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REPORT No. 36/20

PETITION 879-08

REPORT ON ADMISSIBILITY

ROSA ELENA PARIAHUACHI PALACIOS AND OTHER
WORKERS FROM THE AGRICULTURAL SECTOR
PERU

Approved electronically by the Commission on April 22, 2020.

Cite as: IACHR, Report No. 36/20. Petition 879-08. Admissibility. Rosa Elena Pariahuachi and other workers from the agricultural sector. Peru. April 22, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	<i>Centro de Derechos y Desarrollo (CEDAL), Asociación Aurora Vivar, and Rosa Elena Pariahuachi Palacios</i>
Alleged victims :	Rosa Elena Pariahuachi Palacios and other workers from the agricultural sector
State denounced:	Peru ¹
Rights invoked:	Articles 24 (right to equal protection) and 26 (economic, social, and cultural rights) of the American Convention on Human Rights ² in relation to Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) thereof.

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	July 28, 2008
Additional information received at the stage of initial review:	August 25, 2008 and March 24, 2011
Notification of the petition to the State:	August 7, 2013
State's first response:	March 20, 2014
Additional observations from the petitioner:	September 1, 2017
Notification of the possible archiving of the petition:	July 31, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes, under the terms of section VI(A)
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, the American Convention (instrument of ratification deposited on July 28, 1978).

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 24 (right to equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention on Human Rights in relation to Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) thereof.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, February 7, 2008
Timeliness of the petition:	Yes, July 28, 2008.

¹ In keeping with the provisions of Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Julissa Mantilla Falcón, a Peruvian national, did not participate in the debate or decision on this matter.

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

³ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. The *Centro de Derechos Humanos y Desarrollo* (CEDAL) and the *Asociación Aurora Vivar* (hereinafter “the petitioners”), together with Mrs. Rosa Elena Pariahuachi Palacios (hereinafter “Mrs. Pariahuachi” or “the alleged victim”) allege the responsibility of the Peruvian State for having violated the rights of Mrs. Pariahuachi and other workers who are subject to the agricultural employment system on the grounds that they suffered discriminatory treatment with respect to their employment rights and benefits—all of this in a context of historical and structural discrimination towards low-income *campesino* women.

2. The petitioners indicate that as of 2004 the alleged victim has been a laborer at agribusiness companies in Peru, a context in which farm laborers—in particular indigenous and Afro-Peruvian women—have historically been discriminated against. They add that this discrimination is reflected in Law No. 27360 (hereinafter “the Law”) of October 30, 2000, under which measures to promote the agricultural sector were approved. They indicate that Article 7 of the Law established an employment system “of a special and provisional nature” applicable to “individuals or legal entities that conduct agribusiness activities.” The petitioners assert that this Law, which is applicable to the alleged victim as a worker at the agribusiness companies CAMPOSOL S.A. and GREEN PERÚ, provided for a different treatment of paid work in the agricultural sector as compared to the treatment afforded to other sectors under ordinary labor law.

3. According to the petitioners, the Law meant that workers in the agricultural sector had a longer work day, lower pay, and less vacation benefits, employment bonuses, compensation for years of service, and severance for arbitrary dismissal than workers who are under the ordinary [labor law] system, as well as greater restrictions on unionizing. The latter meant that agricultural workers are less protected than other workers who exercise their right to unionize. The petitioners hold that this Law violates the principle of non-regression of economic, social, and cultural rights. Additionally, the petitioners affirm, in keeping with the comparative legal analysis of employment systems they have furnished, that the provisions of Article 7(2) of the Law, which impose abusive working conditions on laborers in the agricultural sector, are discriminatory. The petitioners argue that Mrs. Pariahuachi and other workers in the agricultural sector enjoy fewer rights as compared to workers whose employment relations are regulated by the ordinary system, due to this Law that discriminates against them in an arbitrary and unreasonable manner.

4. The petitioners indicate that the Law was challenged via a remedy of unconstitutionality [*demanda de inconstitucionalidad*] filed by the Bar Association of Ica, which they claim was prepared jointly with the petitioners and an array of social institutions devoted to employment issues. In its remedy of unconstitutionality, the Bar Association of Ica held that the provisions of the Law that regulate the special system are contrary to the principle of equal protection and non-discrimination and undermine the essential provisions of labor rights enshrined in the Peruvian constitution. Additionally, the remedy filed addresses both direct and indirect discrimination by furnishing statistical data on the working conditions of women laborers in the agricultural sector.

5. On November 21, 2007, the Constitutional Court found the remedy of unconstitutionality “groundless” and held that there is no inconsistency between the Constitution and the law challenged inasmuch as Article 103 of the Peruvian Constitution allows for special and exceptional legislation when “the nature of the situation so warrants.” Furthermore, the Court indicated that in this case the Law passed the equality test—which analyzes the principles of adequacy, necessity, and proportionality—to the extent that the special regulation of the agricultural sector was established with a legitimate purpose under the constitution (promoting job creation in the agricultural sector); therefore, it proved to be a less onerous measure and its intended purpose was proportional to the measure adopted. Given this situation, the plaintiffs (Bar Association of Ica), filed a petition for clarification [*recurso de aclaración*] on February 5, 2008.

6. For its part, the State requests the petition be rejected due to lack of competence *ratione personae* with respect to the alleged victims identified as a yet to be determined number of workers subject to the agricultural employment system. The State holds that this group of individuals is abstract and could potentially cover thousands of unidentified, undetermined, unspecified people.

7. Furthermore, the State adduces that no factual determination is made about acts imputed to the State that allegedly impaired human rights—which is necessary to conduct the respective analysis—in connection with Mrs. Pariahuachi. The State holds that the petitioners merely are challenging a law (Law N°27360 – Law Approving Provisions to Promote the Agricultural Sector) that purportedly is applicable to them, but they do not connect the dots to show how the alleged violations specifically played out for Mrs. Rosa Elena Pariahuachi. In addition to the foregoing, the State further adduces that Mrs. Pariahuachi did not exhaust domestic remedies inasmuch as she failed to file on her own behalf the appropriate and effective remedies available in the domestic legal system prior to turning to the IACHR.

8. The State indicates that the Peruvian Constitution of 1993 allows for a law’s constitutionality to be challenged by certain authorities or individuals,³ but underscores that the alleged victim is not any of the authorities mentioned nor did she take part in any citizen initiative that challenged the aforementioned Law. The State further indicates that Article 200(2) of the Constitution provides for *amparo* appeals as one of the constitutional guarantees that is appropriate when any authority, government employee, or individual’s acts or omissions violate or threaten rights such as the right to equal protection and non-discrimination, the right to work, among others recognized by the Constitution. Additionally, Article 37 of the Code of Constitutional Procedure specifies the rights whose protection may be invoked in *amparo* proceedings. The alleged victim, however, decided not to resort to an *amparo* appeal even though it would have thereby been possible for the domestic courts to hear and review the situation that Mrs. Pariahuachi asserts violated her rights. The State claims that the alleged victim failed to provide information about her grievance for the purpose of not being discriminated against in the application of the Law via specific labor proceedings that concerned the rights, which, as an agricultural worker, she deemed had been violated.

9. With respect to competence *ratione personae*, the State claims that the IACHR lacks competence to analyze labor rights, which, although provided for and protected in the Additional Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights, “Protocol of San Salvador,” may not be subject to the petition system. Peru holds that in keeping with Article 19(6) of the aforementioned Protocol this right may not be argued under the individual petition system before the Inter-American Commission, which is why the plea regarding lack of competence applies in this matter. In addition to the pleas noted, the Peruvian State alleges that the mandatory requirement to file and exhaust domestic remedies was not fulfilled and that the purported violation of the alleged victim’s rights has not been shown. The State adds that the petitioners seek to have the IACHR review in a general manner specific international obligations and their abstract application to Mrs. Pariahuachi and all the individuals to whom said Law applies.

VI. ANALYSIS OF ADMISSIBILITY

A. Considerations regarding competence *ratione personae*

10. The petition states that the alleged victim is Mrs. Rosa Elena Pariahuachi Palacios and also refers to a group of “workers subject to the special employment system” as a collective of alleged victims. The State objects to the competence *ratione personae* of alleged victims identified as a number of yet to be determined workers subject to the agricultural employment system, claiming that this group of people is abstract.

11. With respect to the foregoing arguments, the Commission points out that the language of Article 44 of the Convention, which empowers “any person or group of persons, or any nongovernmental entity [...] [to] lodge petitions with the Commission containing denunciations or complaints of violation [...] by a State Party,” places no restrictions on competence in terms of “complete and total” identification of the individuals affected by the violation. Indeed, it allows for review of violations of human rights that may affect —because of

³ Article 203 of the Peruvian constitution in force at the time of the events provided that those empowered to file a remedy of unconstitutionality are: the President of the Republic, the Attorney General, the Ombudsman, 25% of the legal number of congressmen, 5,000 citizens whose signatures are verified by the National Elections Jury, the regional governors with the agreement of the Regional Council, or provincial mayors with the agreement of their Council, in matters under their remit, and professional associations, in matters related to their area of expertise.

their characteristics—an individual or group of specific individuals, but who have not necessarily been fully identified.⁴ In the instant case, although the petitioners have identified an alleged victim throughout the proceedings (Mrs. Rosa Elena Pariahuachi Palacios), the Commission takes note of the difficulties entailed in identifying all of the alleged victims. Furthermore, the Commission considers that in cases such as this one, where the acts denounced are allegedly related to impairment of a group's rights because of the fact that they belong to said group, the criteria for identifying victims must be flexible and complete identification of all victims will be determined by the evidence presented by the parties at the merits stage.⁵

B. Exhaustion of domestic remedies and timeliness of the petition

10. The petitioners allege that the applicable domestic legal remedies were exhausted by a remedy for unconstitutionality filed by the Bar Association of Ica challenging Article 7(2) of Law N° 27360 that establishes a special employment system for workers in the agricultural sector. The Constitutional Court of Peru issued its decision thereon on November 21, 2008, which was officially published on February 2, 2008.

11. For its part, the State argues that there was no exhaustion of domestic remedies because the remedy for unconstitutionality filed was not the appropriate and suitable remedy for lodging the claims of harm to the alleged victim. Firstly, the State holds that Mrs. Pariahuachi Palacios did not make use of domestic remedies before resorting to the inter-American protection system, nor did she participate in the suit filed before the Constitutional Court. The State indicates that Article 203 of the Peruvian Constitution of 1993 expressly provides that specific authorities or eligible individuals may challenge the constitutionality of a law;⁶ given that Mrs. Pariahuachi Palacios is not any of the authorities mentioned, nor did she take part in any citizen initiative to challenge the aforementioned Law, the State considers that she did not file or exhaust domestic remedies.

12. Secondly, the State deems that domestic remedies were not exhausted because the purpose of the remedy of unconstitutionality filed was to abstractly challenge the constitutionality of the law and not to have the Court review a specific act that allegedly violated the rights invoked by the alleged victim. In this respect, the State notes that *amparo* appeals are provided for as one of the constitutional guarantees to protect the rights invoked by the alleged victim.

13. The Commission recalls that the rule for exhaustion of domestic remedies stipulated in Article 46(1)(a) of the American Convention provides that the appropriate remedies available in the domestic legal system must be pursued first to remedy the situation denounced.⁷ Furthermore, the IACHR has deemed that when the legislative provisions whose constitutionality is challenged have a direct effect on the rights of the alleged victims, who claim that a law is discriminatory, the remedy of unconstitutionality is an appropriate remedy to protect the legal situation infringed.⁸

⁴ IACHR, Report No. 51/10, Petition 1166-05, Admissibility, Tibú Massacres, Colombia, para. 102; IACHR, Report No. 86/06 Marino López et al. (Genesis Operation), para. 34, and Report No. 15/09, Massacre and Forced Displacement of Montes de María, para. 47.

⁵ IACHR, Report No. 61/16, Petition 12.325. Admissibility. Peace Community of San José de Apartadó. Colombia. December 6, 2016, para. 62; IACHR, Report No. 64/15 Petition 663-04. Admissibility. Mayan People and Members of the Cristo Rey, Belluet Tree, San Ignacio, Santa Elena, and Santa Familia Communities. Belize, para. 27; IACHR, Report N° 51/10, Petition 1166-05, Admissibility, Tibú Massacres, Colombia, para. 102; IACHR Report No. 86/06 Marino López et al. (Genesis Operation), para. 34.)

⁶ The President of the Republic, the Attorney General, the Ombudsman, 25% of the legal number of congressmen, 5,000 citizens whose signatures are verified by the National Elections Jury, the regional governors with the agreement of the Regional Council, or provincial mayors with the agreement of their Council, in matters under their remit, and professional associations, in matters addressing their area of expertise.

⁷ IACHR, Report No. 16/18, Petition 884-07. Admissibility. Victoria Piedad Palacios Tejada de Saavedra. Peru. February 24, 2018, para. 12.

⁸ IACHR, Report No. 51/18, Petition 1779-12. Admissibility. Kaqchikuel Maya Indigenous People of Sumpango et al. Guatemala. May 5, 2018, paras. 13, 14, and 16.

14. Additionally, the Commission notes that although the *amparo* appeal would have served the purpose of addressing the specific situation of the alleged victim, this constitutional review of the allegedly discriminatory law would have been consistent with the review that was undertaken in the remedy of unconstitutionality. In this sense, the Commission recalls that it is not necessary to exhaust all possible remedies, but, rather, those that are effective to address the situation denounced.

15. In this case, the Commission notes that the purpose of the remedy filed was to challenge the constitutionality of the provisions that establish a special system for workers from the agricultural sector. It is precisely these provisions that the petitioners invoke before the Commission as grounds for potential violations of rights of the alleged victim and the victims whose number will be determined with the evidence provided by the parties during the merits stage. Furthermore, it is noted that if a favorable decision had been handed down, this would have benefited the alleged victim and the number of victims determined during the merits stage. What is more, the Constitutional Court admitted the remedy and ruled on its merits. Therefore, the IACHR deems that the remedy of unconstitutionality was indeed a suitable remedy to address the situation denounced and that the State had the opportunity to address the alleged violation prior to it being heard by the bodies of the inter-American system.⁹ The Commission thus considers that domestic remedies have been exhausted as provided for under Article 46(1)(a) of the American Convention.

16. In relation to the timeliness of the petition, it was presented to the IACHR on July 28, 2008 and the remedies filed were exhausted on February 7, 2008, when notice was provided that the remedy of unconstitutionality had been rejected. Therefore, the Commission notes that the petition was presented by the six-month deadline, in compliance with the requirement provided for under Article 46(1)(b) of the American Convention.

VII. ANALYSIS OF CHARACTERIZATION OF THE FACTS ALLEGED

17. The petitioners contend that the State is responsible for violating the rights of Mrs. Rosa Elena Pariahuachi Palacios and other workers from the agricultural sector inasmuch as they consider that as of the entry into force of Law N°27360, they were subject to discriminatory treatment with respect to their employment rights and benefits. At the same time, the State affirms that the facts alleged do not characterize violations because it holds that differentiation does not necessarily entail discriminatory treatment, reiterating the arguments contained in the decision of the Constitutional Court of Peru.

18. The facts regarding the impact on the rights of individuals subject to the special system for the agricultural sector may, *prima facie*, characterize a violation of the obligations of Article 24 of the American Convention. In particular, the Commission will evaluate the purported discriminatory treatment in light of the Peruvian context of alleged historic and structural discrimination towards low-income *campesino* women. Without prejudging the merits of the case, the Commission recalls that a violation of the right to equal protection and non-discrimination may also occur in situations and cases of indirect discrimination, reflected in a disproportionate impact of provisions that, even when they are or seem to be neutral in their formulation or have a general undifferentiated scope, have adverse effects on certain vulnerable groups.¹⁰ The IACHR and the Rapporteurship on the Rights of Women have noted this pattern of discrimination with respect to women in the workplace.¹¹

19. As for the State's arguments regarding the lack of competence *ratione materiae*, given that Mrs. Pariahuachi's claims involve employment rights provided for in the Additional Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights, the IACHR notes that the petitioners did not allege violations of any Article of said Protocol. This notwithstanding, the Commission also recalls that, although it lacks competence *ratione materiae* to make rulings under its petitions' procedure on possible

⁹ IACHR, Report No. 75/14, Petition 1018-08. Admissibility. Ronald Moya Chacón and Freddy Parrales Chaves. Costa Rica. August 15, 2014, para. 32.

¹⁰ I/A Court H.R., Case of Nadege Dorzema et al. v. Dominican Republic, judgment of October 24, 2012, para. 235; I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, judgment of February 24, 2012, paras. 80, 2, and 267

¹¹ IACHR, *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.143 Doc. 59, November 3, 2011.

violations of the Articles of the Protocol of San Salvador other than those provided for in Article 19(6) thereof, that in keeping with Article 29 of the American Convention, the Commission may take said international instrument into account when interpreting and applying the Convention.

20. With respect to the State's fourth instance arguments, the Commission reiterates that in the framework of its mandate, it is competent to decide that a petition is admissible and rule on its merits when it refers to domestic proceedings that may violate rights guaranteed under the American Convention.

21. In that sense, the IACHR finds that, given the factual and legal arguments presented by the parties and the nature of the matter brought before it, the petitioners' arguments regarding the alleged violation of the right to work in fair and equitable conditions and the right to equal protection and non-discrimination in this case are not manifestly unfounded and therefore demand a review on the merits. Indeed, if these alleged violations were found to be true, they may characterize violations of rights protected under Articles 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention in relation to Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) thereof.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 24, 25, and 26 of the American Convention, in keeping with Articles 1(1) and 2 thereof.

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 22nd day of the month of April, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.