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REPORT No. 44/20
PETITION 1687-09
REPORT ON ADMISSIBILITY

MARÍA ELENA BLANCO QUINTANILLA DE ESTENSSORO
BOLIVIA

Approved electronically by the Commission on February 24, 2020.

Cite as: IACHR, Report No. 44/20, Petition 1687-09. Admissibility. María Elena Blanco Quintanilla de Estenssoro. Bolivia. February 24, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner	José Antonio Rivera Santivañez, Wilman Ruperto Durán Ribera, Legal Center for Women (OJM)
Alleged victim	María Elena Blanco Quintanilla de Estenssoro
Respondent State	Bolivia
Rights invoked	Articles 8 (fair trial), 9 (freedom from <i>ex post facto</i> laws), and 25 (judicial protection) of the American Convention on Human Rights ¹ , in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)

II. PROCEEDINGS BEFORE THE IACHR²

Date of filing	December 28, 2009
Additional information received during initial review	January 3 and June 1, 2010
Notification of the petition	April 8, 2013
State's first response	July 11, 2013
Additional observations from the petitioner	October 8, 2013, and October 5, 2016
Additional observations from the State	September 1, July 23, August 29, October 26, and November 21, 2016

III. COMPETENCE

<i>Ratione personae</i>	Yes
<i>Ratione loci</i>	Yes
<i>Ratione temporis</i>	Yes
<i>Ratione materiae</i>	Yes; American Convention (deposit of instrument of ratification on July 19, 1979)

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 8 (fair trial), 9 (freedom from <i>ex post facto</i> laws), and 25 (judicial protection) of the Convention, in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)
Exhaustion or exception to the exhaustion of remedies	Yes, on June 29, 2009
Timeliness of the petition	Yes, on December 28, 2009

V. SUMMARY OF ALLEGED FACTS

1. The petitioners allege the violation of the human rights of María Elena Blanco Quintanilla de Estenssoro (hereinafter “the alleged victim”) given the irregularities in the criminal action filed against her on charges of banking fraud and which lasted from 1995 until 2009. They submit that Ms. Blanco Quintanilla is now 71 of age and in poor health.

2. According to the petition, Banco de Cochabamba S.A. hired the alleged victim as the general manager, and she worked there from February 1, 1990, until December 16, 1994. The petitioners indicate that later on April 14, 1995, the Superintendent of Banks and Financial Institutions, filed a criminal action against the president and the members of Banco Cochabamba S. A.'s board of directors, including the alleged victim, on

¹ Hereinafter the “American Convention” or “Convention.”

² The observations submitted by each party were duly transmitted to the opposing party.

charges of criminal association, false claims, forgery, concealment, use of false information, banking fraud, and embezzlement, according to the Criminal Code in force when the events took place.³

3. The Tenth Criminal Investigating Judge of La Paz Judicial District issued, on August 2, 1995, the decision to open investigations and the final decision on the investigation on January 9, 1998—that is, two years and ten months later, which violates the 20-day deadline established in article 171 of the Criminal Code.⁴ They submit that in the final decision on the investigation, the judge ordered the criminal prosecution of the accused, including the alleged victim, on charges of criminal association, forgery, concealment, use of false information, and banking fraud. They claim that the judge considered that there were enough elements to prove the alleged victim's guilt in the offenses attributed to her because she was the general manager and a member of the National Loan Committee of former Banco Cochabamba. Thus, the judge found that she infringed provisions of the Code of Commerce and the Law on Banks and Financial Institutions in requesting the board of directors' approval of fraudulent loans, which was aggravated by her awareness of the illegality of her acts.⁵

4. The petitioners assert that four years later, on December 18, 2002, the Fourth Criminal Trial Court of La Paz Judicial District issued a judgment of acquittal in favor of the alleged victim, on considering that the incriminating evidence was *prima facie* evidence; however, it did not declare her innocent.⁶ They claim that deeming that the judgment violated her rights, the alleged victim appealed it and that the plaintiff filed the same remedy. They assert that on September 12, 2003, the court of appeals upheld the judgment of acquittal and declared the appeal by the plaintiff groundless because the offenses raised were untrue. They submit that on November 10, 2003, the alleged victim filed appeals for the annulment of the judgment as she deemed it contrary to her rights, and that the plaintiff filed the same remedies.

5. The petitioners argue that, by decision No. 09/2009 of January 22, 2009 the First Criminal Court of the Supreme Court of Justice, declared the alleged victim guilty of the charge of banking fraud involving multiple victims, sentencing her to five years to life in prison in the Women's Prison in La Paz city, and to pay civil damages, legal costs of the State, and a fine. The court established that based on the evidence submitted, the alleged victim engaged in fraudulent activity as the manager of Banco de Cochabamba to obtain significant financial profits for a group connected with the main shareholder of the said bank to the detriment of the financial interests of both depositors and the State. This conduct was subsumed under the criminal definition of banking fraud aggravated by the number of victims involved, which is set out in and punishable under the criminal code.

6. The petitioners assert that the criminal definition of banking fraud involving multiple victims, was included in the Criminal Code through Law No. 1768 of March 10, 1997, and as it is known, the offenses attributed to the alleged victim in the criminal proceeding were considered to have been committed from 1991 to 1994, and that her criminal prosecution began on August 2, 1995—before the promulgation of the said law—, meaning that the law was applied retroactively. They submit that the supreme order of January 22, 2009, was a new trial judgment—and not a review of the lower courts' decisions—under which the alleged victim was found guilty of a charge against which she could not submit her defense, without her having been heard or prosecuted in relation to the charge she was convicted of, and in a proceeding that should have been declared extinguished given the 13 years elapsed since the filing of the case, that is, August 2, 1995.

7. The petitioners state that on May 29, 2009, they filed a constitutional *amparo* action against the ministers of the Supreme Court of Justice that issued supreme order No. 9/2009, claiming arbitrariness and illegality and requesting that it be declared null and void and that a well-founded and reasoned decision be issued instead. They indicate that on June 29, 2009, the First Civil Court of the Superior Court of Chuquisaca District dismissed the *amparo* action on considering that this remedy does not provide for an examination of the criminal evidence because it is not an ordinary instance of jurisdiction and that since the alleged victim was able to present her defense, heard, and prosecuted in a criminal proceeding, due process and legal certainty

³ These offenses are explained in articles 132, 198, 200, 202, 203, 335, and 345 of the Criminal Code approved by Decree-Law No. 10426 of August 23, 1972.

⁴ According to Article 171 of the Criminal Code, "a preliminary investigation must be closed within 20 days following the date the accused party is notified of the initial order of preliminary investigation."

⁵ According to folio 14 of the final decision on the investigation issued on January 9, 1998.

⁶ Article 245 of the Code of Criminal Procedure establishes that "a judgment of declaration of innocence shall be issued when 1) there is no proof of the criminal offense; 2) when the commission of the offense having been proven, there is conclusive evidence that the defendant did not commit it."

were respected. In addition, the court maintained that the *amparo* action is inadequate regarding court resolutions either amendable or voidable through another remedy, like in the instant case, where the alleged victim should have filed an appeal for review.

8. The petitioners submit that although the *amparo* action is a subsidiary remedy, once the appeal for annulment has been exhausted, there is not an ordinary remedy to obtain immediate and effective protection for the alleged victim's rights under the domestic legal system. They argue that although the federal criminal legislation recognizes the extraordinary remedy of the appeal for review, this remedy does not provide immediate human rights protection because its applicability depends on specific grounds that do not include the violation of human or fundamental rights but concern issues strictly regarding the ordinary jurisdiction; therefore, it is not useful or adequate to remedy the instant matter.⁷

9. The petitioners indicate that on June 29, 2009, that judgment on the *amparo* action was transmitted ex officio to the Constitutional Court for review. At that moment, this court was suspended because all its members had been permanently removed from office and because the National Congress had not made new appointments. As a result, the petitioners report that when they filed their petition, 4965 case files were awaiting resolution by the Constitutional Court. However, they indicate that this remedy was reviewed on May 3, 2011, through judgment 0623/2011-R, which upheld the court of *amparo* resolution No. 206/2009, as it stated that "there was nothing to prove a violation of fundamental rights because the Supreme Court's reasoning and decision cannot be arbitrary or illegal."

10. Lastly, they submit the guilty verdict issued by the Supreme Court of Justice has been served because, the alleged victim was arrested in January 2014, in Santa Cruz.

11. To conclude, the petitioners allege the violation of the alleged victim's human rights based on the following grounds: (i) the violation of the principle of legality given the non-criminality of the investigated conduct and the retroactive application of the law; (ii) the violation of the guarantees of due process, the right of defense, and the right to appeal a decision to a higher judge or court because the alleged victim could not present her defense or was not prosecuted regarding the charge she was convicted of; (iii) the violation of the right to prior and detailed notification of the accused because she was not notified on a timely and detailed basis of the illegal acts for which she was convicted; (iv) the violation of the reasonable period for the proceeding because it lasted 13 years and five months, of which the Supreme Court of Justice took more than five years to decide on the appeal for annulment even though the proceeding could not take more than 30 days;⁸ (v) defenselessness because of the impossibility to carry out evidentiary procedures given the application of a new criminal definition; and (vi) the violation of the right to judicial protection for the denial of the constitutional *amparo* action requested through a remedy filed on May 29, 2009, and because the legislative body did not fulfil its constitutional obligation to appoint judges for the Constitutional Court so that the appeal for review was decided upon in time and in due form.

12. For its part, the State emphasizes that the petitioners seek that the Commission works as a fourth instance of jurisdiction. According to it, what the petitioners seek is that an international body reviews domestic legal issues and examines the evidence presented in the domestic criminal proceeding filed against the alleged victim.

13. The State indicates that the courts were always respectful of the law, respecting the defendant's procedural guarantees and due process. In this regard, it submits that, based on the background information submitted by the petitioners, the alleged victim did use her right of defense. It stresses that she did appear in court voluntarily, but was found in contempt of court.⁹ It contends that the Supreme Court's order of January 22, 2009, was based on the congruence principle, which obliges courts to remedy a legal dispute based

⁷ Article 421 of the Bolivian Code of Criminal Procedure establishes the following grounds for the review of judgment: "(1) When the facts in the arguments of the judgment are incompatible with those established in another final criminal judgment; (2) When the appealed judgment is based on evidence declared false in a subsequent final decision; (3) When the conviction has been the result of offenses by the judiciary whose commission has been proven in a subsequent final decision; (4) When after the judgment, new facts supervene, preexisting facts are discovered, or there are elements proving that (a) the act was not committed; (b) the convict did not commit or engage in the commission of the act, or (c) the act is not punishable, (5) When a more benign law is applicable retroactively, and (6) When a judgment of the Constitutional Court repeals the criminal definition or rule on which the conviction was based."

⁸ According to Transitional Provision No. 3 of the Code of Criminal Procedure.

⁹ It is worth mentioning that although the alleged victim was found in contempt at the preliminary investigation, on folio 38 of resolution 147/2002, it reads that she cured her contempt and that oral hearings were resumed only for the purpose of confessions.

on the facts raised in the proceeding; that, therefore, the decision was not dependent upon the legal description of the offense that the court might have made regarding those facts in the accusation. The State indicates that in its order, the court recognized that in granting around 46.2 million dollars in illegal and related loans and 5.6 million dollars from accrued interests, the defendants violated the provisions of the Law on Banks and Financial Institutions and that because of such illegal acts, the Central Bank of Bolivia had to face the consequences of the damage by using monies from the treasury to repay a large number of savers or multiple victims. It argues that the reform of the Criminal Code by Law No. 1768/1997 did not create a new criminal definition; that it adds an aggravating circumstance to the criminal definition of banking fraud, which was not imposed on the sentence against the alleged victim. In response to the claim that the State did not fulfill its duties under Article 2 of the Convention, the State contends that it has established several legal provisions to adapt the domestic legal system to the rules of the American Convention.

14. The State alleges that the domestic remedies were not exhausted because among the legal remedies regulated by the Bolivian Code of Criminal Procedure is the appeal for review, which the petitioners did not use. It submits that in the constitutional jurisdiction, those prosecuted can also file remedies for the defense, such as the writ of liberty and the constitutional *amparo* action. It indicates that they should have challenged the decision on the appeal for annulment through an appeal for review and a constitutional complaint against the purportedly retroactive application of Law No. 1768 of March 10, 1997. As to the inadmissibility of the *amparo* action, it indicates that this remedy is not part of ordinary proceedings, nor does it substitute other legal means or remedies because of its subsidiary nature.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

15. The petitioners submit that the last legal decision on the criminal action filed against the alleged victim was issued on June 29, 2009. However, they request the application of the exceptions set out in Article 46.2 subparagraphs (b) and (c) of the American Convention since, on the one hand, the Constitutional Court had been suspended since November 2007, and, on the other hand, there was an unreasonable delay in the review of the constitutional *amparo*. The State alleges that the domestic remedies were not exhausted because the petitioners did not present an appeal for the review of the judgment, which they consider it was the adequate mechanism to appeal in the criminal proceeding.

16. In regard to extraordinary remedies, the Commission has previously established that although in some cases these may be appropriate for dealing with human rights violations, as a general rule, the only remedies necessary to be exhausted are those that within the legal system are suitable for providing the protection needed to remedy the infringement of a specific legal right. In principle, these are regular—not extraordinary—remedies.¹⁰ In the instant case, the Commission observes that the action for review cited by the State is an extraordinary remedy invocable against final judgments on strictly specific grounds and, therefore, cannot be considered an appropriate remedy that ensures review or appeal of a conviction before it becomes final,¹¹ in this case, the analysis of supreme order No. 09/2009 issued by the First Criminal Court of the Supreme Court of Justice on January 22, 2009, sentencing Ms. Blanco Quintanilla. Accordingly, the State did not provide the alleged victim with a remedy suitable for protecting those allegedly violated rights, which according to Article 46.2.a of the American Convention, constitutes one of the grounds for the exception to the rule of prior exhaustion of domestic remedies.

17. Despite the foregoing, the IACHR observes that the alleged victim filed a constitutional *amparo* action on May 29, 2009, to have her conviction reviewed and her rights remedied at the domestic level and that the outcome was unfavorable. The Commission notes that initially, the Constitutional Court could not review that remedy as it was suspended given the lack of appointed judges and that only on May 3, 2011, was the *amparo* action decided on with a denial. The Commission believes that by filing that *amparo* action, the petitioner filed domestic legal mechanisms available in view of the lack of adequate remedies under the national legal system. Therefore, the Commission finds that the exception to the requirement of prior

¹⁰ IACHR, Report No. 161/17, Petition 29-07. Admissibility. Andy William Garcés Suárez and family. Peru. November 30, 2017, par. 12.

¹¹ IACHR, Report No. 62/16. Petition 4449-02. Admissibility. Saulo Arboleda Gómez. Colombia. Colombia. December 6, 2016, par. 28; IACHR, Report No. 33/14. Merits. Case 12.820. Manfred Amrhein *et al.* Costa Rica. April 4, 2014, par. 203.

exhaustion of domestic remedies should be applied to the instant case, under Article 46.2.a of the American Convention and Article 31.2.a of the IACHR Rules of Procedure.

18. Lastly, the IACHR observes that it received the petition on December 28, 2009, and that the judgment on the alleged victim's constitutional *amparo* action is dated May 3, 2011, and that its effects persist to date. Consequently, in view of the context and the characteristics of the instant case, the Commission considers that the petition having been presented within a reasonable period, the admissibility requirement of timeliness must be declared met.

VII. COLORABLE CLAIM

19. In view of the factual and legal elements submitted by the parties, along with the nature of the matter brought to its attention, the IACHR considers that, if proven, the alleged facts regarding a possible violation of due process, the possible retroactive application of Law No. 1768 of March 10, 1997, regulating the offense of "banking fraud with multiple victims," the purported arbitrary conviction by the Supreme Court of Justice without prior review, and the alleged lack of judicial protection in relation to the alleged facts all could tend to establish possible violations of Articles 8 (fair trial), 9 (freedom from *ex post facto* laws), and 25 (judicial protection) of the American Convention, in relation to its Articles 1.1 and 2, to the detriment of the alleged victim.

20. As for the allegations by the State regarding a fourth instance of jurisdiction, the Commission reiterates that under its mandate, it is competent to declare a petition admissible and rule on the merits when that petition concerns domestic proceedings that may be contrary to the rights protected by the American Convention, like in the instant case.

VIII. DECISION

1. To declare the instant petition admissible with regard to Articles 8, 9 and 25 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, 2020. (Signed): Joel Hernández, President; Antonia Urrrejola, First Vice President; Flávia Piovesan, Second Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Margarete May Macaulay, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.