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## **REPORT No. 38/17**

## **PETITION 1241-08**

### **REPORT ON ADMISSIBILITY**

**OMAR ERNESTO VÁSQUEZ AGUDELO AND FAMILY  
COLOMBIA**

Approved electronically by the Commission on May 18, 2017.

**Cite as:** IACHR, Report No. 38/17. Petition 1241-08. Admissibility. Omar Ernesto Vásquez Agudelo and Family. Colombia. May 18, 2017.

**REPORT No. 38/ 17****PETITION 1241-08****ADMISSIBILITY****OMAR ERNESTO VÁSQUEZ AGUDELO AND FAMILY****COLOMBIA****MAY 18, 2017****I. INFORMATION ON THE PETITION**

<b>Petitioner:</b>	Roberto Fernando Paz Salas and Lorena Esnid Areiza
<b>Alleged victims:</b>	Omar Ernesto Vásquez Agudelo and family
<b>Respondent State:</b>	Colombia
<b>Rights invoked:</b>	Articles 6 and 10 of the International Covenant on Civil and Political Rights

**II. PROCEEDINGS BEFORE THE IACHR<sup>1</sup>**

<b>Filing date of the petition:</b>	October 22, 2008
<b>Additional information received during the period of study:</b>	January 6, 2011
<b>Date on which the State was given notice of the petition:</b>	February 21, 2014
<b>Date of the State's initial reply:</b>	June 25, 2014
<b>Additional observations of the petitioner:</b>	August 6, 2014 and February 27, 2015
<b>Additional observations of the State:</b>	December 4, 2014 and June 11, 2016

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention on Human Rights <sup>2</sup> (instrument deposited on July 31, 1973)

**IV. ANALYSIS OF DUPLICATION OF PROCEEDINGS AND INTERNATIONAL RES JUDICATA, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES, AND TIMELINESS OF THE PETITION**

<b>Duplication of proceedings and international res judicata:</b>	No
<b>Rights declared admissible:</b>	Articles 1 (obligation to respect rights), 2 (domestic legal effects), 4 (life), 5 (humane treatment), 8 (right to a fair trial), and 25 (judicial protection) of the American Convention
<b>Exhaustion of domestic remedies:</b>	Yes, exception provided in Article 46.2.c of the ACHR is applicable
<b>Timely filing:</b>	Yes, under the terms of section VI

<sup>1</sup> The observations of each party were duly forwarded to the opposing party.<sup>2</sup> Hereinafter, "Convention" or "American Convention."

## V. FACTS ALLEGED

1. The petitioners state that Mr. Omar Ernesto Vásquez Agudelo (hereinafter, “the alleged victim” or “Mr. Vásquez”) was an inmate at the Bellavista Prison in Medellín where, according to the medical report, he died of methyl alcohol poisoning on September 9, 2002. They assert that prison officers found the alleged victim having convulsions and transported him to the medical ward where he was cared for by the prison’s medical staff. They state that medical personnel performed CPR and determined that it was necessary to intubate the patient, but were unable to do so because they lacked endotracheal tubes. Accordingly, they monitored Mr. Vásquez until his immediate transport to an outside medical center was possible. They indicated that the alleged victim suffered cardiorespiratory failure twice more on the way to the hospital and that he died after arriving at the hospital.

2. The petitioners state that authorities from the National Prison and Penitentiary Institute [*Instituto Nacional Penitenciario y Carcelario*] (hereinafter, “INPEC”), opened an investigation but were unable to fully identify those responsible for the alleged victim’s death. Therefore, the investigation was transferred to the Office of the Assistant Prosecutor before the Criminal Judges of Bello in Antioquia for the appropriate investigations to be conducted. They allege that on January 30, 2004, the Office of the Assistant Prosecutor issued a decision declining to open a criminal investigation because it was impossible to identify those responsible.

3. The petitioners assert that the alleged victim’s death was due to the inadequate surveillance by the penitentiary center’s guards and wardens, since the intoxication of Mr. Vásquez and other inmates was the result of their negligence and failure to control the manufacture, sale, and consumption of prohibited substances within the prison. Therefore, they allege that the State is responsible for the omissions of its agents.

4. The petitioners state that on September 9, 2004, they filed a request for pretrial conciliation with the Office of the Judicial Advocate [*Procuraduría Judicial*] before the Administrative Court of Antioquia. They allege that a conciliation hearing was ordered to be held on November 25, 2004, and that INPEC failed to appear. They indicate that a petition for direct reparation was filed with the Administrative Court of Antioquia on November 26, 2004.

5. The petitioners state that on March 11, 2005, the Court asked the Office of Judicial Advocate No. 32 to clarify the date of the failed conciliation hearing in order to be able to determine whether the legal action was time-barred by the statute of limitations. On August 26, 2005, after receiving confirmation from the Judicial Advocate’s Office that the hearing had been held on November 25, 2004, the Court admitted the claim. The petitioners further state that the INPEC filed a motion for reconsideration of that decision on the grounds that the claim had not been filed in person, and requested that it be declared time-barred. On June 15, 2007, the Court dismissed the claim based on the expiration of the statute of limitations because Mr. Vásquez’s family had not filed it within two years of the date of his death.

6. On June 7, 2007, the petitioners appealed this decision to the Council of State, but the appeal was dismissed without a ruling on the merits because the amount requested as reparation did not meet the minimum required by law to allow for review on appeal. The petitioners state that on March 7, 2008, they filed a petition for the protection of constitutional rights [*acción de tutela*] against the Administrative Court of Antioquia, alleging that the court had acted beyond the scope of its authority by failing to properly calculate the filing deadline for the claim and the statute of limitations. The Council of State dismissed that petition as inadmissible.

7. Based on the foregoing, the petitioners assert that this case has been met with impunity and that the State’s actions constitute a violation of the rights to life, humane treatment, and access to justice.

8. The State alleges that the events on which the petition is based do not amount to violations of rights protected under the American Convention according to the terms provided therein. It argues that the manufacture, sale, and consumption of prohibited substances by the inmates was clandestine and done

without the knowledge of the prison's guards or security system, and therefore there was no acquiescence on the part of state agents to the actions of private individuals that would give rise to the responsibility of the State, by act or omission, directly or indirectly.

9. The State adds that the inmates tried to conceal their acts because they knew that their conduct was prohibited; they had to bottle the liquor in a container that would not draw the attention of prison authorities, so it was difficult for officials to demonstrate the risk of an activity carried out in secrecy. In this regard, the State asserts that it is not clear that there was a situation of risk, that the State would have known about it in advance, or that there was a reasonable possibility of preventing it from materializing. The State argues that these acts should not be attributed to it because they were carried out solely and exclusively by third party individuals, and that the State therefore cannot be held responsible for those actions.

10. The State further indicates that the events were investigated and that after all of the respective forensic proceedings were conducted, experts concluded that the cause of death had not been poisoning but rather the consumption of methyl alcohol, which in most cases is fatal. It adds that statements were taken during the investigation from all of the inmates who stated that they had consumed "liquor," and they indicated that they had no knowledge of the origin of that type of beverage, much less of the person or persons in charge of selling it within the penitentiary.

## VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

11. The petitioners maintain that those responsible for Mr. Vásquez's death were never identified and punished, as the criminal investigation carried out by the Office of the Assistant Prosecutor before the Criminal Judges of Bello was shelved on January 30, 2004. They add that the family of the alleged victim filed a direct reparation action for Mr. Vásquez's death and, upon its dismissal, filed several motions including the motion for appeal and the petition for the protection of constitutional rights. They indicate that the final decision was issued by the Council of State on April 24, 2008, thereby exhausting domestic remedies. For its part, the State makes no argument with respect to the exhaustion of domestic remedies, nor does it dispute the petitioner's assertion with respect to the matter.

12. With regard to the identification and punishment of those responsible for the alleged victim's death, the IACHR recalls that to effectively guarantee the right to life of persons deprived of their liberty, in cases of deaths in State custody—including cases of natural death or suicide—the State has the duty to initiate, on its own initiative and without delay, a serious, impartial, and effective investigation that is conducted within a reasonable period of time and not undertaken as a simple formality. The State must establish the circumstances of the death as a legal duty of its own, and not in furtherance of private interests or based on the initiative of private persons.<sup>3</sup> This duty of the State is derived from the general obligations to respect and guarantee rights, established in Article 1.1 of the American Convention, and from the substantive duties established in Articles 4.1, 8, and 25 thereof.<sup>4</sup>

13. The Commission further recalls, with respect to the cases before the administrative dispute courts, that it has repeatedly held that such courts are not a suitable remedy for purposes of examining the admissibility of a claim like this one.<sup>5</sup>

14. The Commission observes that in the instant case, according to the information provided by the parties, the Office of the Assistant Prosecutor pursued a preliminary inquiry into the alleged victim's

<sup>3</sup> See, *inter alia*, IACHR, Report No. 136/09, Petition 321-05.admissibility. María Inés Chinchilla Sandoval. Guatemala. November 13, 2009, para. 45; IACHR, Report No. 82/09, Case 11.535. Admissibility and Merits. Milton Zambrano Vera. Ecuador. August 6, 2009, para. 54.

<sup>4</sup> IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, December 31, 2011, OEA/SER.LK/V/II, Doc. 64, para. 271.

<sup>5</sup> See, *inter alia*, IACHR, Report No. 43/02, Petition 12.009. Admissibility. Leydi Dayán Sánchez. Colombia. October 9, 2002, para. 22; IACHR, Report No. 74/07, Petition 1136/03. Admissibility. José Antonio Romero Cruz *et al.* October 15, 2007, para. 34.

death. However, it abstained from opening an investigation, ordering that the criminal investigation be shelved because it had not been able to identify the perpetrators of the crime. To date, the facts of the case have not been established and the perpetrators have not been punished. The IACHR thus concludes that sufficient elements have been met in this petition to consider that the exception provided in Article 46.2.c of the Convention is applicable. The factors that have prevented the exhaustion of domestic remedies in this case will be examined, in pertinent part, in the Commission's report on the merits of the case in order to establish whether the Convention has in fact been violated. The petition was received on October 22, 2008; the alleged victim died on September 9, 2002; on January 30, 2004 the criminal investigation was shelved, and the effects of this denial of justice in the criminal case and the action for direct reparation extend to the present. Therefore, the Commission finds that the petition was filed within a reasonable period of time and that the requirement of Article 32.2 of the Rules of Procedure of the IACHR has been met.

## **VII. COLORABLE CLAIM**

15. The IACHR finds that the absence of a serious and diligent investigation into the circumstances of Mr. Vásquez's death and the failure to identify the perpetrators resulted in impunity, if proven, could constitute violations of the rights enshrined in Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), and 25 (judicial protection) of the American Convention, in connection with Articles 1.1 and 2 thereof, to the detriment of Mr. Vásquez and his family.

16. At the merits stage, the Commission will also consider whether the inability to appeal a decision based on the amount of reparation sought could result in violations of the rights recognized in Articles 8 (right to a fair trial) and 25 (judicial protection) of the American Convention, in connection with Article 1.1 thereof, to the detriment of Mr. Vásquez and his family.

17. With respect to the petitioners' allegations regarding the violation of the rights enshrined in Articles 6 and 10 of the International Covenant on Civil and Political Rights, the Commission recalls that it lacks the competence to find violations of rights enshrined in that treaty, although it does have the authority to refer to its standards for purposes of interpreting the provisions of the American Convention, pursuant to Article 29 of the Convention.

## **VIII. DECIDES**

1. To declare this petition admissible with respect to Articles 4, 5, 8, and 25 of the American Convention in connection with Articles 1.1 and 2 thereof, with respect to Mr. Vásquez and his family;

2. To provide notice of this decision to the parties;

3. To continue with the analysis of the merits of the case; and

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

Approved electronically by the Commission on the 18<sup>th</sup> day of the month of May, 2017. (Signed): Francisco José Eguiguren, President; Margarette May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and James L. Cavallaro, Commissioners.