

OEA/Ser.L/V/II.  
Doc. 253  
4 September 2020  
Original: Spanish

**REPORT No. 238/20**  
**PETITION 1437-09**  
REPORT ON ADMISSIBILITY

WILBERT ELKI MEZA MAJINO  
PERU

Approved electronically by the Commission on September 4, 2020.

**Cite as:** IACHR, Report No. 238/20. Petition 1437-09. Admissibility. Wilbert Elki Meza Majino.  
Peru. September 4, 2020.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Anibal Florentino Arias and Wilbert Elki Meza Majino
<b>Alleged victim:</b>	Wilbert Elki Meza Majino
<b>Respondent State:</b>	Peru <sup>1</sup>
<b>Rights invoked:</b>	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 9 (freedom from ex post facto laws), 25 (judicial protection) of the American Convention on Human Rights <sup>2</sup> and other international instruments <sup>3</sup> .

**II. PROCEEDINGS BEFORE THE IACHR<sup>4</sup>**

<b>Filing of the petition:</b>	November 12, 2009
<b>Additional information received at the stage of initial review</b>	December 11, 2012 and June 19, 2015
<b>Notification of the petition to the State:</b>	September 30, 2016
<b>State's first response:</b>	January 3, 2017
<b>Additional observations from the petitioner:</b>	March 16, 2017
<b>Additional observations from the State:</b>	December 18, 2019 and June 7, 2020

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (instrument deposited on July 28, 1978) and Inter-American Convention to Prevent and Punish Torture (instrument deposited on March 28, 1991)

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

<b>Duplication of procedures and international <i>res judicata</i>:</b>	No
<b>Rights declared admissible:</b>	Articles 5 (humane treatment), 7 (personal liberty), 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 (obligation to respect rights) and 2 (domestic legal effects); and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, in the terms of Section VI
<b>Timeliness of the petition:</b>	Yes, in the terms of Section VI

<sup>1</sup> Pursuant to Article 17.2.a of the Rules of Procedure, Commissioner Julissa Mantilla Falcón, from Peru, did not participate in the debate nor in the decision of the present case.

<sup>2</sup> Hereinafter "Convention" or "American Convention."

<sup>3</sup> American Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights, Declaration of Fundamental Rights and Freedoms of the European Parliament and Geneva Conventions.

<sup>4</sup> The observations submitted by each party were duly transmitted to the opposing party.

## V. FACTS ALLEGED

1. Anibal Florentio Arias and Wilbert Elki Meza Majino (hereinafter “the petitioners”) report alleged violations to the human rights of Wilbert Elki Meza Majino (hereinafter “the alleged victim”). They allege that he was wrongfully deprived of his liberty, subjected to torture, subjected to criminal proceedings before an authority that did not constitute a lawful judge and deprived of presumption of innocence and the right to counsel. They also claim that he was sentenced on the grounds of a vague and abstract type of criminal offense that did not meet the criteria of the principle of legality, and that he received a harsher sentence than the one that was applicable to such type of criminal offense at the time when the offense was allegedly committed.

2. The petitioners explain that on August 22, 2002 the alleged victim was at an internet kiosk performing his labor duties as a trader when he was arrested by State agents without a warrant. They allege that after the arrest, the agents tied the alleged victim’s hands and feet and blindfolded him in order to take him to Ventanilla Beach (*Playas de Ventanilla*) where he was subjected to physical abuse and physical and psychological torture. The petitioners state that, in order to justify the arbitrary arrest and obtain a million dollars’ reward offered by the State to those who captured terrorist leaders, the alleged victim was accused of being responsible for the logistics and financial matters of the terrorist organization “Shining Path” (*Sendero Luminoso*). They explain that the a quo Court of the National Criminal Court passed sentence on the alleged victim convicting him for acts of terrorism against the State and was he sentenced to 20 years of prison.

3. The petitioners claim that the investigation and criminal proceedings that resulted in the alleged victim’s sentence were full of irregularities that represented human rights’ violations, including: that even though the city of Lima was not in state of emergency, the alleged victim was isolated in the jail of Peru’s National Counterterrorism Directorate (hereinafter, “DIRCOTE”) where he was tortured and, under these circumstances, evidence was gathered and the victim’s statements were obtained and were not withdrawn later in spite of the objections filed; that he was convicted for a type of criminal offense established by a decree that was not valid for having been issued by a *de facto* government; that the type of criminal offense for which he was convicted (terrorism by affiliation) did not meet the minimum requirements of the principle of legality for being abstract, vague, open and imprecise; that a decree issued subsequent to the events for which he was charged was retroactively applied and increased the sentence for the offense for which he was convicted from 15 to 20 years of prison; that the right to be tried by a lawful judge was violated given that the proceedings were heard by special terrorism courts different to the ones established in the Peruvian system of justice prior to the events that resulted in the sentence; that the sentence was based on a “verification report of communication through the internet” without its authenticity, falseness or falsification of its content having been proven by means of an expert’s report.

4. The petitioners claim that the alleged victim has exhausted all the remedies available in the domestic jurisdiction. They indicate that a nullity suit was filed against the condemnatory sentence. Consequently, on May 24, 2006 the Second Provisional Criminal Court of the Supreme Court of Justice upheld the sentence. In addition, they indicate that he filed an habeas corpus action against first and second instance authorities claiming that he had been deprived of his liberty based on irregular proceedings, which was deemed groundless by the Second Criminal Court. Subsequently, he appealed this decision before the Fifth Court of Free Defendants of the Superior Court of Justice, which upheld the negative decision. Finally, he filed a constitutional appeal for the Constitutional Court to reconsider his habeas corpus action, which on May 16, 2009 ruled this action to be groundless. He highlights that his complaints with regard to the malignant violation to the principle of *ex post facto* nature of the criminal law were outlined in the habeas corpus action. He also states that the tortures inflicted upon the alleged victim during his arrest were reported while the criminal proceedings against him were ongoing, first before the Public Ministry’s representative and subsequently before the judicial authorities, which rejected the objections filed and did not apply the principle of *audi alteram partem* with regard to the evidence. They also claim that during the proceedings, a recording made when the alleged victim was arrested by the police was submitted, but that it omitted the video of the abuses and assaults committed against him.

5. On the other hand, the State highlights that the petitioners invoke instruments that do not belong to the Inter-American system and that cannot be evaluated and ruled upon by the Commission. It states that the petition should be declared inadmissible on the grounds of Article 46 of the American Convention since the alleged victim failed to exhaust the domestic remedies. It affirms that the alleged victim did not include in the nullity and habeas corpus actions his claims with regard to the alleged specific violation of the principle of legality, *actus reus* or *ex post facto* nature in criminal matters and indicates that it is demonstrated in the sentences that resolved these remedies. It highlights that the constitutional process represented an appropriate and effective remedy to resolve these claims and that the domestic courts were deprived from issuing a judgment on the matter. In addition, it claims that the State cannot be held accountable for the inappropriate exercise of the alleged victim's legal defense during the constitutional process. Moreover, it notes that the proceedings against the alleged victim were brought forward in the context of the State's fight against the terrorist group Shining Path, which promoted an anti-human rights ideology and was responsible for multiple acts of violence against the civil society. Therefore, the State had the duty and right to defend itself as long as it respected the fundamental rights of its citizens.

6. It also states that the petition should be declared inadmissible on the grounds of Article 47 of the American Convention since the facts alleged do not represent violations of the petitioner's human rights. It States that the petitioners' purpose is for the Commission to act, in breach of its subsidiary nature, as a fourth instance or as an appeals court and examine evaluations and judgments of the domestic courts with which they disagree. It notes that the alleged victim had the right to conduct his defense, to raise objections and to appeal the condemnatory sentence. Therefore, the fact that sentences contrary to his interests were issued does not represent a violation of his rights.

7. It explains that even though the victim alleged that he was subjected to torture and suffered violations of his right to humane treatment, such complaints had to be dismissed within the domestic proceedings given that there was no evidence supporting these statements. It highlights that within the criminal proceedings, a video made when the alleged victim was arrested was filed. It showed that the alleged victim was handcuffed but remained quiet and was reading a statement without apparent signs of violence. It also notes that the alleged victim's arrest was not illegal based on a warrant that was issued against him. It highlights that this was acknowledged by the alleged victim in his writ for appeal for annulment, in which he indicated that at the time of his arrest there was a warrant issued against him for illegal possession of arms, but not for terrorism. It also states that the petitioner was notified of the existence of a court order for his arrest at the time in which it was executed and that this was proven in the condemnatory sentence of first instance.

8. It states that the fact that the proceedings against the alleged victim were brought forward before the National Criminal Court does not represent a violation of his right to be tried by a lawful judge or court pre-established by law. It explains that the judges that are part of said court belong to the ordinary jurisdiction and that the proceedings against the alleged victim were heard before it since it was the competent authority to prosecute terrorism cases based on the principle of specialty for the matter and the territory. It also mentions that in the criminal proceedings before the National Criminal Court, the right to fair trial and the principle of presumption of innocence are respected. The aforementioned is shown in the results statistics of the Court, which indicate that 42.80% of the people prosecuted for terrorism before it between 2003 and 2013 were acquitted. It also alleges that the principle of legality in criminal matters was not violated nor infringed since criminal law must be interpreted by each judge in each specific case.

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

9. The Commission observes that the petitioners have claimed that the alleged victim has exhausted all the available remedies within the domestic jurisdiction; that the alleged violations to humane treatment have been reported before the authorities hearing the criminal proceedings and that their complaints with regard to the violation of the principle of legality were outlined in the habeas corpus action filed by the victim. On the other hand, the State claims that the domestic remedies were not duly exhausted given that the violations of the principle of legality were not raised before the domestic courts.

10. The Commission takes note of the existing dispute between the parties with regard to whether the relevant claims about the alleged violations of the principle of legality were raised at a domestic level. With regard to such dispute, the Commission values that in the records there appears a copy of an appeal for an habeas corpus action provided by the petitioner and stamped in acknowledgment by The Judiciary dated December 28, 2006. The writ indicates the following: "I hereby direct this petition for constitutional relief against the NATIONAL TERRORISM CHAMBER, THE EXECUTIVE POWER AND THE LEGISLATIVE POWER for being accountable for the violation of my constitutional rights of liberty and security, due process, presumption of innocence, freedom from arbitrary arrest and malignant non-retroactivity of criminal law." The Commission values that the State has not claimed, nor it is provided in the records, the falseness of such document. Therefore, for purposes of the present analysis on admissibility, the Commission found it proven that the alleged violations of the principle of legality were raised before the domestic authorities by means of the habeas corpus action.

11. The Commission observes that it arises from the records that the alleged victim had been subjected to ordinary criminal proceedings in which he was sentenced and within which he reported the alleged violations to humane treatment. Subsequently, he filed a nullity suit against the condemnatory sentence and, since this action was ineffective, he resorted to the constitutional justice through a special habeas corpus action by which he reported the alleged violations of his rights. The State has not indicated, nor does it arise from the records, the existence of additional non-exhausted domestic remedies that might be appropriate to solve the claims outlined in the petition at a domestic level. In addition, the Commission recalls that "although the alleged victim's exhaustion of ordinary domestic remedies may suffice in this case, if special remedies have been exhausted with the reasonable prospect of obtaining a favorable outcome, these may be considered as validly exhausted for meeting the requirements for this petition"<sup>5</sup>. Therefore, the Commission considers that the definitive decision that exhausted the domestic remedies with regard to the instant petition was the judgment issued by the Constitutional Court that rejected the constitutional appeal lodged by the alleged victim. Given that the definitive decision was issued on May 16, 2009 and that the petition was filed on November 12, 2009, the Commission concludes that the instant petition meets the requirements provided by Article 46.1(a) and (b) of the American Convention.

## VII. ANALYSIS OF COLORABLE CLAIM

12. The Commission observes that the instant petition includes allegations with regard to the fact that the alleged victim was subjected to tortures and other violations of his physical and mental integrity; that the alleged victim's statement was obtained through coercion and was accepted as valid in the criminal proceedings against him without initiating an investigation on the matter; and that the alleged victim was sentenced on the grounds of a rule issued subsequent to the events for which he was accused, which also did not meet the minimum scope of legality for a criminal offense type due to being too vague.

13. Given the nature of the allegations, the Commission considers relevant to recall that it has already expressed that "the exclusionary rule means that when there is any denunciation of any evidence or statement obtained through torture, the authorities conducting the investigation and criminal proceedings must immediately open a serious investigation to clarify what has happened and, when appropriate, exclude such evidence or statement. To proceed with a criminal trial, assigning full validity to evidence and statements that are alleged to have been obtained through torture, without opening an investigation into it, constitutes clear disregard for the exclusionary rule"<sup>6</sup>. Similarly, the Inter-American Court has indicated that "the elaboration of criminal categories involves a clear definition of the criminalized conduct, establishing its elements, and the factors that distinguish it from behaviors that are either not punishable or punishable but not with imprisonment"<sup>7</sup>. The Inter-American Court has also indicated that "under the rule of law, the principles of

<sup>5</sup> IACHR, Report No. 179/19. Petition 507-09. Admissibility. Omar Dario Clavijo Gutierrez. Colombia. December 5, 2019, par.7.

<sup>6</sup> IACHR, Report No. 40/14, Case 11.438. Merits. Herrera Espinoza et al. Ecuador. July 17, 2014, par. 186.

<sup>7</sup> I/A Court H.R., Case of De La Cruz Flores v. Peru. Judgment on the Merits, Reparation and Costs. November 18, 2004, par. 79.

legality and non-retroactivity govern the actions of all State organs, in their respective spheres of competence, particularly when they must exercise their powers to punish”<sup>8</sup>.

14. With regard to these considerations and after examining the legal and factual elements submitted by the parties, the Commission considers that the petitioners' allegations are not groundless and require an analysis on the merits since, if the alleged facts are proven to be true, they could represent violations of Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 9 (freedom from ex post facto laws) and 25 (judicial protection) of the American Convention on Human Rights in relation to its Article 1.1 (obligation to respect rights) and 2 (domestic legal effects), as well as Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

15. As regards the alleged violations of instruments outside the Inter-American System, the Commission lacks *ratione materiae* competence to rule upon violations of rights embodied in treaties outside the Inter-American System, notwithstanding that it may resort to the standards established in other treaties in order to interpret the Convention by virtue of its Article 29<sup>9</sup>.

16. In relation to the State's allegations about the “fourth instance” formula, the Commission reiterates that, to admissibility effects, the IACHR should decide whether the alleged facts may represent human rights violations, based on Article 47(b) of the American Convention, or whether the petition is “groundless” or if its “inadmissibility is evident”, according to section (c) of the aforementioned Article. The evaluation criterion of these requirements differs from the one used to rule upon the merits of a petition. In addition, within the framework of its powers, the Commission is competent to declare a petition admissible when the petition refers to domestic processes that may violate rights safeguarded by the American Convention. Therefore, according to the conventional rules quoted herein, by virtue of Article 34 of its Rules of Procedure, the admissibility analysis focuses on the verification of such requirements, which refer to the existence of elements that, if proven to be true, could represent *prima facie* violations to the American Convention.”<sup>10</sup>

## VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 7, 8, 9, and 25 of the American Convention in relation to its Articles 1.1 and 2 and Articles 1, 6 and 8 of The Inter-American Convention to Prevent and Punish Torture.

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 4<sup>th</sup> day of the month of September, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, and Stuardo Ralón Orellana, Commissioners.

<sup>8</sup> I/A Court H.R., Case of Lori Berenson-Mejía v. Peru. Judgment on the Merits, Reparation and Costs. November 25, 2004, par. 126

<sup>9</sup> IACHR, Report No. 26/17, Petition 1208-08. Admissibility. William Olaya Moreno and family. Colombia. March 18, 2017, par. 9.

<sup>10</sup> IACHR, Report No. 143/18, Petition 940-08. Admissibility. Luis Américo Ayala Gonzales. Peru. December 4, 2018, par. 12.