

OEA/Ser.L/V/II.151
Doc. 14
21 July 2014
Original: Spanish

REPORT No. 49/14
PETITION 1196-07
REPORT ON ADMISSIBILITY

JUAN CARLOS MARTÍNEZ GIL
COLOMBIA

Approved by the Commission at its session No. 1990 held on July 21, 2014
151 Regular Period of Sessions

Cite as: IACHR, Report No. 49/14, Petition 1196-07. Admissibility. Juan Carlos Martínez Gil.
Colombia. July 21, 2014.

REPORT No. 49/14

PETITION 1196-07

ADMISSIBILITY

JUAN CARLOS MARTÍNEZ GIL

COLOMBIA

July 21, 2014

I. SUMMARY

1. On September 14, 2007, the Inter-American Commission on Human Rights (hereinafter, “the Commission” or “the IACHR”) received a petition submitted by Juan Carlos Martínez Gil,¹ (hereinafter, “the petitioner” or “the alleged victim”) alleging the responsibility of the Republic of Colombia (hereinafter “the State” or “the Colombian State”) for violation of Articles 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 13 (freedom of thought and expression), 15 (right of assembly), 16 (right of association) and 25 (right to judicial protection) in relation to Article 1.1 of the American Convention on Human Rights (hereinafter, “the American Convention”) to the detriment of Juan Carlos Martínez Gil (hereinafter also referred to as “the petitioner” or “the alleged victim”).

2. The petitioner contends that on June 8, 2007, while participating as a leader of the union United Educators of Caldas [*Educadores Unidos de Caldas*] (hereinafter “EDUCAL”) in a peaceful and public demonstration organized with authorization from the municipal government, a member of the Anti-Riot Mobile Squadron of the National Police of Colombia [*Escuadrón Móvil Antidisturbios de la Policía Nacional de Colombia*] (hereinafter “ESMAD”) shot him in the face with a firearm. The shooting permanently deformed his face and caused him to lose his sight in his left eye.

3. For its part, the State alleges that Mr. Juan Carlos Martínez Gil was not wounded by agents of the State nor with officially issued firearms and that ESMAD’s intervention was necessary because demonstrators had blocked the streets. Furthermore, the Colombian State indicates that the requirement to exhaust prior domestic remedies has not been met inasmuch as there are three proceedings pending: a criminal proceeding in the trial phase against the alleged perpetrators, an appeal to the administrative courts in a suit for direct damages compensation [*reparación directa*], and administrative disciplinary proceedings in the appeal phase.

4. Without prejudging the merits of the complaint, after having analyzed the positions of the parties and in compliance with the requirements provided for under Articles 46 and 47 of the American Convention, the Commission decides to declare the case admissible for purposes of its review, based on alleged violations of Articles 4, 5, 8, 13, 15, 16 and 25, in accordance with Articles 1.1 and 2 of said Convention, and inadmissible for review based on alleged violations of Article 7. The Commission further decides to notify the parties of this decision, and to order its publication in the Annual Report of the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

5. On September 14, 2007, the Commission received the petition and registered it under number 1196-07. On June 27, 2008, August 21, 2008 and April 2, 2009, the petitioner submitted additional information. On June 3, 2011, after undertaking a preliminary analysis, the IACHR forwarded the pertinent parts of the petition to the State for it to make observations within a period of two months. On November 4, 2011 the IACHR received the State’s observations, which were duly forwarded to the petitioner. On February 14, 2012 the IACHR received the document containing the petitioner’s observations. On November 29, 2012, and January 29, 2013, the petitioner submitted additional information which was forwarded to the State. On October 15, 2013, the State presented its observation regarding the additional information provided by the petitioner.

¹On March 12, 2012 the Collective Corporation of Attorneys José Alvear Restrepo reported that it would be a party to the case as a petitioner.

III. POSITION OF THE PARTIES

A. Position of the Petitioner

6. The petitioner contends that on June 8, 2007, in his capacity as a leader of the union EDUCAL, he participated in a protest against a bill that supposedly would have cut public resources to finance education, potable water, health [services], and basic sanitation. He states that he was accompanying students from schools in the city of Manizales who were headed to Parque Olaya, where all the demonstrators were gathering. He further states that during the protest there was no blockading of streets, nor was there aggression on the part of any demonstrators, disorderly conduct, or confrontations that could have justified the violent intervention of the national police.

7. Despite the foregoing, the petitioner affirms that at 9:45 a.m., 30 ESMAD police officers appeared at Parque Olaya, blocking the street, creating chaos and pushing the demonstrators towards the opposite street. They allegedly threw tear gas, pushed the demonstrators with shields, and struck them with billy clubs. The petitioner argues that while he looked for somewhere to take cover, an ESMAD agent shot him in the face, fully intending to kill him. He states that the National Institute for Forensic Medicine and Sciences concluded that the mechanism that caused his injuries was a projectile from a firearm, noting that at the scene of the events only ESMAD agents were carrying firearms. In this regard he adds that a homemade weapon in which a glass marble had been introduced was used and that this has been proven by the fact that where he lay injured glass marbles with gun powder and blood were found.

8. He also mentions that the X-rays taken at the health center the day of the demonstrations had been lost. The petitioner adds that he did not receive immediate medical attention because police did not help to transport him to a medical center and as a result he lost his sight in his left eye.

9. The petitioner states that due to the events that occurred he filed criminal proceedings, administrative proceedings for direct damages compensation, and disciplinary administrative proceedings. The criminal proceedings were initiated pursuant to a complaint lodged by the petitioner on June 8, 2007 with the Office of the Attorney General of the Nation [*Fiscalía General de la Nación*], which was sent to the Criminal Military Investigative Court No. 160 in the city of Manizales. He indicates that two years later, in keeping with an order dated June 8, 2009, the case was sent to Specialized Prosecutor's Office 48, "Human Rights and International Humanitarian Law Unit," and that the investigation is currently at the trial stage. According to the petitioner, due to his role as a victim and witness in these proceedings he had received threats warning him not to appear in the court hearing the case.

10. The administrative proceedings for direct damages compensation were initiated in the Administrative Court of Caldas. On May 25, 2012, this Court dismissed the claim for direct damages compensation. The petitioner filed an appeal of this decision, which has yet to be ruled on.

11. The disciplinary proceedings were initiated pursuant to a complaint filed by the petitioner in July 2007 with the Office of Internal Disciplinary Oversight of the Caldas Police Department Command, which in turn sent them to the Office of the Prosecutor Assigned to the National Police of Bogotá. This Office decided to archive the disciplinary investigation—a decision that was appealed and whose final ruling has yet to be handed down.

12. With regard to the rights violated, the petitioner argues that his right under Article 4 of the American Convention had been violated as a threat on his life had been made. He also contends that his right under Article 5 of the Convention had been violated given the violence in Colombia against union activists, as well as the attack that had put his life in jeopardy and led to him losing sight in his left eye and his facing being permanently deformed. He adds that his right to personal liberty had been violated as guarantees of freedom and personal safety had not been respected under the limits placed on the exercise of authority by agents of the State.

13. Furthermore, the petitioner contends that Articles 8 and 25 of the American Convention had been infringed as the Colombian State had refused to conduct a serious and exhaustive investigation that would have fulfilled its obligation to investigate the events of June 8, 2007. The petitioner further contends that the evidence had been manipulated and concealed. He adds that the investigation had not followed basic investigative fundamentals in order to establish the truth and identify the perpetrators, the time lapsed had been excessive, and no results had been made so far.

14. The petitioner adds that in the proceedings, the State settled for simply including the testimony of explosives experts who were not present during the events, or testimony by members of ESMAD themselves and had not considered, for example, repeated use of “homemade” or “handmade ammunition” by this police force. What is more, the proceedings were under the jurisdiction of military criminal justice for two years.

15. Finally, the petitioner points out that with regard to the right to association, this attack on him had occurred in a context where there were threats, persecution and a lack of protection for union activities. Indeed, he states that the “union guarantee” for his organization has been suspended since 2005 and that the Secretariat of Education of the Municipality of Manizales has suspended his salary, and “collaterally” that of the members of the organizations EDUCAL and CUT-CALDAS, since 2006, as well as subjected him to disciplinary and administrative proceedings.

B. Position of the State

16. The State contends that ESMAD intervened in the demonstration because demonstrators had blocked the streets in the Olaya Herrera neighborhood and hindered [the right to] free movement that is guaranteed under Article 24 of the Colombian Constitution. The State adds that Mr. Juan Carlos Martínez Gil was not injured by police units or officially issued firearms inasmuch as ESMAD did not have pellets or BBs to be launched with “slingshots,” and the use of components such as gas and stun grenades to disperse demonstrations was limited to some agents who were experts in the handling and use thereof. At the same time the State argues that the petitioner was not injured with a glass marble, rather with one of the rocks that demonstrators were throwing the day of the demonstration.

17. The State affirms that domestic remedies have not been exhausted and that the exceptions provided for under Article 46.2 of the American Convention are not applicable inasmuch as the task of investigating and punishing the perpetrators had been undertaken by the State of its own initiative from the time it took cognizance of the events. The State adds in this regard that there are still criminal proceedings, as well as administrative proceedings for direct damages compensation and administrative disciplinary proceedings, which have yet to be decided.

18. Specifically with regard to the criminal proceedings, the State indicates that the Military Criminal Investigative Court No. 160 instituted proceedings filed under case No. 4275 on June 8, 2007 against police Captain Libardo Fandiño Soto, patrol officer Kevin David Castrillón, and others on charges of personal injury to Juan Carlos Martínez, and pursuant to an order dated June 8, 2009 had sent the case to Specialized Prosecutor’s Office 48, “Human Rights and International Humanitarian Law Unit.” On June 29, 2012 this Office issued a resolution indicting the defendants. The State adds that these proceedings are currently in the trial phase.

19. Furthermore, the State affirms that an appeal is still pending before the Office to the Prosecutor Assigned to the National Police of Bogotá for its decision to archive the disciplinary investigations.

20. The State highlights that the remedy of appeal of the decision dismissing the suit for direct reparations compensation in administrative court is also pending, and therefore, domestic remedies had not been exhausted. It adds that with regard to this remedy, the provisions of Article 46 of the American Convention require not only exhaustion of criminal and civil remedies, but also that of the suit for direct damages compensation.

21. Finally, the State contends that the events presented by the alleged victim do not characterize violations of the American Convention on Human Rights nor other international instruments as insufficient evidence was provided in the petition to counter what has been proven in the criminal investigation underway in the domestic justice system. The States argues that the lack of any definitive decision in the 6 years since the events occurred did not violate Article 8 and 25 as this was a reasonable period of time. For these reasons, the State affirms that the exceptions provided for under Article 46(2) of the American Convention are not applicable.

IV. ANALYSIS REGARDING COMPETENCE AND ADMISSIBILITY

A. Competence

22. The petitioner has standing, in principle, by Article 44 of the American Convention to present petitions to the Commission. The petition identifies as an alleged victim, an individual with regard to whom the Colombian State committed to respect and ensure the rights in the American Convention. As regards to the State, the Commission notes that Colombia has been a State party to the American Convention since July 31, 1973, when it deposited its instrument of ratification. Therefore the Commission is competent *ratione personae* to review the petition.

23. Furthermore, the Commission is competent *ratione loci* to examine the petition, inasmuch as it alleges violations of rights protected under the American Convention that purportedly took place in Colombia, a State party to said Convention. The Commission is competent *ratione temporis* given that the obligation to respect and ensure the rights protected under the American Convention was already in effect for the State on the date upon when the facts alleged in the petition presumably occurred. Lastly, the Commission is competent *ratione materiae* because the petition denounces potential violations of human rights protected under the American Convention.

B. Admissibility Requirements

1. Exhaustion of Domestic Remedies

24. Article 46.1.a) of the American Convention provides that for a complaint submitted to the Commission to be admissible the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. For its part, Article 46.2 of the Convention provides that the requirement to previously exhaust domestic remedies is not applicable where: (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.

25. As the Inter-American Court of Human Rights has established, whenever a State alleges that the petitioner has failed to exhaust domestic remedies, it has the burden of proving that the remedies that have not been exhausted are “adequate” for remedying the alleged violation, which means that the function of such remedies under the domestic legal system is suitable for protecting the legal right that has been infringed.²

26. In this petition the petitioner contends that there is no due process of law under the State’s domestic legislation to protect his rights. The State, for its part, alleges that the petition does not meet the requirement of prior exhaustion of domestic remedies set forth in Article 46.1.a) of the American Convention inasmuch as there are three pending proceedings: (i) criminal proceedings instituted in 2007 on charges of personal injury that is in the trial phase; (ii) the decision on the remedy of appeal for direct damages

² See Article 31(3) of the Rules of Procedure of the Inter-American Commission on Human Rights; Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No.4, paragraph 64.

compensation in the administrative courts; and (iii) the decision on the appeal of the archiving of disciplinary proceedings before the Office of the Prosecutor Assigned to the National Police of Bogota.

27. In light of the parties' positions and the circumstances surrounding this petition it is necessary to clarify which domestic remedies must be exhausted in keeping with case law of the Inter-American system.

28. In this regard, case law established by the Commission highlights that whenever a crime of public action has allegedly been committed the State has a duty to maintain public order, and therefore it has an obligation to set the criminal law system into motion and to process the matter until the end. In these cases, ordinary criminal proceedings constitute the suitable jurisdiction to shed light on the facts, try the perpetrators, and impose the corresponding criminal penalties, in addition to allowing for other kinds of redress of a monetary nature.³

29. The Commission also notes that as a general rule a criminal investigation must be conducted quickly to protect the victim's interests, preserve evidence, and even safeguard the rights of any individuals who may be considered suspects in the context of the investigation.⁴ Furthermore, the Inter-American Court has established from its initial judgments that while any criminal investigation must fulfill a series of legal requirements, the rule regarding exhaustion of prior domestic remedies must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective.⁵

30. In this case, the petitioner reported the events that occurred during the protest of June 8, 2007 on that very same day to the Office of the Attorney General, which in turn forwarded the case to Military Criminal Investigative Court 160. On June 8, 2009, the case was sent to Specialized Prosecutor's Office 48 "Human Rights and International Humanitarian Law Unit." According to the petitioner and the State, these criminal proceedings are in the trial phase.

31. The Commission considers that the exception provided for under Article 46.2.c) of the American Convention regarding unwarranted delay in rendering a final judgment is applicable, given that more than seven years have lapsed since the events that gave rise to this petition without any definitive outcome in the investigations. For this reason, the requirement to exhaust domestic remedies is not applicable with regard to this remedy of the petition.

32. Finally, with respect to the other remedies that are pending under disciplinary and administrative jurisdictions, the Commission has previously held that decisions issued in these jurisdictions do not meet the requirements set forth under the Convention in terms of their appropriateness for purposes of admissibility. The disciplinary jurisdiction is not considered a sufficient way to judge sanction and redress the consequences of human rights violations.⁶ The contentious administrative jurisdiction for its part is a mechanism that seeks to oversee the administrative activity of the State, and can only provide redress for

³ IACHR, Report No. 52/97, Case 11.218, Merits, Arges Sequeira Mangas, Nicaragua, February 18, 1998, paragraph 96; IACHR, Report No. 2/10, Petition 1011-13, Admissibility, Fredy Marcelo Núñez Naranjo, et al., March 15, 2010, paragraph 29.

⁴ IACHR, Report No. 87/06, Petition 668-05, Admissibility, Carlos Alberto Valbuena and Luis Alfonso Hamburger Diazgranados, Colombia, October 21, 2006, paragraph 25; IACHR, Report No. 70/09, Petition 1514-05, Admissibility, José Rusbell Lara, Colombia, August 5, 2009, paragraph 31.

⁵ Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*. Preliminary Exceptions. Judgment of June 26, 1987. Series C No. 1, paragraph 93.

⁶ IACHR, Report No. 71/09, Petition 858-06, Admissibility, Massacre of Belén-Altavista, Colombia, August 5, 2009, paragraph 37.

damages and injuries cause by abuse of authority⁷. Consequently, in a case such as this, exhaustion of these remedies is not required in order to appeal to the Inter-American system.⁸

33. Invoking exceptions to the rule of exhausting domestic remedies provided for under Article 46.2 of the Convention is closely linked to determining potential violations of certain rights enshrined therein, such as guarantees of access to justice. Nevertheless, Article 46.2, by its nature and purpose, is a provision whose content is independent of the substantive provisions of the Convention. Therefore, the decision of whether the rule to exhaust domestic remedies is applicable to the case in question must be done prior to and separate from the analysis of the merits of the case, as it is determined by a standard of evaluation that is different from that used for determining potential violations of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects that hindered the exhaustion of domestic remedies will be analyzed in the report the Commission adopts on the merits of the dispute, in order to establish whether they constitute violations of the American Convention.

2. Deadline for Submitting the Petition

34. The American Convention provides that for the Commission to admit 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 judgment. In the case under analysis, the IACHR has established that the exceptions to exhaustion of domestic remedies apply in keeping with Article 46.2.c) of the American Convention. In this regard, Article 32 of the Commission's Rules of Procedures stipulates that in those cases where exceptions to prior exhaustion of domestic remedies apply, the petition must be presented within a reasonable period of time, at the discretion of the Commission. To this end, the Commission must consider the data when the alleged violation of rights occurred and the circumstances of each case.

35. The petition was received on September 14, 2007; the alleged events that are the subject of this claim occurred on June 8, 2007, and their effects in terms of an alleged lack of administration of justice extend to the present day. In light of this context and the circumstances surrounding this case, the Commission deems this petition to have been presented within a reasonable period of time and the admissibility requirement in this regard to have been fulfilled.

3. Duplication of Proceedings and International *Res Judicata*

36. There is no evidence in the case file indicating that the matter the petition addresses is subject to any other international settlement proceeding, or that it reproduces a petition that has already been reviewed by this or any other international body. Therefore it is deemed that the requirements provided for under Articles 46 .1 and 47.d) of the American Convention have been fulfilled.

4. Colorable Claim

37. For purposes of admissibility, the Commission must decide whether the facts laid out in the petition could tend to establish a violation, as stipulated in Article 47. b) of the American Convention, whether the petition is "manifestly groundless" or obviously out of order" in terms of subparagraph (c) thereof. At this procedural stage, the Commission is to undertake a *prima facie* evaluation, not for purposes of establishing alleged violations of the American Convention, rather for examining whether the petition denounces facts that may potentially constitute violations of rights ensured under said instrument. This review does not imply any prejudgment or foreshadow any opinion on the merits of the case.⁹

⁷ IACHR, Report No. 72/09, Petition 11.538, Admissibility, Herson Javier Caro (Javier Apache) and family, Colombia, August 5, 2009, paragraph 28.

⁸ IACHR, Report No. 74/07, Petition 1136-03, Admissibility, José Antonio Romero Cruz, Rolando Ordoñez Álvarez and Norberto Hernández, Colombia, October 15, 2007, paragraph 34; IACHR, Report No. 72/09, Petition 11.538, Admissibility, Herson Javier Caro (Javier Apache) and family, Colombia, August 5, 2009, paragraph 28.

⁹ IACHR, Report N° 36/13, Petition 403-02, Admissibility, José Delfín Acosta Martínez and Family, Argentina, July 11, 2013, paragraph 40.

38. 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 Inter-American Commission, although petitioners may do so. It is for the Inter-American Commission, based on the system's case law, 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.

39. In the instant case, the Commission considers that the allegations presented by the petitioner, which include injuries allegedly inflicted on him by members of ESMAD in order to suppress a social protest regarding a legislative bill, supposedly in a context of persecution of his labor union, may characterize violations of Articles 5, 13, 15 and 16 of the American Convention in relation to Article 1.1 thereof.

40. Furthermore, the Commission considers that the allegations the petitioner makes to the effect that he was fired on with a lethal weapon in an attempt to kill him and survived the attack merely by fate may characterize a violation of Article 4 of the American Convention.¹⁰

41. In addition, the IACHR considers that the alleged unwarranted delay and supposed shortfalls in the investigation and proceedings, as well as the fact that the criminal complaint was under military jurisdiction for two years, may characterize violations of Articles 8 and 25 of the American Convention in relation to Articles 1.1 and 2 thereof.

42. For the reasons set forth above, the Commission decides to declare this petition admissible for purposes of analyzing potential violations of Articles 4, 5, 8, 13, 15, 16 and 25 in relation to Articles 1.1 and 2 of the American Convention in the merits stage of this matter.

43. On the other hand, the Commission considers that the petitioner has not presented allegations that would characterize a violation of the right to personal freedom under Article 7 of the American Convention.

44. Finally, given the facts alleged by the petitioner, it should be noted that Article 29 of the Convention will be used, in its entirety, in this and all matters as the guideline for interpreting conventional obligations of the State.

V. CONCLUSIONS

45. The Commission concludes that it is competent to review the claims presented by the petitioner regarding the alleged violations of Articles 4, 5, 8, 13, 15, 16 and 25, in accordance with Articles 1.1 and 2 of the Convention, and that these are admissible in keeping with the requirements set forth in Articles 46 and 47 of the American Convention. It further concludes that the petition is inadmissible as regards Article 7 of the Convention.

46. Based on the factual and legal arguments provided for above and without this implying any prejudgment of the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES TO:

¹⁰ Inter-American Court of Human Rights, *Case of the Massacre of La Rochela v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, paragraphs 127-128; Inter-American Court of Human Rights, *Vélez Restrepo and Family v. Colombia*. Preliminary Exception, Merits, Reparations and Costs. Judgment of September 3, 2012. Series C No.248, Paragraph 182.

1. Declare this petition admissible with regard to Articles 4, 5, 8, 13, 15, 16 and 25, in relation to Article 1.1 and 2 of the American Convention;
2. Declare this petition inadmissible in relation to an alleged violation of Article 7 of the American Convention;
3. Notify the parties of this decision;
4. Continue analyzing the merits of the matter; and
5. Publish this decision and include it in its Annual Report to the OAS General Assembly.