibility requirements set forth in Articles 46 and 47 of the Convention, the Commission concluded that it is competent to hear the complaints regarding Articles 3, 4, 5, 7, 8, and 25 of the American Convention, in conjunction with the general obligations set forth in Articles 1(1) and 2 of the same instrument; Articles I and III of the Inter-American Convention on Forced Disappearance of Persons; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. In addition, the Commission decided to notify the Parties of this Admissibility Report, publish it, and include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

4. The initial petition was received on November 12, 1998 and registered under number 12.224. On November 3, 1999, it was forwarded to the State, with a request that it submit a reply within 90 days, pursuant to the Rules of Procedure of the IACHR in effect at the time.

5. On March 14, 2000, the State presented its reply, which was forwarded to the petitioners on March 28 of the same year. The petitioners submitted its reply on April 26 and May 5, 2000. On December 6, 2004, the Commission requested updated information to the petitioners and the State. The petitioners presented the information requested on February 7, 2005 and, the State submitted the information on May 4, 2005. Thereafter, the petition remained in process before the Commission.

¹ COMISEDH established itself as co-petitioner through a communication received by the IACHR on April 26, 2000.

6. On April 19, 2011, the IACHR requested updated information to the petitioners and stressed that if it did not receive a reply it could consider archiving the case, pursuant to Article 48(1)(b) of the Convention. Subsequent to that date, the State presented new submissions on May 13, August 4, and November 29, 2011. For their part, the petitioners filed additional briefs on July 5 and September 15, 2011.

III. POSITIONS OF THE PARTIES

A. The petitioners

7. The petitioners averred that between 1974 and 1984 the alleged victim lived in Lima, during which time he sporadically visited his family in the hamlet of Manyacc, district of Anta, province of Acobamba, department of Huancavelica. They said that in April 1984 the alleged victim went to the aforementioned district to attend the funeral of his father, Abraham Antezana Espeza. They stated that on May 7, 1984, four members of a peasant patrol pertaining to the local self-defense committee arrested Santiago Antezana Cueto's uncle, Mr. Máximo Antezana Espeza, accusing him of having collaborated with the irregular armed insurgent group Shining Path. When he went to defend his uncle, the alleged victim was also detained, and both were handed over to Army soldiers and taken to the Acobamba Counter-Insurgency Base, at that time under the command of Army Captain José Antonio Esquivel Mora.

8. The petitioners submitted as background information that on May 14, 1984 another uncle of the alleged victim, Mr. Emiliano Antezana Espeza, was arrested by soldiers and taken to the above-mentioned military base. They did not provide further information and did not name Mr. Emiliano Antezana Espeza as a victim. The petitioners maintained that on that same day Mr. Máximo Antezana Espeza was released and complained that both he and his nephew, Santiago Antezana Cueto, had been tortured and obliged to dig graves. They added that while making inquiries with the inhabitants of the Manyacc hamlet, the alleged victims' relatives discovered that another seven persons had disappeared after being taken to the Acobamba Counter-Insurgency Base. They added that on September 11, 1993, Mr. Máximo Antezana Espeza was murdered in the province of Chanchamayo, department of Junín, allegedly in reprisal for having denounced the arbitrary arrests, torture and disappearances in the Manyacc hamlet.

9. According to the petitioners' allegation, on July 23, 1984, the relatives of Santiago Antezana Cueto denounced his disappearance before the Third Directorate of Complaints and Denunciations of the Office of the Attorney General (*Fiscalía de la Nación*). On September 13, 1984, another criminal accusation was filed with the Attorney General. The petitioners stated that on March 15, 1985, the family members of the alleged victim requested the Attorney General to issue a criminal indictment against those responsible for what happened in the Acobamba Counter-Insurgency Base.

10. The petitioners submitted copies of the complaints lodged by the common-law spouse of the alleged victim, Ms. Nelly Calderón Navarro, and other family members before the Human Rights Commission of the Congress in August 1985, the Human Rights Office of the Office of the Public Prosecutor in March and May 1985, in March 1991 and on June 20, 2001. They claimed that, despite those complaints, the judicial authorities furnished no information regarding the investigations possibly being conducted. They argued that the Peruvian State is responsible for violating the rights established in Articles 1, 4, 5, 7, 8, and 25 of the American Convention.

11. Through a communication received on July 5, 2011, the petitioners reported that on November 25, 2005, the Human Rights Commission (COMISEDH) filed a criminal accusation with the Special Criminal Investigation Attorney's Office in Acobamba. They stated that on July 31, 2009, the Prosecution Service charged Army officer José Antonio Esquivel Mora, alias "scorpion", for the crime of forced disappearance. They said that the only injured party referred to in the internal proceedings was Santiago Antezana Cueto, with no mention of the other persons alleged to have been victims of forced disappearance in the Acobamba Counter-Insurgency Base from 1983 to 1984. They added that "despite the evidence and the fact that the first complaints mention other victims, the Peruvian State disregarded

them, excluding them from the proceedings and acting as if the only disappearance in Manyacc were that of Santiago Antezana.”

12. The petitioners submitted copies of resolutions of the judicial authorities involved in the criminal proceedings concerning the disappearance of Santiago Antezana and excerpts from the Final Report of the Truth and Reconciliation Commission, which records that from 1983 to 1984 several inhabitants of the Manyacc hamlet in the District of Anta were detained by members of the peasant patrols (*rondas campesinas*) and disappeared after having been taken to the Cajatambo Counter-Insurgency Base, in the department of Huancavelica. They pointed out that although the disappearance of Santiago Antezana Cueto allegedly took place in May 1984, the corresponding investigations were still at the preliminary stage.

B. The State

13. In its initial briefs the State maintained that the alleged forced disappearance of Santiago Antezana Cueto was denounced by his relatives in May and June 1984, but that only on May 27, 1992 did they go to the offices of the Special Prosecutor for Ombudsman and Human Rights Matters (FEDPDH as in its Spanish acronym). Peru stressed that the petition was transmitted by the Inter-American Commission on November 3, 1999, “after more than 15 years had elapsed since the alleged facts and more than 7 years since the petitioner had approached the FEDPDH”. In that respect, it argued that there has been “more than enough time for the petitioners to have invoked the exceptions referred to in Article 46(2) of the American Convention on Human Rights and that, since they had not done so, the time allowed for presentation of the petition, under Article 46(1)(b) of the American Convention, had expired.” The State averred that the family members of the alleged victim did not file *habeas corpus* writs, even though Law N° 23506 (Law on Habeas Corpus and *Amparo*) was in force at the time of the alleged facts. It added that “since no timely use had been made of a habeas corpus writ, more than 15 years ago, the petition was manifestly inadmissible in light of Article 47(c) of the American Convention.”

14. In a communication received by the IACHR on May 13, 2011, the State asserted that the petitioners had not submitted new communications for several years and requested that the IACHR archive the complaint pursuant to Article 48(1)(b) of the Convention. In subsequent communications, it sent general information about efforts undertaken by the Office of the Attorney General to exhume and identify human remains and investigate cases of forced disappearance. It mentioned that in 2001, it had issued Internal Directive N° 011-MP-FN, regulating “investigations by public prosecutors following the discovery of sites with human remains associated with grave violations of human rights.” It added that, through resolution N° 1262-2003-MP-FN of the Attorney General’s Office adopted on August 13, 2003, the Specialized Forensic Team attached to the Institute of Forensic Medicine had been established and put in charge of forensic investigation in cases of disappearances occurred during the internal armed conflict.

15. The State provided details regarding the facilities, number of professionals hired, and the work of the Specialized Forensic Team. It stated that, using the resources of the Office of the Attorney General and international cooperation funding, a modern Forensic Investigations Laboratory had been built in Ayacucho, which was being used exclusively to look for and identify the human remains of disappeared persons. It claimed that between 2008 and 2010 the Specialized Forensic Team had managed to recover the human remains of 1,047 people and identify 804. 669 remains had been returned to family members. It mentioned that, with a view to effective prosecution of the grave violations of human rights that had occurred during the internal armed conflict, the Office of the Attorney General had established a subsystem of Public Prosecutor’s Offices Specializing in Crimes against Humanity, comprising three Higher Public Prosecutor’s Offices in Lima and nine “Supraprovincial” public prosecutor’s offices in the departments hardest hit by political violence, such as Ayacucho, Huancavelica and Huánuco.

16. The State averred that “since the Inter-American Court of Justice” had handed down judgment in the *Barrios Altos* case, the obligation to investigate, punish, and try had been enforced more effectively than it may have been in the past.” It pointed out that said judgment reflected “nationwide

rejection of so-called “self-imposed amnesties” issued to protect a group of individuals associated with the powers that be.” The State provided statistics on the number of judgments, acquittals, and convictions on charges of forced disappearance of persons handed down by the National Criminal Court between 2004 and 2010, during which time eight people had been convicted and 64 acquitted. The State stressed that the Office of the Attorney General and the Judiciary “are performing the functions assigned to them and fully observing international human rights standards, investigating, prosecuting, and trying the accused. Considering the complexity of the cases, their performance has gradually improved in recent years.”

17. With regard to the criminal proceedings on the alleged forced disappearance of Mr. Antezana Cueto, the State indicated that on April 28, 2010, the Third Criminal Court “Supraprovincial” indicted former Chief of the contra subversive Military Base of Acobamba as alleged perpetrator of the crime of enforced disappearance.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

18. The petitioners are entitled under Article 44 of the Convention to lodge complaints. The alleged victim is an individual who was under the jurisdiction of the Peruvian State at the time of the alleged facts. For its part, Peru ratified the American Convention on July 28, 1978. Accordingly, the IACHR is competent *ratione personae* to examine the petition.

19. The Commission is competent *ratione loci* to take cognizance of the petition since it alleges violations of rights protected by the American Convention that are said to have taken place in the territory of a State Party to said treaty.

20. The Commission is competent *ratione materiae*, because, as will be explained below, the petition alleges facts that could qualify as violation of rights protected under the American Convention, the Inter-American Convention on Forced Disappearance of Persons (hereinafter “ICFDP”), for which the instrument of ratification was deposited by Peru on February 13, 2002, and the Inter-American Convention to Prevent and Punish Torture (hereinafter “ICPPT”), for which the instrument of ratification was deposited by Peru on March 28, 1991.

21. Finally, 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 on the date the facts alleged. The IACHR emphasizes that, although the arrest of Mr. Antezana Cueto and the torture perpetrated on him allegedly occurred in May 1984, according to inter-American jurisprudence, the effects of a forced disappearance and the obligation to respond to acts of torture have an ongoing nature. Accordingly, and in view of the petitioners’ statements that the Peruvian State still has not determined the whereabouts of Santiago Antezana Cueto, punished or made reparation for the deeds denounced before this international body, the IACHR is competent *ratione temporis* to take cognizance of possible failure to comply with obligations under the ICFDP and the ICPPT.

B. Exhaustion of domestic remedies

22. Article 46(1)(a) of the American Convention provides that for a petition filed before the Inter-American Commission to be admissible pursuant to Article 44 of the Convention, an attempt must have been made to exhaust domestic remedies in accordance with the generally accepted principles of international law. The purpose of this requirement is to enable national authorities to take cognizance of the alleged violation of a protected right and, where appropriate, have an opportunity to remedy it before it is examined by an international body.

23. 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.

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

25. The information presented by the parties indicates that the alleged forced disappearance of Santiago Antezana Cueto was denounced before the Office of the Attorney General in July 23 and September 13, 1984, March 15, 1985, March 1991 and June 20, 2001, without his family members being informed of any outcomes. On November 25, 2004, the organization COMISEDH filled a complaint before the Specialized Prosecution Office of Acobamba. In its initial submissions the State asserted that the alleged victim's relatives had not pursued the complaints filled between 1984 and 1991. However, it acknowledged the existence of complaints filled before the judicial authorities during the aforementioned period.

26. The IACHR takes note of the fact that the investigations of the complaints lodged by the relatives of the alleged victim may have been hindered by the adoption of Law No. 26479 on June 15, 1995. Article 1 of this law granted "general amnesty to military, police, or civilian personnel [...] investigated, reported, indicted, prosecuted, or convicted for common and military crimes [...] for all actions derived from or arising upon occasion or as a consequence of the struggle against terrorism [...] between May of 1980 and the date of this law's enactment."² On July 2, 1995 the Democratic Constituent Congress adopted Law No. 26492, specifying that the amnesty law was not subject to judicial review, so that its issuance was exclusively under the jurisdiction of the Legislative Branch. According to information publicly available, following the judgment of the Inter-American Court of Human Rights in the Barrios Altos case,³ the Judicial Branch declared Amnesty Laws Nos. 26479 and 26492 to be without effect. This made it possible to prosecute and punish crimes committed by state agents in the context of the domestic armed conflict, but only starting in late 2001.

27. The information in the case file indicates that the investigation into the alleged forced disappearance of Mr. Santiago Antezana Cueto began only in late 2004; more than 20 years after the presumed facts had occurred and were denounced. This information submitted by the parties indicates that the criminal proceedings into the disappearance of the alleged victims currently remain in the preliminary stage.

28. In the merits stage the Commission will examine whether the State provided a remedy with due guarantees to the relatives of the alleged victim *vis-à-vis* the obligations set forth in Articles 8 and 25 of the American Convention. However, at the present stage of the proceedings, and without prejudging the merits of the matter, the IACHR finds that the passage of over 27 years since the alleged forced disappearance of Santiago Antezana Cueto, without his whereabouts being established and without a final judgment establishing what happened and punishing those responsible, are sufficient to conclude that there has been an unwarranted delay in the sense of Article 46(2)(c) of the American Convention.

C. Time allowed for presentation of the petition

² Law No. 26479 of June 14, 1992, available on the website of the Congress of the Republic of Peru: www.congreso.gob.pe/ntley/imagenes/Leyes/26479.pdf.

³ I/A Court H.R., *Barrios Altos v. Peru Case. Interpretation of the Judgment on the Merits*. (Art. 67 of the American Convention on Human Rights). Judgment of September 3, 2001. Series C, No. 83.

29. Article 46(1)(b) of the Convention establishes that for a petition to be declared admissible, it must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment that exhausted the domestic remedies. This provision is not applicable when the Commission finds that one or more of the exceptions to the exhaustion of domestic remedies established in Article 46.2 of the Convention applies. In such cases, the Commission must determine whether the petition was presented within a reasonable period of time, pursuant to el Article 32 of its Rules of Procedure.

30. As indicated in paragraph 27 above, the Commission concluded that in the instant case, pursuant to el Article 46(2)(c) of the American Convention, there has been an unwarranted delay in rendering a final judgment. Taking into consideration the fact that the present petition was lodged at a time when amnesty laws precluded the investigation and punishment of crimes committed by Peruvian State agents between May 1980 and June 1995, as well as the ongoing nature of the crime of forced disappearance and the alleged denial of justice in the proceedings currently under way, the IACHR considers that the requirement established in Article 46(1)(b) of the Convention and Article 32 of its Rules of Procedure has been met.

D. International duplication of proceedings and *res judicata*

31. Article 46(1)(c) of the Convention establishes that admission of petitions is subject to the requirement that the subject of the petition “is not pending in another international proceeding for settlement; while Article 47(d) of the Convention stipulates that the Commission shall consider inadmissible any petition or communication that is substantially the same as one previously studied by the Commission or by another international organization. In the instant case, the Parties have not contended that either of those two circumstances apply, nor can they be deduced from the file.

E. Characterization of the alleged facts

32. For admissibility purposes, the Commission must, pursuant to Article 47.b) of the American Convention decide whether the petition describes facts that, if shown to be true, would characterize a violation of the Convention and whether, pursuant to Article 47.c), the petition is “manifestly groundless” or “obviously out of order.” The standard for assessing these factors differs from that required to decide on the merits of a complaint. The Commission must conduct a *prima facie* evaluation to see whether the complaint substantiates an apparent or potential violation of a right guaranteed by the Convention, not to establish the existence of a violation. This evaluation is a summary analysis that does not imply a prejudgment or advance opinion on the merits.

33. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

34. In light of the elements presented at the admissibility stage, the IACHR considers that the alleged forced disappearance of Mr. Santiago Antezana Cueto and the supposed impunity surrounding these facts could constitute violations of the rights established en Articles 3, 4, 5, 7, 8, and 25 of the American Convention, in conjunction with the obligations established in Article 1(1) of said instrument, as well as of the rights established in Article I of the CISDFP; all to the detriment of Santiago Antezana Cueto. Furthermore, the Commission considers that these facts could constitute violation of the rights established in Articles 5, 8, and 25 of the American Convention, in conjunction with the obligations established in Article 1(1) of said instrument, to the detriment of the family members of Santiago Antezana Cueto.

35. With respect to the alleged acts of torture against Mr. Antezana Cueto during his detention at the Acobamba Counter-Insurgency Base and the alleged absence of an investigation or

punishment of those responsible, the IACHR considers that, if proven, they could constitute failure to comply with the obligations established in Articles 1, 6, and 8 of the ICPPT.]

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

37. Finally, inasmuch as the facts alleged by the petitioners do not appear to be obviously out of order or manifestly groundless, the Commission concludes that the complaint satisfies the requirements set forth in articles 47(b) and (c) of the American Convention.

V. CONCLUSIONS

38. 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 DE HUMAN RIGHTS,

DECIDES:

1. To declare the petition admissible in respect of the alleged violations of the rights protected in Articles 3, 4, 5, 7, 8, and 25 of the American Convention in conjunction with the obligations established in Articles 1.1 and 2 of the same instrument.; and in respect of Articles I and III of the Inter-American Convention on Forced Disappearance of Persons and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture..

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

3. To begin the process of examining the merits of the case.

4. To publish this decision and include it in the Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 26th day of January 2012. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Felipe González, Rosa María Ortiz; Rose-Marie Antoine and Tracy Robinson, Commission Members.