

OEA/Ser.L/V/II.165
Doc. 170
26 October 2017
Original: Spanish

REPORT No. 144/17
PETITION 49-12
REPORT ON ADMISSIBILITY

ERNESTINA ASCENSIO ROSARIO *ET AL.*
MEXICO

Approved by the Commission at its session No. 2104 held on October 26, 2017.
165th Regular Period of Sessions.

Cite as: IACHR, Report No. 144/17. Petition 49-12. Ernestina Ascencio Rosario *et al.*. Mexico.
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REPORT No. 144/17¹
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 REPORT ON ADMISSIBILITY
 ERNESTINA ASCENSIO ROSARIO *ET AL.*
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 OCTOBER 26, 2017

I. INFORMATION ABOUT THE PETITION

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| Petitioning party: | Abogadas y Abogados para la Justicia y los Derechos Humanos; Centro Heriberto Jara; Coordinadora Regional de Organizaciones Indígenas de la Sierra de Zongolica |
| Alleged victims: | Ernestina Ascencio Rosario <i>et al.</i> ² |
| State denounced: | Mexico |
| Rights invoked: | Articles 4 (Life), 8 (Fair Trial), 13 (Freedom of Thought and Expression) and 25 (Judicial Protection) of the American Convention on Human Rights, ³ in relation to its Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects); Articles 3, 6, 7 and 9 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, ⁴ and other international treaties ⁵ |

II. PROCEDURE BEFORE THE IACHR⁶

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| Date on which the petition was received: | January 11, 2012 |
| Date on which the petition was transmitted to the State: | November 13, 2013 |
| Date of the State's first response: | February 19, 2014 |
| Additional observations from the petitioning party: | January 31 and November 21, 2014; July 3 and September 29, 2015; May 30, 2017 |
| Additional observations from the State: | May 15 and September 1, 2015 |

III. COMPETENCE

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| Competence <i>Ratione personae</i>: | Yes |
| Competence <i>Ratione loci</i>: | Yes |
| Competence <i>Ratione temporis</i>: | Yes |
| Competence <i>Ratione materiae</i>: | Yes; American Convention (deposit of ratification instrument: March 24, 1981) and Convention of Belém do Pará (deposit ratification instrument: November 12, 1998) |

¹ Pursuant to Article 17.2.a of the IACHR Rules of Procedure, Commissioner José de Jesús Orozco Henríquez, a Mexican national, did not participate in the discussion or the decision on this matter.

² Julia Suárez Cabrera and Patricia Benítez Pérez.

³ Hereinafter "the Convention" or "the American Convention."

⁴ Hereinafter "Convention of Belém do Pará."

⁵ Articles 2, 3.1 and 4 of the International Labor Organization 169th Convention and the United Nations Declaration on the Rights of Indigenous Peoples.

⁶ The observations presented by each party were duly transmitted to the opposing party.

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

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| Duplication of procedures and International <i>res judicata</i>: | No |
| Rights declared admissible | Articles 4 (Life), 5 (Humane Treatment), 8 (Fair Trial), 11 (Privacy), 13 (Freedom of Thought and Expression), 25 (Judicial Protection) and 26 (Progressive Development) of the Convention in relation to its Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects); and Article 7 of the Convention of Belém do Pará |
| Exhaustion of domestic remedies or applicability of an exception to the rule: | Yes; under the terms of Section VI |
| Timeliness of the petition: | Yes; under the terms of Section VI |

V. ALLEGED FACTS

1. The petitioning party claims that the State is responsible for the death of Ernestina Ascencio, a Náhuatl indigenous woman aged 73 years, who on February 25, 2007 was allegedly raped and sexually assaulted by members of the Army's 63th Infantry Battalion, which on the previous night had set up their military camp near her dwelling. Her family members found her seriously injured 300 meters away from the camp and, before losing consciousness, she identified soldiers as her assailants. Despite numerous attempts, her family members were unable to access nearby health centers and 10 hours later, they arrived at the regional hospital of Río Blanco, which had no translators. Ernestina Ascencio died in the morning of February 26 due to serious injuries such as "multiple lacerations in the areas of the vagina and the anus," which were confirmed in the necropsy that hospital staff undertook jointly with the gynecologist of the Veracruz Attorney General's Office (hereinafter "PGJV") Sexual Assault Unit.

2. On February 25, 2007, Ernestina Ascencio's family members along with hospital staff reported the sexual assault before the PGJV, filing investigation 140/2007/AE for rape followed by murder. In addition, the Ministry of Defense ordered the Criminal Military Attorney General's Office (PJPM) to open investigation 26Zm/04/2007 for sexual abuse. On March 13, the President of Mexico asserted that Ernestina Ascencio died of "chronic gastritis" and on April 30 the PGJV concluded that her death was not caused by "external factors," ruling to dismiss criminal prosecution. Said decision became final on May 17, thus the case was definitely closed. For its part, the PJPM on June 27, 2007 ruled to definitely close its investigation due to lack of proof of military staff liability. Based on the foregoing, the petitioning party denounces that as a result of her being an impoverished indigenous older person, Ernestina Ascencio was deprived of due access to health services and stigmatized, and the investigation into the motives of her death was as promptly as possible closed with the sole purpose of leaving the serious acts denounced unpunished.

3. Moreover, the petitioners claim that, to the detriment of the right to access information, the PGJV dismissed the request filed by Julia Suárez Cabrera, who, dissatisfied with the information published about Ernestina Ascencio's death, requested access to the Ministry investigation. On May 27, 2009, the Plenary of the General Council of Veracruz Institute of Access to Information (the Plenary of the CGIVAI) groundlessly ratified the denial. After an indirect constitutional appeal was lodged, the First District Court ordered that a duly grounded resolution be issued. Therefore, on February 8, 2010, the Plenary of CGIVAI claimed that "the damage that the release of information might cause is greater than the public interest of access to it." The alleged victim initiated several complaints that were found groundless, the last rejection being notified on July 11, 2011 by the 7th Circuit First Collegiate Court for Administrative Matters. As a result, the petitioners denounce the violation of the right of access to information and the lack of remedies to protect the alleged victim, who was therefore exposed to a series of unsuccessful procedures. On January 31, 2014, the petitioning party extended the petition to Patricia Benitez Perez, whom the PGJV allegedly denied a copy of the same procedure. On July 5, 2012, after numerous administrative and judicial remedies were filed, the

Supreme Court of Justice decided to review the constitutional appeal, ruling that the whole case file be submitted. On April 15, 2013, Patricia Benitez was granted access to the “public version of the files, prepared by the PGJEV.” The petitioning party claims that some background information is still missing, which violates their right to access information.

4. For its part, the State, having recognized inconsistencies in the initial expert reports, affirms that these were amended by the undertaking of new studies that proved that Ernestina Ascencio’s death was due to natural causes. Therefore, it requests the Commission to declare this petition inadmissible regarding the Ernestina Ascencio’s situation because there is no violation of rights, domestic remedies have not been exhausted and the petitioning party does not represent Ernestina Ascencio or her family. With regard to the State’s duty to ensure public access to the investigation files concerning Ernestina Ascencio’s death, the State indicates that Julia Suárez Cabrera’s request was dismissed in order to protect the honor and the dignity of those involved in the criminal prosecution. It requests the Commission to find this petition inadmissible in view of the lack of acts establishing a violation of rights. It moreover asserts that the alleged victim did not exhaust the domestic remedies since despite the possibility of filing a constitutional appeal, they lodged complaints. Finally, it submits that Patricia Benítez’s claims were presented after the initial petition and that, as a result, her petition must be considered apart from the legal action. The State submits that, if considered, said petition should be declared inadmissible as the denounced facts are not violations of rights and the petition was filed out of time.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

5. In this case, the family members lodged a criminal complaint before the PGJV on February 25, 2007. On April 30, the investigation for rape followed by murder was closed, allegedly in a hasty manner and without due diligence, when the court ruled to dismiss criminal prosecution. This decision which became final on May 17, 2007. Even though military jurisdiction is not an appropriate remedy, the Commission notes that the military criminal investigation was closed on June 27, 2007. The State submits that the domestic remedies were not exhausted and that the dismissal of criminal prosecution was not contested by the family.

6. The Commission recalls that when a purported offense subject to prosecution *ex officio* is committed the domestic remedy to be pursued and exhausted is the criminal investigation, which must be undertaken and furthered by the State. In this particular case, the Commission notes, for the purpose of admissibility, that Ernestina Ascencio’s family members and hospital staff reported the alleged facts to the judicial authorities in due course and, as a result, preliminary investigations were initiated; and that these were allegedly deficient and prematurely closed, before the persons responsible could be identified. In this regard, the parties agree that domestic remedies were not exhausted. For the purposes of the admissibility analysis, under the *prima facie* standard, the Commission considers that the authorities knew of the death of Ms. Ascencio and the allegations of rape by members of the 63rd Battalion. In light of this, the Commission considers that the exception provided for Article 46.2.b applies, to the present case. The substantive analysis of the factors which would have allegedly impeded the exhaustion of domestic remedies corresponds to the merits stage. In light of the context and the characteristics of the facts included in this report, the Commission considers that the petition was filed in a reasonable time.

7. As to the State’s observation on the lack of exhaustion of domestic remedies on the part of Julia Suárez Cabrera, the Commission notes that “the only remedies that are necessary to exhaust are those whose functions within the judicial system are adequate to provide protection aimed at redressing the infringement of a given legal right.”⁷ Considering the several and continued remedies initiated by the alleged victim, the Commission considers that in light of the exhaustion of all the available administrative remedies followed by the exhaustion of judicial remedies through constitutional appeals and complaints, the requirement set forth in Article 46.1.a of the Convention is met. With regards to the facts denounced by Julia Suárez Cabrera, the Commission notes that remedies were exhausted on July 11, 2011 and that the petition

⁷ IACHR, Report No. 59/16, Petition 89-07, Admissibility. Juan Alberto Contreras González, Jorge Edilio Contreras González and family. Chile, December 6, 2016, par. 5.

was filed on January 11, 2012; thus, the Commission concludes that the petition meets the requirement established in Article 46.1.b of the Convention.

8. As to the facts denounced by Patricia Benítez Pérez, of which she is the alleged victim, the Supreme Court's final resolution through which the domestic remedies were exhausted was notified on April 15, 2013. Concerning the requirement of timeliness, the Commission notes that the extension procedure by which the alleged victim was included in the petition was initiated on January 31, 2014, which is more than 9 months after the final ruling was notified. Therefore, the Commission decides that, as regards Patricia Benítez Pérez, the petition does not meet the requirement established in Article 46.1.b of the Convention. In this regard, the IACHR observes that, although Ms. Benítez will not be considered as an alleged victim, the facts regarding the alleged lack of access to the judicial file, since they are part of the situation reported, will be analyzed at the merits stage.

VII. COLORABLE CLAIM

9. In view of the elements of fact and law filed by the petitioners and the nature of the matter brought to its attention, the IACHR considers that, if proved, the alleged physical and sexual assault by state officers on Ernestina Ascencio, which, along with the purported difficulties to access proper medical care, provoked her death; and the alleged premature closing of the investigation before the circumstances of Ernestina Ascencio's death and allegations of rape and sexual assault were clarified, with disregard for the applicable obligations given that the alleged victim was an elderly indigenous woman and in situation of poverty may constitute violations of the rights protected by Article 4 (Life), 5 (Humane Treatment), 8 (Fair Trial), 11 (Privacy), 25 (Judicial Protection) and 26 (Progressive Development), in connection with Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the American Convention. Likewise, the Inter-American Commission believes that the allegations may represent violations of Article 7 of the Convention of Belém do Pará. All of the above rights can be interpreted in the light of the International Labor Organization 169th Convention and the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with Article 29 of the Convention.

10. As to the facts denounced by Julia Suárez Cabrera concerning the lack of appropriate response to her request of access to public information and the lack of appropriate remedies to protect said right, these may establish a violation of Articles 8 (Fair Trial), 13 (Freedom of Thought and Expression) and 25 (Judicial Protection) of the Convention, in relation with the obligations enshrined in its Articles 1.1 and 2.

11. With regards to the State's request to exclude the facts denounced after the initial petition was filed, the Commission notes that neither the Convention nor the Rules establish a time for closing the discussion and that, on the contrary, "the bodies of the system have had the need to integrate and assess new and later facts, as long as these are connected with, and reasonably a part of, the case under assessment."⁸ This requirement is met in this case since background information is presented as a part of a series of events which are allegedly the result of actions attributable to the State and linked to its denial to provide information on the archived procedure regarding Ernestina Ascencio's death. Lastly, the Commission recalls that "a person who denounces an act that is in violation of human rights to the Inter-American Commission on Human Rights does not require authorization from the victim,"⁹ therefore, it dismisses the State's arguments concerning the exclusion of petitioners on the basis of non-representation of the victim or their family members.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 4, 5, 8, 11, 13, 25 and 26 of the American Convention, in relation to its Articles 1.1 and 2;

⁸ IACHR, Report No. 61/16, Petition 12.325. Admissibility. Peace Community of San José de Apartadó. Colombia, December 6, 2016, par. 82.

⁹ IACHR, Report No. 5/96, Case 10.466. Admissibility. Fernando and Raquel Mejía. Peru, March 1, 1996, pp. 3 and 4.

2. To notify the parties of this decision;
3. To continue with the analysis on the merits; and
4. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 26th day of the month of October, 2017.
(Signed): Francisco José Eguiguren, President; Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners.