

REPORT Nº 1/01
CASE 12.085
ANA ELENA TOWNSEND DIEZ-CANSECO *ET AL.*
(WIRETAPPING)
PERU
January 19, 2001

I. SUMMARY

1. On November 12, 1998, the Inter-American Commission on Human Rights (hereinafter "the Commission", "the Inter-American Commission", or "IACHR") received a petition lodged by Ana Elena Townsend Diez-Canseco, Congresswoman of the Republic of Peru, Carla Marcos Arteaga, Rossana Cueva Mejía, Mabel Barreto Quineche, Mónica Vecco Ordóñez, Mariela Balbi Scarneo, Guillermo Marcial González Arica, Américo Solís Medina, Iván García Mayer, Eduardo Guzmán Iturbe, Angel Paez Salcedo, Benito María Portocarrero Grados, César Hildebrandt Pérez Treviño, Enrique Zileri Gibson, and Jimmy Torres Carrasco (hereinafter "the petitioners") against the Republic of Peru (hereinafter "Peru", "the State", or "the Peruvian State") alleging that the National Intelligence Service of the State (hereinafter "SIN") was systematically wiretapping the petitioners, journalists, and opposition politicians, and, furthermore, that they were the victims of incidents, also carried out by the SIN, in which they were followed and subjected to forms of intimidation and coercion, such as espionage of journalistic activities, harassment and physical injury. The petitioners argue that such incidents constitute violations by the Peruvian State of the rights to life, physical integrity, personal liberty, privacy, and freedom of thought and expression enshrined in Articles 4, 5, 7, 11, and 13, respectively, of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in accordance with the provisions contained in Articles I, IV, V, y XXVI of the American Declaration of the Rights and Duties of Man (hereinafter "the Declaration" or "the American Declaration"). The Peruvian State argued that the case is inadmissible on grounds of failure to exhaust the remedies under domestic law. The Commission decides to admit the case and to proceed to examine the merits of the matter.

II. PROCESSING BY THE COMMISSION

2. On January 19, 1999, the Commission opened the case, transmitted the pertinent portions of the complaint to the Peruvian State, and asked it to provide information within 90 days. The petitioners submitted additional information on February 8, 1999. On April 26 and September 21, 1999, the State requested an extension of the deadline for replying. On September 29, 1999 the petitioners informed the Commission that the Center for Justice and International Law (CEJIL) was to become co-petitioner.

3. The petitioners furnished additional information on October 5, 1999. The State presented its reply on November 8, 1999. The petitioners presented comments on the State's reply on January 6, 2000. On October 4, 1999 a hearing was held at the request of the petitioners, at which declarations were taken from the following witnesses for the petitioners: Congresswoman Ana Elena Townsend,

journalists José Arrieta Mudas and Guillermo González Arica, and former agent of the SIN, Mrs. Luisa Zanatta Muedas.

4. On March 6, 2000, a second hearing was held, this time at the request of the State, at which declarations were received from two witnesses for the State: Brigadier General Enrique Oliveros Pérez and retired Army Major Ricardo Anderson Kohatsu. Subsequently both parties presented several additional written communications.

III. POSITIONS OF THE PARTIES

A. The petitioners

5. The petitioners allege that in July 1997 they learned that the National Intelligence Service of the Peruvian State (SIN) was systematically wiretapping opposition politicians and journalists critical of the government of Mr. Alberto Fujimori, in order to follow and subject the journalists to unexpected acts of harassment which entailed: a) frequent anonymous threats against the life and person of the journalists so that they would not publicize issues that might inconvenience the government; b) following and unexpected harassment of journalists, by means of robbery and theft of equipment; c) extortion by threats to make public information to which the SIN was allegedly privy on the private life of journalists who were critical of or caused inconvenience to the government; and d) following and physical assault of journalists.

6. They mention the relationship between the aforesaid wiretapping and the planned operations of the SIN and the Army Intelligence Service (SIE): Bermuda Plan, Journalist Operations Plan I, Journalist Operations Plan II, and the Octavio Plan. In that regard, they say that the objectives of Journalist Plan I was to avert, detect, uncover and/or repress in a timely manner any activities involving information exchange, recordings, and contacts that journalists might undertake in connection with matters concerning the government or the army; that the aims of Journalist Plan II were the permanent following and surveillance of targeted journalists; and that the objectives of the Octavio Plan were to follow and spy on media executives and journalists.

7. They say the wiretapping was carried out using equipment with enormous scope and the capacity to listen in on the telephones of 200 people, whose conversations were recorded and immediately transcribed. They add that telecommunications experts agree that wiretapping on such a scale requires very sophisticated and costly equipment, of the kind that the SIN purchased from a foreign company.

8. They adduce that starting in mid-July 1997, several members of the team of reporters working for journalist Cesar Hildebrand were assaulted and beaten up in locations where only the SIN, through wiretapping, could have known the whereabouts of those journalists. The petitioners further adduce that letters were sent by fax to their editorial offices threatening their disappearance or murder; and they add that one such fax was traced to a commercial fax service owned by an army lieutenant and member of the SIN.

9. The petitioners add that Mrs. Luisa Zanatta, a former SIN agent, described how the aforesaid wiretapping activities were carried out, the buildings where they took place, the persons involved, and the persons targeted by this practice, adding that the wiretapping was carried out by the Department of Special Operations of the SIE, and that this intelligence service gave an account of the conversations recorded to the SIN, in the person of Vladimiro Montesinos.

10. The petitioners say that agents of the SIN delivered to the journalist Rossana Cueva of *Contrapunto*, a program formerly broadcast by the *Canal 2* television network, several tapes containing recorded conversations of various journalists and politicians, including conversations of the petitioners themselves. They add that they corroborated the tapes with the journalist and recognized conversations that they had had in July 1997 on telephones in their homes and places of work and on cellular telephones, and that subsequently the wiretapping was made public and became headline news nationwide.

11. The petitioners say that on July 13, 1997, after the wiretapping allegations were made public, the Public Ministry [*Ministerio Público*] appointed an ad hoc government prosecutor, Víctor Hugo Salvatierra, to open a criminal investigation into the events connected with the wiretapping. The petitioners add that as a result of the aforesaid investigation, the Public Ministry concluded that it "had inspected the facilities at the headquarters of the National Intelligence Service, without finding any evidence to suggest that this organization had carried out the wiretapping." In this connection the petitioners say that the investigation conducted by the ad hoc prosecutor was a mere formality; that the forenamed prosecutor was appointed by the Supreme Court Prosecutor, who took her orders from the government and was under the control of the political authorities; and that the investigation did not contribute in any way to the punishment of the culprits but was intended, rather, to vindicate the offenders at the SIN.

12. The petitioners say that on July 15, 1997 they filed for a writ of *amparo* before the Public Law Court against the head of the SIN, in order that they cease the wiretapping. In that connection they held that the wiretapping violated their constitutional rights to secrecy and inviolability of communications, to personal and family privacy, to physical integrity and personal security, to life, to freedom of labor, and to freedom of expression. They add that the writ of *amparo* was declared to be without merit on August 8, 1997, which was upheld on appeal on November 7, 1997 by the Provisional Public Law Chamber. The petitioners say that on November 27, 1997, they filed an extraordinary appeal with the Constitutional Court, which, in a judgment published in the Official Gazette *El Peruano* on May 29, 1998, declared the writ of *amparo* unfounded on the grounds of "failure to identify the violator(s) of the constitutional rights invoked, notwithstanding that the violations of the invoked constitutional rights had been proven." The petitioners hold that the remedies under domestic law were exhausted with the aforesaid judgment of the Constitutional Court.

13. They argue that they accessed an illusory formal legal system of constitutional guarantees, that exists in appearance only but that in practice was set up in order not to function properly and to conceal the progressive dismantling of the country's democratic institutions. The petitioners said that in practice the citizenry has no real possibility of recourse to any judicial organ for upholding constitutional guarantees or fundamental rights when the offender is a representative of the State.

They add that, given the illusory nature of the system of constitutional guarantees in Peru, in reality there existed no due process of law for protection of fundamental rights, for which reason they had to pursue the ineffective remedies under domestic law, in order, then, to invoke before the IACHR the exception to the requirement of exhaustion of the national jurisdiction due to the inexistence of due process of law in Peru.

14. The petitioners say that the news of the wiretapping was brought to the attention of the public by the television program *Contrapunto* on the *Canal 2* network, and the matter became a national scandal. They add that in the face of general disapproval and demands for investigation and punishment, the ruling party, which had a majority in the Congress, on August 27, 1997 instructed the Committee on National Defense and Internal Order to carry out an investigation of the allegations. The petitioners say that on May 27, 1999, the Congress adopted a report in that connection, which was conveyed to the Prosecutor General's office, and which concluded that there was no proof of eavesdropping.

15. The petitioners say that the Prosecutor General received the aforementioned report on July 8, 1999 and decided to broaden the investigations originally carried out, but, however, that said investigations are still continuing.

B. The State

16. The State argues that the petition is inadmissible because domestic remedies were not exhausted. In that respect, it adduces that it would be necessary first to examine the three different proceedings instituted in order to clarify the petitioners allegations under domestic jurisdiction: a) a judicial proceeding entailing the filing of a writ of *amparo*; b) a proceeding before the Public Ministry; and c) a third proceeding before the Congress.

17. The State mentions that in the matter of the judicial proceeding, the judgment of the Constitutional Court published on May 29, 1998, declared the writ of *amparo* unfounded "on the grounds of failure to identify the violator of the constitutional rights invoked, notwithstanding that the violations of the invoked constitutional rights had been proven." The State argues that the decision of the Constitutional Court did not exhaust domestic remedies because the action remains open and pending, subject to the outcome of the investigations of the Prosecutor General's Office. The State adds that the suitable recourse for the investigation and punishment of the acts and allegations mentioned in the petition is a criminal proceeding. The State affirms that although a writ of *amparo* is a suitable recourse to safeguard a legally protected interest that has been violated, it is not, however, an adequate procedure for conducting a thorough investigation that might enable the identification of the person responsible for the alleged violation inasmuch as it does not provide for evidentiary proceedings.

18. As to the proceeding before the Public Ministry, the State contends that before the alleged injured parties filed their writ of *amparo*, the Executive Committee of the Public Ministry appointed, by Resolution N° 615-97MP-FN-CEMP of July 13, 1997, an ad hoc prosecutor to investigate the wiretapping allegations disclosed on the television program *Contrapunto*. The ad hoc prosecutor concluded that there was no wiretapping equipment in the possession of the intelligence organizations in Peru, nor evidence of eavesdropping carried out thereby.

19. In the matter of the proceeding before the Congress, the State adduced that, in view of the significance of the charges made by the injured parties, the Congress, on August 27, 1997, decided that the Committee on National Defense and Internal Order should conduct an investigation of the eavesdropping. The final report of that Committee was conveyed to the Prosecutor General's Office on July 8, 1999, which ordered that the investigations be broadened.

20. The State holds that domestic remedies have not been exhausted inasmuch as the investigation of the Prosecutor General's Office is pending conclusion.

IV. ANALYSIS

21. The Commission proceeds to examine the admissibility requirements for the petition set forth in the American Convention.

A. The Commission's competence *ratione materiae*, *ratione personae*, and *ratione temporis*

22. The petitioners are entitled to lodge petitions with the IACHR under Article 44 of the American Convention. The petition cites as alleged victims individuals on whose behalf Peru undertook to respect and ensure the rights recognized in the American Convention. Insofar as the State is concerned, the Commission finds that Peru is a state party to the American Convention, having ratified said instrument on July 28, 1978. Accordingly, the Commission has *ratione personae* competence to examine the petition.

23. Furthermore, the Commission has *ratione materiae* competence due to the fact that the acts alleged in the petition could violate rights protected by the American Convention. As regards the violations claimed by the petitioners of Articles I, IV, V, and XXVI of the American Declaration, the Commission finds that rights enshrined in those provisions are also recognized in the American Convention, and that the petition does not concern a continuing violation involving acts begun prior to Peru's ratification of the American Convention in 1978. In that connection, the Commission has said that "once the American Convention entered into force (...) the Convention and not the Declaration became the source of legal norms for application by the Commission insofar as the petition alleges violations of substantially identical rights set forth in both instruments and those claimed violations do not involve a continuing situation."^[1] Based on the foregoing, the Inter-American Commission will admit the instant case in respect of claimed violations of the American Convention (see *infra*, paragraphs 34 and 35).

24. The IACHR has *ratione temporis* competence inasmuch as the events in question are alleged to have occurred after July 1997, when the duty to respect and ensure the rights recognized in the Convention was in force for the Peruvian State.

B. Admissibility requirements for the petition

1. Exhaustion of domestic remedies

25. Under Article 46(1)(a) of the Convention, for the Commission to find a petition admissible the remedies under domestic law must first have been exhausted in accordance with generally recognized principles of international law. However, Article 46(2) of the Convention provides that said provision shall not apply when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
 - b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
 - c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

26. The Commission finds that the petitioners, in response to the violations they allegedly suffered, filed a writ of *amparo* in order to bring a halt to the claimed violations of their fundamental rights. The Public Ministry also launched investigations in an attempt to determine criminal responsibilities, based on the public denouncement of those acts, which also led to the opening of an investigation by the Congress of the Republic of Peru. The Commission goes on now to analyze said proceedings in order to determine if the remedies under domestic law have been exhausted in the instant case.

27. Insofar as the investigation carried out by the Congress is concerned, the Commission finds that said proceeding is not judicial in nature and, therefore, that the remedies under domestic law were not exhausted by that proceeding.

28. As to the proceeding relating to the writ of *amparo*, the Commission finds that the petitioners brought that action on July 15, 1997, in an attempt to put an immediate stop to the violation of their fundamental rights. However, the Constitutional Court declared that action unfounded in its final judgment of May 29, 1998, thereby exhausting the internal proceeding relating to the petitioners' attempt to bring an immediate halt to the claimed violations of their rights.

29. Regarding the investigations opened by the Public Ministry, the Commission finds that said investigations could result in an accusation before a criminal court, which would enable identification of the authors of the alleged violations as well as the punishment thereof. That said, the Commission notes that those investigations were initiated in July 1997 by an ad hoc government prosecutor, who concluded that there was no wiretapping equipment in the possession of the intelligence organizations in Peru, nor evidence of eavesdropping carried out thereby. Subsequently, the Public Ministry decided to continue those investigations as a result of the aforementioned report of the Congress, which was transmitted to the Prosecutor General's Office on July 8, 1999. In that connection, the Commission notes that the above-mentioned Article 46(2)(c) of the American Convention provides that the requirement of exhaustion of remedies under domestic law shall not apply when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." Based on that provision, and bearing in mind

that to date more than three years have elapsed since the opening of the initial investigations by the Public Ministry, the Commission finds that the aforementioned exception to the requirement of exhaustion of domestic remedies is applicable in the instant case.

2. Deadline for lodging the petition

30. With respect to the requirement contained in Article 46(1)(b) of the Convention, under which the petition or communication 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 domestic remedies, the Commission notes, on one hand, that the petition was lodged on November 12, 1998, within the six-month period following the judgment of the Constitutional Court of May 29, 1998, which, however, was not an effective recourse for bringing an end to the claimed violations, and that, apart from anything else, as mentioned by the petitioners, these violations were apparently of a continuing nature since the wiretapping would appear to have continued with time.

31. The Commission also finds, in connection with the investigations opened by the Public Ministry, that the aforesaid requirement would not apply since, given that the exception to the requirement of exhaustion of domestic remedies provided in Article 46(2)(c) of the Convention is applicable in the terms set out above, also applicable, under the provisions contained in Article 46(2) of the Convention, is the exception to the above-cited requirement in respect of the deadline for lodging the petition.

3. Duplication of proceedings and *res judicata*

32. The Commission finds that the subject matter of the petition is not pending in another international proceeding for settlement, nor is the petition substantially the same as one previously studied by the Commission or by another international organization. Accordingly, the requirements set forth in Articles 46 (1) (c) and 47 (d) have been met.

4. Nature of the alleged violations

33. The Commission finds that the allegations, if proven, could establish violations of the rights recognized in the American Convention on Human Rights.

V. CONCLUSIONS

34. The Commission concludes that it is competent to take up the instant case and that the petition is admissible in accordance with Articles 46 and 47 of the American Convention.

35. Based on the factual and legal arguments given above, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible as regards the alleged violation of Articles 5, 7, 11, and 13 of the American Convention on Human Rights.
2. To notify the parties of this decision.
3. To continue with its analysis of the merits of the case; and
4. To publish this decision and to include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on this the 19th day of January, 2001. Signed: Hélio Bicudo, Chair; Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman; Commission Members Robert K. Goldman, Peter Laurie, Marta Altolaguirre, and Julio Prado Vallejo.