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Title/Style of Cause:	Leydi Dayan Sanchez v. Colombia
Doc. Type:	Decision
Decided by:	President: Juan E. Mendez; First Vice-President: Marta Altolaguirre; Second Vice-President: Jose Zalaquett; Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, Susana Villaran de la Puente.
Dated:	9 October 2002
Citation:	Dayan Sanchez v. Colombia, Petition 12.009, Inter-Am. C.H.R., Report No. 43/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by:	APPLICANT: the Corporacion Colectivo de Abogados “Jose Alvear Restrepo”
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I. SUMMARY

1. On May 12, 1998 the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition submitted by the Corporación Colectivo de Abogados “José Alvear Restrepo” (hereinafter “the petitioners”) in which the responsibility of agents of the Republic of Colombia (hereinafter “the State” or “the Colombian State”) in the death of the child Leydi Dayán Sánchez, aged 14, on March 21, 1998 in the neighborhood known as Barrio El Triunfo, Ciudad Kennedy, Bogotá, Republic of Colombia.

2. The petitioners alleged that the State was responsible for violating the right to life and right to judicial protection of the child, enshrined in Articles 4, 8, and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) to the detriment of the victim and her next-of-kin, as well as the generic obligation to respect and ensure the rights protected therein, as provided for in its Article 1(1). As regards admissibility of the matter, the petitioners argued that the exception to the requirement of prior exhaustion of domestic remedies set out at Article 46(2)(b) of the American Convention applies since the criminal case on the homicide of this child was heard before the military criminal courts. The Colombian State, for its part, argued that remedies available in the contentious-administrative and disciplinary jurisdictions had not been exhausted, and that the judicial guarantees enshrined in the American Convention have been observed in the proceedings before the military courts.

3. After analyzing the parties' positions, the Commission concludes that it is competent to decide the claim presented by petitioners, and that the case is admissible, in light of Articles 46 and 47 of the American Convention.

II. PROCESSING BEFORE THE COMMISSION

4. On May 26, 1998 the IACHR assigned this matter petition number 12.009 in keeping with the Regulations in force until April 30, 2001 and forwarded the pertinent parts of the complaint to the State; it gave the State 90 days to submit observations. The State submitted its answer on July 14, 1998 and the IACHR forwarded that information to the petitioners on July 28, 1998 giving them 45 days to submit their observations.

5. On August 28, 1998 the petitioners presented addition information; that information was transmitted to the State on September 18, 1998 and the State was given an additional 45 days to present observations. The State responded on December 3, 1998, and its observations were forwarded to the petitioners on December 14, 1998; they were given 30 days to submit information. On March 2, 1999, a hearing was held before the IACHR, during its 112th session. In the course of the hearing, the petitioners submitted information which was duly forwarded to the State.

6. On May 11, 1999 based on the exchange in the above-noted hearing, the Commission placed itself at the disposal of the parties to pursue a friendly settlement, and asked that they inform the Commission of their views in this regard within 30 days. On June 15, 1999 the petitioners submitted proposed terms of a friendly settlement.[FN1] At the same time, the State sought an extension of the time period for responding to the IACHR's offer. On June 23, 1999 the IACHR forwarded the proposed terms of friendly settlement to the State, and gave it one month, commencing on July 1, 1999 to submit its response both to the offer of the IACHR and to the petitioners' proposal. In its response of August 3, 1999 the State indicated that it would only be willing to consider a friendly settlement of the matter once the domestic remedies, including the disciplinary proceeding and the contentious-administrative proceeding, were exhausted. The State's response was forwarded to the petitioners on August 9, 1999.

[FN1] The petitioners stated their willingness to pursue a friendly settlement on the condition that the proceeding then pending before the military courts be removed to the regular courts; that the State acknowledge its responsibility; that the State undertake to guarantee the non-recurrence of the acts alleged; and that it make reparation to the victim's next-of-kin.

7. On December 19, 2000 and July 27, 2001 the IACHR requested additional information from the petitioners. The petitioners remitted additional information on August 2, 2001 and it was forwarded to the State on August 9, 2001 with 30 days to submit observations. On September 10, 2001 the State requested a 30-day extension to respond; it was granted on September 14, 2001. On October 12, 2001 the State submitted its observations.

III. POSITIONS OF THE PARTIES

A. The petitioner's position

8. The petitioners allege that on March 21, 1998 at approximately 10:30 p.m., the child Leydi Dayán Sánchez, her 11-year-old brother, and two of her friends, ages 16 and 18 years, were in the street, approximately two blocks from her home, located at Carrera 107, Barrio El Triunfo, in Bogotá. From where they were situated they saw two armed men, on motorcycles, and two vehicles approaching them. The imminent passing of the armed men and the vehicles caused panic among the minors, who, at the shout of "careful with the militias!" began to run through the street. Leydi Dayán fell behind at street 42 N° 107, and received a gunshot wound in the back.[FN2]

[FN2] The original petition was received on May 12, 1998.

9. According to the petitioners, her brother and friends came back in search of her and found her on the ground, wounded. Before they were able to get her to the hospital by their own means, a Police vehicle picked her up and took her to the Hospital de Santa Clara. Later, she was transferred to the Hospital de Kennedy, where she was reunited with her parents, and where she died on the morning of March 22, 1998. The petitioners allege that the child's parents were pressured by police agents to avoid any contact with the media. Gen. Serna Arias of the Metropolitan Police of Bogotá had covered the costs of the burial as a "gesture of solidarity"; he noted that the gesture should not be interpreted as recognition that the Police were responsible for the child's death.[FN3] Later, once the judicial proceeding had begun, the victim's next-of-kin and one of the witnesses received anonymous threats.[FN4]

[FN3] Id.

[FN4] Information provided by the State in the hearing of March 2, 1999.

10. The petitioners note that on March 22, 1998 the 86th Military Court of Criminal Investigation of the Police opened an investigation into officer Juan Bernardo Tulcan Vallejo of the Metropolitan Police of Bogotá.[FN5] They argue that Mr. Alirio Uribe, member of the Colectivo de Abogados, was prevented from representing the victim's next-of-kin in the proceedings for reconstructing the facts (conducted April 2, 1998) since he was not considered to have standing in the process even after presenting the corresponding powers-of-attorney.[FN6]

[FN5] Original petition received May 12, 1998.

[FN6] Communication from petitioners, August 28, 1998.

11. They indicate that on June 4, 1998 the 86th Military Court of Criminal Investigation ruled that the case should be referred to the ordinary courts. Nonetheless, a few days later, on

June 23, 1998 an appeal was granted before the Superior Military Tribunal regarding the imposition of a measure to assure the appearance of the subjects. Finally, on July 7, 1998, the 86th Military Judge of Criminal Investigation removed the case to the regular courts. However, the 55th Prosecutorial Office (Fiscalía 55) of the Crimes against Life Unit decided not to evaluate the case since an appeal was pending before the military criminal courts and instead to send the case back to the military justice system.

12. On July 23, 1998 the Superior Military Tribunal referred the file to the 86th Military Court of Criminal Investigation, which sent the proceeding back to the Commander of the Police Department at Bacatá, to serve as judge of first instance in the matter.[FN7] On July 27, 1998 the attorney for the civil party to the proceeding requested that the 55th Prosecutorial Office review its decision to send the case back to the military courts, yet this effort was unsuccessful. On August 18, 1998 the Public Ministry asked the Commander of the Police Department at Bacatá to recognize the competence of the 55th Prosecutorial Office of the Crimes against Life Unit to evaluate the case, once again unsuccessfully. On July 6, 2000 officer Juan Bernardo Tulcan Vallejos, after being tried before the military courts, was acquitted of the charge of negligent homicide (homicidio culposo). Finally, on May 15, 2001 the Superior Military Tribunal confirmed the judgment of acquittal, considering that the inconsistencies and evidentiary contradictions justified application of the theory of reasonable doubt.

[FN7] Id.

13. As regards meeting the admissibility requirements set forth in the American Convention, the petitioners allege in their initial petition that the prior exhaustion of domestic remedies requirement is not applicable to the instant case, since the exception provided for at Article 46(2)(b) applies. Concretely, they allege that the military justice system does not answer the requirements of independence and impartiality required by the Convention and therefore is ineffective as an adequate remedy for administering justice in a case such as the instant one, involving non-service-related incidents.

14. As for the State's arguments on the need to exhaust the disciplinary proceeding,[FN8] the petitioners indicate that in effect Leydi Dayán's father lodged a complaint with the National Special Investigations Bureau of the Office of the Procurator General (Procuraduría General de la Nación), in the context of the disciplinary proceeding now pending before the Second Office of the Procurator for Bogotá. The petitioners argue, however, that this remedy is not of sufficient scope to be considered one that must be exhausted prior to recurring to the international jurisdiction, in the terms of Article 46(1)(a) of the American Convention.[FN9]

[FN8] See the State's arguments, *infra*, para. 17.

[FN9] Communication from the petitioners of August 28, 1998 and information presented in the hearing of March 2, 1999.

B. The State's position

15. The State argues that the petitioners' claim is inadmissible for failure to meet the requirement of prior exhaustion of domestic remedies, set forth at Article 46(1)(a) of the American Convention. It also indicates that there is a disciplinary proceeding pending a decision and that the victim's next-of-kin have not filed a claim with the contentious-administrative jurisdiction to seek compensation. It considers that the time used by the local courts in the consideration of this matter is not beyond the limits of reasonableness required by the Convention.[FN10]

[FN10] Note EE/DH 035093 from the Ministry of Foreign Affairs of the Republic of Colombia of July 9, 1998 and Note EE 01383 from the Ministry of Foreign Affairs of the Republic of Colombia, August 3, 1999.

16. As regards the development of the criminal proceeding before the military courts and its brief period before the regular courts, it notes that the 86th Military Court of Criminal Instruction, attached to the Police Department at Bacatá, began the investigation into the facts on March 23, 1998.[FN11] It indicates that despite the efforts of the Public Ministry agent to send the investigation to the regular courts, the case was returned to the military criminal courts since the order was not properly executed.[FN12] The State further indicated that Mr. Alirio Uribe Muñoz, a member of the Colectivo de Abogados "José Alvear Restrepo", was not able to participate as a representative of the civil party initially given that he did not present either the petition or the power-of-attorney necessary to be have standing in these cases. It reports that through judgment of July 6, 2000 by the Police Commander of Bacatá, officer Juan Bernardo Tulcan Vallejos was acquitted of the charge of negligent homicide (homicidio culposo) in these cases, and that the decision was affirmed on May 15, 2001 by the Superior Military Court. It indicates that both decisions were grounded in application of the principle in dubio pro reo.[FN13]

[FN11] Note EE/DH 035093 from the Ministry of Foreign Affairs of the Republic of Colombia of July 9, 1998.

[FN12] Note from the Ministry of Foreign Affairs of December 3, 1998.

[FN13] Note EE 41640 of the Ministry of Foreign Affairs, October 12, 2001.

17. As for the disciplinary proceeding, the State reported that a copy of the complaint was forwarded to the 1st Office of the Procurator for the District of Bogotá to have a disciplinary investigation into the matter.[FN14] At the request of the Police Command of Bacatá, the officer implicated, Juan Tulcan Vallejo, was suspended on May 25, 1998. The State reported that on October 23, 1998 the charges against him were filed, and it was ordered that evidence be taken.[FN15] According to the information provided by the State, the Police denies having pressured the family members to avoid contact with the media.[FN16]

[FN14] Note EE/DH 035093 from the Ministry of Foreign Affairs of the Republic of Colombia, July 9, 1998.

[FN15] Note from the Ministry of Foreign Affairs, December 3, 1998.

[FN16] Note EE/DH 035093 from the Ministry of Foreign Affairs of Colombia, July 9, 1998.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

18. The petitioners are authorized by Article 44 of the American Convention to submit complaints to the IACHR. The petition identifies as the alleged victims individual persons with respect to whom Colombia undertook to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Colombia has been a State Party to the American Convention since July 31, 1973 when the respective instrument of ratification was deposited. Accordingly, the Commission is competent *ratione personae* to examine the petition.

19. The Commission is competent *ratione loci* to take cognizance of the petition insofar as it alleges violations of rights protected in the American Convention in the territory of a State party to that treaty. Moreover, the IACHR is competent *ratione temporis* since the obligation to respect and ensure the rights protected in the American Convention was already in force for the State when the incidents are alleged to have occurred. Finally, the Commission is competent *ratione materiae* because the petition alleges violations of human rights protected by the American Convention.

B. Admissibility Requirements

1. Exhaustion of domestic remedies and time period for submitting the complaint

20. The Colombian State alleges that domestic remedies have not been exhausted because the disciplinary process is pending decision and the victim's next-of-kin have not filed for compensation before the contentious-administrative jurisdiction. It also argues that the use of the military jurisdiction to try the person indicted for the homicide of Leydi Dayán does not violate the rights enshrined in the American Convention. The petitioners allege that the processing of the case before the military justice system justifies applying the exception to the prior exhaustion requirement provided for at Article 46(2)(b) of the Convention, and argue further that the disciplinary proceeding is not a remedy that must be exhausted under the standards of international law applicable to the instant matter.

21. First, one should clarify which domestic remedies must be exhausted based on the text and spirit of Article 46(1)(a) of the American Convention. This rule indicates that in order for a petition to be admitted, it will be required that "... the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." The Inter-American Court has interpreted this to mean that only those remedies adequate to cure

the violations allegedly committed must be exhausted. Adequate domestic remedies are those which

are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.[FN17]

[FN17] I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 64.

The Commission's case law recognizes that whenever a crime is committed that can be prosecuted on the state's own initiative, the state has the duty to set in motion the criminal justice process, and to follow it through to its ultimate conclusion[FN18] and that, in those cases, this is the suitable way to clarify the facts, prosecute the persons responsible, and establish the corresponding criminal sanctions, in addition to making possible other forms of reparation. The Commission considers that the facts alleged by the petitioners in this case involve the alleged violation of a non-derogable fundamental right, the right to life, which in the domestic legislation is a crime that can be prosecuted at the state's initiative, and that it is therefore this criminal proceeding, promoted by the State itself, that should be considered for the purposes of determining the admissibility of the claim.

[FN18] Report N° 52/97, Case 11.218, Arges Sequeira Mangas, Annual Report IACHR 1997, paras. 96 and 97. See also Report N° 55/97, para. 392.

22. The State is of the view that the disciplinary and contentious-administrative remedies available under domestic legislation must also be exhausted prior to triggering the Commission's jurisdiction. Nonetheless, in cases similar to the instant case the IACHR has established that disciplinary rulings do not satisfy the obligations established by the Convention in respect of judicial protection, since they are not an effective and sufficient means for prosecuting, punishing, or making reparation for the consequences of the homicide or extrajudicial execution of persons protected by the Convention. Therefore, in the context of this case, they cannot be considered remedies that must be exhausted under Article 46(1)(a). In terms of exhausting the contentious-administrative remedy, the Commission has already indicated that such a proceeding is exclusively a mechanism for supervising the administrative activity of the State aimed at obtaining compensation for damages and losses caused by abuse of authority.[FN19] In general, this process alone does not constitute an adequate mechanism for making reparation in cases involving human rights violations. It therefore need not be exhausted in a case such as this when there is another jurisdiction for obtaining reparation for the damage, for example the prosecution and punishment demanded.[FN20]

[FN19] Report N° 15/95, Annual Report IACHR 1995, para. 71; Report N° 61/99, Annual Report IACHR 1999, para. 51.

[FN20] Report N° 5/98, Case 11.019, Alvaro Moreno Moreno, Annual Report IACHR 1997, para. 63.

23. As for the use of the military jurisdiction for trying the Police officer allegedly implicated, the Commission has repeatedly stated its position that the military courts are not an appropriate jurisdiction, and therefore do not offer an adequate remedy for investigating, prosecuting, and punishing violations of the human rights enshrined in the American Convention.[FN21]

[FN21] IACHR, Third Report on the Human Rights Situation in Colombia (1999), p. 175; Second Report on the Situation of Human Rights in Colombia (1993), p. 246; Report on the Situation of Human Rights in Brazil (1997), pp. 40-42. In addition, the Inter-American Court has confirmed that the military criminal justice system is only adequate for prosecuting members of the military accused of committing crimes or offenses which by their very nature operate against legal interests particular to the military. I/A Court H.R., Durand and Ugarte Case, Judgment of August 16, 2000, para. 117.

24. Therefore, given the characteristics of this case, the Commission considers that the exception provided for at Article 46(2)(a) of the American Convention applies; accordingly, the requirement to exhaust domestic remedies does not apply. Nor does the six-months requirement at Article 46(1)(b) of the Convention, as the petition was presented within the reasonable time referred to in Article 32(2) of its Rules of Procedure for cases in which there has been no firm decision prior to lodging the petition.

25. All that remains to be noted is that invoking the exceptions to the prior exhaustion requirement of Article 46(2) of the Convention is closely linked to the determination of the possible violation of certain rights set forth therein, such as the guarantees of access to justice. Nonetheless, Article 46(2), by its nature and purpose, is a rule that stands autonomously from the substantive provisions of the Convention. Therefore, the determination as to whether the exceptions to the rule of prior exhaustion of domestic remedies provided for at Article 46(2) are applicable to the case in question should be done prior to and separate from the analysis of the merits, since it depends on a different standard of appreciation from that used to determine violations of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects that have impeded the exhaustion of domestic remedies in the instant case will be analyzed, as relevant, in the Report the Commission adopts on the merits of the dispute, to determine whether indeed violations of the American Convention have taken place.

2. Duplication of procedures and res judicata

26. It does not appear from the file that the subject matter of the petition is pending before any other procedure for international settlement, or that it is substantially the same as a petition

already examined by this or any other international body. Therefore, the requirements set forth at Articles 46(1)(c) and 47(d) of the Convention have been met.

3. Characterization of the facts alleged

27. The Commission considers that the petitioners' allegations of violations of the right to life and the rights to a fair trial and to judicial protection, in the matter addressed herein, tend to establish violations of the rights of the victims and their next-of-kin, enshrined in Articles 1(1), 4, 8, and 25 of the American Convention. In view of the fact that the victim was a minor, when deciding on the merits of the case the IACHR shall determine whether it is appropriate to examine the international obligations of the State with respect to Article 19 of the American Convention.

V. CONCLUSIONS

28. The Commission concludes that it is competent to examine the case submitted by the petitioners on the alleged violation of the right to life of Leydi Dayán Sánchez, as well as the right to a fair trial, the right to judicial protection, and the obligation to respect and ensure the free and full exercise of the rights of all persons under its jurisdiction.

29. In light of the arguments of fact and law set forth above, and without prejudging on the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible, with respect to Articles 1(1), 4, 8, and 25 of the American Convention.
2. To notify the State and petitioner of this decision.
3. To initiate the proceedings on the merits.
4. To publish this decision and include it in the Annual Report, to be presented to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., October 9, 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; and Commissioners Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, and Susana Villarán de la Puente.