

REPORT Nº 13/03¹
PETITION 12.031
ADMISSIBILITY
JORGE ROSADÍO VILLAVICENCIO
PERU
February 20, 2003

I. SUMMARY

1. By petition lodged with the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") on April 13, 1998, Mrs. Amelia Villavicencio de Rosadío (hereinafter "the petitioner") reported that the Republic of Peru (hereinafter "Peru," "the State," or "the Peruvian State") violated, to the detriment of her son, Mr. Jorge Rosadío Villavicencio (hereinafter "the victim") the principle of legality, and the rights to personal liberty, to privacy, and to a fair trial, as enshrined in Articles 9, 7, 11, and 8, respectively, of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in conjunction with Article 1(1) of the Convention. The violations reported are related to alleged irregularities committed by the judicial branch in the criminal proceedings against the victim, in prosecuting him for the crime of possession and trafficking of narcotics. In addition, also appearing in this case, as co-petitioner, is Carolina Loayza Tamayo, Esq.

2. With respect to the admissibility of the petition, the petitioner argues before the Commission that the relevant domestic remedies have been exhausted, and that the petition was lodged within the time period provided for in the Convention, based on when she was notified of the final decision in the domestic system. In addition, petitioner notes that she is not asking the IACHR to review this case as if it were on appeal, but rather, to verify whether her son's rights under the Convention were violated.

3. The State, in turn, has informed the IACHR that it must expressly declare this petition inadmissible, pursuant to Articles 47 and 48 of the American Convention, for being manifestly out of order.

4. After analyzing the arguments of the parties and compliance with the admissibility requirements provided for in the Convention, the Commission decided to declare the petition admissible, in keeping with

¹ In keeping with Article 17(2) of the Commission's Rules of Procedure, Commissioner Susana Villarán, of Peruvian nationality, did not participate in the discussion or decision of this matter.

the provisions of Articles 46 and 47 of the American Convention, with respect to possible violations of Articles 1(1), 7, 8, and 9, of the American Convention, and initiate the procedure on the merits. The Commission also decides to report this decision to the parties, to publish it, and to include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

5. On July 14, 1998, the Commission admitted the case, assigning it number 12.031. The pertinent parts of the complaint were sent to the Peruvian State, and it was asked to provide information within 90 days. On August 18, 1998, the Commission sent the State the annexes to the complaint, at its request, and gave it 90 days to submit observations, counted from when they were received; on October 5, 1998, the petitioner submitted additional information on the complaint.

6. By communication of November 13, 1998, the State submitted its answer brief. On January 18, 1999, the petitioner presented her observations regarding the State's answer.

7. On February 22, 1999, the State submitted additional information with respect to the case. The IACHR sent it to the petitioners, and on May 21, 1999, the petitioners submitted their observations on the information remitted by the Government of Peru. Then, on June 3 and November 3, 1999, the petitioner sent updated information on the victim's situation.

8. On January 3, 2000, the Commission received additional information submitted by the State, and forwarded it to the petitioner. Since then, the parties have continued to provide additional information on the case, and continue to stand by their arguments.

III. POSITIONS OF THE PARTIES

A. The petitioner

9. The petitioner argues that on June 30, 1994, her son Jorge Rosadío Villavicencio, a Peruvian Army officer, was notified of the 1994 Plan for Change of Location of the Peruvian Army, by which he was assigned, as of July 1, 1994, to the post of Chief of the Sión Military Base of the Fifth Military Region, "Leoncio Prado" detachment, Intelligence Company N° 341, based in the city of Tarapoto, department of San Martín.

10. She states that Mr. Rosadío Villavicencio assumed his post and his direct superior, (Peruvian Army) Col. Emilio Murgueytio entrusted him with an intelligence mission in his capacity as Chief of the Sión Base: to carry out the "Angel" Operations Plan, classified as "secret," which involved infiltrating drug trafficking organizations in order to dismantle them. She alleges that he was told that the effectiveness of the infiltration he was to carry out depended on him "passing himself off as a corrupt officer." This intelligence mission began during the first part of August 1994.

11. Soon thereafter, on September 25, 1994, Mr. Rosadío Villavicencio was informed by Memorandum N° 217/SLP/K-1/20.04 of that same date that he had been accused of having committed the following crimes: Illicit drug trafficking (Article 296 of the Criminal Code), in the regular courts, and, for the following offenses provided for in the military justice code: offense against the duty and dignity of the office (Article 200); falsity (Article 299), negligence (Article 238), offense against the administration of justice (Article 302(4)), abuse of authority (Article 180(8)(a)), and disobedience (Article 158, also of the military justice code). Accordingly, she argues, Mr. Rosadío Villavicencio was subjected to multiple prosecutions on the same facts, for he is the subject of an administrative disciplinary proceeding, investigation and prosecution for offenses set forth in the Military Justice Code, in the military courts, and in the regular courts for drug trafficking, all stemming from the same facts.

12. With respect to the administrative disciplinary proceeding, she alleges that even though Jorge Rosadío Villavicencio is an officer of the Peruvian Army, that proceeding was under the Investigative Council for Subaltern Officers, and that in its session of February 7, 1995, it decided to have him retired. That to legalize this decision, the General Command of the Army, by Resolution N° 0527 CP/EP/CP-JAPE of March 3, 1995, issued in the city of Lima, retired him by disciplinary measure effective February 24, 1995; this resolution was handed down when the victim was detained in San Martín, far from the city of Lima, thus he was physically impeded from taking action against it, and the resolution retiring him was applied retroactively, thereby violating due process guarantees.

13. In relation to the actions taken in the military jurisdiction, the petitioner notes that the proceedings against the victim began on January 6, 1997, for allegedly committing offenses proscribed in the Code of Military Justice. She notes that the *Consejo Superior de Guerra* found him guilty as the "perpetrator and person responsible for criminal

negligence," and sentenced him to 16 months in prison, by judgment of November 29, 1996. That resolution was later annulled by the Supreme Court of Military Justice itself. In the new judgment handed down by the *Consejo Superior de Guerra Permanente* of the Sixth Judicial Zone of the Army, on December 15, 1997, he was found guilty of the offense of disobedience, offense against the duty and dignity of the office, falsity, negligence, and abuse of authority. It was on this judgment that the Supreme Council of Military Justice later ruled, on June 30, 1998, convicting him of the offense of disobedience with a maximum sentence of 28 months in prison, of which he was given notice, upon his request, on January 18, 1999.

14. She stated in this regard that the offense of disobedience provided for in Article 158 of the Code of Military Justice provides that "those who fail to carry out a service order without justified cause commit disobedience." The petitioner argues that there was a "service order"; accordingly, the acts performed by Mr. Rosadío Villavicencio were performed strictly in keeping with it.

15. In relation to the proceedings in the regular courts, the petitioner indicates that an investigation was opened into both the victim and the other persons accused along with him of the crime of illicit narcotics trafficking, with injury to the State. She states that during the judicial investigation, the statement by Mr. Rosadío Villavicencio on the so-called "Plan Angel" was corroborated by the other members of the military accused with him and by his superior, (Peruvian Army) Col. Emilio Murgueytio, who intervened as a witness. In addition, she alleges that her son invoked the objection of Nature of the Act, by which he argued the acts of which he was accused were not criminally justifiable.²

2[2] Article 5 of the Code of Criminal Procedure establishes: "Against a criminal action, one may invoke the objections of nature of proceeding, nature of act....

That of nature of proceeding may be invoked when the accusation is substantiated in a manner distinct from what is proper in a criminal proceeding. The objection of nature of act may be invoked when the conduct denounced does not constitute a crime or is not criminally justiciable.

The objections may be invoked at any stage of the process, and may be resolved by the judge *sua sponte*. If the objection of nature of proceeding is declared to be well-founded, the proceeding will be regularized in keeping with the applicable procedure. If any of the other objections are declared to be well-founded, the proceeding shall be considered to have concluded, and the case will be archived with prejudice." The trial judge declared the objection of nature of the act unfounded, and found Mr. Jorge Rosadío Villavicencio guilty of the crime of illicit drug trafficking, by judgment of April 17, 1996, sentencing him

16. She indicates in this respect that Mr. Rosadío Villavicencio filed a motion for nullity against the guilty verdict. The Criminal Chamber of the Supreme Court of Justice ruled on the motion declaring “there not being [nullity] in the judgment in terms of the verdict, and there being nullity in the penalty imposed and the reparation established.” In addition, the Supreme Court increased the prison sentence from six to 15 years, and the payment of the civil reparation, without setting forth any justification whatsoever. Accordingly, petitioner alleges that this ruling violates the right to a fair trial enshrined in Article 8 of the American Convention.

17. Petitioner also asserts that the State violated the principle of legality enshrined in Article 9 of the Convention, on administratively sanctioning Mr. Jorge Rosadío Villavicencio while also convicting him in the military court and the regular criminal court, even though he is exempt from criminal liability under Peru’s domestic legislation, and considering the circumstances of the case. For this reason, she alleges that the deprivation of liberty suffered by the victim is arbitrary, in violation of Article 7 of the Convention, and consequently in violation of Article 11 of the same treaty as well, as his good name has been tarnished.

18. With respect to the issues of admissibility, petitioner states in consideration of all the foregoing that she is not seeking to have the Commission act as a court of review in this case; rather, she seeks its pronouncement with respect to the State’s responsibility for the violation of human rights enshrined in the American Convention through its judicial organs. In relation to the exhaustion of domestic remedies, she alleges that all pertinent remedies have been pursued.

19. Finally, the petitioner has reported that the alleged victim is currently free, under an obligation to justify his activities at the end of each month, reporting to the judicial authority designated for this purpose.

to six years in prison and the payment of civil reparations to the State. The petitioner indicates that the judgment was based exclusively on the testimony of the superior, and that the declaration according to which the objection of nature of the act was unfounded, was not explained or justified.

B. The State

20. The State has not controverted the facts alleged by the petitioner, and has devoted most of its responses to the Commission to explaining the judicial proceedings related to this case. Regarding the proceedings pursued against Mr. Jorge Rosadío Villavicencio, the State indicates that "in both judicial proceedings, military and regular, uniform resolutions have been handed down regarding his legal situation, finding him criminally liable for the unlawful acts investigated." It also states that "administrative liability is determined without prejudice to criminal or civil liability."

21. The State further notes that the crimes for which Rosadío Villavicencio was tried and convicted are illicit drug trafficking and crimes against the discipline of the armed institutions, in the modality of disobedience, which must be investigated and resolved in keeping with the procedures established in the domestic legal order, which determines the jurisdiction for each of those punishable forms of conduct, the regular courts (for the crime of illicit drug trafficking) and the military courts (for the crime of disobedience). Accordingly, he was not subjected to double jeopardy.

22. With respect to the administrative actions, the State indicates that "by Resolution of the General Army Command N° 0527 CP/EPICP-JAPE, of March 3, 1999, it was resolved to retire Mr. Rosadío Villavicencio as a disciplinary measure, on February 24, 1995." It adds that said resolution "was not challenged in the contentious-administrative jurisdiction, consequently it was consented to." In addition, the rules that "contain the duties and rights of public servants also indicate that public servants are responsible civilly, criminally, and administratively for compliance with the statutory and administrative provisions in the performance of public service, without prejudice to disciplinary sanctions for breaches committed (Article 25 of Legislative Decree N° 276), and that public servants shall be administratively sanctioned for the breach of statutory and administrative provisions in the performance of their functions, without prejudice to the civil and/or criminal liabilities they may incur (Article 153 of Supreme Decree N° 005-90-PCM)."

23. As regards the proceedings in the military jurisdiction, the State argues that case N° 1594-0648 was opened against Mr. Rosadío Villavicencio and others, and that he was convicted and sentenced by the *Consejo de Guerra Permanente* of the Sixth Judicial Zone of the Army, on November 29, 1996, to 16 months in prison for the crime of

negligence. It adds that Mr. Rosadío Villavicencio filed an appeal challenging the verdict, which was resolved by final judgment of June 30, 1998, by the Supreme Council of Military Justice, on a motion for review, which held Mr. Rosadío liable for the crime of disobedience, and sentenced him to 28 months in prison. Later, the judgment of the Superior Council was annulled by the Supreme Council of Military Justice. The new judgment of the *Consejo de Guerra Permanente* convicted him of the crimes of disobedience, violating the duty and dignity of his office, falsity and negligence, and abuse of authority. Later, the Supreme Council, ruling on review by final judgment of June 30, 1998, convicted him only of disobedience. In this regard, the State asserts that "there have not been two criminal proceedings in the military courts, there was a single trial in which the principles and rights of the judicial function provided for in the Political Constitution have been applied, such as the right to appeal, the right to not be punished without judicial process, the right to reasoned rulings, and the principle of legality, among others."

24. With respect to the proceedings in the regular jurisdiction, the State points out that the alleged victim, "in the full exercise of his right of defense, pursued the remedies he deemed advisable, such as the objection on grounds of nature of the act, a remedy whose purpose is to void the proceeding, based on the acts in question not being criminally justifiable." The Criminal Chamber of the Superior Court of San Martín in this case, by judgment of April 17, 1996, duly reasoned and justified, declared that objection to be unfounded, and sentenced Jorge Rosadío to six years imprisonment, and to pay a sum for civil reparations. The record was then forwarded to the Supreme Court on a motion for nullity. The Supreme Court chamber specialized in drug trafficking crimes, by final judgment of June 19, 1997, declared "there is no nullity in the judgment of April 17, 1996, and that there is nullity with respect to the penalty imposed; instead a penalty of 15 years imprisonment is imposed."

25. The State also notes that Peruvian legislation allows for a dual process for public servants: the administrative proceeding for breach of the disciplinary rules, during the performance of one's functions, and proceedings for civil liability in the criminal court.

26. The State concludes that it can be established that Mr. Jorge Rosadío Villavicencio "has been tried and convicted by the competent authorities of the Peruvian jurisdiction, in the context of the procedures provided for by the applicable criminal legislation and criminal procedure, in the military courts, with respect to the crimes committed

in the performance of his military function, and by the regular courts, for the crime of illicit drug trafficking. In addition, he was subjected to a disciplinary administrative proceeding, in keeping with the military procedures. It adds that "said proceedings have been carried out with full observance of the principles and rights of the jurisdictional function, and observing the guarantees of due process, as Mr. Rosadío Villavicencio had the unrestricted right to defense, making use of the remedies provided by our criminal and procedural order; the right to appeal has been respected, the judicial resolutions have been duly reasoned and justified. Therefore, in both judicial proceedings, military and regular, uniform resolutions have been handed down with respect to his legal situation that concluded he was criminally liable for the unlawful acts investigated, accordingly the respective judgments of liability were handed down."

27. In terms of the principle of legality, the State argues that the Peruvian judicial organs have tried and convicted Mr. Rosadío Villavicencio for acts criminalized by Peru's criminal law at the time he committed them. With respect to the right to liberty, the State indicates that the alleged victim has been deprived of liberty for having been tried and convicted of criminal conduct for which that is the penalty, and in all instances and jurisdictions it has been uniformly so, as his criminal liability was demonstrated. Therefore, there is no basis for characterizing his detention as arbitrary. For the same reason, it points out, the allegation that his honor was not respected and his dignity not recognized makes no sense.

28. In consideration of all the foregoing, the State argues that the petition is manifestly inadmissible. The State indicates that what the petitioner seeks is for the Commission to act as a court of review with respect to the proceedings and decisions of the Peruvian courts, and that it is not competent to do so, arguing that for the IACHR "to make a new assessment of the evidence and facts that gave rise to the prosecution and verdict is simply inadmissible."

IV. ANALYSIS

A. The Commission's competence

29. The petitioner is authorized by Article 44 of the American Convention to lodge complaints with the IACHR. The petition indicates as the alleged victim an individual person with respect to whom Peru undertook to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Peru has

been a party to the American Convention since September 5, 1984, when it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

30. The Commission is competent *ratione loci* to examine the petition, insofar as it alleges violations of rights protected in the American Convention said to have taken place in the territory of a State party to that treaty. In addition, the IACHR is competent *ratione temporis* insofar as the obligation to respect and ensure the rights protected in the American Convention was already in force for the State on the date when the facts alleged in the petition are said to have occurred. Finally, the Commission is competent *ratione materiae* since the petition alleges violations of human rights protected by the American Convention.

B. OTHER ADMISSIBILITY REQUIREMENTS

1. Exhaustion of domestic remedies

31. In terms of this aspect of admissibility, the Commission observes that in the processing of this matter, at no time did the State invoke the objection of failure to exhaust domestic remedies with respect to the domestic proceedings against Mr. Jorge Rosadío Villavicencio.

32. The IACHR must determine whether the State tacitly waived this objection.

33. The Inter-American Court of Human Rights has noted that: "the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed."³ Accordingly, the IACHR establishes in respect of the instant case that the Peruvian State has not invoked the objection of failure to exhaust domestic remedies, and therefore it tacitly waived it, for having failed to invoke it expressly and in timely fashion in any of the communications sent to the Commission. The Commission considers that the

3 I/A Court H.R., *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987, Series C N° 1, para. 88; *Godínez Cruz Case*, Preliminary Objections, Judgment of June 26, 1987, Series C N° 3, para. 90; *Fairén Garbi and Solís Corrales Case*, Preliminary Objections, Judgment of June 26, 1987, Series C No. 2, para. 87; *Loayza Tamayo Case*, Preliminary Objections, Judgment of January 31, 1996, Series C N° 25, para. 40.

requirement set forth at Article 46(1)(a) of the American Convention has been met.

2. Time period for lodging a petition

34. In the petition under consideration, the IACHR has established that the Peruvian State tacitly waived its right to invoke the objection of failure to exhaust domestic remedies, thus the requirement of Article 46(1)(b) of the American Convention does not apply.

35. Nonetheless, the Convention's requirements of exhaustion of domestic remedies and submission within six months of the judgment exhausting domestic remedies are independent. Therefore, the Inter-American Commission must determine whether the petition under consideration was submitted within a reasonable time. The Commission observes that the petition alleges a multiple prosecution by way of judicial, administrative, and military proceedings for the same facts, against the alleged victim. In this context, and without prejudging on those arguments, to determine whether the complaint has been lodged in timely fashion, one must consider two aspects, the date of submission of the petition, and current status of the domestic proceedings. As of the date of submission, the proceeding in the military jurisdiction was ongoing; accordingly, the IACHR considers that the petition was submitted within a reasonable time.

3. Duplication of proceedings and *res judicata*

36. There is no evidence that the subject matter of this petition is pending before any other procedure for international settlement, or that it is substantially the same as one already examined by the Commission or any other international organization.

4. Characterization of the facts alleged

37. The Commission considers that the petitioner's presentation refers to facts that tend to establish violations of rights enshrined in Articles 7, 8, and 9 of the American Convention, as well as the obligation to respect the rights, set forth in Article 1(1) thereof.

38. The Commission also considers that the petitioner did not specify the alleged violation of Article 9 of the Convention. There are, therefore, no grounds for declaring the petition admissible, as it does not set out facts that could be characterized as a violation of that Article.

V. CONCLUSIONS

39. Based on the arguments of fact and law set forth above, and without prejudging on the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare admissible the allegations contained in the instant case regarding violations of Articles 1(1), 7, 8, and 9 of the American Convention by the Peruvian State to the detriment of Mr. Jorge Rosadío Villavicencio.

2. To notify the parties of this decision.

3. To continue analyzing the merits.

4. To place itself at the disposal of the parties in order to reach a solution grounded in respect for the rights enshrined in the American Convention, and to invite the parties to state their views on such a possibility.

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

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on twentieth day of February 20, 2003. (Signed): Juan E. Méndez, President; Marta Altolaquirre, First Vice-President; José Zalaquett, Second Vice-President; Commissioners Robert Goldman, Julio Prado Vallejo, and Clare K. Roberts.