

REPORT No. 99/14
PETITION 446-09
ADMISSIBILITY
LUIS ALBERTO ROJAS MARÍN
PERU
NOVEMBER 6, 2014

I. SUMMARY

1. On April 14, 2009, the Inter-American Commission on Human Rights (hereinafter also “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition submitted by the Coordinadora Nacional de Derechos Humanos, the Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX), and Redress Trust: Seeking Reparations for Torture Survivors (hereinafter “the petitioners”) in representation of Luis Alberto Rojas Marín (hereinafter also “Mr. Rojas Marín” or “the alleged victim”), that alleges the responsibility of the Republic of Peru (hereinafter “Peru,” “the State,” or “the Peruvian State”), for his illegal and arbitrary detention, for being a victim of acts of sexual violence while under police custody, as well as acts of torture, all motivated by his sexual orientation, and that the State breached the duty to investigate and judicially clarify these facts, in keeping with the norms of due process and the principle of non-discrimination.

2. In their initial petition and additional observations, the petitioners alleged that the facts that are the subject matter of the claim constitute violations of the rights enshrined in Articles 5, 7(2), 7(3), 7(4), 7(5), 8, 11(1), and 25 of the American Convention on Human Rights (hereinafter also “the American Convention” or “the Convention”) in conjunction with the obligations contained in Articles 1(1) and 2 of that instrument, and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Luis Alberto Rojas Marín. In addition, they allege the violation of the right to humane treatment to the detriment of his mother, Juana Rosa Tanta Marín, whose health was negatively affected due to the anguish and fear of reprisals resulting from the facts that are the subject matter of the claim. For its part, the State alleges that the petitioners did not exhaust domestic judicial remedies and that they have not complied with the requirement to state facts that tend to establish a possible violation of the rights alleged to have been violated, and that therefore the petitioners seek to have the IACHR acts as a superior court (a court “of fourth instance.”) Accordingly, the Peruvian State argues that it did not violate the rights of the alleged victim, and asks that the IACHR order the petition archived.

3. After examining the claim in light of the admissibility requirements provided for in Articles 46 and 47 of the Convention, the Commission concluded that it is competent to take cognizance of the claims presented alleging violation of the rights enshrined in Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 11 (right to respect of honor and dignity), 24 (right to equal protection), and 25 (judicial protection) of the American Convention, in relation to Articles 1(1) (obligation to respect and ensure) and 2 (obligation to adopt provisions of domestic law) of the same instrument, and the obligations to prevent and punish torture established in Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. In addition, the Commission decided to give notice of this admissibility report to the parties, make it public, and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BEFORE THE COMMISSION

4. On April 14, 2009, the Commission received the initial petition by electronic mail; it was recorded as petition number P-446-09. On April 22, 2009, the Commission received the original of the petition with its annexes. On June 4, 2010, October 25, 2011, January 30, 2012, February 7, 2013, and March 1, 2013, the petitioners filed additional information, which was duly incorporated into the record.

5. On June 5, 2013, after completing the preliminary study of the petition, the Commission proceeded to transmit the pertinent parts of the petition to the Peruvian State, giving it two months to submit

its observations, as per Article 30(3) of the Commission's Rules of Procedure then in force. On August 12, 2013, the State requested an extension, which was granted, up until October 10, 2013, in keeping with Article 30(3) of the Commission's Rules of Procedure. On October 10, 2013, the State requested a second extension, which was rejected by the IACHR based on Article 30(3) of its Rules of Procedure, by communication of November 13, 2013. On November 4, 2013, and January 29, 2014, the petitioners asked the IACHR to issue a pronouncement on admissibility.

6. The State submitted its response on March 24, 2014; it was sent to the petitioners on April 15, 2014, requesting their observations within one month. On May 13, 2014, a communication was received from the petitioners in which they requested an extension. On June 26, 2014, the IACHR received the petitioners' observations, which was transmitted to the State on July 25, 2014, requesting its observations within one month. On September 12, additional observations were received from the State, which were forwarded to the petitioners.

III. THE PARTIES' POSITIONS

A. The petitioners' position

7. The petitioners allege that Luis Alberto Rojas Marín is a young gay man, with scant economic resources originally from the province of Ascope, department of La Libertad, who at the time of the facts was 26 years old.

8. They allege that on February 25, 2008, at approximately 12:30 a.m., Luis Alberto Rojas Marín was headed to his home, when he was detained by members of the security force of the local government (known as *serenazgo*), and by a police agent, because he had a "suspicious attitude." It is alleged that for the purpose of fully identifying him – he did not have identification papers on him – he was taken to the police station in the district of Casagrande, province of Trujillo, department of La Libertad, where he was deprived of his liberty until his release at 6 o'clock the next morning.

9. They allege that during his detention Luis Alberto Rojas Marín was subjected to physical and verbal aggression by three police agents, who he could not fully identify; that he was interrogated in a rude manner and insulted with expressions alluding to his sexual orientation (for example, in the words of the petitioners, he was asked "whether he liked the male sexual organ"); it is alleged that he was forcibly stripped and held in that state until his release; his body was groped; and he was said to have been tortured by introducing a rubber police baton in his anus, twice, which caused bleeding lesions. In this respect, the petitioners argue that the insults, groping, and rape (*violación sexual*) perpetrated against him reflect how violence and discrimination against gay persons entails exacerbated violence.

10. The petitioners argue that the alleged victim went to report the facts to the police station of Casagrande, the very place that is the headquarters for the members of police who attacked him, so he was not well-received and his request was rejected, as the police officers in charge adduced that the chief of police was not in. The petitioners allege that Luis Alberto Rojas Marín "was only able to report the facts" on February 27, 2008, when he filed the complaint with the Police Station of Casagrande. They argue that while the Public Ministry ordered the forensic medical exam be performed, the prosecutor in charge "was delayed in attending to Luis Alberto [Rojas Marín], which meant that he could not have the forensic examination that same day," but rather on February 29, 2008; at which time he was also given the clothing he'd been wearing the day of the facts, so that the corresponding exams could be performed.

11. They argue that the State breached its duty to investigate the facts, prosecute and punish the persons responsible, in keeping with the standards of due process and the principle of non-discrimination. As regards the investigation into the facts, they argue that irregularities had been committed in the forensic examination of the alleged victim. In particular, they indicate that the deputy prosecutor had entered the doctor's office to call into question that the injuries were a result of the rape, a situation that was later argued by the Office of the Prosecutor as a basis for questioning Luis Alberto Rojas Marín's allegation that the injuries were inflicted by the police officers.

12. They also argue that when he gave a statement to the Public Ministry, Luis Alberto Rojas Marín was subjected to pressure, intimidation, and questioning related to his sexual orientation. They note that the Office of the Prosecutor had been explicit in noting that the statements by the alleged victim on the acts of sexual violence suffered were not credible and that, given his sexual orientation, he may have had relations with other persons and then blamed the police agents.

13. They argue that the State breached its duty to implement measures aimed at establishing a process for the judicial clarification of the conduct alleged. The Prosecutor's Office was said to have rejected the request to investigate those responsible or to file any charges for the crime of torture, all despite the evidence produced. According to the petitioners, the Prosecutor's Office had considered that the facts alleged were not committed with criminal intent, nor with the subjective element of special intent to obtain a confession or information, to punish, to intimidate, or to coerce any person, which is presumably required by Article 321 of the Criminal Code in force in Peru for prosecuting for acts of torture. Nonetheless, the petitioners argue that the police agents said to have detained and tortured the alleged victim continuously asked him about his brother's whereabouts, since there was an arrest warrant for his brother for the crime of homicide. In addition, they argue that the abuses were committed with the intent of punishing the alleged victim for his sexual orientation.

14. On March 24, 2008, the Public Ministry ordered an investigation opened solely to clarify the alleged commission of the crime of aggravated rape (*violación sexual agravada*) and abuse of authority. On July 23, 2008, the Office of the Second Provincial Prosecutor of the Province of Ascope rejected the request to expand the investigation to alleged acts of torture committed against Luis Alberto Rojas Marín. This decision was confirmed on August 28, 2008, by the Office of the First Superior Prosecutor for the Judicial District of La Libertad. In addition, the nullity action filed against this decision was found to be inadmissible on procedural grounds on October 15, 2008.

15. With respect to this, they add that the prosecutors and judges often characterize acts that constitute torture as a crime of abuse of authority. They indicate that Article 321 of the Criminal Code is too restrictive with respect to the subjective element, and that it is clearly at odds with Article 2 of the Inter-American Convention to Prevent and Punish Torture, which has been ratified by Peru, which establishes that torture can be committed for any number of motives, including "for any other purpose." In this connection, they argue that the motives of discrimination on grounds of sexual orientation had not been considered as motives of acts of torture in the Peruvian judicial system.

16. Moreover, they argue that the State breached its duty to administer justice in relation to the facts alleged, given that the process had culminated with a dismissal order on January 9, 2009, in response to the request by the Second Office of the Provincial Prosecutor of Ascope, on October 20, 2008. They argue that the dismissal threw out the allegations regarding the crime of abuse of authority, based on the provision that authorizes taking any person without papers to a police office to obtain their full identification; had called into question the truth of the statements by the alleged victim; and dismissed the allegations with respect to aggravated rape. They argue that this decision was appealed by the alleged victim, but the appeal was thrown out on procedural formalities. Even so, they argue that in any event this remedy was not adequate or effective for considering the argument of torture, and therefore they are not required to exhaust it.

17. The petitioners also invoked remedies aimed at clarifying the irregular conduct of two prosecutors in the case, said to have discriminated against the alleged victim because of his sexual orientation. They argue that on March 28, 2008, a complaint was filed against the prosecutorial officials associated with the investigation before the Office of Internal Control of the Public Ministry for La Libertad and Santa, for the crimes of abuse of authority, coercion, and denial of justice. Specifically, a complaint was filed against the prosecutor who received his statement, who is said to have intimidated the alleged victim and pressured him to minimize what had happened; and against the deputy prosecutor, who had entered the doctor's office and had always expressed skepticism that the injuries were the result of rape. On July 24, 2009, the Superior Prosecutor in charge of the case had considered well-founded the complaint in relation to abuse of authority. Nonetheless, on November 19, 2010, the Office of the Attorney General dismissed the complaint due to lack of merit, and

ordered the case archived. The petitioners argue that this decision is not well-founded, shows bias in the justification of arbitrary and illegal acts committed by the prosecutors in the case, and is contrary to the law that established the authorization of persons other than the attending physician to perform the forensic exam.

18. As regards the arguments of law, the petitioners argue, first, that the treatment accorded Luis Alberto Rojas Marín while he was in police custody and the acts of sexual violence against him constitute violations of the right to humane treatment and the prohibition of torture and cruel and inhuman treatment, as per Article 5 of the American Convention and Articles 1 and 2 of the Inter-American Convention to Prevent and Punish Torture.

19. Second, the petitioners argue that the acts of torture occurred in the context of an illegal, arbitrary detention with no judicial oversight, in violation of Articles 7(2), 7(3), and 7(5) of the American Convention. In this respect, they argue that the police agents violated the domestic legislation in relation to a detention for the purposes of identification, Article 205 of the New Code of Criminal Procedure, to the detriment of the alleged victim, since in his case the police agent who detained him (i) did not identify himself at the moment of the detention; (ii) did not allow him to go to his domicile so as to then show them his identification papers; (iii) the alleged victim was not engaged in grave acts meriting detention for not having one's papers on one's person; (iv) his detention lasted more than four hours, which is the limit established by law; (v) he was not allowed to communicate with any family member; and (vi) the authorities did not document the detention and entry of the alleged victim in the Registry Book (Libro-Registro). In addition, the petitioners argue that the alleged victim was not taken before a judge without delay, did not have access to a lawyer for his defense, and had not been examined by a physician upon entering and leaving the detention center, so as to be able to certify his health before and after his detention. In addition, as regards the detention of the alleged victim, they argue that it was not based on the conditions provided for in the Constitution of Peru, but rather by application of a lower-ranking legal provision.

20. Third, the petitioners argue that the arbitrary detention and acts of torture and cruel and inhuman treatment against Luis Alberto Rojas Marín while he was under the custody of the State are still in impunity. Therefore, they consider that the State breached its duty to investigate and judicially clarify the allegations of acts of torture and cruel and inhuman treatment, in keeping with the standards of due process and judicial protection found at Articles 8 and 25 of the American Convention, and the standards of prevention and effective punishment of torture, and of impartial investigation, as per the standards of Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

21. Fourth, the petitioners allege that the acts of violence and discrimination that are the subject of the claim and the impunity associated with those acts constitute arbitrary and abusive interference in the person of Luis Alberto Rojas Marín and have had a negative impact on how he thinks of himself and his reputation, in violation of the protection of honor and dignity enshrined in Article 11(1) of the American Convention.

22. In addition, the petitioners argue that impunity in Peru is even more serious in the case of poor persons and peasants, like the alleged victim, due to his "situation of social vulnerability," which is accentuated in the case of a gay person, considering the social rejection that exists in Peru with respect to that sexual orientation, particularly in the rural area of the country, where the alleged victim lives.

23. Finally, the petitioners allege that the facts show that Luis Alberto Rojas Marín was subjected to acts of discrimination because of his sexual orientation, both by the police agents involved in committing torture by means of sexual violence, and by the judicial officers who were dismissive of the complaints and statements of the alleged victim, interfered with the production of evidence, and trivialized the seriousness of the case. The petitioners allege that as a result of the negative perceptions of state agents in relation to the sexual orientation of the alleged victim, the case was not accorded priority, the seriousness of the facts was trivialized, the preliminary investigation was plagued by irregularities, there was not an immediate report of the rape to the Police Station of Casagrande, and the office of the prosecutor obstructed the forensic medical exam, among others. They consider that this violates the duty of non-discrimination and the duty to respect

and ensure the rights enshrined in the American Convention, as per Articles 1(1) and 2 of that treaty and in relation to Articles 5, 7, 8, 11, 24, and 25.

24. As regards the exhaustion of domestic remedies, they argue that the decision to consider inadmissible the challenge brought against the decision not to open an investigation for the alleged crime of torture, of October 15, 2008, closed the possibility of investigating the commission of the crime of torture, and therefore exhausted domestic remedies. They also argue that in the event the IACHR considers that domestic remedies were not exhausted, it would apply an exception to the exhaustion requirement based on the ineffectiveness of the criminal proceeding captioned under rape (*violación sexual*) and abuse of authority when it comes to investigating the facts for the crime of torture.

25. Finally, they allege that in view of the facts that are the subject matter of the claim, Luis Alberto Rojas Marín's mother, Juana Rosa Tanta Marín, has suffered continuous detriment to her health because of the anguish and depression over the harm inflicted on her son, the impunity related to the case, and the fear of reprisals, thus they ask that the Commission find a violation of the right to humane treatment, enshrined in Article 5 of the Convention, to her detriment.

B. The State's position

26. The State asks the IACHR to find the petition inadmissible, as it considers that the petitioners did not comply with the requirement of prior exhaustion of domestic remedies, on having filed a late challenge against the judicial act that ordered the dismissal and that in addition they did not state facts that tend to establish a possible violation of the rights alleged. Specifically in relation to the facts, the State alleges that at approximately 1:25 am of February 25, 2008, a pickup truck of the municipal security force (*serenazgo*) went to the Carretera Industrial-Casa Grande in response to calls from neighbors who had reported the presence of unfamiliar persons in the proximity of the highway. Once there they saw three persons running, and were able to stop only the alleged victim, who put up resistance. It reports that "due to the circumstances in which he was stopped," his lack of identification, and his alleged inebriated state, the agents took Luis Alberto Rojas Marín to the Police Station of Casa Grande, with the aim of identifying him. The State indicates that the three police agents accused had indicated that none of what Luis Alberto Rojas Marín said "is the truth," that they didn't ask the alleged victim any questions about his brother, nor had they committed any acts of sexual violence against him, and that rather, he had adopted an aggressive attitude, proffering offensive expressions against the police.

27. In relation to the allegation of rape and abuse of authority, on April 2, 2008, the Office of the Second Provincial Prosecutor of Ascope had requested the pretrial detention of the three police officers who were allegedly involved. Nonetheless, on October 21, 2008, the same Office of the Prosecutor had presented, before the preparatory investigative judge, a motion to dismiss due to the insufficiency of the information collected to make a well-founded request to prosecute the accused. The alleged victim had opposed that request, but on January 9, 2009 the Judge of Criminal Investigation of Ascope had declared the request of the Public Ministry well-founded, and had ordered the charges dismissed.

28. The State argues that there has been a serious and exhaustive investigation by the Peruvian authorities with respect to sexual violence, with analysis of the evidence produced during the proceeding, including the forensic medical certificate, the expert examinations in forensic biology, and the clothes. The State makes reference to the prosecutorial and judicial analysis of the case on indicating that the alleged victim had not been consistent in his statement of the facts, as there were contradictions. So in his first two statements on February 27 and 28, 2008, and contrary to what was reported by the petitioners, the alleged victims had not denounced that he had been a victim of rape; and that he did not report it until his statement of March 6, 2008. In addition, they report that the local press, based on statements made by the alleged victim right after the facts alleged, did not refer at any time to rape and that the forensic medical exam he underwent occurred three days after the alleged fact, and, therefore, there was "a reasonable doubt that the old anal fissures with signs of recent acts against nature ... were caused on the day of the facts by the accused."¹ In addition, it indicates that while

¹ Order of dismissal No. 6 of January 9, 2009, granted by the Criminal Investigative Judge.

in his first accusation the alleged victim mentions three assailants, in his complaint brief he indicates that “his rapists” numbered four.

29. The State also alleges that the prosecutorial authorities considered that the alleged victim engaged in physical activities after the supposed attack, and that what is alleged by Mr. Rojas Marín contradicted other elements of evidence in the proceeding. The State also indicates that one of the police agents denounced had been a key witness in the trial for homicide in which the defendant was a brother of the alleged victim, in which he was convicted and sentenced to 10 years in prison. In addition, the State argues that contrary to what the petitioners indicate, the resolutions issued in the context of the domestic investigation were duly motivated, and that there was no evidence that the acts had occurred.

30. With respect to the abuse of authority, the State argues that Article 205 of the New Code of Criminal Procedure grants powers to the National Police of Peru to make stops to check identity, without the need for an order from a prosecutor or judge. In addition, it reports that it has not been shown that Mr. Rojas Marín was detained until 6 o'clock on the morning, but that he was released, respecting the time period legally provided for and that, in his statements, he had not indicated that he was unaware of the reasons for his detention. On this point, the State indicates that the investigative judge found that based on the evidence collected by the police intervention “it was fully justified and lawful.” Therefore, it was not an illegal and arbitrary detention, as the petitioners have indicated. The State also notes that the petitioners’ argument to the effect that Mr. Rojas Marín was in “supposed incommunicado detention,” whereby neither he or his family was able to present any action to guarantee his release, is not an argument that was made known to the authorities in any of his statements, complaint, or briefs filed during the criminal proceeding.

31. The State reports that on January 22, 2009, the alleged victim filed an appeal before said court, but that it had been declared inadmissible on procedural grounds supposedly for having been filed after the time provided for in the legislation on criminal procedure (three working days after notice of the resolution). Accordingly, the Peruvian State considers that it cannot be attributed international responsibility based on the inadequate or negligent use of the remedies provided for in the domestic order. Therefore, it alleges that this negligence in the use of the remedy translates into the failure by the alleged victim to exhaust the suitable and effective domestic remedy.

32. Moreover, in relation to the request by the alleged victim on May 5, 2008, to expand the investigation into the crime of torture, the State alleges that the Office of the Second Provincial Prosecutor of Ascope had ordered it was not appropriate to expand and continue the investigation into the crime of torture, as it was considered that the special subjective element was not present, which is to say the special intent to obtain information or a confession from the alleged victim or to punish him for some act he committed or that it is presumed he committed. In this regard, it argues that the legal characterization of a given unlawful act is entrusted to the Public Ministry and the alleged victim does not have the authority to replace the characterization of the facts.

33. In addition, the State argues that the alleged victim successfully requested, by means of a complaint appeal (*recurso de queja*), that the proceedings be forwarded to the Superior Prosecutor. Nonetheless, that prosecutorial office had found the motion unfounded, and therefore affirmed the ruling by the Provincial Prosecutor (Fiscal Provincial). In addition, it reports that for the purpose of the prosecution and eventual punishment of the persons allegedly responsible, the characterization as crime of torture did not have a considerable impact on the judicial decision, especially if the crime of aggravated rape (*violación sexual agravada*) carries a criminal sanction heavier than that for the crime of torture.

34. The State indicates that the petitioners contradict one another with respect to decisions and procedural moments they cite to argue that they exhausted of domestic remedies. It reports that in their first brief the petitioners consider the prosecutorial resolution finding inadmissible on procedural grounds the complaint appeal that was filed late as the point of reference for arguing exhaustion. Nonetheless, in their second brief, the petitioners indicated that domestic remedies were exhausted with the prosecutorial resolution that found the motion to annul inadmissible on procedural grounds given the legal characterization of the crime as sexual violence and not torture.

35. In this regard, the State argues that the analysis of exhaustion of domestic remedies should not be focused on the prosecutorial decision with respect to the crime of torture because the authorities understood the facts alleged as rape (*violación sexual*) and abuse of authority. They also state that the domestic criminal legislation, in addition to the remedy that was rejected as time-barred, provides for the motion for cassation, which was not exhausted by the alleged victim either. In other words, even in the event that the alleged victim had filed the appeal within the statutory time for doing so, and even if it had been declared to be unfounded, that decision on appeal could have also been brought before the Supreme Court by means of a motion for cassation.

36. In addition, the State observes that as regards the petitioners' argument of alleged intimidation of Mr. Luis Alberto Rojas Marín by both prosecutors, the alleged victim filed a complaint against both prosecutors with the Decentralized Office of Internal Control of La Libertad. In this respect, it argues that the prosecutorial rulings issued throughout the criminal proceedings were not issued by the prosecutors who were called into question, but by another prosecutor who was assigned to the case, which is why it indicates that the alleged actions of these prosecutors did not affect the proper development of the domestic proceeding.

37. Finally, the State argues that the petitioners go beyond the factual framework of the instant case because they did not allege in the original petition, or in Peruvian courts, the aspects relating to the regulation of the crime of torture in the Peruvian Criminal Code, due diligence in the investigation in general, and as to the absence of a national registry of complaints in cases of torture. In addition, the State alleges that the petitioners seek a review of domestic judgments for not agreeing with the criteria used by the judges and reiterates that the Commission is not a sort of court of fourth instance.

38. In view of all the foregoing, the State asks that the petition be found inadmissible based on Articles 46(1)(a) and 47(b) of the American Convention on Human Rights.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae* of the IACHR

39. The petitioners are authorized by Article 44 of the Convention to file complaints. The alleged victim is an individual person who was under the jurisdiction of the Peruvian State as of the date of the facts. Peru deposited the instrument of ratification of the American Convention on July 28, 1978, and of the Inter-American Convention to Prevent and Punish Torture on March 28, 1991. Accordingly, the Commission is competent *ratione personae* to examine the petition.

40. The Commission is competent *ratione loci* to take cognizance of the petition, insofar as it alleges violations of rights protected by the American Convention under jurisdiction of a State party to that treaty.

41. The Commission is competent *ratione materiae*, considering that the petition alleges facts that could characterize the violation of rights protected by the American Convention and the Inter-American Convention to Prevent and Punish Torture.

42. Finally, the Commission is competent *ratione temporis*, for the obligation to respect and ensure the rights protected by the American Convention and the Inter-American Convention to Prevent and Punish Torture was already in force for the State on the date of the events alleged in the petition.

B. Exhaustion of domestic remedies

43. Article 46(1)(a) of the American Convention provides that in order for a complaint filed with the Inter-American Convention to be admissible under Article 44 of the Convention, it is necessary to have pursued and exhausted domestic remedies in keeping with generally recognized principles of international

law. The objective of this requirement is to enable the national authorities to learn of the alleged violation of a protected right and, where appropriate, to have the opportunity to resolve it before it is heard by an international body. The requirement of prior exhaustion applies when adequate and effective remedies are actually available in the domestic system to remedy the alleged violation of human rights. In this regard, Article 46(2) specifies that the requirement does not apply when (a) the domestic legislation does not have due process of law for protecting the right in question; (b) the alleged victim did not have access to domestic remedies; or (c) whether there is unwarranted delay in the decision on said remedies.

44. On a preliminary basis, the IACHR observes that the precedents established by the Inter-American Commission and the Inter-American Court indicate that whenever a crime is committed that is subject to prosecution at the initiative of the authorities, the State has the obligation to promote and advance the criminal proceeding, and that in those cases it is the suitable means for clarifying the facts, prosecuting those responsible, and making possible other forms of reparation. In the instant case, the IACHR takes note on a preliminary basis that although the domestic legislation authorizes the injured person to come forward as a “civilian plaintiff” (“*actor civil*”) when it comes to invoking remedies in the context of a criminal investigation, this does not relieve the State of its responsibility to drive the criminal investigation in cases that should be prosecuted at the initiative of the authorities, as in the instant case.

45. As appears from the record, on February 27, 2008 Luis Alberto Rojas Marín filed the complaint for the acts alleged to have occurred with the Police Station of Casagrande. Two days later the forensic medical exam was conducted to determine the physical condition of the alleged victim. On March 24, 2008, the Public Ministry ordered an investigation opened into aggravated sexual violence and abuse of authority. On May 5, 2008, the alleged victim requested that the investigation be expanded to include torture, which was denied by the prosecutorial authority on June 16, 2008, indicating that there had not been criminal intent or proof that the act had been committed with one of the purposes described in Article 321 of the Criminal Code in relation to the elements that constitute torture. Accordingly, the prosecutorial authority held that “while there are sufficient and reasonable indicia that the accused have caused lesions to the injured person Luis Alberto Rojas Marín and the [police agent] introduced a rubber baton into his rectum with the aid of his co-accused ... it is also true that there is no evidence that ... they acted with criminal intent, i.e. with the knowledge or will to commit the crime investigated ... and much less than they have caused those lesions with the intent of obtaining from the victim a confession or to punish him ... intimidate him, or coerce him....”²

46. The alleged victim appealed this decision, arguing that he was tortured as punishment due to his sexual orientation. The alleged victim asked the prosecutorial authority to investigate the facts alleged as torture, indicating, in light of international standards, that it had not only been a situation of abuse of authority and sexual violence. This appeal was declared to be unfounded by the prosecutorial authority on August 28, 2008, and upheld by the superior prosecutorial authority on October 15, 2008. The petitioner argues the ineffectiveness of the investigation in these terms.

47. In relation to the investigation into aggravated sexual violence and abuse of authority, on October 21, 2008, the prosecutorial authority asked the judge to close the investigation by declaring the charges dismissed; Luis Alberto Rojas Marín opposed this request. On January 9, 2009, the Judge of Criminal Investigation of Ascope, Superior Court of Justice of La Libertad issued an order of dismissal, on considering that the situations provided for in sections (a) and (d) of Article 344(2) of the Code of Criminal Procedure applied, that is, that the act cannot be attributed to the police agents, that there is no reasonable possibility of including new information in the investigation, and that there are not elements of conviction sufficient to request the prosecution in relation to the three accused and the crimes investigated. The alleged victim, appearing as “civil plaintiff” in the criminal proceeding, appealed this decision; the appeal was rejected as it was filed four days after the period established by the domestic provisions.

² Public Ministry, Second Office of the Provincial Prosecutor of Ascope, “Disposición de No Ha Lugar Ampliación Investigación Preparatoria,” Case No. 113-2008-MP/2º DFPPC-A, June 16, 2008, Ascope. Annex to the petitioners’ brief, received April 22, 2009.

48. The IACHR also observes that on March 28, 2008, the alleged victim filed a complaint with the Superior Prosecutor, Chief of the Decentralized Office of Internal Control of La Libertad, to begin an investigation into the crimes of abuse of authority, coercion, and delay in the administration of justice against two prosecutors who were involved in his case. The alleged victim argued that he has been the target of harassment and discrimination by a provincial prosecutor, which also caused delays making it impossible for him to have his forensic medical exam immediately, and by a deputy prosecutor who had intervened during the forensic medical exam to call into question the occurrence of the rape. The Superior Prosecutor, by report of July 24, 2009, declared that the complaint for abuse of authority was well-founded, indicating that the prosecutor had delayed the medical exam, and that the deputy prosecutor had been present when the medical exam was performed, without the prior consent of the person injured, as required by the Code of Criminal Procedure. The Office of the Attorney General, for its part, found the complaint to be without merit and archived it.

49. The IACHR takes note of the petitioners' argument that the alleged victim had suffered discrimination due to his sexual orientation from the moment of his detention and during the investigation into the facts. In addition, the Commission notes that the alleged victim presented arguments to the prosecutorial authority regarding irregularities in the preliminary investigation related to alleged delaying and intimidating actions by prosecutors, presumably motivated by his sexual orientation. In this trend, the obligation to conduct an investigation with due diligence takes on a special meaning when the presumed victim has alleged that he has been discriminated against because of his sexual orientation, which is a suspect category under article 1(1) of the American Convention;³ taking into account the situation of marginalization and historic exclusion that persons with a sexual orientation that is not heterosexual have been subjected to,⁴ moreover when it concerns a person under state custody.

50. In conclusion, the IACHR observes that the proceedings initiated domestically, both to determine liability in relation to the alleged acts of violence to the detriment of Luis Alberto Rojas Marín and in relation to the alleged discrimination by the prosecutors in the case, were closed in the investigative stage. In this regard, the petitioners argue that the alleged victim did not have effective access to justice, given the fact that he allegedly suffered discrimination due to his sexual orientation.

51. Taking into account the information presented, and for the purposes of the preliminary analysis on admissibility, the IACHR considers that the alleged victim fits within the exception to the exhaustion of domestic remedies requirement, in keeping with Article 46(2)(b) of the American Convention. The Commission wishes to emphasize that this decision on admissibility is *prima facie*, for the purposes of determining compliance with the admissibility requirements, and does not constitute prejudgment on the merits of the controversy. The IACHR considers that these arguments require an in-depth analysis in the merits phase.

C. Time for filing the petition

52. Article 46(1)(b) of the American Convention establishes that for a petition to be declared admissible it must be filed within six months counted from the date on which the interested party was notified of the final decision that exhausted domestic remedies. This rule does not apply when the Commission finds that one of the exceptions to the exhaustion requirement set forth in Article 46(2) of the Convention applies. In such cases, the Commission must determine whether the petition was filed in a reasonable time, as per Article 32 of its Rules of Procedure.

53. As regards this claim, the Commission has already established that the alleged victim is exempt from exhausting domestic remedies. Accordingly one must determine whether the petition was filed in a reasonable time after the events occurred.

³ IACHR, Application before the I/A Court H.R., Case 12.502, Karen Atala and Daughters, Chile, September 17, 2010, para. 95.

⁴ IACHR, Application before the I/A Court H.R., Case 12.502, Karen Atala and Daughters, Chile, September 17, 2010, para. 94.

54. The Commission takes note that the facts are alleged to have taken place February 25, 2008, and that the petition was filed with the IACHR on April 14, 2009. Because of this, the IACHR considers that the petition was filed within a reasonable time.

D. Duplication of procedures and international *res judicata*

55. Article 46(1)(c) of the Convention provides that the admissibility of petitions is subject to the requirement that the matter “is not pending in another international proceeding for settlement” and Article 47(d) of the Convention stipulates that the Commission will not admit a petition that substantially reproduces a prior petition or communication already examined by the Commission or another international organization.

56. It does not appear from the record that the subject matter of the petition is pending another procedure for international settlement, nor that it reproduces a petition already examined by this or any other international body. Therefore, the requirements established at Articles 46(1)(c) and 47(d) have been satisfied.

E. Characterization of the facts alleged

57. For purposes of admissibility the Commission must decide whether the petition states facts that tend to establish a violation, as stipulated at Article 47(b) of the American Convention, whether the petition is “manifestly groundless” or whether it is “obviously out of order,” as per Article 47(c). The standard of appreciation in applying these rules is different from that required to decide on the merits of a complaint. The Commission must perform a *prima facie* evaluation to examine whether the complaint established the basis for the apparent or potential violation of a right guaranteed by the Convention and not to establish the existence of a violation. Such a review is a summary analysis that does not imply any prejudice or a preliminary opinion on the merits.

58. The American Convention and the Rules of Procedure of the IACHR do not require the petitioner to identify the petitioner to identify the specific rights alleged to be violated by the State in the matter submitted to the Commission, although the petitioners may do so. It is up to the Commission, based on the case-law of the system, to determine in its admissibility reports which provisions of the relevant inter-American instruments are applicable and which could be determined to be violated if the facts alleged are proven by sufficient evidence.

59. In view of the information presented in the admissibility phase, the IACHR considers that the facts that are the subject matter of the claim regarding the alleged illegal and arbitrary detention of Luis Alberto Rojas Marín and the alleged commission of acts of torture and other cruel and degrading treatment directed against him, as well as the lack of judicial clarification of these facts, could tend to establish violations of the rights enshrined in Articles 5 (right to humane treatment), 7 (right to personal liberty), 11 (right to respect for honor and dignity), 8 (right to a fair trial), and 25 (judicial protection) of the American Convention, in relation to the obligations established at Articles 1(1) (obligation to respect and ensure) and 2 (obligation to adopt provisions of domestic law) of the same instrument, and of the obligations to prevent and punish torture established in Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. In addition, the Commission considers that the facts that are the subject matter of the claim tend to establish a violation of Article 5 (right to humane treatment) of the American Convention to the detriment of the mother of Luis Alberto Rojas Marín, Juana Rosa Tanta Marín.

60. As regards the alleged commission of acts of discrimination to the detriment of Luis Alberto Marín, the Commission observes that given the arguments made in relation to discriminatory treatment by various state agents – in the context of the detention and taking of evidence, such as the statement and the forensic medical exam – the determination as to the possible responsibility of the State for the alleged violation of the right established in Article 24 (equal protection) of the American Convention, in connection with Article 1(1) of the same treaty, is to be made in the merits phase.

61. Finally, neither the failure to establish the foundation or the inadmissibility of the petitioners' arguments is evident, accordingly the Commission concludes that the petition satisfies the requirements set out at Articles 47(b) and (c) of the American Convention.

V. CONCLUSIONS

62. Based on the considerations of fact and law set forth above, and without prejudging on the merits, the Inter-American Commission concludes that this claim meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention, and accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the petition admissible in relation to Articles 5, 7, 8, 11, 24, and 25 of the American Convention in conjunction with the obligations established in Articles 1(1) and 2 of the same instrument; and in relation to Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

2. To notify the State and the petitioners of this decision.

3. To initiate the processing of the case on the merits.

4. To publish this decision and include it in the Annual Report, to be presented to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 6th day of the month of November 2014. (Signed): Tracy Robinson, President; Rose-Marie Belle Antoine, First Vice President; Felipe González, Second Vice President; José de Jesús Orozco, Paulo Vannuchi and James Cavallaro, Commissioners.