

PARTIALLY DISSENTING OPINION OF JUDGE DE ROUX RENGIFO

Upon carrying out an evidentiary assessment related to Article 5 of the American Convention, the Court has concluded

[i]n this case, it has not been proven Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera had been subjected to mistreatment or that their dignity had been damaged by Peruvian authorities while they were detained in El Fronton penitentiary [...]. It is evident that there was a disproportionate use of force to subdue the riots. However, from this disproportion it can not be inferred that authorities used cruel, inhumane, or degrading treatment; concepts that their own juridical content, and that they cannot be necessarily and automatically inferred from an arbitrary deprivation of life, even under aggravating circumstances such as the current ones.

I regret to withdraw myself from the transcribed conclusion. In its recent jurisprudence on evidence appraisal (including the one having an effect on the judgment related to this opinion), this Court has stated the following three criteria: 1) an international court of human rights has a significant scope of flexibility when assessing evidence, according to logic rules and based on experience; 2) international courts can largely base their decisions on circumstantial or indirect evidence, on presumptions as long as these means can give rise to solid conclusions on the facts; 3) in processes of violations of human rights the State defense can not be grounded on the failure of the plaintiff to gather evidence because, very frequently, these can not be obtained without the cooperation of the State itself, which precisely has the availability of the necessary resources to clarify the facts that have taken place in its territory. I consider that, if these criteria are strictly and rigorously applied to evidentiary appraisal in the present case, the conclusion about the matter at hand will differ from that of the Court.

The latter is right when stating based only the disproportion of means used by the State to subdue the riots in El Frontón prison, it cannot be inferred that there were cruel, inhumane or degrading treatment against Durand Ugarte and Ugarte Rivera. Nevertheless, in this case we not only know that there was disproportionate use of means, but we also know, with some precision, what kind of force were used by the State against inmates and in what way and sequence they were used, and we know or can reasonably infer what kind of effects, besides death, this force had on these people.

Upon analyzing the circumstances in this case, it is probable that between the time State agents attacked inmates as stated by the gathered evidence and the time of death of each of the inmates, almost everybody, if not all, bore moments, if not hours, of the most serious and severe anguish. Certainly, the overwhelming majority of inmates in El Frontón who lost their lives during the events in this case, were not only limited to confirm, before dying, that they were involved in a highly-risky situation, as the one the related to a typical penitentiary mutiny. They were also aware that they were deadly and mercilessly attacked without any possibility of surrender or escape. Those were able to escape, and were wounded in the debris of the demolished Blue Pavilion, for some hours or days, the situation was certainly more serious. Hypothetically, the victims' anguish and anxiety were indeed critical.

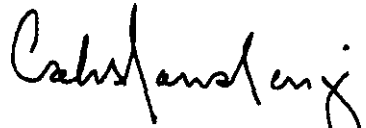
The value of indirect evidence, in general, and circumstantial evidence, in particular, is the result of a probability judgment. It is possible that Durand Ugarte and Ugarte Rivera had been shot first without being able to understand what the situation was. It is also possible that they undergone all the stages and manifestations of a chain of horror in El Frontón prison and that they died several days after the uprising began in the midst of most terrible physical and mental atrocities. The exact time of these events is uncertain. However, if the above evidence appraisal is used, there will grounds to conclude with a high level of certainty that Durand and Ugarte undergone severe moral and psychological suffering before dying as a result of inhumane and cruel treatment by the State during the riot subduing in El Frontón.

Consequently, I do not share the conclusion reached by the Court in the second operative paragraph of this judgment. In my opinion, the issue should have been stated as follows:

"THE COURT,

[...]

2. declares that the State violated, to the detriment of Nolberto Durand Ugarte and Gabriel Ugarte Rivera, Articles 5(1) and 5(2) of the American Convention about Human Rights".



Carlos Vicente de Roux-Rengifo
Judge



Manuel E. Ventura-Robles
Secretary