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REPORT No. 3/18
PETITION 1173-08
ADMISSIBILITY REPORT

DIEGO FABIÁN MONTESINO
ARGENTINA

Approved by the Commission at its session No. 2115 held on February 24, 2018.
167th Special Period of Sessions.

Cite as: IACHR, Report No. 3/18, Petition 1173-08. Admissibility. Diego Fabián Montesino.
Argentino. February 24, 2018.

I. INFORMATION ABOUT THE PETITION

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| Petitioner: | Diego Fabián Montesino |
| Alleged victim: | Diego Fabián Montesino |
| Respondent State: | Argentina |
| Rights invoked: | Articles 1 (obligation to respect rights), 5 (humane treatment), 8 (fair trial), 9 (principle of legality and non-retroactivity), and 24 (equality before the law) of the American Convention on Human Rights ¹ |

II. PROCEEDINGS BEFORE THE IACHR²

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| Filing of the petition: | October 7, 2008 ³ |
| Notification of the petition to the State: | July 9, 2009 |
| State's first response: | November 1, 2013 |
| Additional observations from the petitioner: | December 16, 2013 |
| Additional observations from the State: | August 14, 2014 |
| Notification of the possible archiving of the petition: | May 2, 2017 |
| Petitioner's response to the notification regarding the possible archiving of the petition: | July 12, 2017 |

III. COMPETENCE

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| 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 (ratification instrument deposited on September 5, 1984) |

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

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| Duplication of procedures and International <i>res judicata</i>: | No |
| Rights declared admissible | Articles 8 (fair trial) and 25 (judicial protection) of the American Convention in connection with Article 1.1 (obligation to respect rights) |
| Exhaustion of domestic remedies or applicability of an exception to the rule: | Yes, April 15, 2008 |
| Timeliness of the petition: | Yes, October 7, 2008 |

¹ Hereinafter Convention or American Convention.

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

³ The petition's annexes were subsequently sent by postal mail.

V. FACTS ALLEGED

1. The petitioner and alleged victim (hereinafter also Mr. Montesino) points out that, on December 1, 2005, the First Criminal Court of San Carlos de Bariloche, province of Río Negro, sentenced him to life imprisonment for the concurrent crime of homicide in furtherance of a felony of robbery with firearms, aggravated because the victim was a police officer. He alleges that, at the time he was tried, a widely known public figure, Juan Carlos Blumberg, spearheaded a media campaign that led to a “hardline” criminal policy that was popular among public authorities. He alleges that Mr. Blumberg followed closely the handling of his case and that “he even appeared in court when the judgment was given.”⁴ In that respect, the petitioner argues that there was a situation of “public pressure” that severely undermined the impartiality of the judges of the court that convicted him and that this was reflected in the partial and fragmented assessment of the evidence.

2. Mr. Montesino indicates that, against this ruling of the first instance, his court-appointed defense attorney filed a cassation appeal, questioning the impartiality of the judges, the erroneous assessment of the evidence brought to the trial, and the arbitrariness of the judgment. The Superior Court of Justice of Río Negro turned down this appeal on August 28, 2006, considering that the court of first instance had conducted a detailed review of the evidence provided in the trial and issued a ruling based on reasoning required by law, taking into consideration as well that the petitioner’s arguments did not provide sufficient grounds to overturn the judgment of the first instance. The petitioner alleges that the Superior Court of Justice, when ruling on the cassation appeal, did not undertake a full review of the matters of fact and evidence that led to the conviction; and when examining the objections made by the defense, it had confined itself to running through an argument that referred automatically and uncritically to the judgment on the merits. The petitioner alleges that, although all the hearings in which the oral proceedings took place were filmed, none of them were examined by the reviewing court. The petitioner considers that these facts violate his right to review.

3. Against this ruling, Mr. Montesino then filed a special appeal with the same Superior Court of Justice of Río Negro, later handled by his court-appointed defense attorney, which was turned down by the court on April 18, 2007, because it was deemed that the court-appointed defender filed the supporting evidence past the due date and failed to provide sufficient arguments. The petitioner alleges that his court-appointed defense attorney was negligent when filing this appeal because he had not built an adequate legal argument. The petitioner indicates that, against this ruling, he filed a special appeal challenging dismissal of the previous appeal with the Supreme Court of Justice of the Nation, which in turn was ruled inadmissible and notified on April 15, 2008.⁵

4. The petitioner also alleges that there was a legal reclassification of the crime for which he was convicted; during the investigative stage it was identified as a homicide during a robbery, and subsequently, it was reclassified by the court of first instance as a concurrent crime of homicide, for which he was convicted. In that respect, it indicates that the investigative judge at that stage established that “the death of the police victim does not seem to have been the outcome that the accused were pursuing, but rather an unforeseen consequence on which there had been no prior agreement.” Nevertheless, he was convicted as the co-perpetrator of first-degree murder with the specific intent of killing the police officer who appeared as an obstacle to committing the felony. From the above, the petitioner alleges there is a violation of the principle of legality because this reclassification, which the petitioner views as unexpected, had not given him the opportunity to defend himself.

⁴ Regarding this, the petitioners provided documentation mentioning that the First Criminal Court of Bariloche decided to postpone reading of the judgment until Mr. Blumberg had reached that city and appeared in the court. In addition, the latter had met with one of the court judges just before the reading of the judgment of conviction. See attachments to the initial petition “Special federal motion of appeal challenging previous dismissal,” filed by the Defense Attorney Office of the Supreme Court of Justice of the Nation, p. 11.

⁵ On the basis of information provided by petitioner, the Inter-American Commission observes that the Superior Court of Justice of Río Negro, in its above-mentioned ruling of August 28, 2006, noted that the court-appointed defense attorney representing Mr. Montesino had filed this special appeal past its due date.

5. Mr. Montesino indicates that he was sentenced to life imprisonment and that, because he is a repeat offender, he does not have the chance to be later released on parole. He alleges that, in the facts, this breaches the principle of proportionality of the sentence and, in turn, creates a situation that contradicts the social reintegration aims of prison sentences envisaged in the Convention.

6. In short, the petitioner considers that his rights to a trial by an impartial and independent court, to the effective benefit of counsel, to a review of the judgment of conviction, and to the principles of legality, equality, and proportionality, have been violated.

7. The State of Argentina requests that the petition be ruled inadmissible because it believes that there has been no violation whatsoever of the rights alleged by the petitioner and that domestic legal remedies have not been exhausted. In that respect, it alleges that the petition is confined to voicing the petitioner's dissatisfaction with the ruling of the local courts, without presenting arguments referring to concrete violations of the human rights guaranteed by the American Convention. Therefore, it considers that the petitioner wishes the IACHR to act as a "fourth instance." It alleges that there are no objective elements that would tend to establish the partiality of the judges who convicted the petitioners, because the breach of the guarantee cannot be substantiated by merely mentioning the social and media impact that the incident might have exerted on Argentine society.

8. The State alleges that the Superior Court of Justice undertook a full review of the judgment of conviction, focusing on an examination of the petitioner's grievances and the extent of his participation in the incident. It also indicates that the Superior Court of Justice of Río Negro made it clear that it believed that the decision of the First Provincial Criminal Court to qualify the petitioner as the "co-perpetrator" of the incidents was mistaken, considering that his participation corresponded to that of "primary participant" and, in turn, that it was a mistake to declare that there was concurrent overlapping between the two criminal offenses chosen. Nevertheless, it understood that both of the above-mentioned errors failed to have any detrimental practical effects on the petitioner because, according to Argentine law, penalization both for co-perpetrators and primary accomplices is identical and the sentence given matched the highest minimum prescribed. Because of the above and after a full review of the judgment, the Superior Court of Justice of Río Negro decided to uphold it in all of its parts.

9. The State alleges that the Superior Court of Justice of Río Negro fulfilled the standards that the protection bodies of the inter-American system have set forth with respect to the right to a second hearing. It also alleges that the right to the effective benefit of counsel was not breached because the court-appointed defender correctly argued the petitioner's position and he cannot then feel offended when the petitioner realizes he has not secured the result he was looking for. Furthermore, there were no challenges filed in domestic proceedings by the petitioner about the effective benefit of counsel. The State considers that the principle of the proportionality of sentencing was not breached, because the refusal to grant parole is provided for in the law, which respects the principle of legality and is based on the severity of the crime committed.

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

10. In the present case, the Commission observes that the petitioner was convicted in first instance on December 1, 2005 by the First Criminal Court of San Carlos de Bariloche. This ruling was challenged in the Superior Court of Justice of Río Negro, which upheld the judgment on August 28, 2006. Subsequently, a special appeal was filed, which was turned down by the Superior Court of Justice of Río Negro on April 18, 2007. Against this ruling, a special appeal of complaint regarding dismissal of the previous appeal was filed with the Supreme Court of Justice of the Nation, which in turn was ruled inadmissible and was notified on April 15, 2008. The petitioner contends that, on the basis of this last ruling, domestic legal remedies have been exhausted.

11. As for the State, it argues that the petitioner did not duly exhaust domestic remedies, because the special federal appeal that was filed to challenge rejection of the cassation appeal was dismissed because it had been filed past the due date and because, in addition, it failed to provide sound, concrete, and reasoned arguments against the judgment of conviction. In that respect, the State argues that the petitioner has not met the Convention's requirement of exhausting domestic remedies, because the impossibility of reviewing the judgment stems from the fact that the petitioner incorrectly filed the remedies that were available to him.

12. In response to these considerations, the Commission observes that the domestic remedies were indeed definitively exhausted with the ruling of the Supreme Court of Justice notified to the petitioner on April 15, 2008. As for the matter of untimely filing of the special appeal by the alleged victim's court-appointed defendant, because it is connected with the right to the effective benefit of counsel, it is a substantive matter that the Commission shall eventually examine in the later stage of the present case. In that regard, the Commission deems that the petition meets the requirement set forth in Article 46.1.a of the American Convention. The Commission also observes that the petition was filed on October 7, 2008, that is, within a period of six months, as set forth in Article 46.1.b of the American Convention.

13. Furthermore, the Commission takes note that the State also questioned the admissibility of the petition, alleging what it describes or qualifies as the untimely transmission of the petition. Regarding this, the IACHR points out that neither the American Convention nor the Commission's Rules of Procedure set time-limits to transmit a petition to the State after it has been received and that the time-limits set forth in the Rules of Procedure and the Convention for other stages of the proceedings are not applicable by analogy.⁶

VII. ANALYSIS OF COLORABLE CLAIM

14. In view of the elements of facts and law presented by the parties and the nature of the matter under its review, the IACHR considers that, if proven, the allegations regarding the violation of the rights to the effective benefit of counsel and to an impartial trial could tend to establish possible violations of Article 8 (fair trial) and Article 25 (judicial protection) of the American Convention, in connection with Article 1.1. of said Convention, to the detriment of Mr. Diego Fabián Montesino.

15. Regarding the State's allegation about the fourth instance, the Commission observes that, when it rules that the petition is admissible, it does not wish to supersede the competence of domestic judicial authorities. Rather, it shall examine, in the stage of the merits of the present petition, whether or not domestic legal proceedings complied with the guarantees of due process of law and judicial protection and provided due guarantees of access to justice for the alleged victim according to the terms of the American Convention.

16. Finally, as for the claim about the alleged violation of Article 5 (right to humane treatment), Article 9 (principle of legality and non-retroactivity), and Article 24 (equality before the law) of the American Convention, the Commission observes that the petitioners have not provided allegations or sufficient arguments that would make it possible to consider *prima facie* their possible violation.

VIII. DECISION

1. To find the instance petition admissible in relation to Articles 8 and 25 in connection with Article 1.1 of the American Convention on Human Rights; and

⁶ See, for example, IACHR, Report No. 56/16. Petition 666-03. Admissibility. Luis Alberto Leiva. Argentina. December 6, 2016. See also I/A Court H.R., *Case of Mémoli v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 22, 2013. Series C No. 295, paras. 30-33.

2. To notify the parties of this decision; to continue with the analysis of the merits of the case; and 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 Bogotá, Colombia, on the 24th day of the month of February, 2018.
(Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.