

REPORT No. 163/11
PETITION 11.054
ADMISSIBILITY
TERESA DÍAZ APARICIO *et. al.*
PERU
November 2, 2011

I. SUMMARY

1. On August 28, 1992 the Inter-American Commission on Human Rights (hereinafter also “the Inter-American Commission” or “the IACHR”) received a petition submitted by Rodolfo Asencios Martel, Federico Díaz Aparicio, and the *Asociación Pro Derechos Humanos* (APRODEH) (hereinafter also “the petitioners”)¹ as representatives of Teresa Díaz Aparicio (hereinafter also “the alleged victim”), alleging violation by the Republic of Peru (hereinafter also “Peru,” “the State,” or “the Peruvian State”) of rights enshrined in the American Convention on Human Rights (hereinafter also “the American Convention” or “the Convention”). The petitioners stated that on August 19, 1992 Teresa Díaz Aparicio, a professor with the School of Social Sciences at the San Marcos National University, was arrested by members of the security forces and since that time her whereabouts have been unknown. The petitioners indicated that this happened in a context of forced disappearances of several people investigated by the National Anti-Terrorism Directorate of the National Police of Peru, particularly individuals with ties to national universities. They added that prior to her disappearance, in August 1993, Mrs. Díaz Aparicio had been arbitrarily arrested by the Anti-Terrorism Directorate, whose members had also conducted an illegal search of her residence.

2. The State asserted that it was not until 2003 that the brother of the alleged victim, Mr. Federico Díaz Aparicio, filed complaints with the Public Prosecutor’s Office and the Truth and Reconciliation Commission regarding the alleged forced disappearance of Mrs. Teresa Díaz. It maintained that neither the petitioners nor the IACHR have promoted the processing of the petition in recent years and that it should thus be archived in accordance with Article 42(1) of the Convention. Finally, the State indicated that the matter has been under investigation by the Public Prosecutor’s Office since March 2003 and that given the lack of evidence that could be used to determine those potentially responsible for the alleged disappearance of Mrs. Díaz Aparicio, the Prosecutor in charge of the investigation ordered provisional archiving of the case in a resolution dated February 13, 2009.

3. After examining the positions of the parties in the light of the admissibility requirements provided in Articles 46 and 47 of the Convention, the Commission concluded that it is competent to hear the claims submitted with respect to the rights enshrined in Articles 3, 4, 5, 7, 8, and 25 of the American Convention, as they relate to Articles 1(1) and 2 of the same instrument, as well as Articles I and III of the Inter-American Convention on the Forced Disappearance of Persons. 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 August 28, 1992 and recorded under number 11.054. On September 2, 1992 the petition was forwarded to the State with the request that it submit a response within 90 days, in accordance with the IACHR Rules of Procedure then in effect.

5. On February 10, 1993 the State submitted its response, which was forwarded to the petitioners on February 25 of the same year. The State submitted additional briefs on October 18, 1993,

¹ The *Asociación Pro Derechos Humanos* was established as a co-petitioner through a power of attorney signed by Mr. Federico Díaz Aparicio on June 27, 2011. That power of attorney was submitted to the IACHR as an annex to the petitioners’ communication received on July 27, 2011.

January 26, February 2 and 16, March 11 and May 9, 2005. The petitioners in turn submitted additional briefs on May 11 and September 30, 2004 and January 12, 2007.

6. On July 30, 2010 the IACHR asked the parties to submit additional information. On June 13, 2011 the State submitted its response, which was forwarded to the petitioners on June 23 of the same year. The petitioners submitted observations on July 27, 2011.

III. POSITION OF THE PARTIES

A. The petitioners

7. The petitioners asserted that Mrs. Díaz Aparicio was arrested for the first time on March 28, 1989 and presented to the 41st Provincial Criminal Prosecutor's Office, and an investigation was initiated against her for the crime of terrorism. They stated that on April 7 of the same year she was released by the head of the above-mentioned Provincial Prosecutor's Office. They stated that on August 10, 1989 members of the National Police of Peru broke into her residence and told her mother that she should appear on the following day at the headquarters of what was then the Anti-Terrorism Directorate (DIRCOTE), although they left no notification.

8. The petitioners asserted that on August 11, 1989 Mrs. Díaz Aparicio filed a *habeas corpus* action with the 41st Examining Court of Lima, alleging that her liberty and personal security were in danger. They stated that the 41st Court declared the action inadmissible, concluding that "the existence of an investigation pending in DIRCOTE against the petitioner that would threaten her liberty through potential arrest has not been established." It was alleged that that decision was based on statements made by the Chief and Assistant Chief of DIRCOTE, indicating that they had not ordered entry into the residence of Mrs. Díaz Aparicio. It was alleged that after the described events Mrs. Díaz Aparicio mentioned to her relatives that she was under surveillance by members of the National Police.

9. The petitioners asserted that on August 19, 1992 Mrs. Díaz Aparicio was headed to the School of Social Sciences at the San Marcos National University where she was a professor. They indicated that when it was realized that the alleged victim did not return to her home on that date, her brother Federico Díaz Aparicio asked friends and relatives where she might be and looked for her at hospitals, clinics, and the central morgue of Lima and Callao, but obtained no information. It was alleged that since August 19, 1992 the relatives of Teresa Díaz Aparicio have no information on her whereabouts.

10. The petitioners stated that between 1991 and 1992 death squads created within the security forces carried out arbitrary arrests, executions, and disappearances of students and teachers at the universities of San Marcos and Enrique Guzmán y Valle (La Cantuta). They added that in its final report published in 2003 the Truth and Reconciliation Commission concluded that between 1989 and 1993 there was a systematic practice of forced disappearances of hundreds of people who were suspected of being a member of collaborating with the insurgent group, Shining Path. In this respect and in view of the police record and the search without a court order of the residence of Mrs. Díaz Aparicio, the petitioners maintained that the alleged victim was forcibly disappeared.

11. The petitioners stated that although the alleged forced disappearance of Mrs. Díaz Aparicio occurred in August 1992 the judicial authorities have not clarified the facts or identified and punished those responsible. They argued that in the light of case law in the inter-American system "in order to establish that a violation of the rights enshrined in the Convention has occurred it is not necessary to determine, as happens in domestic criminal law, the culpability of the perpetrators or their intention, nor is it essential to individually identify the agents to whom the violating acts are attributed."

12. According to the petitioners' allegations, on February 27, 2002 Mr. Federico Díaz Aparicio filed a *habeas corpus* action in order to discover the whereabouts of his sister. However, that action was declared groundless in the final instance by the Superior Court of Justice of Lima, and the Provisional Prosecutor's Office was ordered to initiate investigations for the alleged forced disappearance

of Mrs. Díaz Aparicio. It was alleged that that investigation is still in the preliminary stage and that in November 2009 the Office of the Public Prosecutor ordered its provisional archiving.

B. The State

13. In its initial brief, the State sent official letters from the Joint Armed Forces Command, the Army General Inspectorate, divisions of the National Police of Peru and the Office of Detainee Control. These letters indicated that there was no record of the intervention or arrest of Teresa Díaz Aparicio by state security personnel. A communication received by the IACHR on January 26, 2005 maintained that in 2003 Mr. Federico Díaz Aparicio submitted communications to the Public Prosecutor's Office, the APRODEH organization, and the Truth and Reconciliation Commission "in which he detailed the events relating to the disappearance of his sister."

14. The State asserted that on March 7, 2003 an order was issued to open a police investigation under the direction of the Office of the Special Prosecutor on Forced Disappearances, Extrajudicial Executions, and Exhumation of Clandestine Graves with respect to the disappearance of Mrs. Díaz Aparicio. It stated that during the prosecutor's activities statements were taken from relatives and others close to the injured party, and information was sought from various state entities such as the Ministry of the Interior, DIRCOTE, the National Office of Electoral Processes, the Interrogations Division of the National Police, the National Penitentiary Institute, the San Marcos National University, hospitals, and morgues in the province of Lima.

15. In a communication received on June 13, 2011 the State asserted that "a considerable amount of time has elapsed during which neither the victim's representatives nor the IACHR have pushed for the processing of this case." In this regard, it noted "its concern regarding the inaction on the part of both the petitioners and the Honorable Commission, as shown by the passage of time, inaction that has affected the process and limited the State's ability to present a defense."

16. The State attached an official letter from the alternate representative of the Attorney General's Office to the National Human Rights Council dated May 10, 2010. According to that letter, on February 13, 2009 the Prosecutor in charge of the investigation into the alleged disappearance of Teresa Díaz Aparicio issued a resolution of provisional archiving and submitted the case file to the Division of Police of the Public Prosecutor's Office "in order to continue with the investigation and submit information on new evidence." That same letter indicated that it was impossible to obtain necessary evidence that could be used to identify those allegedly responsible for the disappearance of Mrs. Díaz Aparicio.

17. The State argued "that due to the passage of time and the absence of efforts to pursue the process, new evidence has not been presented, the principle of a matter already concluded has been operating in this petition, and additionally there has been no confirmation of the violation of any of the rights enshrined in the Convention." Finally, the State asked the IACHR to archive the petition in accordance with Article 48(1)(b) of its Rules of Procedure and Article 42(1) of the Convention.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

18. The petitioners are empowered by Article 44 of the Convention to submit complaints to the Commission. The alleged victim is a natural person 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.

19. 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.

20. 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.

21. Finally, the Commission is competent *ratione materiae* because, as will be explained further, the petition contains allegations of actions that could constitute violations of human rights protected by the American Convention and by the Inter-American Convention on Forced Disappearance of Persons, ratified by Peru on February 8, 2002.

B. Exhaustion of domestic remedies

22. 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.

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 Teresa Díaz Aparicio, under Peruvian law, constitute criminal actions whose investigation and prosecution should be instituted by the State on its own initiative.

25. The information submitted by the parties indicates that the Peruvian State learned of the alleged disappearance of Mrs. Díaz Aparicio on September 2, 1992, through the notice of this petition sent by the IACHR. Subsequently, in its report on the Situation of Human Rights in Peru of March 12, 1993, the Commission expressed concern over reports of various persons who were disappeared between May and August of 1992, among them Mrs. Teresa Díaz Aparicio, nine students and a professor from La Cantuta University, the journalist Pedro Yauri, and members of the peasant community of El Santa.² Although that information was in the public domain, it was only in March of 2003 that the Office of the Special Prosecutor on Forced Disappearances, Extrajudicial Executions, and Exhumation of Clandestine Graves ordered the opening of investigations into the alleged disappearance of Mrs. Díaz Aparicio. The IACHR notes that the investigation of those facts may have been obstructed by adoption of Law No. 26479 on June 15, 1995, Article 1 of which 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.³

26. Similarly, Article 6 of Law No. 26479 stipulated that “actions or offenses under this law are not subject to investigation [...] and all court cases being prosecuted or on which decisions have been

² IACHR, *Report on the Situation of Human Rights in Peru*, OAS/Ser.L/V/II.83, Doc. 31, March 12, 1993, Section III. SITUATION SINCE APRIL 5, 1992, paragraph 90, available at www.cidh.oas.org/countryrep/Peru93sp/iii.htm.

³ Law No. 26479 of June 14, 1992, available on the website of the Congress of the Republic of Peru: www.congreso.gob.pe/ntlevy/Imagenes/Leyes/26479.pdf.

reached are permanently archived.” 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 known to the public, following the judgment of the Inter-American Court of Human Rights in the Barrios Altos case,⁴ 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 disappearance of Mrs. Díaz Aparicio was initiated in March 2003, but on February 13, 2009 a provisional archive resolution was adopted and the Police Division of the Public Prosecutor’s Office was ordered to adopt new measures. That information indicates that more than 19 years after the alleged forced disappearance and more than eight years after the criminal investigations were opened, those investigations are still 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 19 years since the alleged forced disappearance of Teresa Díaz Aparicio without the determination of her whereabouts, and without a final decision establishing what occurred and punishing all those responsible, is sufficient to conclude that an unwarranted delay has occurred, under the terms of Article 46(2)(c) of the American Convention.

C. Deadline for presentation of the petition

29. 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.

30. As indicated in paragraph 28 above, the Commission concluded that there has been an unwarranted delay in reaching a decision in the instant case, in accordance with Article 46(2)(c) of the American Convention. Given that the petition was submitted nine days after the alleged forced disappearance of Mrs. Teresa Díaz Aparicio, as well as the ongoing nature of that crime and the alleged denial of justice to the detriment of the relatives of the alleged victim, the IACHR deems that the requirements provided in Article 46(1)(b) of the Convention and Article 32 of its Regulations have been met.

D. Duplication of proceedings and international *res judicata*

31. 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

32. 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

⁴ 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.

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.

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 view of the evidence presented up to this point in the proceeding, the IACHR considers that the alleged forced disappearance of Mrs. Teresa Díaz Aparicio and the alleged impunity surrounding the crime could characterize violations of the rights enshrined in Articles 3, 4, 5, 7, 8, and 25 of the American Convention, as they relate to the obligations established in Articles 1(1) and 2 of that instrument, as well as the rights established in Article I of the Inter-American Convention on the Forced Disappearance of Persons, all to the detriment of Teresa Díaz Aparicio. In addition, the Commission concludes that these facts could constitute the violation of the rights enshrined in Articles 5, 8, and 25 of the American Convention as they relate to the obligations established in Article 1(1) of that instrument to the detriment of the relatives of Teresa Díaz Aparicio.

35. 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.

36. 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

37. 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 notify the State and the petitioners of this decision.

3. To initiate proceedings on the merits of the matter.

4. 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 2nd day of November 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Felipe González, Luz Patricia Mejía Guerrero and María Silvia Guillén, Commission Members.