

OEA/Ser.L/V/II.

Doc. 225

6 December 2019

Original: Spanish

REPORT No. 203/19

PETITION 25-11

REPORT ON ADMISSIBILITY

DONATO DE LA CRUZ ET AL.

PERU

Approved electronically by the Commission on December 6, 2019.

Cite as: IACHR, Report No. 203/19, Petition 25-11. Admissibility. Donato de la Cruz et al. Peru. December 6, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner	Comisión de Derechos Humanos (COMISEDH)
Alleged victim	Donato Mendoza de la Cruz et al ¹
Respondent State	Peru ²
Rights invoked	Articles 4, 5, 7, 8 y 25 of the American Convention on Human Rights ³ and articles I.a, I.b and III of the Inter-American Convention on Forced Disappearance of Persons ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition	January 6, 2011
Notification of the petition	August 12, 2016
State's first response	November 14, 2016
Notification of the possible archiving of the petition	February 8, 2019
Response to the notification regarding the possible archiving of the petition	March 8, 2019

III. COMPETENCE

<i>Ratione personae:</i>	Yes
<i>Ratione loci:</i>	Yes
<i>Ratione temporis:</i>	Yes
<i>Ratione materiae:</i>	Yes, American Convention (deposit of instrument on July 28, 1979) and CAFDP (deposit of instrument February 13, 2002)

IV. 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 3, 4, 5, 7, 8 y 25 of the American Convention in relation to articles 1.1 y 2, and article I of the CAFDP
Exhaustion of domestic remedies or applicability of an exception to the rule	Yes, July 5, 2010
Timeliness of the petition	Yes, January 6, 2011

V. SUMMARY OF ALLEGED FACTS

1. The current petition references the alleged forced disappearance of Mr. Donato Mendoza de la Cruz, 43 years-old, Mr. Eliseo Tineo Yupanqui, 23 years-old, Mr. Marcelo Enciso García, 34 years-old and Mr. Lázaro Paquiayuri Canchari, 24 years-old (hereinafter "the alleged victims"). The petitioners affirm that on July 19, 1990 approximately at 4am while Mr. Tineo Yupanqui, Enciso García and Mr. Paquiayuri Canchari were resting in Acocro, department of Ayacucho, 60 members of the Committee of Peasant Self-Defense coming from Urpay, Seccelambras, Pantipampa and Carhuachocce entered the city. They mention that said Committee gathered the local population, apprehended a woman and the alleged victims and took them to the

¹ Eliseo Tineo Yupanqui, Marcelo Enciso García and Lázaro Paquiayuri Canchari.

² In accordance with the provisions of Article 17(2)(a).a of the Commission's Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, of Peruvian nationality, did not participate either in the discussions nor the decision in the present matter.

³ Hereinafter "American Convention" or "Convention".

⁴ Hereinafter "CAFDP".

⁵ The observations submitted by each party were duly transmitted to the opposing party.

town of Pantipampa. They indicate that later on, they were taken to Urpay, where they freed the woman, leaving the alleged victims detained.

2. They claim that on July 21, 1990, the same members of the Comitee returned to Acocro, and in front of many witnesses, detained the former Mayor of said town, Mr. Donato Mendoza de la Cruz, and took him to Pantipampa where he was reunited with the other three that remained detained. They affirm that on July 23, 1990, the alleged victims were transported to Huayhuas, without being able to find their whereabouts after these events. They mention that these facts occurred in a context of violence where current clashes occurred between “Lightning Path” and peasant communities. They explain that the peasant watch appeared in response to attacks carried out by subversive groups against rural communities that identified as a self-defense group that later launched violent reprisals alongside the military with the acquiescence of the State.

3. They describe that on July 3, 1991 they filed a claim to the Investigative Police of Peru; that on July 4, 1991, the Prosecutor formalized the claim against 16 alleged perpetrators for the crime against personal freedom-kidnapping and that on that very same date the First Instance Tribunal of Huamanga ordered the detention. They claim that on June 16, 1992, the Prosecutor’s Office extended the complaint to three other people. They indicate that on August 26, 1992, the Criminal Chamber of the Superior Court of Ayacucho sentenced the accused to 4 years of prison for kidnapping. They contend that the conviction was suspended in favour of the only accused convicted that was present, reserving the process to the other accused that were convicted.

4. They manifest that on June 15, 1995, through Law 26.479, the State granted a general amnesty provision for all facts derived or originated as a consequence of the fight against terrorism taken place from May 1980 until the enactment of said law. Likewise, they affirm that Law 26.492 of July 2, 1995 established that the granted amnesty did not violate the state duty of vigilance of human rights and that it did not admit any revisions. They describe that, based on this legislation, on December 18, 1995 the people convicted of the forced disappearance of the alleged victims requested the benefits of the amnesty which were granted by the First Criminal Chamber of the Superior Court of Ayacucho on March 27, 1996 which issued a decision definitely archiving the case and releasing the people convicted.

5. They contend that on January 2004, after the derogation of the amnesty law, relatives of the alleged victims requested the Superior Mixed Chamber of Ayacucho to annul the resolution that had granted that benefit. Hence, on July 20, 2004, the Chamber annulled the resolution and reopened the criminal process. They manifest that on August 24, 2004, the Prosecutor’s Office specialized on Human Rights presented a claim for the crime of forced disappearance against 18 people accused in the previous process. They affirm that on September 20, 2007, the Prosecutor’s Office excluded from the process 13 people investigated claiming that there was no proof of their criminal responsibility and accused 4 people for the crime of kidnapping requesting a prison sentence of 12 years and the payment of five thousand soles as civil reparation. They affirm that said resolution indicated that for the crime of forced disappearance to occur, an authorization, support or acquiescence from the State was needed, a fact that was not proven. They indicate that based on this situation they have presented an appeal for annulment that was dismissed by the Supreme Court of Justice on April 20, 2010.

6. In this sense, they describe that on February 11, 2009, the National Criminal Chamber condemned one of the people involved in the kidnapping of Donato Mendoza de la Cruz to 4 years of prison and acquitted the other 4 accused of the kidnapping of the alleged victims. They affirm that against said resolution they presented an appeal of annulment before the Supreme Court which confirmed the decision of August 5, 2009.

7. They contend that the National Criminal Chamber and the Supreme Court contributed to the impunity of the disappearance as they only consider the crime of kidnapping with the limitations this imposes for analyzing, prosecuting and determining responsibilities for the facts described in the present case. They highlight that, against the crime of forced disappearance, it is the obligation of the State that investigations include a comprehensive review of the facts that takes into account the background and context where these took place. They affirm that this mistake impacted negatively in the criminal process as only one person was condemned for the forced disappearance of the alleged victims.

8. The petitioners claim that the authors of the crime were members of the Committee of Peasant Self-Defense whom acted with the consent of the State and under the protection of several norms. In particular, they highlight that Law 24.571 of November 17, 1986, legally acknowledged that peasant watch groups were autonomous organs of defense in the service of the community with capacity to cooperate with authorities in the elimination of unlawful criminal activities that affect public order. Moreover, they highlight that Legislative Decree 740 legally authorized peasant watch groups to employ fire weapons to fight against subversive groups. They refer that Supreme Decree 012-88-IN, formally granted them the power to detain persons and that the peasant guards were subordinated to the Military Force. Petitioners claim that based on the violations committed by these groups, this can be assumed as part of the responsibility of the State. In this sense, they indicate that the application of amnesty laws to the people prosecuted is an additional element that reveals the support, tolerance and state acquiescence.

9. On its part, the State indicates that petitioners do not provide any information of the direct intervention of state agents in the facts that they invoke as relevant to the forced disappearance, and only questioning the classification of the crime done by the judiciary.

10. It defends that investigations to clarify the facts and to identify those responsible were carried out and that said international obligation is and obligation of means not of results as long as it is done in a serious, impartial and effective manner. It indicates that the investigations started with the crime of kidnapping that it was expanded later on to include a possible forced disappearance, but the Prosecutor's Office discarded that penal type as there was not sufficient proof. It argues that, at the time of the facts, the crime of forced disappearance was not included in the Peruvian legislation and was only introduced in 1991 and hence, claiming that there could have been only one rightfully condemned.

11. They claim that Legislative Decree 740 and 741 were published in the Official Gazette on November 12, 1991 and, hence, cannot be applied to the alleged facts and that law 24.150, despite having been published before the facts, said norm regulates all states of emergency and cannot be used to prove the acquiescence of the State in this case. Besides, it indicates that in 2016, the Law of Search of victims of Forced Disappearance, which demonstrates the commitment of the State to comply with its international obligations in relation to the fight against forced disappearances. Finally, it affirms that the four alleged victims and its relatives have been inscribed in the Registry of Victims and that the majority have already been repaired.

12. Finally, the State argues that the existence of an unfavorable judgment does not imply a violation of the Convention, since the Commission cannot act as a fourth instance, arguing that this body could not substitute its own evaluation of the facts for that of the internal courts, to which corresponds the interpretation of the law and the evaluation of the test. Besides, it concludes that the facts presented by the petitioner do not constitute a violation to the Inter-American instruments.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

13. The Commission notes that the facts alleged in the present case involve the alleged forced disappearance of Mr. Eliseo Tineo Yupanqui, Mr. Marcelo Enciso García, Mr. Lázaro Paquiayuri Canchari and Mr. Donato Mendoza de la Cruz, and that these types of crimes have to be investigated ex officio and diligently by governmental authorities. In these cases, the criminal process is the correct path to clarify the facts and establish proper criminal sanctions aside from allowing for other forms of pecuniary reparation. In this sense, based on the facts presented, the Commission observes that for the forced disappearance of the alleged victims one person was condemned for kidnapping and later he benefitted from amnesty law of March 27, 1996. Additionally, it considers that in the framework of the second process initiated in 2004, the Supreme Court of Justice of Peru condemned one person for the involvement in the facts described and acquitted four of the accused in its August 5, 2009 decision through a resolution issued on April 20, 2010 that ratified that 13 people involved in the fact be excluded from investigation. The Commission considers that the last decision exhausted local remedies.

14. On the other hand, the Commission observed that the petition sent by mail was received by the IACHR on January 6, 2011, and that the notification of the Supreme Court's decision took place on July 5, 2010. On that note, considering the practice from the IACHR, assuming that the days that went by while the

petition was in the postal office⁶, the Commission considers that the petition was presented in due time satisfying in such manner the requirement of article 46.1.b of the American Convention.

VII. COLORABLE CLAIM

15. In view of the elements of fact and law presented by the parties and given the nature of the matter brought to it, the Commission considers that, if proved, the alleged detention, torture and disappearance of Mr. Eliseo Tineo Yupanqui, Mr. Marcelo Enciso García, Mr. Lázaro Paquiayuri Canchari and Mr. Donato Mendoza de la Cruz and the the lack of criminal punishment of those responsible for said facts could establish a possible violation of the rights protected by Articles 3, 4, 5, 7, 8 and 25 of the American Convention, in relation to articles 1.1 y 2, as well as article 1 of the Inter-American Convention on Forced Disappearance of Persons.

16. In relation to the claim of fourth instance presented by the State, the Commission observes that in admitting this petition it does not pretend to replace the competence of domestic judicial authorities. It will analyze at the merits stage of the present petition, whether internal judicial processes complied with the guarantee of due process and judicial protection and whether it offered the due guarantees of access to justice to the alleged victims in the terms of the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 3, 4, 5, 7, 8 and 25 of the American Convention, in accordance with articles 1.1 and 2, as well as article I of the Inter-American convention on Forced Disappearance of Persons.

2. To notify the parties of the decision; to continue with the analysis on the merits and to publish this decision and to include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 6th day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.

⁶ IACHR, Report No. 173/17, Petition 1111-08. Admissibility. Marcela Brenda Iglesias, Nora Ester Ribaldo and Eduardo Rubén Iglesias. Argentina. December 29, 2017, par. 8.