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REPORT No. 42/19

PETITION 467-10

REPORT ON ADMISSIBILITY

MARITZA ELIZABETH GUTIERREZ CORTEZ AND OTHERS
("MESA REDONDA" TRAGEDY)
PERU

Approved electronically by the Commission on April 24, 2019.

Cite as: IACHR, Report No. 42/19, Admissibility. Petition 467-10. Admissibility. Maritza Elizabeth Gutierrez Cortez and others ("Mesa Redonda" Tragedy). Peru. April 24, 2019



I. INFORMATION ABOUT THE PETITION

Petitioner:	Marcos Herrera Castro and others ¹
Alleged victim:	Maritza Elizabeth Gutierrez Cortez and others (“Mesa Redonda” Tragedy) ²
Respondent State:	Peru ³
Rights invoked:	Articles 4 (life), 5 (humane treatment), 8 (fair trial), 21 (property), 24 (equal protection), and 25 (judicial protection) of the American Convention on Human Rights ⁴ in relation to its Article 1

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	April 1, 2010
Additional information received at the stage of initial review:	May 17, 2011, October 21, 2013
Notification of the petition to the State:	July 31, 2012
State’s first response:	November 13, 2013
Additional observations from the petitioner:	October 6, 2014, July 7, 2017
Additional observations from the State:	January 20, 2015

III. COMPETENCE

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 instrument made on July 28, 1978)

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 4 (life), 5 (humane treatment), 8 (fair trial), 13 (freedom of thought and expression), 19 (rights of the child), 21 (property), 24 (equal protection), 25 (judicial protection), and 26 (economic, social and cultural rights) of the American Convention, in relation to its Articles 1.1 and 2
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of Section VI
Timeliness of the petition:	Yes, in the terms of Section VI

¹ Víctor Ccanahuire Mamani, Oscar Schiappa-Pietra, Ivar Jesús Calixto Peñafiel and Yurica Ramos Montes are identified as petitioners.

² The petition was filed on behalf of 68 alleged victims of the “Mesa Redonda” tragedy, identified in the annexed document.

³ In accordance with the provisions of Article 17.2.a of the Commission’s Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, of Peruvian nationality, did not participate in either the discussion or decision in the present case.

⁴ Hereinafter “the Convention” or “the American Convention”.

⁵ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. The petitioners indicate that on December 29, 2001, there was a fire in "Mesa Redonda", a populous neighborhood located in the historic district of Lima, caused by the large-scale combustion of all types of pyrotechnic articles that were illegally traded in the area. They report that 277 people lost their lives, 189 disappeared, and about 220 were injured, among them 28 children. In addition, 173 children were orphaned, and hundreds of merchants suffered losses to property.

2. They indicate that the State failed to fulfill its duty of prevention due to the fact between November and December of 2001 there had already been four fires in the commercial district of "Mesa Redonda". They argue that these events should have been taken into account by the authorities, since they were an obvious indication of the area's vulnerability and the imminent risk it posed to its inhabitants. They point out that the judicial inspections carried out after the fires demonstrated that none of the businesses had complied with the rules and regulations concerning evacuation routes, fire detection and protection. On the other hand, they state that the National Police of Peru ordered a sequence of operations, called plans "Eradication III" "Pyrotechnics I and II" and "Operation Plan Noel", in order to maintain public order and combat the pyrotechnics itinerant trade. However, they state that on December 15, 2001, the National Police Chief ordered the suspension of police personnel support in the execution of the aforementioned preventive plans as from December 19, 2001.

3. They point out that after the lifting of the police protection cordon in the "Mesa Redonda" market, the streets were occupied by pyrotechnic product sellers who traded and stored their products on the premises, sidewalks and streets of the area. They indicate that on December 29, 2001, one of the traders decided to show a customer the operation of one of the pyrotechnic devices on sale. When he ignited the device it came into contact with others of a similar kind, which in a few minutes caused the fire. They indicate that at the time of the tragedy about 900 tons of pyrotechnic products were illegally stored in this commercial area. They allege that from the time of the events, the State failed to comply with its obligation to draw up lists of all the fire's victims, including those persons affected, injured, deceased and disappeared, or whose remains could not be identified.

4. They point out that two criminal proceedings took place, which after nine years failed to protect the victims' rights or ascertain legal responsibility. They explain that the first criminal proceeding was initiated by the representative of the Public Ministry on June 5, 2002. They report that these proceedings suffered from various irregularities in violation of due process including cursory evidence, excluding the responsibility of businesses, officials of the Municipality and the General Directorate of Security Services for Firearms Control, Ammunition and Explosives for Civil Use. In this regard, they state that the Fifth Criminal Chamber of the Superior Court of Lima issued a judgment on October 17, 2007, convicting 18 individuals with 3 to 4 years imprisonment for the crimes of aggravated manslaughter, serious negligent wounding and the unlawful possession of pyrotechnic products. They also indicate that in the hearing where this judgment was delivered civil compensation was awarded in the sum of two hundred thousand nuevos soles for each deceased victim, and thirty thousand nuevos soles for each injured victim. They point out that for this reason, the alleged victims did not reserve their right of appeal at that time, and that the Public Ministry also abstained from appealing the judgment. However, they point out that when the written version of the judgment was notified, the victims noticed that the amount of the civil compensation awarded would not be paid individually, but jointly to all the victims.

5. They indicate that they filed a motion for annulment, which was dismissed by the Second Transitory Criminal Chamber of the Supreme Court of Justice on August 27, 2008. They indicate that the casting vote defining the previous decision was issued on March 4, 2009. They report that on April 20, 2009, the alleged victims petitioned the Fifth Criminal Chamber of the Superior Court of Lima for clarification of their judgment regarding the amount of civil compensation. They emphasize that this Chamber established that the amounts should be paid by those convicted jointly with liable third parties. In addition, the Court determined that since the civil remedy had not been challenged at the appropriate juncture, the ruling had become enforceable and acquired the authority of *res judicata*.

6. They argue that on November 13, 2009, the alleged victims jointly requested the proper execution of the sentence before the Twenty-third Criminal Court of Lima, that is, the payment of two hundred thousand nuevos soles for each deceased and thirty thousand for each injured person. They allege that the amount awarded as civil reparation was a derisorily low amount and that it insults the dignity of the victims, without remotely conforming to international human rights standards. They argue that the Twenty-Third Criminal Judge of Lima has only received partial payments from the importers of pyrotechnic products, and that the amount that had to be paid to the Ministry of the Interior has not yet been settled.

7. They report that the second criminal case began in 2007 before the Fifty Fourth Criminal Court of Free Defendants of Lima. It was brought by a group of victims of the fire who had not been identified in the first criminal proceeding. They point out that the case is still currently in the investigation stage. They emphasize that on March 3, 2010, the Prosecutor assigned to the case, made a request to gather testimonies of 12 people, being the last action taken in the proceedings. They also indicate that these proceedings also fail to constitute a domestic remedy required for purposes of admissibility, due to excessive length of time in the proceedings and their lack of results. They also argue that they are ineffective, since they fail to consider the alleged victims included in the first criminal proceedings.

8. On the other hand, they point out that as a result of the events, which took place in the Mesa Redonda commercial center, a Multi-sector Commission was set up by Supreme Decree No. 008-2002-PCM of February 8, 2002, to coordinate the Comprehensive Rehabilitation and Reconstruction Program of the affected area, with the participation of public administration agencies. They state that a free conveyance of two properties in favor of the Municipality of Lima was approved by Resolution 026-2002 of March 19, 2002, in order to grant the victims of the Mesa Redonda tragedy a physical area to carry out their trading activities. They allege, however, that the benefit of said properties did reach all those affected, since the State has failed to provide an official list of victims, and that the competent institutions have failed to provide support to obtain presumption of death certificates. They argue that as a result of the lack of a consolidated registry of victims, some of those properties have been taken over by individuals unrelated to the tragedy. They also point out that this situation of inequality means that a majority of victims are prevented from taking advantage of the very limited reparation measure of the possession of real estate.

9. Finally, they allege that the State is also responsible for irregularly modifying the judicial decision, awarding a derisorily low amount of civil compensation, incompatible with human rights standards. In addition, they argue that the authorities have been unable to effectively enforce payment of said civil reparation, since the Ministry of the Interior in its capacity as a civilly liable third party continues to avoid its obligation to contribute to the payment.

10. For its part, the State indicates that the petitioners have not effectively exhausted domestic remedies. It argues that in the context of the first criminal proceedings, they did not resort to an appeal for annulment, which had to be filed the day after the issuance and reading of the judgment or service of the contested judgment. It argues that this was the appropriate moment in terms of procedure to question the compensation. However, the alleged victims resorted to the clarification motion that does not as such constitute a measure to question the judgment. It points out that other victims, not identified in the first proceedings, are included in the second criminal proceedings. Likewise, it alleges that the petitioners failed to exhaust the relevant domestic remedies, since they could have, but did not, pursue civil proceedings to obtain the judicial declaration of presumed death or presumed missing.

11. In addition, it alleges that the petition fails to fulfill the timeliness requirement because it was submitted after the filing period of 6 months from notification of the last resolution dated April 2, 2009, at the national level. On the other hand, it argues that the events in the petition fail to characterize violations of rights guaranteed by the Convention. The criminal proceedings undertaken observed the judicial guarantees that culminated in a final judgment. It points out that the petitioners' disagreement with the decision does not imply a violation of rights. On the contrary, it observes that they are asking the Commission to review a decision of the domestic jurisdiction as a fourth instance in a manner incompatible with its jurisdiction.

12. Finally, it observes that the list of the alleged victims annexed to the petition is deficient, on account of the fact that the identification of the deceased persons' relatives is general and not specific, which is important for determining whether their cases were addressed by domestic judicial decisions.

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

13. The petitioners argue that the criminal proceedings following the events exceeded a reasonable time limit, and that so far there has been a failure to punish those responsible. They indicate that the first criminal proceedings were ineffective, and conducted in violation of due process, with the judgment yet to be satisfied. They also say that the second criminal proceedings are still ongoing, pending the actions of the Provincial Prosecutor's Office of Lima. For its part, the State indicates that the alleged victims have not exhausted the appeal for nullity in the first criminal proceedings and that the second criminal proceedings are still pending resolution. Additionally, the State argues that the petition is untimely, since the Supreme Decision of August 27, 2008, was served on April 2, 2009, and the petition filed on April 1, 2010.

14. The Commission observes that in the present case, the investigations conducted by the Public Prosecutor's Office, in the context of the first criminal proceedings, ended with the conviction of 18 individuals. On the other hand, according to the information provided by the parties, second criminal proceedings initiated in 2007 before the Fifty-Fourth Criminal Court of Parole Convicts of Lima, are still ongoing. The Commission observes that even eighteen years after the events, the causes of the fire and the responsibility of all those involved - including businessmen and public officials of different state entities - have not been determined, nor have all the victims of the fire been fully identified. On the other hand, in relation to the amounts of reparation set by the judgment issued by the Fifth Criminal Chamber of the Superior Court of Lima, the Commission has repeatedly emphasized that such a route does not constitute an appropriate remedy for analyzing the admissibility of a claim such as the present kind, since it is inadequate to provide comprehensive reparation and justice to family members. Based on this, the Commission concludes that the exception to the exhaustion of domestic remedies established in Article 46.2.c of the American Convention is applicable.

15. Finally, the petition was filed on April 1, 2010. The alleged events in the complaint began on December 29, 2001, and their alleged effects continue up to the present. Therefore, in view of the context and characteristics of this case, the Commission considers that the petition was filed within a reasonable period of time and that the admissibility requirement regarding timeliness must be considered satisfied.

VII. ANALYSIS OF COLORABLE CLAIM

16. In view of the factual and legal elements submitted by the parties and the nature of the matter brought to its attention, the Commission considers that, if proven, the State's alleged failure to comply with its duty of prevention, could have led to the fire that caused the death of 277 people, and the disappearance of 189 and to injuries caused to 220 others, including 28 children; the alleged failure to identify the individuals affected, the lack of diligence in the preparation of a list of victims, as well as the alleged lack of effective judicial protection, the alleged awarding of derisory amounts in compensation, the concession of real estate property without adequate control or protection against possible squatters, and the alleged violation of equality in the criteria for reparation, could characterize possible violations of Articles 4 (life), 5 (humane treatment), 8 (fair trial), 13 (freedom of thought and expression), 19 (rights of the child), 21 (property), 24 (equal protection), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention in relation to its Articles 1.1 and 2, to the detriment of the alleged victims and their families.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 13, 19, 21, 24, 25 and 26 of the American Convention in relation to its Articles 1.1 and 2;

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

Approved by the Inter-American Commission on Human Rights on the 24th day of the month of February, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.

Annex 1
List of Alleged Victims

1. Ana María Luque Gutiérrez de Cruz
2. Miria Macahualli Chasnamote
3. Dorita Chasnamote Maurajari
4. María Olga Huaranga Mendoza
5. Juan Aguilar Mendivil
6. Mari TangoaPardo
7. Deonocc Bacelisa Yauri
8. Maura Cecilia Barboza Rojas
9. Tomas Año Amachi
10. Bertha Ruiz De Gómez
11. Camilo Matías Fabian Valverde
12. Yessenia Gómez Hinostraza
13. Juan Sánchez Marcelo
14. Jesús Armando Canchari Díaz
15. Ayarquispe Jarico, Helaria
16. Constancia SerranoPillihuaman
17. Gloria María Balvin Ramírez
18. Elizabeth Crespo Barragan
19. Milton Joel Urcos Cano
20. Feliciano Paredes Dechancas
21. Irma Aquino Tito
22. Adela Aguilar Quispe
23. Jorge Luis Mendoza Romero
24. Saturnino Ferro García
25. Olga María Luis Conqui
26. Ricardo Jesús Ávila Valenzuela
27. Rosas Choque Condorapa
28. Carlos Vicente Ortiz Villegas
29. Guillermo Canales Llacta

30. Florentina Rosa Simón Mora
31. Herlinda Isabel Gil De la Cruz
32. Pedro Diestra García
33. Amalia Pretel Torres
34. Aquilina Teodora García Rodríguez
35. Lidia Beatriz Marcial Mora
36. Alex Víctor Atencio Luna
37. Celia Lucila Paucar Aguirre
38. Timoteo De La Cruz Lozano
39. Liz Cáceres Palomino
40. Rosario Paypay Palomino
41. Máximo Paypay Candela
42. Antonio Paypay Palomino
43. Efraín Campos Rosales
44. Maria Nila Micaya Espinoza
45. Javier Paucar Moreno
46. Pastora Nuñez Izaguirre
47. Zenaida Valverde Rodríguez
48. Luz Elena Bustamante Saldaña
49. Lidia Mamani Condori
50. Manuela Quispe Mamani
51. Donatila Marquina Torres
52. Pelaya Cordova Alvites
53. Nelitón Prado Mamani
54. Reynaldo Bernardo Castañeda
55. David Lavado Dávila
56. Encarnación Pérez Quispe
57. Iván Crisóstomo Paredes Choque
58. Melchora Yolanda Triqueros Romero
59. Luís Alberto Tito Huarcaya
60. Florina Fernández Vega
61. Tania Simón Mora
62. Soledad Areche Yauri
63. Felipa Gladis Trigueros Romero
64. Luis Felipe Castillo Navarro
65. Rosa Violeta Gala Vásquez

66. José Fernández Vega
67. Jhonny Carlos Cartagena Salazar
68. Martha Gladis De La Cruz De Velarde