

REPORT No. 64/16
PETITION 2332-12
ADMISSIBILITY REPORT
VICKY HERNÁNDEZ AND FAMILY
HONDURAS
6 DE DICIEMBRE DE 2016

I. SUMMARY

1. On December 23, 2012, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or “the IACHR”) received a petition filed by the Lesbian Network “CATTRACHAS”-Feminist Lesbian Organization of Honduras, the Center for the Human Rights Women (hereinafter “CDM”)¹, and Robert F. Kennedy Human Rights² (hereinafter “the petitioners”) against the Republic of Honduras (hereinafter “Honduras” or “the State”). The petition was filed on behalf of Vicky Hernández Castillo (hereinafter also “the alleged victim”) and her family.

2. The petitioners argue that the State is responsible for an unwarranted delay in the investigation of the murder of Vicky Hernández Castillo; and they allege discrimination in the access to justice based on their sexual orientation. The petitioners allege that the State is responsible for the violation of the alleged victim’s right to life, given that her death took place in a time and space context of high militarization and mobilization of state security forces; and that as a result this was possibly an extrajudicial killing. In addition, they argue that the State violated the duty of protection of life to detriment of the alleged victim. In turn, the State declares that the petitioners’ complaint is inadmissible in view that the State has complied with its duty to investigate, as it put into action several procedures in the criminal investigation in order to search the truth; and it alleges that domestic remedies have not been exhausted.

3. Without prejudging the merits of the complaint, after analyzing the position of the parties and pursuant to requirements set forth in Articles 31 to 34 of the IACHR’s Rules (hereinafter “the Rules”) and Articles 46 and 47 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), the Commission decides to declare this petition admissible in order to assess the allegations concerning the alleged violation of rights embodied in Articles 4 (Right to Life), 5 (Right to Personal Integrity), 8 (Right to Fair Trial), 13 (Right to Freedom of Thought and Expression), 24 (Right to Equality before the Law) and 25 (Right to Judicial Protection) of the American Convention, in agreement with its Article 1.1; and the violation of Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter “Convention of Belém do Pará”). The Commission moreover decides to notify the parties of its decision, to publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE IACHR

4. The IACHR received this petition on December 23, 2012, and transmitted to the State a copy of the pertinent parts on June 21, 2013, granting a two-month period to submit its observations, under Article 30.3 of its Rules of Procedures then in force. On August 21, 2013, the IACHR received the State’s reply. The petitioners submitted their additional observations on August 23, 2013 and on April 1, 2015. In turn, the State submitted its additional observations on June 24, 2015 and on December 8, 2015. All the observations were duly transmitted to the other party.

¹ In its communication of April 1, 2015, the CDM reported that it withdrew representation from the alleged victim in this case, due to internal issues in the organization.

² In their communication of September 22, 2015, the petitioners informed that the center Robert F. Kennedy Human Rights became co-petitioner in this petition.

III. POSITION OF THE PARTIES

A. Position of the petitioners

5. The petitioners allege that on the night of June 29, 2009, Vicky Hernández Castillo was murdered in the city of San Pedro Sula; she was a transgender woman registered at birth as Johnny Emilson Hernández. They allege that the crime took place in the context of raids carried out by the National Police during the curfew imposed after the coup in the Honduras. They declare that according to the media, Vicky Hernández Castillo's body "was found with signs of strangulation and two gunshots –one in the eye and the other to the head".

6. They also declare that on July 24, 2009, the IACHR requested information on the case, in the framework of Article 41 of the American Convention. In reply, the Supreme Court of Justice gave information about the "case of the death of Johnny Emilson Hernández Martínez, known as 'Vicky Hernández Castillo,' member of the LGTTB community, I.D. number 0501 1983 08333, Honduran, domiciled at the Barrio Sunsery of San Pedro Sula, Cortés; aged 26. The cause of her death was strangulation; at present, this is under investigation; so far, the motive of the crime is unknown, though the most likely hypothesis is that it was a crime of passion, according to file 1057-2009".

7. As to the criminal investigations that have been advanced, the petitioners allege that the authorities' performance was not diligent enough to clarify the facts and identify the perpetrators. They declare that the file shows that only 12 procedures were carried out, 4 of which are the formalities concerning the removal of the body and the identification of the victim. In addition, they say that while the Prosecutor's Office did participate in the investigation from the date of the killing, it was only about two years later that the Prosecutor proceeded to conduct the corresponding requirement of prosecution investigation. They mention that in May 2011, the victim's mother bore witness, which is the only witness statement in the investigation procedure, and that a criminal record of the victim was included to the file. They declare that after said procedures, the investigation was again inactive for two years until March 2013, when the Prosecutor requested access to the photographic album and the map of the crime scene from Visual Inspections, and the alleged victim's record from the Migration Office. They allege that these requests were not complied with.

8. Furthermore, the petitioners argue that basic procedures in the investigation were not put into practice, for example, the autopsy of the victim's body –requested by the Prosecutor for the first time in March 2011 and left aside until October 2013, when it was requested for the second time. They allege that, according to a report filed by the Regional Coordinator of Forensic Medicine, the Autopsy Report had been filed to the Prosecution on June 13, 2013; however, by March 2015, said report was not in the case file yet. In this regard, the petitioners allege that the forensic authorities refused to carry out the autopsy "under the excuse that the victim was HIV-positive" and "did not want to carry out any investigative procedure, as they considered that the victim was a 'different' person and with no rights, which amounts to discrimination based on sexual preferences".

9. In light of the foregoing, the petitioners allege that seven years after the crime, the perpetrators of the victim's death have not been punished, which establishes an unwarranted delay in the application of justice. Therefore, they believe that the exception set forth in Article 46.2 (c) of the Convention is applicable concerning this petition.

10. The petitioners moreover allege that the State violated Vicky Hernández Castillo's right to life since it did not prevent her murder, as the facts took place during the seizure of power in Honduras and the situation was of high militarization. Taking into account the characteristics of the murder, the petitioners argue that maybe it was an extrajudicial killing, since during the curfew "it was precisely officers of the security forces the only ones who were allegedly allowed to be on the streets with complete impunity".

11. Based on the foregoing, the petitioners allege that the State violated, to the detriment of the alleged victim, the rights embodied in Articles 4, 8, 24 and 25 of the American Convention in agreement with Article 1.1 of the same treaty. They also argue that under the Statute of Rome of the International Criminal Court, the alleged violations may tend to establish a crime against humanity due to the context in which these took place. In this regard, they say that during the coup, there were 23 alleged violent deaths among the members of the LGBTI community, “which is the highest frequency rate of murders of transsexuals and homosexuals in a semester in Honduras”. As a result, they allege that these may be “systematic and generalized conducts, committed with particular intensity after the seizure of power”.

B. Position of the State

12. According to the State, the petition must be declared inadmissible in view that the State complied with its duty to investigate concerning the death of Vicky Hernández Castillo, making significant efforts to search the truth. It believes, however, that the procedure has been extended and delayed due to the complexity of the case, as the facts are described as “extremely harmful and, therefore, demand more severe punishment”.

13. In particular, the State describes several investigation procedures that it carried out to identify the victimizers. It adds that in the preliminary investigation, Rosa Hernández, mother of the alleged victim, bore witness; that she declared that on June 27, 2009, “the victim arrived in the morning and asked her 100 lempiras, and after that she never saw him again”; and that later, in her witness statement to the National Office of Criminal Investigation (hereinafter “DNIC”), she declared that “her son had told her that there was another travesty, whose name she does not remember, who had robbed him and who threatened to kill him if he saw him again”. The State argues that later many several calls were made to a friend of the victim, a religious ministry, and a group from a neighborhood in the city; but that the telephone lines were out of service, which did not allow finding out their addresses so that they bore witness.

14. The State stresses that the lack of witnesses at the place of the events has hindered the clarification of the facts and the identification of the persons responsible for the death of the alleged victim, in spite of which the investigation continues. In this regard, it alleges that it has duly complied with its duty of protection and safeguard of human rights in favor of Vicky Hernández Castillo, as it carried out several investigation procedures aimed at searching the truth, in conformity with all the requirements of the substantive, and criminal procedural laws. In particular, as to the autopsy report, the State says that by December 2015, the report had been included in the case file.

15. Concerning the exhaustion of domestic remedies, the State argues that the domestic law has effective, adequate and necessary remedies to solve the case. In addition, it states that the action of criminal prosecution has not prescribed, and that therefore, it is possible to protect the rights of the victim by means of domestic remedies.

16. In conclusion, the State argues that given that domestic remedies have not been exhausted, the petition is inadmissible, and requests the IACHR so declare.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

17. Under Article 23 of the IACHR’s Rules and Article 44 of the American Convention, the petitioner is entitled to lodge complaints with the Commission. In the petition, the alleged victim is an individual person whose rights are protected under the American Convention. The State of Honduras agreed to respect and ensure the rights embodied in said Convention. As to the State, the Commission declares that Honduras is a State Party to the Convention since September 8, 1977, when it deposited the instrument of ratification. As a result, the Commission is competent *ratione personae* to examine the petition. Moreover, the State is party to the Convention of Belém do Pará since July 12, 1995; therefore, the Commission is competent

ratione personae to analyze possible violations of said treaty. The Commission is also competent *ratione loci* to assess the petition, in so far as it alleges violations that seemingly occurred within the territory of Honduras.

18. The Commission is competent *ratione temporis*, since by the time that the alleged facts are said to have taken place, the State was already bound to respect and ensure the rights protected by the American Convention and the Convention of Belém do Pará. Finally, the Commission is competent *ratione materiae* regarding the alleged violations of human rights protected by the American Convention on Human Rights and the Convention of Belém do Pará.

19. As to the petitioners' complaint on the alleged violation of Article 7.1 (h) of the Statute of Rome of the International Criminal Court, the Inter-American Commission sees that it is not competent to rule on violations of said statute. However, under the principles of interpretation of treaties and Article 29 of the Convention, if necessary, the Commission is entitled to resort to provisions established in other treaties in order to interpret the provisions of the American Convention³.

B. Admissibility requirements

1. Exhaustion of domestic remedies

20. Under Articles 31.1 of the Rules and 46.1 (a) of the American Convention, for a petition to be admissible, domestic remedies must have been pursued and exhausted, in accordance with generally recognized principles of international law. This requirement is aimed at enabling national authorities to take cognizance of the alleged violation of a protected right and, if applicable, reverse the situation before it is heard by an international body. In turn, Articles 31.2 of the Rules and 46.2 of the Convention establish that the requirement of prior exhaustion of domestic remedies does not apply when: (a) 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; (b) 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 (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

21. The petitioners argue that in view of the delays in the investigations, the exception to the requirement of prior exhaustion of domestic remedies in Article 46.2 (c) of the American Convention does apply. In turn, the State argues that it has carried out all the necessary procedures in conformity with the law and that the procedure has been extended and delayed due to the high complexity of the case. In this regard, it alleges that the petition does not meet the requirement of prior exhaustion of domestic remedies set forth in Article 46.1 (a) of the Convention in view that the State has effective and adequate remedies to solve the case.

22. Concerning the alleged unwarranted delay, the Commission makes an assessment of the circumstances, and an analysis on a case-by-case basis to determine if there has been an unwarranted delay. As a general rule, the Commission establishes that "a criminal investigation shall be carried out promptly to protect the interests of the victims and to preserve evidence". To determine if an investigation has been carried out "promptly," the Commission takes into account a series of factors such as the time elapsed since the offense was committed, if the investigation is beyond than the preliminary stage, the measures adopted by the authorities, and the complexity of the case⁴.

23. The information available indicates that although a criminal investigation was open due to Vicky Hernández Castillo's death, the investigation is still at the preliminary stage more than 7 years later after the events. Moreover, the IACHR sees that according to the information submitted, the last action in the case

³ I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70., paragraphs 208 y 209.

⁴ IACHR, Report No. 50/08 (Admissibility), Petition 298-2007 Admissibility, *Néstor José Uzcátegui and others*, Venezuela, July 24, 2008, par. 42.

file dates from November 4, 2013; and that by that time, many of the procedures requested by the Prosecutor's Office had not been complied with.

24. As a result, the Commission concludes that in this case, the exception to the requirement of prior exhaustion of domestic remedies is applicable, under Article 46.2 (c) of the American Convention and Article 31.2 (c) of the Rules.

2. Timeliness of the petition

25. Under Articles 46.1.b of the American Convention and 32.1 of the Rules, for a petition to be declared admissible by the Commission, it must be lodged within a period of six months from the date on which the alleged victim was notified of the final judgment. Concerning the complaint under assessment, the IACHR establishes that the exception to the requirement of prior exhaustion of domestic remedies is applicable, under Article 46.2 (c) of the American Convention and Article 31.2 (c) of the Rules. In this regard, under Article 46.2 of the Convention and Article 32.2 of the Rules, in those cases where exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable term, as determined by the Commission. Therefore, the Commission shall consider the date of the alleged violations of rights and the circumstances of each case.

26. In the case under assessment, the IACHR has established that the exception to the requirement of prior exhaustion of domestic remedies is applicable, under Article 46.2 (c) of the American Convention and Article 31.2 (c) of the Rules. The petition to the IACHR was received on December 23, 2012, and the alleged events that are the subject matter of the complaint took place on June 29, 2009. The investigation is still at the preliminary stage and its effects, in terms of the alleged lack of judicial protection, persist to this date. Consequently, in view of the context and the characteristics of the case, the Commission believes that the admissibility requirement of timeliness of the petition has been met.

3. Duplication of proceedings and International *res judicata*

27. From the case file, there is nothing to indicate that the subject matter of the petition is pending in other international proceedings for settlement or that it duplicates a petition already examined by this or by another international body. Therefore, inadmissibility requirements set forth in Articles 46.1 (c) and 47 (d) of the Convention and Articles 33.1 (a) and 33.1 (b) of the Rules do not apply.

4. Colorable claim

28. The Commission must decide if the facts alleged tend to establish a violation of protected rights, under Articles 47 (b) of the American Convention and 34 (a) of the Rules of Procedure, or if the petition is 'manifestly groundless' or 'obviously out of order,' under Articles 47 (c) of the American Convention and 34 (b) of the Rules. The assessment criteria for admissibility differs from that used for the assessment of the merits of the petition, since the Commission only undertakes a *prima facie* assessment to determine whether the petitioners have established the apparent or possible violation of a right protected by the American Convention on Human Rights. It is a general analysis not involving a prejudgment of, or issuance of a preliminary opinion on the merits of the matter.

29. Moreover, the corresponding legal instruments do not require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, 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.

30. The petitioners argue that the state authorities are responsible for the death of Vicky Hernández Castillo, since the events took place during the curfew, a context of high militarization in Honduras. They add that no procedures aimed at establishing the facts were put into action, and that the few procedures that were carried out do not indicate that there is a coherent plan of investigation. Finally, they stress that the

authorities' denial to carry out the autopsy of the alleged victim on the grounds that she was a transgender woman and, hence, allegedly HIV positive, shows a high level of discrimination against her gender identity. Moreover, they allege that during the coup, there was one of the highest rates in murders against people with diverse sexual orientation and gender identity in Honduras. The State, in turn, says that it did carry out all the procedures necessary for an effective investigation and that the criminal investigation is not finished yet.

31. In view of the elements of fact and law submitted by the parties, and given the nature of the matter under assessment, the IACHR believes that, if proved, the facts alleged in the petition may tend to establish a violation of the rights protected by Articles 4, 5, 8, 24 and 25 of the American Convention in agreement with duties set forth in Article 1.1 of the same treaty, to the detriment of the alleged victim and the family members that may be identified in the assessment of the merits. Furthermore, at the merits stage, the IACHR shall consider the possible applicability of Article 13 of the Convention with respect to the alleged violation of the right to expression of the alleged victim's gender identity⁵. Lastly, the Inter-American Commission believes that the allegation may tend to establish violations of Article 7 of the Convention of Belém do Pará, since under said instrument, States Party are obliged to prevent, punish and eradicate all forms of violence against women, including lesbian, bisexual, transgender, and intersex women⁶.

V. CONCLUSIONS

32. Based on the above elements of fact and law, the Inter-American Commission concludes that this petition meets the admissibility requirements set forth in Articles 31 to 34 of the Rules and Articles 46 and 47 of the American Convention, and without prejudgment of the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible with regard to Articles 4, 5, 8, 13, 24 and 25 of the American Convention in accordance with Article 1.1 of said treaty, and Article 7 of the Convention of Belém do Pará;
2. To notify the parties of this decision;
3. To proceed to the analysis of the merits of the matter; 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 Panama, on the 6th day of the month of December, 2016. (Signed): James L. Cavallaro, President; Francisco José Eguiguren, First Vice President; Margarette May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, Esmeralda E. Arosemena Bernal de Troitiño and Enrique Gil Botero, Commissioners.

⁵ IACHR, Report "Violence against LGBTI Persons in America," OAS/Ser.L/V/II.rev.2 Doc. 36 November 12, 2015, par. 217.

⁶ IACHR, Report "Violence against LGBTI Persons in America," OAS/Ser.L/V/II.rev.2 Doc. 36 November 12, 2015, par. 282.