

REPORT No. 11/11
PETITION 697-04
ADMISSIBILITY
JESÚS REYNALDO AGUIRRE CHING
PERU
March 22, 2011

I. SUMMARY

1. On June 1, 2004, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") received a petition on behalf of Jesús Reynaldo Aguirre Ching (hereinafter "the alleged victim"), presented by William Arturo Valdivia Paredes (hereinafter "the petitioner"), which alleged that the Republic of Peru (hereinafter "Peru," "the State," or "the Peruvian State") had violated the rights enshrined in Articles 8 and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"). The petitioner alleged that on June 27, 1993, Mr. Aguirre Ching was assaulted by two members of the Peruvian National Police, who shot him with a firearm, causing permanent physical injuries. He indicated that these events were investigated by a military court, which he called an inappropriate forum for prosecuting common crimes such as the one perpetrated against the alleged victim. He added that, as a result of irregular actions taken by the military authorities, one of the policemen was acquitted and the other secured a ruling that criminal action was time-barred. He emphasized that, although investigations were initiated under ordinary jurisdiction, those investigations were hindered by the military courts.

2. For its part, the State argued that the criminal trial carried out under military jurisdiction was conducted in keeping with the law in force. It argued that the alleged victim took no action to challenge this jurisdiction, nor did he act as a plaintiff (*parte civil*) to the trial conducted under ordinary jurisdiction. It stated that the events alleged in the petition would not constitute a violation of rights protected in the American Convention and requested that the IACHR rule the complaint inadmissible under Articles 46(1)(a) and 47(b) of that instrument.

3. After examining the positions of the parties in the light of the admissibility requirements established in Articles 46 and 47 of the American Convention, the Commission concluded that it has jurisdiction to hear the petition and found it admissible as regards the alleged violation of the rights enshrined in Articles 8 and 25 of the American Convention, in relation to Articles 1.1 and 2 of that instrument. Additionally, under the principle *iura novit curia*, it concluded that the events described in the petition could constitute a violation of the right protected in Article 5 of the Convention. The Commission decided to notify the parties of this Report on Admissibility, to publish it, and to include it in its Annual Report.

II. PROCEEDINGS BEFORE THE COMMISSION

4. On June 1, 2004, the IACHR received a communication from the Inter-American Court of Human Rights, to which it attached a complaint dated April 5, 2004 on behalf of Jesús Reynaldo Aguirre Ching. The complaint had been originally addressed to the Inter-American Court. It was registered by the IACHR under number 697-04 and on May 6, 2005, the petitioner presented additional information. On May 7, 2009, the pertinent parts of that documentation were transmitted to the State, which was granted a period of two months to submit its reply, in keeping with the Rules of Procedure of the IACHR.

5. The State presented its reply on July 20, 2009; and on February 24, 2010, it submitted additional information. For his part, the petitioner presented observations on September 22, 2009 and on March 18, 2011.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

6. The petitioner indicated that in the early morning of June 27, 1993, Mr. Jesús Reynaldo Aguirre Ching, then 18 years old and a cabin boy in the Navy, was circulating in the *San Martín* square in the city of Lima, when he was stopped by Eduardo Jesús Delgado Espinoza and Carlos Sifuentes Alejos, who identified themselves as members of the Peruvian National Police (hereinafter also “the PNP”). He affirmed that these individuals, allegedly civilian employees of the PNP, demanded his identification and then money. When he refused, a fight ensued, during which Sifuentes Alejos allegedly shot the alleged victim twice at close range with his service weapon. According to the allegations, the bullets entered Mr. Aguirre Ching’s spine, causing permanent paralysis and leading to his discharge from the Navy for physical disability.

7. The petitioner maintained that on the day of the attack the 13th Criminal Prosecutor of Lima opened an investigation to clarify the facts, but another criminal investigation was initiated under military jurisdiction. According to the allegations, on November 10, 1993, the 13th Prosecutor of Lima formally charged the aforementioned PNP members, requesting that the Second Judicial Section of the Peruvian National Police refrain from hearing the case. He indicated that on December 27, 1993, the Supreme Council of Military Justice assigned jurisdiction to the Permanent War Council of the Peruvian Air Force and that on the following day the 14th Criminal Court of Lima issued a warrant for the arrest of the policemen under investigation.

8. The petitioner indicated that on November 15, 1999, the First Alternate Court of the Air Force acquitted Eduardo Jesús Delgado Espinoza, since Carlos Sifuentes Alejos, then a fugitive, was allegedly the one who fired the gun. According to the information presented, that decision was upheld on March 13, 2001, by the Permanent War Council of the Air Force. He added that on October 20, 2005, the First Alternate Court of the Air Force ruled that criminal action concerning Carlos Sifuentes Alejos was barred by statute of limitations provided in Articles 80 and 83 of the Penal Code in force.

9. As to the trial conducted under ordinary jurisdiction, the petitioner affirmed that on December 28, 1993, the 14th Criminal Prosecutor of Lima formally charged the policemen Eduardo Jesús Delgado Espinoza and Carlos Sifuentes Alejos with assault on life, body, and health – serious injury. Nevertheless, he indicated, Delgado Espinoza pled the defense of *res judicata* by virtue of the acquittal issued under military jurisdiction. According to the information presented by the petitioner, on October 10, 2002, the 14th Criminal Court of Lima ruled in favor of the defense of *res judicata* and on September 9, 2003, the Fourth Criminal Chamber of the Superior Court of Justice of Lima upheld this decision. This information also indicates that on June 30, 2009, the 14th Criminal Court of Lima declared the prosecution against Carlos Sifuentes Alejos barred by statute of limitations and ordered the case file in the ordinary proceedings to be archived.

10. The petitioner maintained that, given the economic situation and the expenses he incurred in his recovery, Mr. Aguirre Ching was unable to act as a plaintiff to the ordinary trial. He stated that certain judicial remedies were never pursued at the military trial “simply because when notice was issued the deadline for appeal had already passed,” and that Mr. Aguirre Ching’s legal representative did not have full access to the case file. He indicated that the alleged perpetrators never appeared before the ordinary court to give their statements and that, despite a warrant for the arrest of defendant Carlos Sifuentes Alejos, issued in 1999, military justice authorities allegedly failed to take the necessary measures to find him. In that regard, he indicated that Mr. Sifuentes Alejos had a fixed address and worked as a taxi driver in the city of Lima, but was not served notice to appear before the military court and respond to the accusations against him.

11. According to the allegations by the petitioner, the Peruvian Constitution provides in Article 173 that military jurisdiction is limited to on-duty crimes, defined as those committed “by military and police personnel on active or available status in the performance of their service, duty, or employment [...] strictly linked to military functions and exclusively limited to actions described and punished in the Code of Military Justice.” He stated that military justice in Peru does not meet the requirements of independence, impartiality, and autonomy and that its members allegedly do not possess the necessary legal training to act as magistrates.

12. As for the admissibility requirements, the petitioner argued that the alleged victim was exempt from the requirement to exhaust remedies under domestic jurisdiction asserted by the Peruvian State in its reply to the complaint. Additionally, he affirmed that the exceptions provided in Article 46.2, (a) and (b), of the Convention apply to this petition. Finally, he argued that the State is liable for the violation of the rights enshrined in Articles 8 and 25 of that instrument.

B. Position of the State

13. The State argued that the alleged victim did not participate as a civilian party to the criminal trial carried out in the ordinary court, nor did he challenge the decisions of the 14th Court and Fourth Criminal Chamber of the Superior Court of Justice of Lima, which granted the defense of *res judicata* to Eduardo Jesús Delgado Espinoza. On the other hand, it affirmed that Mr. Aguirre Ching participated actively in the military trial as a plaintiff, requesting the seizure of assets of one of the defendants and issuing a preemptive statement to the First Alternate Trial Court of the Air Force. It stressed that Mr. Ching did not challenge the jurisdiction of military courts to hear the case. On that basis, the State argued that the petition does not meet the requirement of prior exhaustion of domestic remedies.

14. The State indicated that the petitioner's challenge to the jurisdiction of the military court is groundless because the criminal trial was carried out in strict adherence to the right to be heard by a court pre-established by law and other guarantees provided both in the Constitution and in the 1980 Code of Military Justice, which was in force at the time of the events. It stated that the petitioner's allegations do not describe violations of the Convention and it emphasized that, under the case-law of the inter-American system, "an unfavorable ruling does not constitute *per se* a violation of human rights."

15. Finally, the State requested that the petition be ruled inadmissible for failure to meet the requirements set forth in Articles 46(1)(a) and 47(b) of the American Convention.

III. ANALYSIS OF ADMISSIBILITY

A. Competence

Competence *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae* of the Commission

16. The petitioner is entitled by Article 44 of the Convention to submit complaints. The alleged victim is an individual who was under the jurisdiction of the Peruvian State on the date of the reported events. For its part, Peru ratified the American Convention on July 28, 1978. Therefore, the Commission is competent *ratione personae* to examine the petition.

17. The Commission is competent *ratione loci* to hear the petition, since it alleges violations of rights protected by the American Convention and occurring within the territory of a state party to that treaty.

18. Additionally, the Commission is competent *ratione temporis*, because the obligation to respect and guarantee the rights protected by the American Convention was already in force for the State at the time of the events alleged in the petition.

19. Finally, the Commission is competent *ratione materiae*, because the petition alleges violations of rights protected by the American Convention.

B. Exhaustion of domestic remedies

20. Article 46(1)(a) of the American Convention provides that, in order for a complaint presented to the Inter-American Commission, in keeping with Article 44 of the Convention, to be

admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to allow national authorities to examine the alleged violation of a protected right and, if appropriate, have the opportunity to resolve it before it is examined by an international body.

21. This petition alleged violations of rights protected in the Convention, stemming from irregular action by Peruvian authorities in connection with a robbery attempt, followed by serious physical injury to Mr. Jesús Reynaldo Aguirre Ching, on June 27, 1993. It affirmed that the crime was committed by two civilian employees of the PNP. It indicates that, because the allegations were heard by a judicial body lacking impartiality, independence, and autonomy, the alleged victim did not have effective access to justice. Additionally, it stated that the policemen charged were favored by final judicial rulings issued by military courts.

22. According to the allegations of the parties, after the events of June 27, 1993, criminal investigations were opened under both military and ordinary jurisdiction. As for the military court, on November 15, 1999, the First Alternate Court of the Air Force acquitted Eduardo Jesús Delgado Espinoza; on October 20, 2005, it ruled that criminal action against the second defendant, Carlos Sifuentes Alejos, was barred by statute of limitations. As for the trial conducted under ordinary jurisdiction, the available information indicates that on September 3, 2003, the Fourth Criminal Chamber of the Superior Court of Justice of Lima granted the defense of *res judicata* to Eduardo Jesús Delgado Espinoza. This information also indicates that on June 30, 2009, the 14th Criminal Court of Lima declared statute of limitations concerning the prosecution against the defendant Carlos Sifuentes Alejos.

23. The Peruvian State claimed that domestic remedies had not been exhausted in that, before presenting his complaint to the IACHR, the alleged victim should have challenged the jurisdiction of the military court and participated as a plaintiff to the ordinary proceeding. For his part, the petitioner affirmed that, although the alleged victim did not argue conflict of jurisdiction, the 13th Criminal Prosecutor of Lima, when formally charging the two sole defendants, requested that the military court refrain from hearing the allegations concerning the events of June 27, 1993, since they did not clearly fit the definition of an on-duty crime. The petitioner added that, under the circumstances of this petition, the exceptions to the rule of exhaustion of domestic remedies provided in Articles 46.2, (a) and (b), of the American Convention apply.

24. According to the Rules of Procedure of the IACHR and the jurisprudence of the inter-American system, whenever a State argues that domestic remedies have not been exhausted, it bears the burden of indicating what remedies should have been pursued and demonstrating that such remedies are effective to redress the alleged violations brought to the attention of the inter-American system.

25. Although the Peruvian State affirmed that the alleged victim should have participated as a plaintiff to the ordinary legal proceeding and should have challenged the jurisdiction of the military courts, the available information indicates that on November 10, 1993, the 13th Specialized Provincial Prosecutor requested the 14th Court of Lima to take charge of the proceedings concerning the bodily injuries to Mr. Aguirre Ching and requested that it instruct the military judicial authorities to refrain from investigating the events in question. Despite that, the military judges continued to examine the events of June 27, 1993, and issued final rulings that would hinder the prosecution of the sole defendants under ordinary jurisdiction. This means that the remedy cited by the Peruvian State as suitable in this case, namely a challenge to the jurisdiction of the military court, was pursued by the domestic legal bodies themselves, and a favorable result was not obtained.

26. The Commission has found that military jurisdiction does not provide adequate remedies for investigating, judging, and punishing alleged human rights violations by members of the police and military¹. Additionally, the Inter-American Court has stated that military criminal justice constitutes an appropriate forum only for prosecuting members of the military for crimes or acts of omission which, by

¹ IACHR, Report No. 47/08, Petition 864-05, Admissibility, Luis Gonzalo "Richard" Vélez Restrepo and family, Colombia, July 24, 2008, par. 74.

their nature, may affect military legal interests². In this sense, for the purposes of the admissibility requirement set forth in Article 46(1)(a) of the American Convention, the Commission finds that the criminal trial carried out under military jurisdiction did not constitute an effective remedy.

27. Considering the existence of final judicial rulings under military jurisdiction and their effects on the prosecution concerning the events of June 27, 1993, under ordinary jurisdiction, the IACHR finds that Mr. Aguirre Ching did not have access to an effective judicial remedy and, therefore, that the exception set forth in Article 46(2)(a) of the American Convention applies.

C. Deadline for presentation of the petition

28. Article 46(1)(b) of the Convention provides that, in order for a petition to be found admissible, it must have been lodged within a period of six months from the date on which the interested party was notified of the final judgment that exhausted domestic jurisdiction. This rule does not apply when the Commission finds that any of the exceptions to the exhaustion of domestic remedies, enshrined in Article 46(2) of the Convention, applies. In such cases, the Commission must determine whether the petition was presented within a reasonable time, in keeping with Article 32 of its Rules of Procedure.

29. In this case, the Commission has established that the exception provided in Article 46.2.a of the Convention applies. According to information presented by the parties, when the IACHR received the petition, on June 1, 2004, criminal investigations remained open under both military and ordinary jurisdiction. Therefore, when the complaint was filed the alleged victim had a legitimate expectation that the bodily injuries to which he was subjected on June 27, 1993, would be investigated and punished by the domestic judicial authorities. On that basis, the IACHR finds that the petition was presented within a reasonable period of time, under the terms of Article 32 of its Rules of Procedure.

D. Duplication of procedures and international *res judicata*

30. Article 46(1)(c) of the Convention provides that, in order for a petition to be admissible, the question addressed in the petition must not be pending in another international proceeding for settlement. In Article 47(d), the Convention stipulates that the Commission shall not admit a petition that is substantially the same as one previously studied by the Commission or by another international organization. In this case, the parties have not claimed, nor does the case file indicate, that either of those two circumstances exists.

E. Nature of the alleged events

31. For purposes of admissibility, the Commission must decide whether the petition describes events that could constitute a violation of rights as stipulated in Article 47.b of the American Convention; and whether the petition is "manifestly groundless" or "out of order" according to section (c) of that article. The standard for assessing those requirements is different from the one used to rule on the merits of a petition. The Commission must make a *prima facie* assessment as to whether the petition includes the basis for the possible or potential violation of a right guaranteed by the Convention, but not to establish the actual existence of a violation. This determination constitutes a summary examination that does not prejudge or rule upon the grounds for the case.

32. The Commission finds that the alleged lack of competence of the military court to examine the events of June 27, 1993, and the alleged lack of an effective investigation could constitute violations of the rights enshrined in Articles 8 and 25 of the Convention, in relation to the obligations established in Articles 1.1 and 2 of that instrument. Moreover, under the principle *iura novit curia*, the IACHR finds that the alleged participation of agents of the State in inflicting bodily harm on Mr. Jesús Reynaldo Aguirre Ching could constitute a violation of the right enshrined in Article 5 of the Convention. In

² Inter-American Court of Human Rights, *case of Durand and Ugarte v. Peru*. Judgment of August 16, 2000. Series C No. 68, par. 117; *case of Almonacid Arellano et al v. Chile*. Judgment of September 26, 2006. Series C No. 154, par. 131; and *case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, par. 124.

the merits phase, the Commission will analyze whether the Peruvian State is liable for the alleged violation of the aforementioned provisions of the Convention in the light of applicable criteria for the attribution of responsibility under international human rights law.

33. Since the claims presented by the petitioner have not been shown to be groundless or out of order, the Commission finds that the requirements established in Article 47, (b) and (c), of the American Convention have been met.

IV. CONCLUSIONS

34. On the basis of the arguments of fact and of law presented, and without prejudging the merits of the matter, the Inter-American Commission concludes that this case meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention and, therefore,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible, with respect to the rights enshrined in Articles 5, 8, and 25 of the American Convention, in connection with the obligations set forth in Articles 1.1 and 2 of that instrument.
2. To notify the State and the petitioner of this decision.
3. To begin proceedings on the merits of the matter.
4. To publish this decision and include it in its Annual Report, which is to be presented to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 22nd day of March 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, Commission Members.