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REPORT No. 173/19
PETITION 561-11
REPORT ON ADMISSIBILITY

ASEL LUZARRAGA ZARRABEITIA
CHILE

Approved by the Commission on December 5, 2019 in San Salvador, El Salvador.

Cite as: IACHR, Report No 173/19. Petition 561-11. Admissibility. Asel Luzarraga Zarrabeitia. Chile. December 5, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Jaime Madariaga de la Barra and Asel Luzarraga Zarrabeitia
Alleged victim:	Asel Luzarraga Zarrabeitia
Respondent State:	Chile ¹
Rights invoked:	Articles 1 (obligation to respect rights), 11 (right to privacy), 13 (freedom of thought and expression) and 24 (right to equal protection) of the American Convention on Human Rights ² and other international treaties ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	April 20, 2011
Additional information received at the stage of initial review:	April 19, 2017
Notification of the petition to the State:	July 13, 2017
State's first response:	January 19, 2018
Additional observations from the petitioner:	July 31, 2018

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 on Human Rights (deposit of instrument made on August 21, 1990)

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 11 (right to privacy), 13 (freedom of thought and expression) and 24 (right to equal protection) of the American Convention in conjunction with Article 1.1 of the same instrument
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of Section VI
Timeliness of the petition:	Yes, in the terms of Section VI

V. FACTS ALLEGED

1. The alleged victim, a Basque writer, alleges that the Chilean State has violated his human rights in the context of criminal and deportation proceedings taken against him. He indicates that in December 2008 he moved to Chile and took up residence in the city of Temuco, Araucanía, with his partner.

¹ In accordance with the provisions of Article 17.2.a of the Commission's Rules of Procedure, Commissioner Antonia Urrejola Noguera, of Chilean nationality, did not participate in either the discussions or decision in the present case.

² Hereinafter "the American Convention" or "the Convention".

³ Article 17 of the International Covenant on Civil and Political Rights.

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

He states that the city was located in a troubled region, and that since 2001, several homemade explosive devices have detonated in the city, without fatalities.

2. He argues that his problems with the Chilean authorities began in December 2009, for the following reasons: (i) a bomb exploded in the city on December 7; ii) on December 19, when he was on his way with a group of individuals to create a street mural, he was subjected to an identity check by the police; and iii) on December 31, the police disarmed an explosive device found in the forecourt of the Regional Ministerial Secretariat of Justice in Temuco. He states that as the authorities failed to resolve these attacks, they adopted a policy of persecution of all individuals considered to be anarchists and sympathetic to the Mapuche cause. He indicates that he had authored several publications in favor of anarchism and the Mapuches and that, in light of this, his profile, his Basque origin and his belonging to a punk group, an investigation was initiated against him and an order issued to search his residence.

3. He indicates that on December 31, 2009, he was arrested during a raid on his home, that the police planted items that could be used in the manufacture of homemade explosives in order to incriminate him and then altered the forensic photographs to eliminate the date and time of the photos. He adds that the authorities branded him as a terrorist and that he was represented in the media as such. He adds that on January 5, 2010, the police issued a report evidencing the discriminatory nature of the criminal investigation and prosecution, which made disparaging references to his Basque origins and to his anarchist views as grounds to portray him as a subversive character. He refers that according to the report, the raid and subsequent capture was carried out based on "his ideology, for having carried out, organized various anarchist groups worldwide and for incorporating ideas for young people into Chilean youth". He considers that the raid on his home was motivated from his exercise of freedom of expression.

4. He indicates that on September 7, 2010, he was sentenced to 220 days in prison for the illegal possession of weapons or explosives. This sentence was considered served at that time since he had been in preventive detention between December 31, 2009 to February 10, 2010, under house arrest between February 10, 2010 to July 2, 2010, and under partial house arrest, for a period of twelve hours, from July 2, 2010, until the date of his sentence.

5. He maintains that, although the first instance conviction does not and could not appear to punish him for his ideas, and there is no doubt that he was persecuted and convicted for them: seven days after initiation of criminal proceedings, an order for his deportation from the country was issued for the same reason without any trial. He indicates that he challenged the first instance conviction by filing an annulment motion, which upheld the former judgment on October 22, 2010. He adds that currently the police officers that persecuted and testified against him have been imprisoned for falsifying evidence in the context of another criminal trial. Finally, he refers that the deportation order was not executed because he decided to voluntarily leave the country before the annulment decision was issued. This allowed him to leave freely, instead of being returned to his country handcuffed and exposed in the media, because at this time there were no precautionary measures against him.

6. The State indicates that the alleged victim was not convicted on the basis of his "anarchist views", his origin, or his sympathies for the Mapuche people. In this regard, the State points out that the first instance trial court considered the alleged victim's arguments regarding the allegedly discriminatory nature of the report prepared by the police in January 2010, and decided not to take it into account. It indicates that the judge held that the trial was not based on the political ideology of the accused nor on the acts perpetrated by him prior to December 31, 2009, and, therefore, said document was irrelevant and failed to relate to the events under consideration in the court's decision. It adds that the court also held that the purpose of the proceedings concerned the precise, definite and objective behavior of the accused. The accused's origins, beliefs, way of life, social environment and all other conduct were inconsequential and had nothing to do with the charges, given that the criminal law's punitive foundations are the actions of the perpetrator and not his or her personal characteristics. It also notes that the alleged victim's record was not used against him, but that the court reduced his sentence due to his irreproachable conduct and considered that the offense constituted an "isolated [incident] to [the alleged victim's] outstanding daily behavior".

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

7. The State alleges that the annulment motion filed against the first instance judgment exists to assess the criminal responsibility of the accused, an issue that was not questioned at any time in this complaint, and that the petition must be declared inadmissible because there has been a failure to exhaust the appropriate remedies for challenging the alleged violations invoked. In this regard, it maintains that the alleged interference with Mr. Zarrabeitia's privacy, allegedly due to his exposure in the media as a terrorist, should have been challenged by a request for rectification against the media and that the State has no responsibility for these alleged events. It adds that the alleged victim could also have challenged the alleged discriminatory persecution due to his views by applying for an injunction, but did not do so. Finally, it alleges that Mr. Zarrabeitia could have challenged the deportation decision by means of an appeal to the Supreme Court, but failed to do so.

8. The alleged victim alleges that the annulment motion was the adequate remedy to protect his fundamental rights, and that he exhausted domestic remedies with the second instance decision dismissing his motion, and that the remedies indicated by the State were not adequate or necessary. In this sense, he indicates that since the discriminatory acts occurred within the framework of the criminal proceedings, the annulment motion was an adequate challenge, and there was no need to file an injunction against these acts. In addition, he maintains that the injunction was not filed because it was not appropriate when there were criminal proceedings pending and cannot be used to challenge judicial decisions and acts that take place at trial. The alleged victim also argues that the State itself was responsible for branding him as a terrorist in the media based on the statements of its agents and that it would not be appropriate to file an appeal for clarification and rectification against the media.

9. Finally, the alleged victim indicates that he was not in a position to challenge the deportation order, since he was in jail at the time and his first objective was his release and if this meant leaving Chile, it was the lesser of two evils. He indicates that the only thing left to him was to channel his efforts and resources into defending himself in the criminal proceedings aimed at convicting him for more serious offenses. It was therefore strategically not advisable for him to challenge the deportation order and run the risk of having an unfavorable decision against him.

10. In regard to the allegations of the discriminatory criminal prosecution allegedly based on Mr. Zarrabeitia's views and origin, the IACHR considers that the annulment motion was sufficient to analyze the claims presented by the alleged victim in that regard, and it was unnecessary to exhaust other additional or extraordinary remedies. Additionally, the IACHR observes that the alleged victim's exposure in the media occurred during and as a result of the criminal proceedings brought against him and that its effects also impacted the alleged victim's right to the presumption of innocence. Therefore, the Commission considers that the remedies used to challenge the criminal proceedings were also sufficient to analyze compliance with the requirement to exhaust domestic remedies in this case.

11. In view of the foregoing, the IACHR considers that domestic remedies were exhausted on October 22, 2010, the date on which the judgment of first instance was upheld. Taking into account that the petition was filed on April 20, 2011, it complies with the requirements of Articles 46.1.a and 46.1.b of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

12. The petitioners maintain that the State is responsible for the violation of the alleged victim's human rights based on the discriminatory criminal prosecution due to his views and origin. The State argues that the alleged facts do not characterize violations of human rights because: i) the alleged victim was not convicted based on his opinions or origin, but on his objective conduct; and ii) at no time was his freedom of expression curtailed since the articles that the alleged victim had written in relation to the Mapuche conflict, or to his anarchist views, were not censured or eliminated. In addition, the book written by the alleged victim about his arrest was published by a Chilean publisher and was never censored.

13. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the IACHR considers that the facts about the raid on his home, the criminal and deportation proceedings presumably due to his expressions and the events surrounding the alleged excessive exposure of the alleged victim as a terrorist in the media, if proven, could constitute violations of the rights enshrined in Articles 8 (right to a fair trial) and 11 (right to privacy), 13 (freedom of thought and expression) and 24 (right to equal protection) of the American Convention in conjunction with Article 1.1 of the same instrument. The above could constitute a potential breach of the right to the presumption of innocence and the right to privacy.

14. Finally, the Commission reiterates that it lacks competence to establish violations of the International Covenant on Civil and Political Rights, without prejudice to the fact that it may take its provisions into account as part of its interpretative exercise of the rules of the American Convention in the terms of Article 29 thereof.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 11, 13 and 24 of the American Convention in conjunction with Article 1.1 of the same instrument;

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 5th day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Margarette May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva and Flávia Piovesan, Commissioners.