REPORT No. 12/12
CASE 1447-05
ADMISSIBILITY
OMAR DE JESÚS LEZCANO LEZCANO, ÁNGEL JOSÉ LEZCANO VARGAS ET AL
COLOMBIA[1]
March 20, 2012

I. SUMMARY

1. On December 15, 2005, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition lodged by Iván Darío Arroyave Vásquez (hereinafter "the petitioner") alleging that the Republic of Colombia (hereinafter "the State" or "the Colombian State") is responsible for the deaths on May 18, 1997 of Omar de Jesús Lezcano Lezcano and Ángel José Lezcano Vargas (hereinafter "the alleged victims" or "the Lezcanos"), in the Department of Antioquia; as well as for failure of the judicial bodies to investigate the crimes and provide reparation to their family members.

2. The petitioner claims that the State is responsible for the violation of the right to life and humane treatment of the Lezcanos and for the violation of the right to a fair trial and judicial protection of their families, in conjunction with the obligation to respect and ensure the rights protected in the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"). In response, the State denies any international responsibility inasmuch as domestic courts have determined that the crimes were not committed by agents of the State or with the acquiescence thereof. It contends that the acts alleged in the petition do not tend to establish violations of the rights enshrined in the Convention and that the IACHR cannot act as a court of review.

3. After examining the positions of the parties and whether the requirements set forth in Articles 46 and 47 of the Convention have been met, the Commission decided to find the case admissible as to examining the alleged violation of Articles 4, 5, 8 and 25, in connection with Article 1.1 and 2 of the American Convention. It also decided to notify the parties of the report and direct it to be published in the annual report.

II. PROCEEDINGS BEFORE THE COMMISSION

4. On December 15, 2005, the Commission received the petition and registered it under the number 1447-05. On April 25, 2006, the Commission requested the petitioner to submit additional information. The petitioner's response was received on April 28, 2006.

5. After conducting a preliminary examination, on November 2, 2009, the IACHR forwarded the relevant portions of the petition to the State for its response. On January 7, 2010, the State requested an extension in order to submit its response, which was granted. On February 12, 2010, the State submitted its response, which was then forwarded to the petitioner for his observations. The petitioner submitted his reply on March 4, 2010, which was forwarded to the State for its observations. On April 16, 2010, the State provided its response, which was conveyed to the petitioner for his reference.

III. POSITION OF THE PARTIES

A. Position of the petitioner

6. The petitioner states that the events took place in La Cantina Villanueva, located in the Village Los Sauces of the Municipality of Caicedo, Department of Antioquia, Colombia. He contends that on the night of May 18, 1997, armed suspects shot Omar de Jesús Lezcano Lezcano and Ángel José Lezcano Vargas to death.

[1] Pursuant to Article 17.2 of the Rules of Procedure of the Commission, Commissioner Rodrigo Escobar Gil, a Colombian national, did not participate in the discussion or in the decision-making process on the instant petition.

7. The petitioner alleges that a "military extermination group" was operating in the area at the time of the incidents. He claims that, even though the alleged culprits have not been fully identified, it would be possible to determine based on available evidence that: i) there was a presence of the Public Security Force in the area at the time when the incidents occurred; ii) the individuals who caused the death of the alleged victims were carrying weaponry and wearing attire exclusively used by the National Army; and iii) these individuals travelled in vehicles that are the property of the municipality of Caicedo.[2]

8. The petitioner reproduces verbatim passages of the statements taken by domestic officials from individuals who witnessed the incidents and others who were in the area when they occurred. He notes that, in these statements, the armed suspects were identified as military officers, who shot the alleged victims with "official military issue weapons and ammunition." By way of example, he indicates that one of the individuals who witnessed the incidents stated the following:

> [W]hat I know is that an army group came up and murdered them, I was present at the time, Omar and Ángel José were coming up from here from the town and the army was going down, they told Ángel José to lend them the horse. Ángel told them that he couldn't and then one of them became enraged and shot them both, several people from the village recognized that it was the army because they had already been here in the municipality as members of the national army and with a group of soldiers. The army was bringing seized cattle from those same parts of a village that is called la milagrosa, after they killed Omar and Ángel José a superior took the assailant away scolded him and took him away.[3]

9. Furthermore, the petitioner claims that members of the Army had participated and that, even if it was the work of a third party, it would be possible to attribute responsibility to the Army because they had acted "in collusion, collaboration and assistance" of the Public Security Force. He also contends that the State has "sponsored the creation and operation of self-defense or paramilitary groups," and therefore the acts committed by these groups would be attributable to the State by action or omission since they created a situation of risk and the State did not take effective measures to prevent said risk from materializing.

10. Additionally, the petitioner cites the domestic investigation and court proceedings. In this regard, he notes that as to clarification of the events, an investigation was opened in the local criminal jurisdiction, which was temporarily suspended on December 15, 2000 (for lack of evidence in the investigation, even though no evidence had been gathered related to the alleged participation of members of the Army therein). Moreover, he alleges that the authorities did not act with due diligence to successfully identify, prosecute and potentially punish those responsible and the crimes remained in impunity. Consequently, he contends that the State failed not only in its duty to prevent the alleged violations from happening by exercising due diligence, but also to treat the violations as required by the Convention.

11. He further argues that on May 18, 1999, the family members of the alleged victims filed suit for direct reparation against the Nation-Ministry of Defense.[4] In the context of said proceeding, the Court of Administrative Claims of Antioquia determined that State responsibility had not been proven and, therefore, the claims of the suit were dismissed on April 7, 2005.[5]

12. He alleges that this decision relieved the State of responsibility based on the fact that those responsible for the crime were not successfully identified even when the link between alleged

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[2] In support of his claim, the petitioner reproduces one of the verbatim statements, among other ones, that were taken in the domestic investigation opened in the case, given by Mr. Elkin de Jesús Restrepo Serna, who was the Mayor of the Municipality of Caicedo at the time when the events occurred.

[3] Statement of Adrián Holguín. Quoted in the original petition of December 15, 2005, p. 7.

[4] The petition notes that Mrs. Rosa Antonia Vargas, mother of Ángel José Lezcano Vargas, filed as a plaintiff to this suit for direct reparation; however, to the date the case was brought before the IACHR, Mrs. Rosa Antonia had died.

[5] The petitioner notes that the decision was notified by the court on June 14, 2005, and was made firm and final on June 21 of the same year.

members of the military and the crimes was proven, which was the required element for the court to hear the claims alleged in the complaint. He adds that this decision could not be challenged because this type of proceeding is not appealable, due to the amount involved, which would constitute an infringement of the right to judicial protection.

13. With regard to prior exhaustion of domestic remedies, he argues that the exceptions set forth in Article 46.2 of the Convention apply in this case. As for the criminal investigation, he alleges that it was not an effective mechanism for judicial bodies to successfully clarify the facts. With regard to the administrative claim, he notes that because the decision of the Administrative Claims Court of Antioquia cannot be challenged through any regular or special appeals process, this avenue was exhausted when the decision of April 7, 2005 was handed down. However, he also alleges that, based on standards upheld by the IACHR in other decisions, due to the very nature of this type of remedy, as established in the Convention, it would not be a suitable procedure to clarify facts such as those of the instant case.

14. Lastly, he notes that at the time of their death, the alleged victims were farmers and helped support their families. He contends that at the time of the death of Omar de Jesús Lezcano Lezcano, he was 18 years of age and lived with his mother and sisters. As for Ángel José Lezcano Vargas, he indicates that he lived with his wife and three children from that union. He alleges that the death of the alleged victims caused "profound pain and suffering" for their family members.

B. Position of the State

15. The State contends that the petition should be found inadmissible because it does not allege facts that tend to establish a violation of the rights set forth in the American Convention and that, by virtue of the subsidiary nature of the Inter-American Human Rights System (IAHRS), the Commission cannot act as a court of review.

16. It claims that there has been no proof of participation of agents of the State in the death of the Lezcanos or that the perpetrators acted under the supervision, protection, tolerance or acquiescence of members of the National Army. It also argues that the factual context in which the instant case is to be examined should only pertain to the deaths of Omar de Jesús Lezcano Lezcano and Ángel José Lezcano Vargas on May 18, 1997. Accordingly, it contends that the facts and evidence introduced by the petitioner pertain to matters that are unrelated to the petition.

17. The State alleges that in order to attribute indirect responsibility to it for acts committed by private individuals, it must be proven that it had knowledge of a risk and did not act effectively to avoid it.[6] It notes that this case involves the occurrence of an "unforeseen" act and that the State did not have any "reasonable chance to avoid it." As for the petitioner's argument regarding State responsibility in the "creation and operation of self-defense or paramilitary groups," it maintains that this is not the proper stage in the procedure to discuss the matter, but that this should be done instead during examination of the merits.

18. With regard to investigation of the crimes, the State contends that the authorities, who took over the investigation of the matter, acted effectively and with due diligence. It notes that the day after the incidents took place, an investigation was opened as a matter of regular criminal procedure and, in the context of said investigation, the competent authorities ordered and conducted the gathering of evidence. It adds that in the course of the investigation, the authorities did not act on the hypothesis of an alleged link of the culprits to members of the Armed Forces and notes that the decision to temporarily suspend the investigation took into account the different pieces of evidence what were gathered in the course of the investigation and was duly based on the law and the facts.

[6] In support of its allegation, the State cites IA Ct. of H.R. *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C No. 159, para. 123 et seq. (Note DDH.GOI. No. 1678/0264 of the Ministry of Foreign Relations of Colombia of February 5, 2010, p. 6).

19. The State argues that just because certain evidence mentioned by the petitioner was not gathered, or the culprits were not successfully identified, does not mean that the State has failed in its duty to investigate, inasmuch as this obligation is of means and not of results. It also mentions the importance of considering the complexity of the investigation, taking into account "the very characteristics of the area due to the situation of public order prevailing at the time of the occurrence of the events."

20. Furthermore, the State notes that the suit for direct reparation brought by the family members of the alleged victims led to the decision of the Court of Administrative Claims of Antioquia, under which the State was exonerated of responsibility because no "causal link" was successfully established between the facts raised in the claim and the alleged participation of agents of the State. It contends that this decision cannot be disqualified as a judicial act because: i) the remedy pursued was examined and a decision on the merits was obtained; ii) the decision had due basis in the law of the Colombian legal system; and iii) it has not been raised that there is any State policy preventing exhaustion of remedies before the administrative courts, which in any case would be disproven by the fact that these remedies were effectively exhausted and decided in a timely fashion.

21. As to the allegation of lack of remedies to challenge the decision handed down by the Court of Administrative Claims of Antioquia, which was based on the amount involved therein under Law 954 of 2005, the State notes that this matter was already settled by the Constitutional Court of Colombia which found that the exception to the guarantee of double instance set forth for this type of proceedings fulfills the requirements provided for in the Political Constitution.[7] It argues that the right enshrined in Article 8.2h) of the Convention pertains to criminal proceedings and, therefore, that requirement does not apply to other areas of law.[8]

22. In short, the State contends that the claim of the petitioner for the IACHR to review the appropriateness of a suit for reparation that was already ruled upon by national courts with respect to due process and fair trial rights, as well as the alleged violation of the guarantee of a double instance that was already examined by the Constitutional Court, would amount to the Commission acting as a fourth instance. For the foregoing reasons, the State requests the Commission to find the petition inadmissible because it does not meet the requirement set forth in Article 47.b) of the Convention.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

23. The petitioner has standing, in principle, under Article 44 of the American Convention, to file petitions on behalf of the alleged victims. As regards the State, Colombia has been a State party to the American Convention since July 31, 1973, the date it deposited its instrument of ratification. The Commission therefore is competent *ratione personae* to examine the petition. Likewise, the Commission is competent *ratione temporis* in that the obligation to respect and ensure the rights protected in the American Convention was already in effect for the State on the date when the events alleged in the petition occurred.

[7] Accordingly, the State indicates that in Judgment C-509 of July 6, 2006, the Constitutional Court established that "there are certain criteria that must be respected by the legislator so that his decision to submit a particular procedure or procedural act to a single instance is not at odds with the Constitution, to wit: i) that the exclusion of the double instance must be an exception; ii) that there exist procedural remedies, actions or opportunities that adequately ensure the right to a defense and the right of access to administration of justice to those who find themselves adversely affected by the proceedings or by the decision in single instance procedures; iii) that the exclusion of the double instance should be aimed at achievement of a constitutionally legitimate purpose; iv) that the exclusion cannot give rise to discrimination." Cited in Note DDH. GOI. No. 1678/0264 of the Ministry of Foreign Relations of Colombia of February 5, 2010, p. 12.

[8] In support of its argument, the State cites: IACHR, Admissibility, Report No. 43/04, Petition 306-99. *Yamileth Rojas Piedra* (Costa Rica). October 13, 2004, para. 65.

24. In addition, the Commission is competent *ratione loci*, in that the alleged violations occurred within the territory of a State party to said convention and it is competent *ratione materiae*, inasmuch as the petition alleges violations of human rights protected by the American Convention.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

25. Article 46.1.a of the American Convention requires the prior exhaustion of available domestic remedies, in accordance with generally recognized principles of international law, as a requirement for the admission of claims on an alleged violation of the Convention. However, Article 46.2 of the Convention provides that the requirement of prior exhaustion of domestic remedies is not applicable when (i) 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; (ii) 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 (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

26. In the matter under consideration, the petitioner alleges that domestic procedures have been inadequate to investigate, prosecute, punish and redress the consequences of the violations that have allegedly been committed. He contends that the remedy to achieve economic reparation for damages was exhausted with the decision of the administrative claims court, which dismissed the claims lodged in the suit for direct reparation. As to the criminal investigation, he argues a lack of due diligence by authorities to identify the alleged culprits of the crimes, in light of the fact that a temporary suspension of the investigation was ordered in 2000. In response, the State alleges that the decision to temporarily suspend the criminal investigation had a proper basis in the law. Regarding the administrative claims court, it contends that the IACHR could not act as a court of appeals to review the propriety of the suit for reparation or the alleged violation of the guarantee of double instance that has already been examined by the domestic bodies of the judiciary.

27. It should first be clarified what domestic remedies must be exhausted in the instant case. The Inter-American Court has held that adequate remedies to cure the violations that have allegedly been committed are the only ones that 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.[9]

28. According to precedents set by the Commission, whenever a crime is committed that is prosecutable ex officio, the State has the obligation to bring charges and open criminal proceedings[10] and, in those cases, this constitutes the suitable procedure to clarify the crimes, prosecute those responsible and establish the appropriate criminal punishment, as well as to make other means of reparation of a monetary nature possible. The IACHR considers that the facts alleged in the instant case involve the alleged violation of fundamental rights such as life, which translate in domestic legislation into offenses that are prosecutable ex officio and, therefore, it is this proceeding that is brought by the State itself that must be considered for the purpose of determining the admissibility of the claim.

29. In this regard, the IACHR has established as a general rule that a criminal investigation must be conducted promptly in order to protect the interests of the victims, preserve the evidence and

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[9] I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras.* Judgment of July 29, 1988. Series C No. 4, para. 64.

[10] Report No. 52/97, Case 11.218*, Arges Sequeira Mangas,* Nicaragua, *1997* Annual Report of the IACHR, paras. 96 and 97. Also see: Report No. 55/97, Case 11.137, Juan Carlos Abella, Argentina, para. 392. Report No. 62/00, Case 11.727, *Hernando Osorio Correa,* para. 24. 2000 Annual Report of the IACHR.

even safeguard the rights of any person who, in the context of the investigation, may be considered suspicious.[11] Moreover, the Inter-American Court has held that even though all criminal investigations must meet several different legal requirements, the rule of prior exhaustion of domestic remedies should never lead to a halt or delay that would render international action in support of the defenseless victim ineffective.[12] The Court has established that in order for a remedy to be considered as effective, it must be capable of producing the result for which it was designed.[13]

30. As for the other remedies to which the State refers in support of its argument on the use of the IACHR as a court of review, the Commission has held in the past that the courts of administrative claims are a mechanism whereby one seeks the oversight of the administrative activity of the State and which only makes it possible to obtain compensation for damages caused by abuse of power. Consequently, in a case such as this one, it is not the suitable remedy for purposes of the admissibility requirements, because it does not constitute an adequate means to try, punish and redress the consequences of human rights violations.

31. Invoking the exceptions to the rule of prior exhaustion of domestic remedies set forth in Article 46.2 of the Convention is closely tied to the determination of potential violations of certain rights enshrined therein, such as the right of access to justice. However, due to its nature and purpose, Article 46.2 is a provision whose content is autonomous, as opposed to the substantive provisions of the Convention. Therefore, the determination as to whether or not the exceptions to the rule of prior exhaustion of domestic remedies are applicable to the case must be made prior to and separate from the analysis on the merits of the matter, inasmuch as it is based on a standard of evaluation that is different from the one used to determine a potential violation of Articles 8 and 25 of the Convention.

32. In the instant case, a criminal investigation and case was opened on May 18, 1997. It was temporarily suspended on December 15, 2000. The Commission notes that, more than fourteen years later, the criminal proceeding is at the preliminary stage and the State has not reported any further efforts to gather any evidence to make it possible to reopen the case. Consequently, it is in order to apply the exception set forth in Article 46.2.c) of the American Convention.

2. Deadline for Submitting the Petition

33. The American Convention establishes that for a petition to be admissible before the Commission, it must be lodged within a time limit of six months from the date on which the party alleging the violation of rights was notified of the final decision. In the claim under examination, the IACHR has established that the exceptions to the rule of prior exhaustion of domestic remedies pursuant to Article 46.2.c of the American Convention do apply. In this regard, Article 32 of the Rules of Procedure of the Commission set forth that in instances when the exceptions to the rule of prior exhaustion of domestic remedies apply, the petition must be lodged within a reasonable time. For this purpose, the Commission must consider the date when the alleged violations occurred and the particular circumstances of each case.

34. In the instant case, the petition was received on December 15, 2005 and the events that are the subject of the petition took place on May 18, 1997 and the effects thereof in terms of the alleged lack of results of the administration of justice would extend to the present date. The criminal investigation has been suspended since December 15, 2000, and the suit for direct reparation was dismissed in April 2005. Therefore, in view of the context and nature of the case, as well as the fact that those responsible for the crimes have not been identified or punished, the Commission finds that the petition was lodged within a reasonable time and that the admissibility requirement regarding timeliness has been met.

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[11] IACHR, Report No. 71/09, Petition 858-06, *Massacre of Belén - Altavista*, Colombia, August 5, 2009, para. 36.

[12] I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras.* Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 93.

[13] I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras.* Judgment of July 29, 1988. Series C No. 4, para. 66.

3. Duplication of Proceedings and International *Res Judicata*

35. There is no indication in the case record that the subject of this petition is pending in another proceeding before an international adjudicatory body, or that it reproduces a petition that has already been examined by this or another international body. Therefore, it is deemed that the exceptions set forth in Articles 46.1.d) and 47.d) of the Convention are not applicable.

4. Characterization of the Alleged Facts

36. In view of the elements of fact and law presented by the parties and the nature of the claim submitted for its analysis, the IACHR considers that the petitioner's allegations on the scope of the State's alleged responsibility regarding the events that are the subject of the petition may constitute colorable claims on the violation of the rights to life to the detriment of Omar de Jesús Lezcano Lezcano and Ángel José Lezcano Vargas, and to humane treatment, fair trial and judicial protection to the detriment of their family members, enshrined respectively in Articles 4, 5, 8 and 25 of the Convention in conjunction with Article 1.1. Inasmuch as it is not evident that these aspects of the claim are groundless or out of order, the Commission deems that the requirements set forth in Article 47.b. and c. of the Convention have been met.

37. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements. In the instant case, the Commission notes that the allegations set forth with regard to the application of Law 954 of 2005 (which established a single instance based on the amount involved in the suit for direct reparation), requires analysis on the merits, given that it raises issues relating to the scope of the obligation set forth in Article 2 of the American Convention, in connection with the guarantees of Article 8 of the same instrument.[14].

V. CONCLUSIONS

38. The Commission concludes that it is competent to examine the claims lodged by the petitioner on the alleged violation of Articles 4, 5, 8 and 25, in connection with Articles 1.1 and 2 of the American Convention and that these claims are admissible pursuant to the requirements established in Articles 46 and 47 of the Convention.

39. Based on the foregoing arguments of fact and of law and without prejudging the merits of this matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To find the instant case admissible with regard to Articles 4, 5, 8 and 25, in connection with Articles 1.1 and 2 of the American Convention.

2. To notify the State of Colombia and the petitioner of this decision.

3. To continue with an analysis of the merits of the matter.

4. To publish this decision and include it in the Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 20th day of the month of March 2012. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rosa María Ortiz, and Rose-Marie Belle Antoine, members of the Commission.

[14] IACHR, Report No. 71/09, Petition 858-06, *Massacre of Belén - Altavista*, Colombia. August 5, 2009, para. 44.