

**REPORT No. 88/12**  
PETITION 751-06  
ADMISSIBILITY  
ANETTE BETTINA HERRERA OSORIO VIUDA DE [WIDOW OF] ARANKY ET AL.  
GUATEMALA  
November 8, 2012

**I. SUMMARY**

1. On July 21, 2006, the Inter-American Commission on Human Rights (hereinafter "Commission," "Inter-American Commission," or "IACHR") received a petition presented by Anette Bettina Herrera Osorio viuda de [widow of] Aranky, José Luis Arenas Woolrich, and Jorge Alejandro Zamora Barasé (hereinafter "petitioners") on behalf of Anette Bettina Herrera Osorio viuda de Aranky and her children, Mariam Fadua, Suhad Faride, Farah Bettina, Yusef Habib , and Melanie Fawcia, all surnamed Aranky Herrera (hereinafter "alleged victims"). The petition was filed against the State of Guatemala (hereinafter "State," "Guatemalan State," or "Guatemala") for breach its duty to deliver justice within a reasonable time in two legal cases, a criminal case and a civil case, arising from a February 15, 1992 traffic accident resulting in the death of Issa Roberto Aranky Ortiz and the injury of the alleged victims.

2. The petitioners assert that the State has violated the rights protected under Article XXIV of the American Declaration of the Rights and Duties of Man and Article 8 (fair trial) of the American Convention on Human Rights.

3. The State does not contest the petition's admissibility with respect to an alleged violation of Article 8 of the American Convention on Human Rights in the criminal case. However, it contests the petition's admissibility with respect to the civil proceedings, on the grounds that the domestic remedies have not been exhausted.

4. Without prejudice to the merits of the case, after analyzing the parties' positions and determining compliance with the requirements of Articles 46 and 47 of the American Convention on Human Rights (hereinafter "Convention" or "American Convention"), the Commission decides to declare the case admissible for the purpose of examining the alleged violation of the rights under Articles 8(1) and 25 of the American Convention of Anette Bettina Herrera Osorio viuda de Aranky and her children, Mariam Fadua, Suhad Faride, Farah Bettina, Yusef Habib, and Melanie Fawcia, all surnamed Aranky Herrera, pursuant to Article 1(1) of that instrument. The Commission further decides to notify the parties of this decision, to publish it, and to include it in its Annual Report to the OAS General Assembly.

**II. PROCESSING BY THE COMMISSION**

5. On July 21, 2006, the Commission received the petition and assigned it number 751-06. On December 20, 2006, it forwarded the relevant portions of the petition to the State of Guatemala, setting a two-month deadline for reply in accordance with Article 30(2) of the IACHR Rules of Procedure then in effect. The State's reply was received on February 23, 2007 and duly forwarded to the petitioners.

6. The IACHR received information from the petitioners on March 21, 2007, July 18, 2007, October 23, 2007, February 20, 2008, May 16, 2008, August 16, 2008, August 24, 2009, and January 13, 2012. These communications were duly forwarded to the State.

7. The IACHR received information from the State on June 5, 2007, August 24, 2007, January 10, 2008, March 28, 2008, July 1, 2008, September 26, 2008, and January 25, 2010. These communications were duly forwarded to the petitioners.

### III. POSITIONS OF THE PARTIES

#### A. The petitioners

8. The petitioners claim that, through its judiciary and competent bodies, the State of Guatemala has breached its obligation to provide justice within a reasonable time in two judicial proceedings arising from the February 15, 1992 traffic accident: (1) in criminal proceedings against Antonio Velasco Mendizábal for the offenses of homicide and wrongful injury and against Emiliano Merino López for the offense of ordinary accessory after the fact (*encubrimiento propio*) and (2) in ordinary civil proceedings against Emiliano Merino López for damages.

9. The petitioners indicate that on February 15, 1992, at approximately 6:45 p.m., in Escuintla Department, at the 36-kilometer mark of the Pacific Road, the alleged victims were riding in a car with Issa Roberto Aranky Ortiz, the husband of Anette Bettina Herrera and father of the then-minor alleged victims, and with then-17-year-old family domestic Rosa Marina Lorenzo Gómez. Mr. Aranky was driving north on the highway when Antonio Velasco Mendizábal, driving a Flor de Mayo company extraurban bus owned by Emiliano Merino López, collided head on with the vehicle in which they were riding. Mr. Aranky and Rosa Marina Lorenzo Gómez died in the accident, and the alleged victims suffered multiple, serious injuries requiring hospitalization, surgery, and treatment for trauma.

#### • Criminal case

10. As a consequence of the accident, a complaint, criminal case number 829-92, was filed with the Escuintla Department Second Criminal Court of First Instance against Antonio Velasco Mendizábal, for the offenses of homicide and wrongful injury, and Emiliano Merino López, for the offense of ordinary accessory after the fact. The case was later transferred to the Escuintla Second Criminal Court of First Instance as case number 421-92. Mrs. Herrera viuda de Aranky initiated criminal proceedings on her own behalf, as an injured party, and on that of her children, reserving the civil action, which she filed separately with the competent court. However, the petitioners report that the Court itself lost the criminal case file in 1993.

11. The petitioners indicate that Mr. Velasco fled the scene of the accident. The authorities never located him or enforced an August 3, 1992 warrant for his arrest. Mr. Merino López was indicted as an accessory after the fact and released on recognizance. They indicate that the State did not follow through on the criminal prosecution of either individual, resulting in impunity for crime.

12. In regard to the exhaustion of domestic remedies in the criminal case, they accuse the authorities of unwarranted delay in the administration of justice. They maintain that, in addition to having lost the case file in 1993, the State has never located the accused fugitive and has therefore never enforced the warrant for his arrest, with the result that he has never been prosecuted.

- **Ordinary civil action for damages**

13. Also as a consequence of the accident, on April 23, 1993, Mrs. Herrera viuda de Aranky brought an action for damages against Emiliano Merino López. Subsequently, through the exercise of ancillary jurisdiction in probate proceedings, the case was transferred to the Guatemala Department Third Civil Court of First Instance and, later, to the Sixth Court of First Instance (Ord. 96-2002).

14. In the course of these proceedings, on August 2, 1995, the Escuintla First Civil Court of First Instance and Financial Enforcement rescinded the preventive attachment order issued against the defendant after the plaintiffs failed to pay a court-imposed security deposit of 60,000 quetzals, which they could not afford because they were financially exhausted by funeral and medical expenses. The petitioners contend that it was unreasonable to require the aforementioned security deposit in order to maintain an attachment order ensuring compliance with a possible compensatory judgment and argue that the Court denied justice by making it impossible to preserve the previously ordered attachment of the defendant's assets. Moreover, in their view, the fact that they did not contest the amount of the security has no bearing on whether there has been an unwarranted delay in providing justice for the alleged victims.

15. On January 26, 2001, the Third Civil Court of First Instance found against Mr. Merino in the ordinary civil action. On September 25, 2001 the appellate court overturned the lower court's judgment because it had failed to notify the defendant of a ruling in the case. This defect was cured, and the defendant filed an appeal. When the appeal was dismissed, he filed an action for amparo, which was declared inadmissible.

16. The petitioners indicate that, finally, on January 2, 2008, the Sixth Civil Court of First Instance issued a judgment in the ordinary action for damages. The Court ruled in favor of the plaintiffs and assigned Emiliano Merino López joint and several liability for damages arising from the deaths of Issa Roberto Aranky Ortiz and Rosa María López Gómez, as well as for injuries to the plaintiff and her children. They indicate that the delay is attributable not to remedies exercised by the interested parties but to the fact that the lower court judgment was issued nine years after the start of the proceedings and was then invalidated by the failure to provide notice of a ruling, a procedural defect that was cured eight years after it occurred.

17. With regard to the exhaustion of domestic remedies in the ordinary civil proceedings, the petitioners allege unwarranted delay in the administration of justice. They indicate that when the lower court judgment was invalidated on January 26, 2001, the case was retried from the point at which the court failed to provide notice to the defendant Emiliano Merino López on May 22, 2000. This failure to provide notice was cured, and on January 2, 2008, the court ruled in favor of the plaintiffs. However, the petitioners claim that despite this judgment, the delay in the administration of justice had already occurred.

- **B. The State**

18. The State does not contest the petition's admissibility with respect to an alleged violation of Article 8 of the American Convention on Human Rights in the criminal case. However, it contests the petition's admissibility with respect to the civil proceedings, on the grounds that the domestic remedies have not been exhausted.

- **Criminal case**

19. The State asserts that investigations were undertaken in criminal case number 421-92 as a result of the traffic accident in which the alleged victims were involved on February 15, 1992. The bus was driven by Antonio Velasco Mendizábal, who fled at the time of the accident. The Escuintla Second Criminal Court of First Instance received the case on March 2, 1992. On August 3, 1992, a warrant was issued for the arrest of the accused bus driver, Antonio Velasco Mendizábal, for the offenses of homicide and wrongful injury, and the National Police were officially notified. On July 31, 1992, a statement was

taken from Emiliano Merino López, the bus owner, who was released on his own recognizance that day. The State indicates that the warrant for the arrest of the accused bus driver has not been enforced to date.

20. In a communication received on July 1, 2008, the State reported that the case file created on February 16, 1992 and subsequently lost had been located and was being analyzed. It asserted that Emiliano Merino could no longer be prosecuted under criminal law because the case had been dismissed. With respect to Antonio Velasco Mendizábal, in a communication dated January 20, 2010, it indicated that there was no record of the complaint against him and that no criminal action could be brought because it had been more than 16 years since the accident, and the criminal case was time-barred.

- **Ordinary civil action for damages**

21. With respect to the ordinary civil action for damages, the State indicates that on June 3, 1992, Mrs. Herrera Osorio submitted a request for the preventive seizure of several buses owned by Mr. Merino López, which was granted by the competent court. On April 23, 1993, Mrs. Herrera Osorio and Mr. Mauricio Hernández filed an action for damages against Mr. Merino López, which was declared admissible. Mr. Merino López filed a motion for vacation, which was denied on October 1, 1993. On January 12, 1994, he invoked the defense of statute of limitations (*prescripción*), which was rejected. Mr. Merino López appealed this ruling, and the appellate court confirmed the lower court's decision. On June 2, 1995, Mr. Merino López entered a plea of 'not guilty' and asked for the case to be dismissed.

22. The State reports that on May 1, 1996, Mrs. Herrera Osorio filed a request to broaden the seizure order, which was denied on the grounds that the existing seizure of several buses was sufficient. On June 25, 1995, Mr. Merino López asked to have the seizure order lifted or, if it were to remain in effect, for the plaintiff to post security for damages in the event that he was acquitted. The Escuintla Court of First Instance ruled on July 27, 1995 and set a security deposit of 60,000 quetzals with a five-day deadline for payment. On August 2, 1995, the seizure order was rescinded because the plaintiffs had not deposited the court-imposed security amount. The State points out that national law provides for the right to request security and that, in accordance with Articles 527 and 531 of the Civil and Commercial Code of Procedure, the Civil Court of First Instance acted in exercise of the powers conferred on it under national law. Furthermore, there is no indication in court records that Mrs. Herrera contested the court-imposed security deposit or asked for it to be reduced in view of her personal circumstances, given that, according to the August 2, 1995 ruling, the plaintiffs ignored the notice of the ruling.

23. On January 26, 2001, the Third Civil Court of First Instance issued a judgment in favor of the plaintiffs, and the parties were notified on March 15, 2001. Mr. Merino López appealed this judgment, arguing that he had received notice of the lower court's judgment without having been previously notified of the May 22, 2000 court ruling denying the motion to dismiss for lack of legal capacity to bring suit. On September 25, 2001, the Tenth Chamber of the Court of Appeal granted the appeal and vacated the lower court's judgment, ordering the case to be retried from the point in the proceedings where the defect had occurred and invalidating all proceedings after that time. The case was transferred to the Third Civil Court of First Instance to be decided in accordance with the law on November 5, 2001.

24. The Third Judge of First Instance in Civil Matters resigned from the case on November 5, 2001 and appointed the Sixth Judge of First Instance in Civil Matters of Guatemala City to take over consideration of the case. On April 2, 2003, the Sixth Court of First Instance provided notice of the May 22, 2000 ruling, thereby curing the failure to provide notice to the defendant. Mr. Merino López filed an appeal of the May 22, 2000 ruling, which was dismissed by the Third Chamber of the Court of Appeal on October 14, 2004. Mr. Merino López filed an action for amparo, which was dismissed by the Supreme Court on September 26, 2005. The Supreme Court remanded the case to Sixth Civil Court of First Instance on May 30, 2006, and on July 3, 2006 the latter Court set the start date for the oral phase of the trial for July 21, 2006. On July 20, 2006, it agreed to hear the motion to vacate the July 3, 2006 decision for procedural defect. On May 2, 2007, the Sixth Judge of First Instance for Civil Matters issued a ruling partially approving the motion to vacate the aforementioned decision.

25. The State indicates that on January 2, 2008, the Court issued a judgment against Mr. Emiliano Merino López in the ordinary action, assigning him joint and several liability for damages. Emiliano Merino filed an appeal of this judgment, which was dismissed as time-barred. He also requested an amendment of the procedure, which was denied. When his appeal was dismissed, he filed an application for judicial review, which was denied by the Third Chamber of the Civil and Commercial Court of Appeal on September 8, 2009. Mr. Emiliano Merino has filed an action for amparo, which is currently pending.

26. Regarding the exhaustion of domestic remedies, the State does not contest the admissibility of the petition under Article 8 of the American Convention with respect to the delay in the criminal case. However, it does contest the petition's admissibility with respect to the civil action, because some delay in its resolution is attributable to the parties' exercise of domestic remedies. It therefore contends that the domestic remedies have not been exhausted.

#### **IV. ANALYSIS OF ADMISSIBILITY**

##### **A. Commission's jurisdiction *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae***

27. The petitioners are eligible in principle to submit petitions to the Commission under Article 44 of the American Convention. The alleged victims indicated in the petition are individuals whose rights under the American Convention the State of Guatemala has undertaken to respect and preserve. The Commission notes that Guatemala has been a state party to the American Convention since May 25, 1978, when it deposited its instrument of ratification. Consequently, the Commission has jurisdiction *ratione personae* to examine the petition. The Commission has jurisdiction *ratione loci* to consider the petition because it alleges that violations of rights protected by the American Convention took place in Guatemala, a state party to the Convention. The Commission reiterates that once the Convention has entered into force in a state, it and not the Declaration becomes the primary source of law to be applied by the Commission, as long as the petition alleges violation of substantially identical rights set forth in both instruments and a continuing situation is not involved.<sup>1</sup> The Commission will therefore refer only to the standards of the Convention.

28. The Commission has jurisdiction *ratione temporis* because the obligation to respect and preserve rights protected under the American Convention was already incumbent on the State at the time of the facts alleged in the petition. Lastly, the Commission has jurisdiction *ratione materiae* because the petition reports possible violations of human rights protected under the American Convention.

##### **B. Other requirements for admissibility of the petition**

###### **1. Exhaustion of domestic remedies**

29. Article 46(1)(a) of the American Convention provides that, for a complaint lodged with the Inter-American Commission pursuant to Article 44 of the Convention to be admissible, all 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 be seized of the alleged violation of a protected right and to have the opportunity to resolve it if appropriate before it is considered at the international level. Article 46(2) of the Convention establishes three situations in which the rule requiring the exhaustion of domestic remedies does not apply: (a) when 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; (b) when the party alleging violation of his rights has been denied access to the remedies of domestic law or has been prevented from exhausting them; or (c) when there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. This provision requires not only that the remedies in question exist but also that they be adequate and effective.

<sup>1</sup> IACHR, Report No. 03/01 (Admissibility), Case 11.670, Amílcar Menéndez, Juan Manuel Caride *et al.* (Social Security System), Argentina, January 19, 2001, para. 41 *et seq.*

30. In the present case, the State does not contest the petition's admissibility with respect to the alleged violation of Article 8 of the American Convention on Human Rights in the criminal case. However, it contests its admissibility with respect to the civil proceedings, arguing that the domestic remedies have not been exhausted. The petitioners hold the authorities responsible for unjustified delay in the provision of justice in both legal proceedings.

31. With respect to the criminal case, without going into an analysis of the parties' arguments regarding the alleged violation of the rights to a fair trial and judicial protection, the Commission notes that it has been twenty years since the alleged facts occurred, and at the date of this writing the State's representatives have yet to provide specific information on measures taken to move beyond the initial investigatory phase, since they acknowledge that the criminal case file was lost. Furthermore, the State reports that the case cannot be prosecuted because it has been too long and the criminal action is now time-barred. Therefore, the IACHR considers the exception to the exhaustion of domestic remedies provided in Article 46(2)(c) of the American Convention to be applicable in this case.

32. Regarding the civil action for damages, the Commission notes that the alleged facts giving rise to the present petition originated in litigation between private parties that was initiated on April 23, 1993 and that the matter before the Commission relates the State's response through its judiciary. On January 2, 2008, a judgment was issued against Mr. Emiliano Merino López in the ordinary civil case, assigning the defendant joint and several liability for damages. According to information supplied by the State, the defendant filed an appeal of this judgment, which was dismissed as time-barred. He also requested an amendment of the procedure, which was denied. After the appeal was dismissed, he filed an application for review, which was denied by the Third Chamber of the Civil and Commercial Court of Appeal. On the basis of its analysis of the information submitted, the Commission finds that the alleged victim exercised the remedies available to her and that the alleged obstacles to bringing the legal proceedings to a conclusion and enforcing the judgments require analysis at the merits stage. Given that the case remains open, with no final judgment, the Commission considers the exception to the rule of prior exhaustion to be applicable on the basis of unwarranted delay, pursuant to Article 46(2) of the American Convention.

33. Lastly, the Commission notes that invoking the exceptions to the rule of exhaustion of domestic remedies set forth in Article 46(2) of the Convention is closely related to the issue of determining whether certain rights enshrined in the Convention, such as the right of access to justice, may have been violated. However, by their nature and purpose, the provisions of Article 46(2) are independent from the substantive norms of the Convention. It is therefore necessary to determine separately whether exceptions to the rule of exhaustion of domestic remedies set forth in this Article apply to a particular case before analyzing the merits of the case, because this determination is subject to a different standard of appreciation than the standard used to establish violations of Articles 8 and 25 of the Convention.

## **2. Filing period**

34. Article 46(1)(b) of the American Convention establishes that, to be declared admissible, petitions must be filed within a period of six months from the date on which the applicant was notified of the final judgment. In the petition in question, the IACHR has established the applicability of the exceptions to the exhaustion of domestic remedies under Article 46(2)(c) of the Inter-American Convention. In this connection, Article 32 of the Commission's Rules of Procedure provides that, in cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition must be presented within a reasonable period of time. For this purpose, the Commission must consider the date on which the alleged violation of rights occurred and the circumstances of each case.

35. In the present case, the petition was received on July 21, 2006, when both the criminal and the civil cases were still open and reportedly still being considered by the respective courts. The Commission therefore deems that the petition was presented within a reasonable period of time and deems the filing period requirement for admissibility to have been met.

### 3. Duplication of proceedings and international *res judicata*

36. Nothing in the case file indicates that the subject of the petition is pending decision in another international procedure of settlement, nor that it duplicates a petition already examined by this or any other international body. Therefore, the requirements of Articles 46(1)(c) and 47(d) can be deemed to have been met.

### 4. Characterization of the alleged facts

37. The Commission does not consider it appropriate at this stage of the procedure to determine whether or not the alleged violations occurred for the alleged victims. At this point, for the purposes of admissibility, the IACHR need only decide if the allegations state facts that, should they be proved, would tend to establish violations of the American Convention, as provided in Article 47(b) thereof, and if the petition is “manifestly groundless” or “obviously out of order,” in accordance with paragraph (c) of the same Article.

38. The standard for identifying these extremes is different from the one used to judge the merits of a complaint. The IACHR must make a *prima facie* evaluation to determine whether the complaint demonstrates an apparent or potential violation of a right protected by the American Convention, but not whether such a violation occurred.<sup>2</sup> By establishing both an admissibility stage and a merits stage, the Commission’s own Rules of Procedure reflect this distinction between the evaluation required for the Commission to declare a petition admissible and the one required to establish the existence of a violation attributable to the State.<sup>3</sup>

39. Moreover, neither the American Convention nor the IACHR Rules of Procedure require the petitioner to indicate specific rights that have allegedly been violated by the State in the matter submitted to the Commission, although the petitioners may do so. It is up to the Commission to determine in its admissibility reports, on the basis of case law, which provisions of the relevant inter-American instruments are applicable, and it may establish that they have been violated if there is sufficient evidence to prove the alleged facts.

40. In the opinion of the IACHR, the alleged facts regarding the supposed lack of compliance by the State with its obligation to investigate could represent a possible violation of the rights under Articles 8(1) and 25 of the American Convention of Anette Bettina Herrera Osorio viuda de Aranky and her children, Mariam Fadua, Suhad Faride, Farah Bettina, Yusef Habib, and Melanie Fawcia, all surnamed Aranky Herrera, pursuant to Article 1(1) of that instrument.

## V. CONCLUSIONS

41. The Commission concludes that it has jurisdiction to consider the merits of this case and that the petition is admissible under Articles 46 and 47 of the American Convention. It decides to proceed to the analysis of merits of the alleged violation of the rights under Articles 8(1) and 25 of the American Convention of Anette Bettina Herrera Osorio viuda de Aranky and her children, Mariam Fadua, Suhad Faride, Farah Bettina, Yusef Habib, and Melanie Fawcia, all surnamed Aranky Herrera, pursuant to Article 1(1) of that instrument.

42. On the basis of the above factual and legal arguments,

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<sup>2</sup> See IACHR, Report No. 128/01, Case 12.367, *Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser of “La Nación” Newspaper* (Costa Rica), December 3, 2001, para. 50; Report No. 4/04, Petition 12.324, *Rubén Luis Godoy* (Argentina), February 24, 2004, para. 43; Report No. 32/07, Petition 429-05, *Juan Patricio Marileo Saravia et al.* (Chile), April 23, 2007, para. 54.

<sup>3</sup> See IACHR, Report No. 31/03, Case 12.195, *Mario Alberto Jara Oñate et al.* (Chile), March 7, 2003, para. 41; Report No. 4/04, Petition 12.324, *Rubén Luis Godoy* (Argentina), February 24, 2004, para. 43; Petition 429-05, *Juan Patricio Marileo Saravia et al.* (Chile), April 23, 2007, para. 54; Petition 581-05, *Víctor Manuel Ancalaf LLaupe* (Chile), May 2, 2007, para. 46.

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

**DECIDES:**

1. To declare this petition admissible with respect to the alleged violation of the rights under Articles 8(1) and 25 of the American Convention of Anette Bettina Herrera Osorio viuda de Aranky and her children, Mariam Fadua, Suhad Faride, Farah Bettina, Yusef Habib, and Melanie Fawcia, all surnamed Aranky Herrera, pursuant to Article 1(1) of that instrument;

2. To notify the parties of this decision;

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

Done and signed in the city of Washington, D.C., on the 29 day of the month of March, 2012.  
(Signed): José de Jesús Orozco Henríquez, President; Felipe González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz and Rose-Marie Antoine, Commissioners.