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REPORT No. 184/23

PETITION-2299-13

REPORT ON ADMISSIBILITY

LUZ MARINA BENITO CÉSPEDES AND OTHERS
COLOMBIA

Electronically approved by the Commission on September 23, 2023

Cite as: IACHR. Report No. xx/22. Petition 2299-13. Admissibility. Luz Marina Benito Cespedes and others. Colombia. September 23, 2023.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Luz Marina Benito Cespedes, Adelmo Benito Cespedes and Angelmiro Ávila
Alleged victim:	Luz Marina Benito Cespedes and others ¹
Respondent State:	Colombia ²
Rights invoked:	The petition does not specify articles from the American Convention ³ but of the facts alleged it can be identified that they refer to the right to judicial guarantees.

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	October 11, 2013
Notification of the petition to the State:	November 2, 2021
State's first response:	April 5, 2021
Notification of the potential archiving of the petition:	December 3, 2020
Petitioner's response to the notification regarding the potential archiving of the petition:	December 28, 2020

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of instrument of ratification submitted on July 31, 1973)

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 (right to a fair trial) and 25 (right to judicial protection) of the American Convention in relation to article 1.1 (obligation to respect rights)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, the exception of article 46.2.b) of the Convention applies
Timeliness of the petition:	Yes, under the terms of section VI

¹ The petition references twenty-two alleged victims; however in the petition there is individualization of three of them only: 1. Luz Marina Benito Cespedes; 2. Adelmo Benito Cespedes; and 3. Angelmiro Ávila.

² Based on article 17.2.a) of the Rules of the Commission, Commissioner Carlos Bernal Pulido, a Colombian national, did not participated in the debate or decision of the matter.

³ Hereinafter "the American Convention" or "the Convention".

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. POSITION OF THE PARTIES

Allegation from the petitioner party

1. The present petition refers to the lack of reparation of the alleged victims for the damages suffered due to the overflowing of a creek over the neighborhood of San Cristobal, in Bogota, Capital District. They allege that said lack of reparation is directly related to the negligent actions of the public defender assigned to them by the State.

2. The petitioners state that on May 19, 1994, the "El Zuque" stream overflowed, causing an avalanche that flooded the streets and homes of San Cristobal, Bogota, Capital District, leaving six dead, one missing and more than one hundred people affected, among the latter, the alleged victims. As a result, they state that the Ombudsman's Office appointed a public defender for the alleged victims to protect their rights and represent them before the judicial authorities in relation to these events.

3. On December 19, 1995, the alleged victims, through the ombudsman assigned to them, filed an action for direct reparation against the mayor of Bogota, alleging that the overflowing of the stream was a consequence of the undue exploitation of the natural resources of the stream, with the undue consent of the local authorities. In a judgment of February 18, 1999, the Administrative Court of Cundinamarca, Third Section, ruled as follows:

FIRST: To declare the Capital District of Santafe de Bogota administratively liable for the events of May 14, 1994.

SECOND: Condemn in the abstract the District of Santafe de Bogota to pay for material damages, according to the value determined in the corresponding incident of damages provided for in Article 137 of the C.P.C. and within the term and with the guidelines established above.

[...]

4. Consequently, on June 28, 1999, the delegate of the Ombudsman's Office, on behalf of the alleged victims, requested the liquidation of damages before said court. On November 17, 1999, the Administrative Court of Cundinamarca granted a term of five days to the public defender to prove his capacity as legal representative in the administrative process. On November 21 of that year the term granted expired; however, the representative of the alleged victims did not accredit his judicial mandate. Consequently, by order of January 27, 2000, the Administrative Court of Cundinamarca considered that the proposal of the liquidation incident had not been presented, due to the fact that he did not accredit his judicial mandate; said decision became final because no appeal was filed against it.

5. From the information contained in the file, it is clear that the alleged victims, in order to obtain reparation in their favor, continued to carry out a series of actions before the Administrative Court of Cundinamarca, as follows:

(i) On June 11, 2002, the new legal representative of the alleged victims, provided evidentiary material for the incident of regulation of damages before the Administrative Court of Cundinamarca. In an order dated July 16, 2002, the referred court rejected the inclusion of the alleged victims in the regulation incident due to its untimeliness. In this line, the alleged victims requested again their recognition as part of the incident of regulation of damages; however, on April 22, 2004 the mentioned court denied their claims.

(ii) On May 19, 2005, a conciliation proceeding was held with respect to the plaintiffs who were included in the incident of liquidation of damages. In a resolution dated July 6, 2005, the Administrative Court of Cundinamarca annulled the orders of July 16, 2002 and April 22, 2004, whereby it rejected the inclusion of the alleged victims in the liquidation incident. Dissatisfied with this, the respondent authority filed an appeal, which was partially denied on August 10, 2005; however, once again it did not consider the alleged victims in the incident of regulation of damages.

(iii) Against this, they filed an appeal for reconsideration; however, on November 9, 2005, the Administrative Court of Cundinamarca confirmed the decision of August 10, 2005, establishing that: "[...] *the reason why the memorial proposing the liquidation incident was not taken into account was that the judicial presentation had not been accredited, and not because it had been filed out of time [...]*".

(iv) Subsequently, on November 8, 2006, the Administrative Court of Cundinamarca sentenced the Capital District of Bogota to pay the incident of regulation of damages in favor of two parties, for material damages in the form of consequential damages, without including the alleged victims. Against this, the attorney for the alleged victims filed an appeal, which was denied by the Administrative Court of Cundinamarca on December 6, 2006, on the grounds that the amount of the case constituted a single instance proceeding. Not satisfied, they filed an appeal for complaint before the Council of State, which in a decision of February 7, 2007, issued by its Third Section, deemed the appeal to be well denied.

6. In the same line, it follows that the alleged victims exercised their right to petition before the Administrative Court of Cundinamarca, which in its resolution of February 22, 2008 resolved as follows:

[...]

Finally, it is appropriate to point out that the incidental proceeding was initiated at the request of two of the defendants, through a legal representative; in relation to the petitioners (sic), although the request for the incident of regulation of damages was filed by the Delegate of the Ombudsman's Office (...), invoking your representation, it was not accepted by order of January 2000, since he had not accredited his capacity as legal representative), invoking your representation, it was not accepted by order of January 27, 2000, for not having accredited the capacity of legal representative, consequently his request for inclusion in the incident of regulation of damages was rejected, which remained firm for not having been challenged in a timely manner.

7. On the other hand, in 2008 the alleged victims filed a new action for direct reparation before the Administrative Court of Cundinamarca, suing the Attorney General's Office and the Ombudsman's Office for the acts, facts and omissions presented in the public defender's service. In a resolution dated March 4, 2009, the referred court rejected the claim, considering that the action had lapsed, since it was filed four years after the alleged omission of the public defender and the term to file the claim for direct reparation is two years after the harmful event. Not satisfied, the alleged victims filed an appeal, which in a resolution of October 21, 2011 issued by the Third Section of the Council of State, confirmed the appealed decision.

8. Against this decision, the alleged victims filed a writ for the protection of constitutional rights, alleging violations of their human rights by the Council of State when it rejected the appeal. In a judgment of June 21, 2012, the Council of State denied the writ for the protection of constitutional rights due to its inadmissibility, stating that "[...] *since it does not comply with the general elements of admissibility, it is unnecessary to establish whether one of the determining events for the prosperity of the writ for the protection of constitutional rights against the judicial decision has occurred*".

9. In summary, the alleged victims allege that the negligence of the legal representation provided to them by the Ombudsman's Office resulted in the lack of reparation of the damages caused by the authorities of the Capital District; they also allege the violation of their right to equality, because only two persons of the group of victims, as well as the relatives of the three deceased persons and the missing person, were repaired in the administrative proceedings.

Allegations of the Colombian state

10. The Colombian State, for its part, asks the IACHR to declare the instant petition inadmissible because: (a) the petition was filed out of time; (b) it is manifestly unfounded; (c) domestic remedies were not exhausted; and (d) because the petitioners intend to use the IACHR as a "fourth international instance". In addition, it argues that the petitioners do not identify the nineteen of the twenty-two persons to whom they

refer in their initial petition, and therefore, it is unclear as to the persons who make up the group of alleged victims in the instant petition.

11. With respect to point (a), Colombia indicates that the petition was lodged with the IACHR on October 11, 2013, and that the final decision related to the subject matter of the petition was the writ for the protection of constitutional rights; ruling issued on June 21, 2012 by the Fourth Section of the Council of State, which was referred to the Constitutional Court on December 14, 2012, where it was not selected for review. In this regard, Colombia argues that the petition was filed nine months and twenty-five days after the notification of the decision of the Council of State denying the writ for the protection of constitutional rights, in breach of the time limit requirement established in Article 46(1)(b) of the American Convention.

12. In relation to point (b), it points out that the petitioners do not present any argument that demonstrates the existence of a discriminatory law at the domestic level or whose application has been arbitrary and, therefore, could result in an alleged violation of the right to equality before the law. Therefore, the petition is manifestly unfounded in accordance with the provisions of Article 47(c) of the Convention, since there is no evidence to support the alleged responsibility of the State.

13. Regarding point (c), it states that the action for direct reparation constitutes an adequate and effective remedy to recognize the possible administrative responsibility of the State for human rights violations, providing the necessary measures to establish comprehensive reparation. However, it establishes that the second action for direct reparation filed by the petitioners was inadmissible in an order of March 4, 2009 by the Administrative Court of Cundinamarca, considering that the action had lapsed. In this regard, it argues that in the instant case there was improper exhaustion of domestic remedies in accordance with Article 46(1)(a) of the American Convention.

14. Finally, regarding point (d), Colombia indicates that the IACHR's role as intervener determines that it does not have the power to review the decisions of national courts acting within the sphere of their competence and in application of judicial guarantees. Therefore, the review of a judgment issued by a domestic judicial instance will only be admissible when it deals with the violation of a right contained in the American Convention. In this order of ideas, it alleges that the petitioners seek verification of the decisions issued in the contentious-administrative jurisdiction and with respect to the tutela action filed in 2008. Therefore, it considers that the petitioners are asking the ICDH to re-evaluate the evidence and interpret the rules applicable to each specific case, arguing that the instant petition is inadmissible under Article 47(b) of the Convention.

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

15. The Commission notes that the main claim made by the petitioners is the failure to pay compensation to the alleged victims for the events that occurred on May 19, 1994, in the neighborhood of San Cristobal, Bogota, belonging to the Capital District, due to the fact that the public defender provided by the Ombudsman's Office did not exercise a diligent defense in their favor, since he did not accredit his capacity as legal representative within the term established by the domestic judicial authorities and, consequently, the Administrative Court of Cundinamarca did not include them in the incident of regulation of damages. The State, on the one hand, alleges the improper exhaustion of domestic remedies, due to the fact that the second action for direct reparation filed by the alleged victims was filed in an untimely manner and on the other hand, it argues that the petition was filed nine months and twenty-five days after the notification that put an end to the domestic remedies.

16. Closely related to the foregoing, the IACHR notes that on February 19, 1999, the Administrative Court of Cundinamarca, Third Section, determined the administrative responsibility of the Capital District of Santafe de Bogota for the overflowing of the stream that occurred in May 1994. Consequently, the public defender assigned to the alleged victims by the Ombudsman's Office requested the liquidation of damages in their favor. On November 17, 1999, the referred court granted the public defender a term of five days to accredit his judicial mandate; however, he failed to respond to such request and on January 27, 2000, the Administrative Court of Cundinamarca considered that the liquidation incident had not been filed, a

resolution that remained firm since it was not challenged. However, the alleged victims, through a new legal representative, continued to pursue the process before the contentious-administrative proceeding. However, in a decision dated November 8, 2006, the Administrative Court of Cundinamarca ordered the Capital District of Bogota to pay damages only in favor of two persons, without including the alleged victims of the present petition. Not satisfied, they filed an appeal, which was denied on December 6, 2006. Against such denial, they filed a complaint before the Council of State, which established that the denial of the appeal was correctly issued. On the other hand, the alleged victims exercised their right to petition before the Administrative Court of Cundinamarca; however, in a resolution of February 22, 2008, said court again determined that: "[...] for not having accredited the quality of legal representative, consequently, their request for inclusion in the incident of regulation of damages was rejected, which remained firm for not having been timely challenged [...]"

17. Subsequently, the alleged victims filed a new action for direct reparation alleging the omissions committed by the public defender assigned by the Ombudsman's Office; however, on March 4, 2009, the Administrative Court of Cundinamarca rejected the claim on the grounds that the action had lapsed. Not satisfied with this, they filed an appeal, which was dismissed because it was a single instance process due to the amount of the case; finally, against this, they filed a writ for the protection of constitutional rights, which was rejected as inadmissible in a judgment of June 21, 2012.

18. Notwithstanding the foregoing, the Commission notes that the legal representation of the alleged victims was the responsibility of the Ombudsman's Office, a public agency. In the opinion of the IACHR, it was the responsibility of the representatives of this entity to ensure, within the framework of the contentious-administrative process, the interests of the alleged victims by filing the corresponding appeals and proceedings before the competent judicial authorities. In a case such as the present one, in which the alleged victims are persons in vulnerable conditions who required a public defender who would effectively ensure their access to justice, the Commission considers, following similar precedents in the matter,⁵ that the omissions of the public defender assigned to them, in principle, are not attributable to the alleged victims; and therefore, the exception provided for in Article 46(2)(b) of the American Convention is applicable.

19. The Commission also considers that the petition was lodged within a reasonable period and that the admissibility requirement regarding the deadline for lodging the petition must be considered satisfied, in accordance with Article 32.2 of the Commission's Rules of Procedure. This, when considering that the facts took place since May 19, 1994; that the petitioners continued to pursue the process in the contentious-administrative route and through tutela actions, the latter being rejected on June 21, 2012, and subsequently becoming enforceable on June 24 of that same year; and that the petition was received by the Executive Secretariat of the IACHR on October 11, 2013. Therefore, in view of the context and the characteristics of the facts included in this report, the Commission considers that the petition was lodged within a reasonable time and that the admissibility requirement regarding the deadline for submission must be considered satisfied.

20. Finally, it is pertinent to recall that Article 46(2) of the Convention, by its nature and purpose, is a norm with autonomous content vis-à-vis the substantive norms of the American Convention. Therefore, the determination of whether the exceptions to the rule of exhaustion of domestic remedies are applicable to the case in question must be carried out prior to and separately from the analysis of the merits of the case, since it depends on a different standard of appreciation from that used to determine the possible violation of Articles 8 and 25 of the Convention. The Commission recalls that the standard of assessment at the admissibility stage differs from that used to rule on the merits of a petition; the Commission must conduct a prima facie evaluation to determine whether the petition establishes the basis for the possible or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation of rights. This determination on the characterization of violations of the American Convention constitutes a primary analysis, which does not imply prejudging the merits of the case.⁶

⁵ See: IACHR, Report N. 214/22. Petition 867-09. Admissibility. Abelardo Arévalo Choque and others. Bolivia. August 13, 2022, par. 49 and IACHR, Report N. 29/17, Petition 424-12. Admissibility, Manuela and family, El Salvador. March 18, 2017, par. 12.

⁶ IACHR, Report N. 69/08, Petition 681-00. Admissibility. Guillermo Patricio Lynn. Argentina. October 16, 2008, par. 48.

VII. ANALYSIS OF COLOURABLE CLAIM

21. In response to the State's argument regarding the lack of individualization of the alleged victims, it is recalled that the Commission has followed the criterion of interpretation of Article 44 of the American Convention, requiring that for a petition to be admissible, there must be concrete, individualized and determined victims, or it must refer to a specific and defined group of victims composed of determinable individuals.⁷ Likewise, the Commission has considered that the text of the aforementioned article of the Convention does not contain limitations of competence in terms of the "full and total" identification of the persons affected by the violation, but rather allows for the examination of human rights violations that - due to their characteristics - may affect a specific person or group of persons, but which are not necessarily fully identified.⁸ In the present situation, twenty-two alleged victims have been established as those affected by the overflowing of the stream that occurred in San Cristobal, Bogota, Capital District on May 19, 1994; however, only three of the twenty-two alleged victims have been identified. In this sense, as the Inter-American Court has clarified, in the procedure of contentious cases before the Inter-American System, the final individualization of the alleged victims must be made in the merits stage before the IACHR, which must be established in the report issued by the latter in the terms of Article 50 of the American Convention.⁹

22. Furthermore, the State alleges that the IACHR does not have the competence to become an additional instance to the national courts in order to reevaluate domestic decisions that have already been assessed by the latter. In response, the IACHR recalls that, at the present procedural stage, it must make a *prima facie* evaluation to determine whether the petition establishes the basis for the possible or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation of rights. This determination on the characterization of violations of the American Convention constitutes a primary analysis, which does not imply prejudging the merits of the case. For purposes of admissibility, the Commission must decide whether the alleged facts can be characterized as a violation of rights, as stipulated in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order" under Article 47(c) of the American Convention.

23. In the instant case, the petitioner alleges that the public defender assigned by the Ombudsman's Office failed to take the appropriate steps before the Administrative Court of Cundinamarca and, as a result, they were not compensated in the administrative proceedings. With regard to this controversy, the Commission recalls that, in accordance with inter-American jurisprudence, in order to analyze whether there has been a possible violation of the right to defense by the State, it is necessary to determine whether or not the State has violated the right of defense it is necessary to assess whether the actions or omissions of the public defender constituted inexcusable negligence or manifest failure in the exercise of the defense, which had - or could have - a decisive adverse effect on the interests of the accused.¹⁰ This, since "the legal assistance provided by the State must be effective".¹¹ Based on the aforementioned parameters, the Commission considers that, *prima facie*, the omissions of the public defender could characterize a violation of the right to defense, since the public defender is the one who represents in all instances and must look out for the best interests of those he represents.

24. In view of these considerations and after examining the elements of fact and law presented by the parties, the Commission considers that the allegations of the petitioner are not manifestly unfounded and require a study of the merits; since the alleged facts, if corroborated as true, could characterize violations of Articles 8 (the right to fair trial) and 25 (judicial protection) of the American Convention, in connection with its

⁷ IACHR, Report N. 57/08, Petition 283/06. Inadmissibility. Mario Roberto Chang Bravo. Guatemala. July 24, 2008, par. 38.

⁸ IACHR, Report N. 61/16. Case 12.325. Admissibility. Peace Community of San José de Apartadó. Colombia. December 6, 2016, par. 62.

⁹ I/A Court H.R., Case of Habbal et al. v. Argentina. Preliminary Objections and Merits. Judgment of August 31, 2022. Series C No. 463, par. 23; I/A Court H.R., Case of Vereda La Esperanza v. Colombia. Interpretation of the Judgment on Preliminary Objection, Merits, Reparations and Costs. Judgment of November 21, 2018. Series C No. 367, par. 32.

¹⁰ I/A Court H.R., Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 303, par. 164.

¹¹ I/A Court H.R., Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, par. 159.

Article 1(1) (obligation to respect rights), to the detriment of the alleged victims, in the terms of the present report.

VIII. DECISION

1. To declare the present petition admissible in relation to Articles 8 and 25 of the American Convention, in accordance with Article 1(1) thereof; and

2. To notify the parties of this decision; to proceed to the analysis of the merits of the matter; 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 23rd day of the month of September 2023. (Signed:) Margarette May Macaulay, President; Esmeralda Arosemena de Troitiño, First Vice President; Roberta Clarke, Second Vice President; Julissa Mantilla Falcón and Stuardo Ralón Orellana, Commissioners.