

REPORT No. 3/11
ADMISSIBILITY
P-491-98
NÉSTOR ROLANDO LÓPEZ, *ET AL.*
ARGENTINA
January 5, 2011

I. SUMMARY

1. On October 15, 1998, the Inter-American Commission on Human Rights (hereinafter “the Commission,” “the IACHR,” or “the Inter-American Commission”) received a petition submitted by Gerardo Nicolás García, Claudia Ramírez, Marcelo Montero, Flavia Piccinini, Maximiliano Sánchez, Milton Hernán Kees, Juan Manuel Kees, Laura Marcela Serrano, Alejandra Coria, Oscar Suárez, Alejandra Marina Luna, Carla Castiglioni, and Julio Helisondo Jara (hereinafter “the petitioners”), who state that they are inhabitants of the province of Neuquén. They claim that the Argentine Republic (hereinafter “Argentina” or “the State”) is responsible for violations committed with prejudice to Néstor Rolando López, Miguel Ángel González Mendoza, José Heriberto Muñoz Zabala, Julio Eduardo Gómez, Cristian Eduardo Crespo, Juan Pablo Lucero, Néstor Zacarías Pardo, Hugo Alberto Blanco, Eduardo Enrique Aguilera de la Hoz, Mario Leonardo Aguilera de la Hoz, Omar Garrido, Héctor Darío Sánchez, Aldo Manuel Omán, Raúl Colicheo, Alfredo Guzmán and Héctor Sosa (hereinafter “the alleged victims”) when they were transferred to prisons inordinately far from their places of residence.

2. The petitioners contend that the State is responsible for the violation of the right to humane treatment and of the rights of the family provided for, respectively, by articles 5 and 17 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), in connection with the obligation to respect and guarantee rights provided for by article 1.1 of same. In this respect, they claim that the transfer of the alleged victims to locations distant from their place of residence infringes their right to a treatment respecting their dignity; it considerably affects their relations with their next of kin; it prevents effective access of their defense counsel, which makes the exercise of their defense difficult at the stage of enforcement of their sentence; it unlawfully removes them from the enforcement judges under whom they find themselves; it prevents the fulfillment of the re-socialization function of the imprisonment, and clearly constitutes a form of punishment that transcends the convict, and affects the next of kin of the alleged victims.

3. The State, in turn, argues that the fact that the inmates convicted by the courts of the Province of Neuquén are being held in federal facilities outside that province is chiefly because the province lacks sufficient prisons capable of housing the inmate population. Moreover, it contends that the fact of having been transferred outside of the provincial jurisdiction cannot be construed to be cruel, inhumane, and degrading punishment, and that domestic law provides procedures to request transfers and extraordinary visits, thus legally guaranteeing inmate contact with their immediate family. The State also objected to the petitioners’ claim that domestic remedies had been exhausted.

4. After analyzing the positions of the parties and, pursuant to the requirements established by articles 46 and 47 of the American Convention, the Commission decides to declare the case admissible for the purpose of examining the alleged violation of the rights provided for by articles 5 and 17, in connection with article 1.1. of same. The Commission also decides to notify the parties of this decision, to publish it, and to include it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BEFORE THE COMMISSION

5. The petition was received on October 15, 1998. On April 10, 2003, the Commission requested additional information from the petitioners. On September 24, 2003, a response from the petitioners was received. On November 14, 2003 the Commission forwarded to the State the pertinent parts of the petition, granting it two months to submit its reply. In a December 19, 2003 note, the State

requested an extension from the IACHR. The State's response to the petition was received on June 14, 2004, and it was forwarded to the petitioners on September 2, 2004.

6. The petitioners submitted additional information on December 8, 2004, which was forwarded to the State on February 3, 2005, granting it one month to submit its observations. Subsequently, on September 17, 2008, the Commission reiterated to the State its request for observations regarding the petitioners' communication.

7. The State's response was received on August 11, 2009 and it was forwarded to the petitioners on September 17, 2009. A response was received from the petitioners on November 17, 2009, and it was forwarded to the State on August 25, 2010, granting it one month to submit its observations.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

8. The petitioners claim that following an agreement signed between the Province of Neuquén and the Ministry of Justice of the Nation, many of the convicts from that provincial jurisdiction are sent to carry out their sentence in prisons of the federal penitentiary system. They maintain that although most of the inmates are housed in Unit No. 9 of the Federal Penitentiary Service, in the city of Neuquén, others have been transferred to other federal penitentiary system units in regions that are very far from the Province of Neuquén and therefore, also far from their next of kin and friends, as well as from their sentence enforcement judge [*juez de ejecución de sentencia*]. For instance, the Unit No. 6 of Rawson, in the Province of Chubut (approximately 800 km from the Province of Neuquén) and Unit No. 1 in the Federal Capital (at a distance of 1200 km).

9. The petitioners argue that these transfers to distant zones have entailed for the inmates unlawful suffering beyond that which comes with imprisonment itself. They note that it is impossible for the inmates to receive visits from their next of kin and close friends, who for the most part lack the economic resources to travel to distant places; this is a violation of the rights of the family, provided for by article 17 of the Convention, as it undermines their capacity to maintain family ties. Moreover, it infringes the principle that punishment shall not be extended to any person other than the criminal, established by article 5.3 of the Convention, since the next of kin of the inmates are not able to visit them. The petitioners claim that these transfers are "disguised punishments" of the convicts and that they clearly qualify as a form of cruel, inhumane, and degrading treatment according to the provisions of article 5.2 of the Convention.

10. In addition, they argue that the transfers of the prisoners who are Neuquén natives outside of their province also violates the principle that punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners (article 5.6 of the Convention), as these transfers remove them completely from their next of kin, their legal counsel, and their enforcement judges.

11. According to the petitioners, the removal of convicts to zones that are distant from their provincial jurisdiction also constitutes an impediment to effective assistance by their legal counsel their criminal sentences are being carried out, and places them in a situation of abandonment regarding the enforcement judges with jurisdiction to exercise judicial control over the aforementioned execution of their sentences.

12. The facts object of the complaint, they argue, infringe various constitutional and legal norms at both the federal and state levels, and in particular article 41 of the Constitution of Neuquén which provides that: "In no case will convicts be sent to prisons outside the territory of the Province," which is relevant in the instant case if it is interpreted in concordance with article 29 of the Convention.

13. With respect to the specific situation of the alleged victims (all convicted in the jurisdiction of Neuquén), the petitioners state the following:

- a. *Néstor Rolando López*: confined in Unit No. 6 of Rawson (Province of Chubut) from January 11, 1997 at least until September 24, 2003.
- b. *Julio Eduardo Gómez*: imprisoned from January 2, 1998 and held in Unit No. 6 of Rawson (Province of Chubut).
- c. *Cristian Eduardo Crespo*: imprisoned from December 22, 1996 and held in Unit No. 6 of Rawson (Province of Chubut).
- d. *Juan Pablo Lucero*: imprisoned from February 2, 1997 and held in Unit No. 7 (Province of Chaco) from 2003 at least until September 24, 2003.
- e. *Néstor Zacarías Pardo*: imprisoned from June 7, 1996 and held in Unit No. 6 of Rawson (Province of Chubut) from January 2001 at least until September 24, 2003.
- f. *Hugo Alberto Blanco*: he was transferred on November 20, 2004 to Unit No. 6 of Rawson (Province of Chubut), allegedly as a reprisal for having complained of a beating received in the Neuquén prison where he was held at the time.
- g. *Eduardo Enrique Aguilera de la Hoz y Mario Leonardo Aguilera de la Hoz*: they were transferred to Unit No. 6 of Rawson (Province of Chubut) before November 2004.
- h. *Raúl Colichero*: as of November 2009 he was carrying out his sentence in Unit No. 1 (Province of Buenos Aires).
- i. *Alfredo Guzmán y Héctor Sosa*: as of November 2009 they were carrying out their sentences in Unit No. 6 of Rawson (Province of Chubut).

14. Regarding the following alleged victims the petitioners generally claim that they were transferred to carry out their sentences beyond the Province of Neuquén: Miguel Ángel González Mendoza, José Heriberto Muñoz Zabala, Omar Garrido, Héctor Darío Sánchez and Aldo Manuel Omán.

B. Position of the State

15. The State mainly claims that the fact that inmates convicted under the Province of Neuquén's criminal justice system are housed in federal penitentiaries outside of the province is due to the lack of penal facilities that can guarantee the treatment and conditions mandated by national and international law. In addition, it maintains that it would be unreasonable and prejudicial to expect that Neuquén inmates be held only in Unit No. 9 of the federal penitentiary system (in that province) because that unit is a closed one, intended to house inmates who are highly conflictive or only in the early stages of the gradual release program established by law.

16. The State reports that the agreement signed by the Province of Neuquén and the Federal Government authorizes the housing of inmates in any of the units of the federal penitentiary system and that there are various reasons related to penitentiary management that could lead to a decision to transfer a person to any one of these units. In addition, the State notes that the mere fact of being housed outside of the provincial jurisdiction simply cannot be labeled as cruel, inhumane, or degrading treatment.

17. The State further contends that Argentine law provides for transfers to other units to ensure proximity to next of kin, and extraordinary visits. Therefore, contact of any inmate with his or her nuclear family is guaranteed. In this respect, the State maintains that transfers are administrative acts; as such they are subject to judicial control. The petitioners have not proven that they initiated any legal actions and therefore their complaint before the IACHR is inadmissible.

18. The State also claims that the complaint lodged before the Inter-American Commission has become futile, since as of August 2009 the following alleged victims have been released: Cristian Eduardo Crespo, Julio Eduardo Gómez, Néstor Rolando López, Néstor Zacarías Pardo, Hugo Alberto Blanco and Miguel Ángel González Mendoza.

19. Regarding José Heriberto Muñoz Zabala, the State reports that he is a Chilean national and therefore would never have received any visits, whether in Neuquén or in any of the other locations where he has been held; as of August 2009 he was in Unit No. 7 (Province of Chaco). Regarding Juan Pablo Lucero, as of August 2009 he was held in Unit No. 6 of Rawson (Province of Chubut); he is visited by his mother and has not requested a transfer to the Province of Neuquén. Both Muñoz Zabala and Lucero are in the trust stage [*fase de confianza*], the last one in the gradual release program.

IV. ANALYSIS REGARDING COMPETENCE AND ADMISSIBILITY

A. Competence

20. The petitioners have standing, in principle, pursuant to article 44 of the American Convention to submit petitions before the Commission. The petition names individual persons as alleged victims, with respect to whom the Argentine State undertook to respect and guarantee the rights provided for by the American Convention. Regarding the State, the Commission notes that Argentina is a State-Party to the American convention since May 9, 1984, the date upon which it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition. Likewise, the Commission is competent *ratione loci* to take cognizance of the petition, because it alleges the violation of rights protected by the American Convention which took place within the territory of the Argentine Republic, a State-Party to said treaty.

21. The Commission is competent *ratione temporis* because the obligation to respect and guarantee rights protected by the American Convention was in force for the State at the time when the facts in the petition allegedly occurred. Finally, the Commission is competent *ratione materiae* because the petition reports the possible violation of human rights protected by the American Convention.

B. Exhaustion of domestic remedies

22. Article 46(1)(a) of the American Convention requires the prior exhaustion of domestic remedies in accordance with generally recognized principles of international law, for the admission of a petition regarding an alleged infringement of the American Convention. The purpose of this requirement is to allow national authorities to take cognizance of an alleged violation of a protected right and, if appropriate, to provide a remedy before the case is heard in an international venue.

23. In the instant case, the State argues, in general terms, that in the petitioners' complaint there is no record of any attempt on their part to initiate legal action to protect the rights alleged to have been infringed.

24. It is then up to the Commission to establish whether the requirement of exhaustion of domestic remedies has been met by each one of the alleged victims. In this respect, the following can be inferred from the case file:

a. *Néstor Rolando López*: the Second Criminal Chamber of the city of Neuquén issued a decision on February 11, 1997 in which it denied a request from Mr. López for his prompt return to Unit No. 9 of Neuquén. Mr. López's defense lawyer filed a cassation appeal against this decision, which was dismissed by the Superior Court of Neuquén in its Judgment No. 67/1997. An extraordinary federal appeal [*recurso extraordinario federal*] was filed against this last ruling, which was again denied by the same Superior Court of Justice in its Interlocutory Decision No. 74 of April 21, 1998. In response to this ruling, the defense submitted a motion for admission of a denied appeal [*recurso de hecho*] before the Supreme Court of Justice of the Nation which, on August 6, 1998, was also dismissed.

b. *Miguel Ángel González Mendoza*: the Second Criminal Chamber of the city of Neuquén denied, in a May 14, 1997 decision, a request made on behalf of Mr. Miguel Ángel González Mendoza for his prompt return to Unit No. 9 of Neuquén. Defense attorney Mr. López filed a cassation appeal against this ruling, which in turn was dismissed by the Superior Court of Neuquén in its Judgment No. 55/1997. An extraordinary federal appeal was filed against this decision, which was denied by the same Superior Court of Justice in its Interlocutory Decision No. 73 of April 21, 1998. Against this decision defense counsel filed a motion for admission of a denied appeal before the Supreme Court of Justice of the Nation, which was dismissed by this court in an August 6, 1998 ruling.

c. *José Heriberto Muñoz Zavala*: regarding his case, the petitioners claim that the same procedural steps as in the cases of Néstor Rolando López and Miguel Ángel González were exhausted. Thus, the last judicial decision adopted regarding his request for his transfer to the Province of Neuquén was an August 6, 1998 ruling in which the Supreme Court of Justice dismissed a motion for admission of a denied appeal filed on his behalf. This ruling is in the petition's case file.

d. *Julio Eduardo Gómez*: the Second Criminal Chamber of the city of Neuquén decided, in Interlocutory Order No. 353/2001 of November 8, 2001 to deny *in limine* a habeas corpus petition filed on behalf of Mr. Julio Eduardo Gómez, with the purpose of obtaining an order for his return to a penitentiary facility in the Province of Neuquén. A cassation appeal was filed against this decision, which was dismissed by the Superior Court of Neuquén in Judgment No. 26/2002 of September 24, 2002.

e. *Cristian Eduardo Crespo*: the Second Criminal Chamber of the city of Neuquén issued Interlocutory Order No. 367/2002 of August 6, 2002, denying an urgent request filed on behalf of Mr. Cristian Eduardo Crespo for his return to a penitentiary unit in the Province of Neuquén. A cassation appeal was filed against this judgment, which was declared to be inadmissible by the Superior Court of Neuquén in its Interlocutory Decision No. 109 of October 24, 2002.

f. *Hugo Alberto Blanco*: the Second Criminal Chamber of the city of Neuquén issued, on November 22 and 23, respectively, interlocutory orders No. 329 and No. 333 denying habeas corpus petitions filed in favor of Mr. Hugo Alberto Blanco requesting his transfer to a facility in the Province of Neuquén.

25. The petitioners have generally claimed that domestic judicial remedies have been exhausted with the submission of formal petitions for prison transfer. In some of the cases submitted, the alleged victims requested their transfer by filing habeas corpus petitions and, in others, through formal transfer requests. In both cases the Commission notes that the Second Criminal Chamber of the city of Neuquén, as the sentence enforcement court, was the competent tribunal to hear these petitions or requests. In addition, it can be inferred that the Superior Court of Justice of Neuquén (the highest court in the province), heard cassation appeals against the decisions denying the requests issued by the Second Criminal Chamber.

26. The State, for its part, although it invokes the lack of exhaustion of domestic remedies, does not explain which appropriate and effective remedies should have been exhausted. It does not explain, either, why it was necessary for the petitioners to use the cassation appeal before the Superior Court of Neuquén as the appropriate appeal to use in the context of the facts object of the complaint.

27. Based on the foregoing, it is the Inter-American Commission's opinion that, pursuant to article 46(1)(a) of the petition, the exhaustion of domestic remedies has been proven by the petitioners regarding the following six alleged victims: Néstor Rolando López, Miguel Ángel González Mendoza, José Heriberto Muñoz Zavala, Julio Eduardo Gómez, Cristian Eduardo Crespo and Hugo Alberto Blanco.

28. With respect to the remaining alleged victims, the Commission does not have the necessary specific information to decide regarding compliance with this admissibility requirement.

C. Timeliness of the petition

29. Article 46(1)(b) of the American Convention provides that for a petition to be admissible before the Commission it 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; article 32 of the Commission's Rules of Procedure provides that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

30. It can be inferred from the instant case file that the latest judicial decisions regarding the requests of Messrs. Néstor Rolando López, Miguel Ángel González Mendoza and José Heriberto Muñoz Zavala, to be returned to the Province of Neuquén were adopted by the Supreme Court of Justice of the Nation in three rulings issued on August 6, 1998, that is, two and a half months before they lodged their petition before the Commission on October 15, 1998. Therefore, they were filed within the time period of six months established by the American Convention as a requirement for admission.

31. In the case of Mr. Hugo Alberto Blanco, it is on record in the case file that the Second Criminal Chamber of the city of Neuquén issued Interlocutory Order No. 333/04 on November 23, 2004, denying a habeas corpus petition containing a request for his transfer. The complaint was submitted by the petitioners to the IACHR in a communication received on December 8, 2004, and therefore was presented within the six months time period established by the American Convention as a requirement for admitting the petition.

32. It can be inferred from the information presented in the instant case that the latest judicial appeals decided in the cases of Messrs. Julio Eduardo Gómez and Cristian Eduardo Crespo, were those in which decisions were handed down by the Superior Court of Neuquén on September 24, 2002 (Decision No. 26/2002) and October 24, 2002 (Interlocutory Decision No. 109). However, the complaints specifically regarding these two alleged victims were filed by the petitioners in a communication received by the IACHR on September 24, 2003. Thus, both final decisions were adopted at least eleven months before the petitions regarding Messrs. Gómez and Crespo were lodged, and therefore the petitions were submitted after the time period of six months, established as a requirement for admissibility by the American Convention, had expired.

33. Regarding the rest of the alleged victims, the Commission does not have the necessary specific information to decide on whether this admissibility requirement has been met.

34. With respect to this matter, the Commission notes that article 46(1)(b) establishes a six month time period for the petition to be lodged starting from the date on which the "party alleging violation of his rights" was notified of the final judgment. Therefore, in cases such as the one at hand, in which specific violations are alleged regarding each one of the alleged victims, and in which each person has his own proceedings for the exhaustion of domestic remedies, the Commission must examine, individual by individual, whether the time period requirement for the lodging of a petition has been met.

35. Therefore, the IACHR concludes that the petitions regarding Néstor Rolando López, Miguel Ángel González Mendoza, José Heriberto Muñoz Zavala and Hugo Alberto Blanco were lodged within the time period established by article 46(1)(b) of the Convention.

D. Duplication of proceedings and international *res judicata*

36. It cannot be inferred from the case file that the petition is pending in another international proceeding for settlement, nor that it is substantially the same as one previously studied by this or by another international organization. Therefore, it is the opinion of the Commission that the requirements established by articles 46(1)(c) and 47(d) of the Convention have been met.

E. Characterization of the Facts Alleged

37. For the purposes of admissibility, the Commission must decide whether the facts alleged tend to establish a violation of rights, pursuant to the provisions of article 47(b) of the American Convention, or, pursuant to paragraph (c) of same, if the petition is “manifestly groundless” or “obviously out of order.” The criterion for the evaluation of these requirements is different from the one used to decide on the petition’s merits; the Commission must carry out a *prima facie* evaluation to determine whether the petition provides grounds for a possible or potential violation of a right guaranteed by the Convention, but not to establish whether an infringement of rights has occurred. This determination constitutes a preliminary analysis that does not entail prejudgment on the merits of the case.¹

38. The Commission notes that the petition’s chief contention is that the transfer of the alleged victims to locations that are considerably distant from their place of residence infringed certain rights protected by the American Convention, such as the right to humane treatment and the rights of the family. They claim that their housing in penitentiary units such as Unit No. 6 of Rawson, eight hundred miles from Neuquén made access of their next in kin inordinately difficult and entailed a form of uprooting of them from their community. The State, in turn, has held that the measures taken were lawful, and that the mere fact of their transfer out of the jurisdiction of their province did not *per se* mean that the inmates were subjected to cruel, inhumane and degrading treatment.

39. In this respect, it is the opinion of the Inter-American Commission that the distance between a person’s place of residence and the facility where he or she is incarcerated constitutes one of a set of conditions of detention of that person. In the instant case, the transfer of the alleged victims to places distant from their place of residence could constitute a disproportionate measure that could unjustifiably worsen their incarceration, and could constitute a real obstacle to the maintenance of family ties. Therefore, at the merits stage, the Commission must determine if the application of this measure in fact has infringed the rights to humane treatment and the rights of the family provided for by the American Convention.

40. In the light of the arguments in fact and in law submitted by the parties and the nature of the matter of which it has taken cognizance, the IACHR considers that the facts alleged by the petitioners tend to establish possible violations of the rights protected by articles 5 and 17 of the American Convention, in connection with article 1(1) of same.

V. CONCLUSIONS

41. The Commission concludes that it is competent to examine the claims submitted by the petitioners regarding the alleged violation of articles 5 and 17 in connection with 1(1) of the American Convention with prejudice to Néstor Rolando López, Miguel Ángel González Mendoza, José Heriberto Muñoz Zavala, Hugo Alberto Blanco, and those next of kin that will be identified at the merits stage, and that the claims are admissible pursuant to the requirements established by articles 46 and 47 of the American Convention.

42. The Commission also concludes that the petition is inadmissible with respect to the claims submitted on behalf of Julio Eduardo Gómez, Cristian Eduardo Crespo, Juan Pablo Lucero, Néstor Zacarías Pardo, Eduardo Enrique Aguilera de la Hoz, Mario Leonardo Aguilera de la Hoz, Omar Garrido, Héctor Darío Sánchez, Aldo Manuel Omán, Raúl Colicheo, Alfredo Guzmán and Héctor Sosa.

43. Based on the foregoing arguments in fact and in law and without prejudging on the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

¹ Among other precedents, see: IACHR, Report No. 12/10, Case 12.106, Admissibility, Enrique Hermann Pfister Frías and Lucrecia Pfister Frías, Argentina, March 16, 2010, para. 46; IACHR, Report No. 10/10, Petition No. 214-08, Admissibility, Koempai et al., Suriname, March 16, 2010, para. 43.

1. To declare the instant petition admissible with respect to articles 5 and 17 in connection with 1(1) of the Convention.
2. To notify the Argentine State and the petitioners of this decision.
3. To continue with the examination of the merits of the case.
4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Approved on the 5th day of the month of January, 2011. (Signed): Felipe González, President; Paulo Sérgio Pinheiro, First Vice-President; María Silvia Guillén, José de Jesús Orozco Henríquez and Rodrigo Escobar Gil, Commissioners.