

REPORT No. 81/12¹
PETITION 404-06
ADMISSIBILITY
ALEX EDMUNDO LEMÚN SAAVEDRA AND OTHERS
CHILE
November 8, 2012

I. SUMMARY

1. On April 25, 2006, the Inter-American Commission on Human Rights (hereinafter "Inter-American Commission," "Commission" or "IACHR") received a complaint filed by two persons, who requested that their identity be kept confidential (hereinafter "petitioners"), against the Republic of Chile (hereinafter "Chile," "State" or "Chilean State"), to the detriment of Alex Edmundo Lemún Saavedra (hereinafter "alleged victim"). By means of a note received by IACHR on November 4, 2009, Blanca Sonia Saavedra Horia and Edmundo del Carmen Lemún Necul, parents of the alleged victim, and the Centre for Justice and International Law (CEJIL) presented themselves as co-petitioners and representatives of the alleged victim (hereinafter "petitioners").

2. The petitioners alleged that the Chilean State is internationally responsible for the alleged extrajudicial execution of the Mapuche indigenous child, Alex Edmundo Lemún Saavedra, on November 7, 2002 by police officers as a result of what might have been the excessive use of force during actions of containment during a land recovery claim by the Mapuche community, as well as for the impunity in which said incidents remained, as a result of the order issued to stay the prosecutor's investigation in the military judiciary system. They argue that the incidents reported establish a violation of Articles 4 (right to life), 19 (rights of the child) and 25 (right to judicial protection), with respect to Articles 1 and 2 of the American Convention on Human Rights (hereinafter "Convention" or "American Convention").

3. As for the State, it submitted an objection claiming that domestic remedies had not been exhausted because the petitioners should have filed an appeal for annulment of judgment based on the merits of the case (*recurso de casación*) against the stay of proceedings, which is provided for by Chilean military criminal law. On the basis of the above, Chile states that the petition is inadmissible, because the requirements provided for in Article 46.1.a of the Convention have not been met.

4. Without prejudging the merits of the case, after examining the positions of the parties and in compliance with the requirements provided for in Articles 46 and 47 of the American Convention, the Commission hereby decides that the petition is admissible for examination of the alleged violation of Articles 4, 5, 19 and 24 of the American Convention, with respect to Article 1.1 of the same instrument, to the detriment of Alex Edmundo Lemún Saavedra, and Articles 5, 8, 24 and 25 of the American Convention, with respect to Articles 1.1 and 2 of the same instrument, to the detriment of the next of kin of Alex Edmundo Lemún. The Commission hereby decides, in addition, to notify the parties of the decision, publish it and include it in its Annual Report to the OAS General Assembly.

¹ In accordance with the provisions of Article 17.2.a of the Commission's Rules of Procedure, Commissioner Felipe González, a Chilean national, did not participate in the discussion or in the decision-making of the present case.

II. PROCESSING BEFORE THE COMMISSION

5. On April 25, 2006, the Commission received the petition and assigned it No. 404-06. On February 24, 2011, it sent the relevant parts to the State, requesting it to present its observations within two months. The State's response was received on April 25, 2011 and sent to the petitioners by means of a note dated June 20, 2011.

6. The petitioners submitted additional information on July 21, 2011, which was sent to the State on September 1, 2011, granting it one month to present its observations. When those time-limits had elapsed without any forthcoming response, IACHR again requested information from the State by means of a note sent on March 6, 2012. To date, IACHR has not received any reply to this request.

III. THE POSITIONS OF THE PARTIES

A. The petitioners

7. The petitioners allege the extra-judicial execution of the indigenous child Alex Edmundo Lemún Saavedra by a police officer, presumably as a result of the excessive use of force while containing an action aimed at recovering territories claimed as ancestral lands by the Mapuche indigenous people. They added that the criminal proceedings filed as a result of these incidents were heard by the military criminal court jurisdiction and culminated in the acquittal of the perpetrator of the child's death.

8. With respect to the context in which the incidents took place, they indicate that the case of Alex Edmundo Lemún Saavedra is not the only one reported because of police violence against members of the Mapuche people. They contend that "there have been various cases reported because of violence against the Mapuches, leading to injuries of diverse severity and psychological after-effects on the boys and girls of the Mapuche communities." They also assert that "none of these cases has been clarified, attributing some kind of responsibility to the police and exposing the ineffectiveness and partiality of military courts."

9. In particular, they indicate that, on November 7, 2002, a group of about 40 Mapuche indigenous persons of the Montutui Mapu community, among whom there were children and women, occupied part of the plot of land called Fundo Santa Alicia or Santa Elisa, in the community of Ercilla, IX Region. They indicate that their goal was to draw the attention of state authorities to their request for restitution of their ancestral lands. They point out that Alex Lemún, a 17-year-old Mapuche student from the community of Requen Lemún Bajo, was participating in the protest. They report that, shortly after they entered the farm, three policemen (*carabineros*) arrived, led by the Major of the First Police Station of Angol, attached to the Prefecture of Malleco. They point out that the police officers had received orders from the Area Chief of the IX Region to check the occupation, as a result of a protection measure for the above-mentioned land.

10. They indicate that, under said circumstances, an unjustified aggression took place against the Mapuche indigenous people, which had not been provoked. They report that, although the protesters were not armed, the major in charge of the operation used first tear-gas and rubber bullets and then fired a 12-gauge Winchester rifle loaded with lead bullets several times. They state that one of the shots hit Alex Lemún in the forehead. According to the petitioners, when they realized what had happened, the father of the alleged victim called the policemen (*carabineros*) by phone, and they hung up; therefore he called the emergency room of a public hospital in Angol. They report that the ambulance reached the place of the incident close to 40 minutes afterwards. They state that Alex Lemún was severely injured and died five days later in a hospital of Temuco.

11. They point out that, as a result of the death of Alex Lemún, the District Attorney's Office of the Ministry of Justice of La Araucanía initiated an investigation. They contend that, on November 2002, the District Attorney's Office ruled that they were not qualified to hear the case and ordered that the case be transferred to the military court jurisdiction, because "the preliminary ballistic report shows that the characteristics of the bullet extracted from the head of the young person Lemún Saavedra is

compatible with cartridges of rifles used by uniformed police and their sale is governed by the Arms Control Law and because it involves an incident in which police officers on active duty were involved.”

12. They point out that the Office of the Consulting Military Attorney of the Armed Forces and Police Force (*Carabineros*) of Malleco-Angol, belonging to the Fourth Military Court of Valdivia, took cognizance of the investigation. They report that, in the investigation, it was confirmed that, as a result of various expert reports, the death of Alex Lemún was caused by a shot fired from a 12-gauge Winchester rifle. They point out that, on the basis of the evidence submitted, the Military Attorney filed indictment proceedings against the Major of the First Police Station of Angol on August 29, 2003, for the crime of unnecessary violence leading to death, categorized as a crime in Article 416 bis of the Military Justice Code. They indicate that, as a consequence, the Military Attorney ordered the preventive detention in the facilities of the Police Prefecture of Malleco No. 21 of Angol, and then granted him parole with bail set of 100,000 pesos.

13. They state that the defense attorney of the Major filed an appeal before the Court Martial, and they report that the court ruled on September 9, 2003 to overturn these indictment proceedings, because it considered that “on the basis of alleged background to the proceedings, the existence of the crime being investigated does not seem to be duly substantiated.” They add that he was immediately released. They point out that, on December 9, 2003, the attorneys of the Lemún family [as the injured party] once again requested that the accused be brought before the Military Attorney, which request was turned down on May 25, 2004. They indicated that, because of this, the attorneys of the next of kin of the alleged victim submitted an appeal to the Court Martial, which upheld the ruling of the lower court.

14. They add that, on July 20, 2004, the Fourth Military Court of Valdivia had temporarily and partially stayed the proceedings of the case and that, afterwards, by means of the decision of September 17, 2004, it had temporarily and entirely dismissed it. They indicate that, on March 18, 2005, the Court Martial had upheld that ruling. They report that the notifications to the attorney and the proxy of the next of kin of Alex Lemún and to his relatives were received on September 15, 2005, November 17, 2005, and October 27, 2005, respectively.

15. Furthermore, they state that an administrative inquiry was initiated against the Major of the First Police Station of Angol, which concluded, by means of a decision issued on December 22, 2002, that the “planning and police tactics in the proceedings did not correspond to the planned prior instructions on the matter... that the identification, appraisal, and dimensions of the risks involved by the Major (...) was not adequate, that the stage was well known as one of conflict,.. that he did not take into consideration the operational strategy designed by the prefecture.” They assert that, because of this, he was subjected to a disciplinary measure, which consisted of one day of arrest with service. They report that, at present, the Major continues to be a member of the police corps and that he has been transferred to the city of Rancagua and holds the same rank.

16. With respect to the exhaustion of domestic remedies, they contend that, with the Court Martial ruling of March 18, 2005 to uphold the temporary stay of proceedings, the domestic remedies available for judging and punishing the perpetrator of the homicide of Alex Lemún were exhausted. As for the State’s objection that remedies had not been exhausted, the petitioners have three arguments. First of all, they contend that, as expressly provided for by the domestic legal system, the appeal for annulment of judgment (*recurso de casación*) is special in nature and therefore it need not be exhausted. Second, they allege that Article 171 of the Military Justice Code that provides for the appeal for annulment of judgment refers to Article 546, which in turn refers to Article 408 of the Criminal Procedures Code, which do not allow for the filing of appeals for annulment of judgment against rulings that order the temporary stay of proceedings, as a result of which it was not possible to file this appeal. Finally, they allege that the investigation of the execution of Alex Lemún was heard in the military criminal court jurisdiction, where the remedy did not have to be exhausted, since that jurisdiction did not provide guarantees of independence and impartiality.

B. The State

17. As for the State, it does not dispute the basic facts reported in the petition in terms of the sequence of events; nevertheless, it does submit an objection for failure of the petitioners to exhaust domestic remedies, and for that reason it requested that the petition be declared inadmissible.

18. Regarding this, it contends that the ruling of the Fourth Military Court that temporarily stayed the proceedings of the case, which was upheld by the Military Court, could have been appealed for annulment of judgment based on the merits of the case. It indicates that Article 171 of the Military Justice Code makes it possible to file an appeal for annulment of judgment based on the merits or on the procedures of the case with the Supreme Court of Justice against the judgments of the Military Courts. It adds that the above-mentioned provision refers to the norms of Chapter X of the second part of Volume II of the Criminal Procedures Code, whose Article 546 provides the requirements that must be met to proceed with the appeal for annulment of judgment based on the merits of the case.

19. It states that, as the petitioners did not pursue all available domestic law instruments, the petition must be declared inadmissible because it does not meet the requirements of Article 46.1.a of the American Convention and Article 31 of the Commission's Rules of Procedure.

IV. REVIEW OF ADMISSIBILITY

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

20. The petitioners are legitimately entitled to file a petition with the Commission in accordance with the provisions of Article 44 of the American Convention. The alleged victim and his next of kin are natural persons whose rights, as recognized in the American Convention, the State has pledged to respect and guarantee. As for the State, the Commission notes that Chile is a State party to the Convention since August 21, 1990, date on which it deposited its ratification instrument. Therefore, the Commission has the competence *ratione personae* to hear the petition.

21. The Commission has the jurisdiction *ratione loci* to hear the petition, because the petition alleges violations of rights protected by the American Convention and which took place in the territory of a State party to the Convention. IACHR has the competence *ratione temporis* because the obligation to respect and guarantee the rights protected by the American Convention was in force for the State at the time that it was stated the alleged violations of rights, as claimed in the petition, took place. Finally, the Commission has jurisdiction *ratione materiae* because the petition claims violations of human rights protected by the American Convention.

B. Other requirements for the petition's admissibility

1. Exhaustion of domestic remedies

22. Under Article 46.1.a of the American Convention, for a petition to be admitted by the IACHR, the remedies offered by the domestic jurisdiction must have been exhausted in accordance with generally recognized principles of international law. The prior exhaustion requirement is applicable when, in the national system, genuinely available resources are adequate and effective to remedy the alleged violation. In this regard, Article 46.2 specifies that the requirement shall not be applicable when: a) 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) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; and c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

23. The Chilean State filed an objection for failure by the petitioners to exhaust domestic remedies, pointing out that, prior to the filing of the complaint with the IACHR, the petitioners should have filed an appeal for annulment of judgment based on the merits of the case with the Supreme Court of Justice against the resolution taken by the Court Martial, which upheld the temporary stay of proceedings in the case, in accordance with the provisions of Article 171 of the Military Justice Code.

24. According to the Rules of Procedure of IACHR and case law of the Inter-American System, when a State alleges that domestic remedies have not been exhausted, it must indicate what remedies should have been filed and demonstrate, in addition, which remedies are viewed as "adequate" to redress the alleged violation, that is, that the role of these remedies in the domestic legal system is suitable to redress the alleged breach of human rights that were brought to the cognizance of the Inter-American System.

25. The Commission also repeats that, in cases such as the present one, alleged criminal lawbreaking involving public action, the suitable remedy is normally a criminal investigation and proceedings. In addition, the IACHR points out that the requirement of exhaustion of domestic remedies is applicable when the remedies available in the domestic system make it possible to redress the alleged violation. Indeed, according to Article 46.2.a of the American Convention, this requirement shall not be applicable 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."

26. As for the case that is being examined, IACHR takes note that there is no denial that the investigation of the alleged extrajudicial execution of Alex Lemún was carried out by the military jurisdiction and that it culminated in the decision of the Court Martial to uphold the temporary stay of proceedings of the case, issued on March 18, 2005. The Commission observes that the petitioners have claimed that it was precisely the absence of independence and impartiality of the criminal proceedings processed in the military jurisdiction that led to its dismissal and the resulting impunity of the incidents.

27. As repeatedly indicated by the Commission, the military jurisdiction does not provide an adequate remedy to investigate, hear, judge and punish alleged violations of human rights, supposedly perpetrated by members of law and order. As for using the military courts to hear and judge members of the Armed Forces who were presumably involved, it does not constitute a suitable forum and therefore does not provide an adequate remedy to investigate, hear, judge, and punish human rights violations enshrined in the American Convention.² Because of the above, the Commission believes it is admissible to apply the exception envisaged in Article 46.2.a of the American Convention.

² IACHR, Report No. 11/11, Petition 697-04, Admissibility, Jesús Reynaldo Aguirre Ching, Peru, March 22, 2011, para. 26; Report No. 39/10, Petition 150-06, Admissibility, Nélio Nakamura Brandão and Alexandre Roberto Azevedo Seabra Da Cruz, Brazil, March 17, 2010, para. 31; Report No. 47/08, Petition 864-05, Admissibility, Luis Gonzalo "Richard" Vélez Restrepo and family, Colombia, July 24, 2008, para. 74; Report No. 93/06, Petition 972-03, Admissibility, Valentina Rosendo Cantú et al., Mexico, October 21, 2006, para. 28; Report No. 94/06, Petition 540-04, Admissibility, Inés Fernández Ortega et al., Mexico, October 21, 2006, para. 24.

28. It is noteworthy that Article 46.2, because of its nature and purpose, is a norm with autonomous contents with respect to the substantive standards of the Convention. Therefore, the determination of whether or not the exceptions to the rule of prior exhaustion of domestic remedies provided for in that norm is applicable to the case at hand, must be made previously and separately from the review of the merits of the case, as it depends on a standard of appraisal that is different from the one used to determine the violation of Articles 8 and 25 of the Convention. It must be explained that the causes and effects preventing the exhaustion of domestic remedies in the present case shall be examined, in their relevant aspects, in the report that the Commission shall adopt on the merits of the dispute, in order to decide whether or not they tend to establish violations of the Convention.

2. Time-limits to file the petition

29. In accordance with the provisions of Article 46.1.b of the Convention, for admission of a petition, 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 domestic judgment. In the complaint being reviewed, IACHR has established the applicability of exception to the exhaustion of domestic remedies in accordance with Article 46.2, subparagraph a), of the Convention. Regarding this, Article 32 of the Rules of Procedure of IACHR establishes 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. According to information submitted by the parties, the incidents that led to the present case took place on November 7, 2002; the decision of the Military Court to uphold the stay the proceedings of the case was notified to the representatives of the next of kin of the alleged victim between September 15, 2005 and November 17, 2005, whereas the petition was received by the Commission on April 25, 2006. Bearing in mind that the above-mentioned decision suspended the proceedings until "better investigation data" were found or "the legal objection that had halted the prosecution was lifted," the Commission observes that it is not a final court judgment. In that regard, the Commission believes that the petition was submitted within a reasonable period of time according to the circumstances. On the basis of the above, the IACHR concludes that the petition was filed within a reasonable period of time, in accordance with the terms of Article 32 of its Rules of Procedures.

3. Duplication of procedures and international *res judicata*

31. Article 46.1.c of the Convention establishes that admission of the petition shall be subject to the requirement that the subject of the petition "is not pending in another international proceeding for settlement" and Article 47.d of the Convention stipulates that the Commission shall consider a petition inadmissible if the petition or communication is "substantially the same as one previously studied by the commission or by another international organization." In the briefs, there is no element emerging from the proceedings indicating any of these circumstances of inadmissibility.

4. Characterization of the alleged facts

32. The Commission deems that it does not pertain to the present stage of the proceedings to decide whether or not the alleged violations to the detriment of the alleged victims did take place. For admissibility purposes, the IACHR must only decide if the petition stated facts that, if proven, tend to establish a violation of the American Convention as stipulated in its Article 47.b and if the petition is "manifestly groundless" or if it is "obviously out of order," according to subparagraph (c) of the same article. The criteria to examine these points of law are different from the ones required to rule on the merits of a complaint. IACHR must conduct a *prima facie* evaluation and determine if the complaint shows the grounds for an apparent or potential violation of a right guaranteed by the American Convention, but not to establish the existence of said violation.³ In the present stage, a summary review not involving a

³ See IACHR, Report No. 128/01, Case 12.367, *Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser of the Daily Newspaper "La Nación"* (Costa Rica), December 3, 2001, para. 50; Report No. 4/04, Petition 12.324, *Rubén Luis Godoy*

prejudgment or the issuance of any opinion on the merits must be carried out. The Rules of Procedure of the Inter-American Commission, when it established an admissibility stage and another on the merits, highlight this difference between the assessment that the Inter-American Commission must conduct to declare that a petition is admissible and the assessment required to determine if a violation attributable to the State has been committed.⁴

33. Likewise, neither the American Convention nor the Rules of Procedure of the IACHR require the petitioner to identify the specific rights that were supposedly violated by the State in a case submitted to the Commission, although the petitioners are entitled to do so. It pertains to the Commission, on the basis of the system's case law, to determine in its admissibility reports, which provision of the relevant inter-American instruments is applicable and could tend to establish its violation if the alleged facts are proven on the basis of sufficient evidence.

34. The petitioners allege that the State has violated the right to life of the indigenous child Alex Lemún as a result of his alleged execution by a police officer, because of the disproportionate use of force in a context of repression of an action to claim an indigenous territory. They add that the investigation of these incidents had been heard by Chilean military justice, applying the Military Justice Code, proceedings that were devoid of the guarantees of independence and impartiality. They assert that, because no effective investigation had been conducted leading to the trial and punishment of those responsible, the alleged extrajudicial execution of Alex Lemún remains unpunished. The petitioners also refer to an alleged practice by the police of the excessive use of force in operations involving Mapuche indigenous persons.

35. Furthermore, bearing in mind that the alleged incidents refer to a member of the Mapuche people in a context of a land claim, the IACHR shall examine, in the merits stage, if the complaint entails a situation of discrimination and, as a result, tends to establish a violation of Article 24, with respect to Article 1.1 of the same international instrument.

36. In this regard, the Inter-American Commission observes that the alleged incidents with respect to Alex Edmundo Lemún Saavedra, if substantiated, could tend to establish alleged violations of the rights guaranteed by Articles 4, 5, 19 and 24 of the American Convention, in connection with Article 1.1 of said international instrument. It also observes that the alleged incidents could tend to establish violations of Articles 5, 8, 24 and 25 of the American Convention, with respect to Articles 1.1 and 2 of the same instrument, to the detriment of the next of kin of Alex Edmundo Lemún Saavedra.

V. CONCLUSION

37. The Commission concludes that it is competent to hear the complaint filed by the petitioners and that the petition is admissible, in conformity with Articles 46 and 47 of the Convention, for the alleged violation of Articles 4, 5, 19 and 24 of the American Convention, with respect to Article 1.1 of the same instrument, to the detriment of Alex Edmundo Lemún Saavedra, and Articles 5, 8, 24 and 25 of the American Convention, with respect to Articles 1.1 and 2 of the same instrument, to the detriment of the next of kin of Alex Edmundo Lemún Saavedra.

38. By virtue of the arguments of fact and law indicated above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

(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.

⁴ 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 Laupe* (Chile), May 2, 2007, para. 46.

1. To declare the present petition admissible with reference to the alleged violations of Articles 4, 5, 19 and 24 of the American Convention, with respect to Article 1.1 of the same instrument, to the detriment of Alex Edmundo Lemún Saavedra and Articles 5, 8, 24 and 25 of the American Convention, with respect to Articles 1.1 and 2 of the same instrument, to the detriment of the next of kin of Alex Edmundo Lemún Saavedra.

2. To notify the parties of this decision.

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

Done and signed in the city of Washington, D.C., on the 8h day of the month of November, 2012.
(Signed): José de Jesús Orozco Henríquez, President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz and Rose-Marie Antoine, Commissioners.