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REPORT N° 78/09
PETITION 478-05
ADMISSIBILITY
UNDOCUMENTED MIGRANT, LEGAL RESIDENT,
AND U.S. CITIZEN VICTIMS OF ANTI-IMMIGRANT VIGILANTES
UNITED STATES

Approved by the Commission at its session N° 1795
held on August 5, 2009

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I. SUMMARY

1. On April 28, 2005 the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," or "the IACHR") received a petition from Border Action Network (the "petitioners"), a nongovernmental organization based in Arizona that defends the rights of immigrants to the United States, against the Government of the United States of America (the "State", "United States" or "U.S."). The petition was presented on behalf of the presumed victims of twenty-four identified incidents and the class of undocumented migrants, legal residents, and U.S. citizens who have been victims of alleged acts of violence and intimidation at the hands of anti-immigrant vigilante groups and like-minded individuals operating primarily along the U.S. - Mexico border in southern Arizona.

2. The petition alleges that the State, through its failure to prosecute such alleged acts of vigilante violence, has violated and continues to violate the rights of the identified victims and other undocumented migrants, legal permanent residents, and U.S. citizens, enshrined in Articles I, II, XVIII of the American Declaration of the Rights and Duties of Man (the "American Declaration"), along with other principles of international human rights.

3. The petitioners claim to have satisfied the admissibility requirements established in Articles 23, 28, 32, and 33 of the IACHR Rules of Procedure. They further claim that the petition satisfies one or more of the exceptions to the requirement to exhaust domestic remedies, under Article 31(2) of the Commission's Rules of Procedure.

4. The State claims in response to the petition that the victims have failed to exhaust domestic remedies as required under Article 31 of the Inter-American Commission's Rules of Procedure. In addition, the State claims that the petition does not present a colorable claim of violation of any of the articles of the American Declaration, or other applicable instruments and should be deemed inadmissible under Article 34 of the IACHR Rules of Procedure.

5. In the present report, the IACHR examines the information available and the contentions on admissibility and --without prejudging the merits of the matter-- decides to admit the claims relating to violations of Articles I, II, and XVIII of the American Declaration with regards to any duty the State may have had to respond to alleged anti-immigrant vigilante violence and intimidation committed against the identified undocumented migrant alleged victims of incidents No. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 presented in the petitioner's submission of August 19, 2005.¹ The Inter-American Commission further decides to notify the parties of this decision, continue with the analysis of the merits of this case, and publish this decision and include it in its Annual Report to the OAS General Assembly.

¹ See Appendix No. 1 for the list of identified undocumented migrant alleged victims of the admissible incidents.

II. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION

6. The petition was registered as P478/05, after which the IACHR requested additional information from the petitioners as to the identity of specific victims, the circumstances of the alleged human rights violations, and the status of any pending proceedings. On August 19, 2005, the petitioners provided the Inter-American Commission with the details of 24 separate incidents and the names of presumed victims who allegedly suffered violations of their human rights at the hands of anti-immigrant vigilante groups and like-minded individuals in Cochise County, Arizona. Some of the alleged incidents also included a number of unidentified alleged victims. As part of the August 19, 2005 submission, petitioners also provided a status report on four pending civil lawsuits against some of the principal alleged perpetrators.

7. On November 23, 2005, the Inter-American Commission transmitted the pertinent parts of the petition to the United States, with a request for observations within two months as established by its Rules of Procedure. On the same date the IACHR informed the petitioners that their petition had been transmitted to the State. On January 20, 2006, the Inter-American Commission granted the State a 30-day extension for its response.

8. On April 26, 2006, the IACHR received the State's response and on April 28, 2006 transmitted the pertinent parts of it to the petitioners. On May 15, 2006, the Inter-American Commission granted a 30 day extension to the petitioners in order to reply to the State's response. On June 16, 2006, the petitioners' reply to the State's response was received. The IACHR transmitted the pertinent parts of the petitioners' reply to the State on June 21, 2006.

9. On September 18, 2006, the State informed the IACHR that it had no further information to add to its initial response. In a letter dated October 25, 2006 the petitioners responded reemphasizing their position on admissibility and claiming the State did not refute the basic facts of the petition.

10. On April 5, 2007, the Inter-American Commission transmitted the pertinent parts of the petitioners' rejoinder to the State, which responded on May 7, 2007. The State denied conceding any of the essential facts of the petition and reiterated its position on lack of exhaustion of domestic remedies.

11. By letter dated January 8, 2008, the petitioners requested a hearing, which was granted and held on March 7, 2008 during the Inter-American Commission's 131st Sessions. On April 15, 2008, the petitioners provided the IACHR with supplemental information that addressed the Commissioners' questions and the State's responses during the hearing.

12. The Inter-American Commission transmitted the pertinent parts of the petitioners' supplemental submission to the State on July 7, 2008, with a request that the State provide any response within one month. The Inter-American Commission did not receive any further observations from the State within the prescribed time period.

II. POSITIONS OF THE PARTIES

A. Position of the Petitioners

13. The petitioners' submissions identify several hundred presumed victims by name and allege 24 specific incidents of violence and intimidation by anti-immigrant vigilante groups and like-

minded individuals in Cochise County, Arizona.² In the course of those 24 incidents, the petitioners claim that at least 10 different state and federal crimes were committed but not prosecuted. These crimes include impersonation of a federal employee, conspiracy against rights, assault, vicious animal assault, aggravated assault, threatening or intimidating, endangerment, conspiracy, unlawful imprisonment, and intimidation.³ The petitioners also included a report prepared by the Mexican Consulate in Douglas, Arizona (within Cochise County), which documents 65 alleged incidents involving nearly one thousand immigrants, who were allegedly subjected to threats, violence, and intimidation by anti-immigrant vigilante groups or like-minded individuals.⁴

14. The petitioners allege that in all but one of the 24 incidents specifically addressed, vigilantes used firearms to threaten and detain the presumed victims against their will.⁵ The petitioners report at least four incidents where vigilantes fired shots to intimidate the victims, and twelve occasions when vigilantes pointed their firearms directly at the victims, threatening them with violence if they did not cooperate.⁶

15. According to the petitioners, vigilantes also often used aggressive dogs to frighten the victims into acquiescing. The petitioners report the use of dogs during 9 of the 24 documented incidents.⁷ During one incident, a vigilante's dog bit one of the victims in the thigh as he tried to escape, while another victim was treated for multiple dog bites after another incident.⁸

16. Many times the vigilantes allegedly wore clothes similar to the official uniforms of the U.S. Border Patrol, often confusing the presumed victims with respect to the vigilantes' true identities and lack of authority to detain.⁹ During every incident, the petitioners report that the vigilantes were verbally abusive, often screaming obscenities and racial epithets at the victims.¹⁰ They also mention that often the vigilantes were physically abusive, assaulting a number of the victims. Once the victims were detained, vigilantes often photographed or videotaped the individuals they had captured before contacting the U.S. Border Patrol.¹¹

17. The following are excerpts from three of the incidents, which provide examples of the type of treatment alleged by the petitioners:

Incident # 10: In the early afternoon [of June 5, 2004], the [] group of 7 victims was resting in the brush near Highway 80, in what has (*sic*) supposedly part of Roger Barnett's Cross Rail Ranch. The victims heard the sound of a vehicle nearby, and Roger Barnett and his brother appeared shortly thereafter. The victims split up to run away and hide, but the Barnetts pursued and eventually caught up to them. Roger Barnett overtook one group of victims on foot, then grabbed one of the women, [REDACTED] by her hair and stuck a pistol against her left side near her ribs. He then held up his gun in front of the rest of the victims and said, 'Do you know what this is?' Meanwhile, Barnett's brother mounted an ATV and , with his dog, followed behind [REDACTED] who was attempting to escape on

² Petitioners' submission dated August 19, 2005.

³ Petitioners' submission dated Mar. 7, 2008, p. 1.

⁴ Petitioners' submission dated April 28, 2005, p. 11, App. X.

⁵ Petitioners' submission dated Aug. 19, 2005.

⁶ *Id.*

⁷ *Id.*

⁸ Petitioner's submission dated August 19, 2005, pp. 12, 9.

⁹ Petitioner's submission dated August 19, 2005.

¹⁰ *Id.*

¹¹ *Id.*

foot. The Barnetts' dog caught up with ██████ and bit him in the thigh. The dog bite caused him to fall to the ground, where Barnett's brother soon arrived, kned him in the stomach and carried him away on the front of his ATV to meet Barnett and the others. [footnotes omitted].¹²

18. The petitioners add:

Several of the above victims gave accounts of the incidents to the Cochise County Sheriff's Department. The department report on the incident states that the Barnetts had committed two felony violations under Arizona law: Aggravated Assault, class 3 felony; and Disorderly Conduct, class 6 felony." [footnotes omitted]. Despite the incident being raised to the federal Assistant United States Attorney and the local Cochise County Attorney by both the Cochise County Sheriff's Department and the U.S. Border Patrol, no charges were ever brought.¹³

Incident # 13: On October 30, 2004, Roger and Don Barnett detained members of the ██████ and ██████ Families—all U.S. nationals of Mexican-American Descent and longstanding residents of Cochise County—at gunpoint, barraging them with harsh language and racial insults. ██████ and ██████ were hunting that afternoon on what they believed to be state land, accompanied by ██████'s daughters, nine-year old ██████, eleven year-old ██████ and ██████'s eleven year-old friend ██████. As ██████ was away tracking a deer with ██████ close behind, Don Barnett approached ██████, ██████ and ██████ on an ATV and began yelling at them to 'get the fuck out' of his property. ██████ and ██████ heard the commotion and came quickly to the scene, followed by Roger Barnett, who arrived in a Dodge pickup. Roger Barnett got out of his truck toting an A-15 assault rifle, then fired a round into the ground and pointed the gun at the ██████' (*sic*) and the young girls." [footnotes omitted]. During the ensuing argument, Roger Barnett allegedly called ██████ an "ignorant Mexican" and "advanced on him, all the while pointing his rifle and screaming obscenities and death threats" [footnotes omitted].¹⁴

19. The Cochise Sheriff's Department's initial investigation "concluded that the Barnetts had committed eight counts of aggravated assault, five counts of disorderly conduct and five counts of threat and intimidation" [footnotes omitted] during alleged Incident # 13. Nonetheless, the Cochise County Attorney never brought criminal charges against the Barnetts.¹⁵

Incident # 14: On August 1, 2003 the [] victims were detained by nine 'volunteers' of the militant organization Civil Homeland Defense, headed by Chris Simcox of Tombstone, Arizona. At around 7:45p.m. on the above date, the victims were walking north of Naco, Arizona, when they were approached by several of the armed vigilantes, some of which had night vision lenses. At first, several of the victims thought the armed vigilantes were law enforcement officials, which indicates that the assailants wore clothing that resembled law enforcement official uniforms. Some of the victims were able to flee from the scene, however, most of the group traveling obeyed the orders given by the individuals who carried weapons. One of the assailants pointed a high caliber gun menacingly while other assailants had holstered guns. The assailants ordered the victims to stop, sit on the ground and not to escape, all in an intimidating manner. Once the victims were detained, the vigilantes started taking photographs of them and filming them with video cameras. The victims also stated that their captors seemed to (*sic*) very happy since they were laughing at all times – and one of them, in broken Spanish, told the victims that if they ever came back to the United States, 'that would mean war.' The victims were later taken to the USBP [United States Border Patrol] station in Naco [footnotes omitted].¹⁶

¹² All 24 incidents and their respective alleged victims are summarized in Appendix No. 1

¹³ See Petitioner's submission dated Aug. 19, 2005, pp. 12-13.

¹⁴ See Petitioner's submission dated Aug. 19, 2005, pp. 15-16.

¹⁵ *Id.*; Petitioner's submission April 28, 2004, App. W16.

¹⁶ See Petitioner's submission dated Aug. 19, 2005, pp. 16-17.

The victims reported the incident in their interviews with the Mexican Consulate and USBP. Mexican Consul Escobar stated that the USBP reported the incident to the U.S. Attorney in Tucson. Cochise County Attorney, Chris Roll, was present at the Naco station and told Consul Escobar that all 29 victims would be retained, and his office would select certain victims to serve as material witnesses in what seemed at the time to be the likely event that charges were pressed against Simcox and the other assailants. Despite these assurances, no further action was taken against this particular vigilante group [footnotes omitted].¹⁷

20. The petitioners indicate that, while some of these incidents appear to have occurred on the vigilantes' personal property or property leased by the vigilantes from the federal or state government, many of the incidents seem clearly to have occurred on public lands, other individuals' lands, or land directly adjacent to public roads and highways.

21. According to the petitioners, all 24 incidents were reported to the Cochise County Attorney and many were reported to the federal U.S. Attorney's Office.¹⁸ Despite the Mexican Consul, the American Civil Liberties Union (ACLU) and the petitioners' concerted efforts to have authorities press charges, federal and state authorities never followed through in any of the incidents. The petitioners also allege that over the past few years they and other civil society organizations have made repeated pleas to the Arizona Attorney General and other federal, state, and local government officials to address these acts of anti-immigrant vigilantism but to no avail.¹⁹

22. The petitioners do report that victims in four of the incidents did subsequently file civil lawsuits against the perpetrators. However, due to the difficulties for deported migrants to pursue a civil action, only two of the four civil lawsuits involve undocumented migrants. As of the initial petition, all four lawsuits were still pending.²⁰ In a subsequent submission, the petitioners attached a *New York Times* article dated November 24, 2006, which reports that the victims of Incident # 13, excerpted above, were awarded \$98,750 in their civil action against Mr. Barnett.²¹ The *New York Times* reports that, during the trial Mr. Barnett stated that "the legal action would not deter his efforts," and that "[f]or your children, for our future, that's why we need to stop them."²² Indeed, the petitioners allege they continue to receive reports of Mr. Barnett's illegal anti-immigrant vigilante activities.²³

23. In addition to those they name as victims, the petitioners seek redress for alleged human rights violations committed against the class of individuals --undocumented migrants, legal permanent residents, and U.S. citizens-- subjected to violence, threats, and intimidation perpetrated by anti-immigrant vigilante groups and like-minded individuals.

¹⁷ *Id.*

¹⁸ *See*, Petitioners' submission dated Aug. 19, 2005.

¹⁹ Petitioners' submission dated April 28, 2005, pp. 17-20, 22-23, Apps. BB-EE.

²⁰ Petitioners' submission dated Aug. 19, 2005, pp. 26-28.

²¹ *New York Times*, "A Border Watcher Finds Himself under Scrutiny," (Nov. 24, 2006), *available at* <http://www.nytimes.com/2006/11/24/us/24border.html?adxnnl>.

²² *Id.*

²³ Petitioners' submission dated Mar. 7, 2008.

24. The petitioners report that in the face of the State's inaction to crackdown on border vigilante activities, the anti-immigrant vigilante movement is multiplying. The Southern Poverty Law Center, a U.S. non-profit civil rights organization, has identified 144 nativist extremist groups in 39 states.²⁴ That same organization reports nearly 100 of them were formed after April 2006.²⁵

25. In the vacuum of State inaction, according to the petitioners, anti-immigrant vigilantism, racial profiling, discrimination and attitudes of xenophobia are proliferating across the border region and beyond.

26. The petitioners also assert that the victims are exempt from exhausting domestic remedies because they consider that the petition satisfies one or more of the three grounds for exemption articulated in Article 31(2) of the IACHR's Rules of Procedure. In particular, they affirm that the exceptions found in Article 31(2)(b) and 31(2)(c) apply in the present petition.²⁶

27. According to the petitioners, all 24 specific incidents were brought to the attention of the County Attorney for Cochise County, Arizona and many to the U.S. Attorney's Office. Despite the Cochise County Sheriff's Department and the U.S. Border Patrol's opinion that vigilantes committed criminal violations in a number of these incidents,²⁷ neither the county nor U.S. Attorney's offices ever pressed charges. The petitioners contend that the victims "[have] been denied access to the remedies under domestic law or have been prevented from exhausting them" and that the exhaustion requirement does not "apply to situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact."²⁸

28. In addition, to the extent that federal, state, and local government officials claim that investigations into the specified incidents are still on-going, the petitioners asserts that "there has been unwarranted delay in rendering final judgment," as prescribed in Article 31(2)(c). The petitioners note that the Inter-American Commission has a standing policy that "where [an] 'investigation has been prolonged to an excessive degree, without any sign that the government intends to intensify or accelerate it,' domestic remedies are proven unavailable as a matter of fact."²⁹

29. The petitioners report at least one incident dating back to October 10, 1999. The petitioners allege that despite numerous interviews of various victims, promises to investigate incidents, detention of material victims before deportation, and reports of criminal behavior prepared by both state and federal law enforcement officials, both the county and U.S. Attorney's offices have not brought charges in any of the incidents nor have indicated that they continue to investigate any of the incidents.³⁰

²⁴ The petitioners cite Southern Poverty Law Center, "Shoot, Shovel, Shut Up," (Spring 2007), available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=763>.

²⁵ *Id.*

²⁶ Petitioners' submissions dated April 28, 2005, pp. 26-29; Mar. 7, 2008, p. 3; and June 16, 2006.

²⁷ *Id.* at pp. 11-15, paras. 31-37.

²⁸ Petitioners' submission dated April 28, 2005, citing Inter-Am. Ct. Advisory Opinion, OC 11/90, para. 17 (Aug. 10, 1990).

²⁹ Petitioner's submission dated April 28, 2005, para. 64, citing Case 11.598 (Brazil), Inter-Am. C. H.R. 399, OEA/Ser.L/V/II.106, doc. 3rev. paras. 24-25 (2000).

³⁰ Petitioners' submission dated Aug. 19, 2005; Petitioner's submission dated June 16, 2006, pp. 7-10.

30. Further, the petitioners contend that civil lawsuits are not an adequate remedy as a matter of law and fact for human rights violations that constitute criminal acts.³¹ The petitioners assert that the Inter-American Commission has maintained that the requirement to exhaust domestic remedies does not apply when human rights violations represent “crimes of public action” and the State fails to comply with its “non-delegable” duty to criminally prosecute.³² “A crime of public action is ‘a criminal action of the type that must be prosecuted at the initiative of the authorities.’”³³ With regards to crimes of public action, the petitioners state that “the Commission has held that States have ‘a duty to maintain public order, and therefore [have] an obligation to set the criminal law system into motion and to process the matter until the end.’”³⁴ In short, the petitioners assert that the Inter-American Commission has held that civil remedies are an inadequate remedy for criminal acts, particularly when the State holds the monopoly on the ability to press criminal charges.³⁵

31. The petitioners further advance that civil remedies, as a matter of fact, have proven to be an inadequate remedy in this case. Of the 24 incidents detailed, the petitioners allege only 4 civil lawsuits have been filed.³⁶ Of those four, only two have included undocumented migrants, the most vulnerable class of victims.³⁷ Of those four, only in one lawsuit have victims received monetary damages.³⁸ Subsequent to that lawsuit, the petitioners reports that it continues to receive reports of human rights violations committed by the same vigilante perpetrator.³⁹ Consequently, the petitioners conclude that civil remedies as a matter of fact have proven to be ineffective to redress the human rights violations to the victims.

32. Finally, the petitioners stress that “[a] ‘State claiming non-exhaustion [of domestic remedies] has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.’”⁴⁰ The petitioners assert that the State has not satisfied its burden of proof.

B. Position of the State

33. The State contends the petition is inadmissible on two independent grounds. First, the State asserts that the victims have not exhausted effective domestic remedies.⁴¹ Second, the State asserts that even if the Inter-American Commission determines that the victims are exempt from exhausting domestic remedies, their petition does not present a colorable claim of a violation

³¹ Petitioners’ submission dated June 16, 2006, p. 2.

³² Petitioners’ submission dated April 28, 2005, para. 64; Petitioner’s submission dated June 16, 2006, p. 2, citing Case 11.589 (Cuba), Inter-Am. C.H.R. 586, OEA/Ser.L/V/II.106 doc.3 rev. para. 47 (2000).

³³ Petitioners’ submission dated June 16, 2006, pp. 2-3, citing Jose Ruben Rivera, Report No. 53/05 (admissibility), Petition 880/01 (El Salvador), Inter. Am. C.H.R., para. 11 (Oct. 12, 2005).

³⁴ Petitioner’s submission dated April 28, 2005, para. 64, citing Case 11.589 (Cuba), Inter-Am. C.H.R. 586, OEA/Ser.L/V/II.106 doc.3 rev. para. 47 (2000).

³⁵ Petitioner’s submission dated June 16, 2006, p. 3; Petitioner’s submission dated April 15, 2008, para. 2, citing, Michael Gayle, Report No. 8/03 (Admissibility), Petition 191/02 (Jamaica), Inter-Am. C.H.R., para. 41 (Feb. 20, 2003); Christian Daniel Domínguez Domenichetti, Report No. 51/03 (Admissibility), Petition 11.819, (Argentina), Inter. Am. C.H.R. paras. 46-47 (Oct. 22, 2003).

³⁶ Petitioner’s submission dated Aug. 19, 2005, pp. 26-28.

³⁷ Id.; Petitioner’s submission dated June 16, 2006, p. 13, citing, Juridical Condition and Rights of Undocumented Migrants, Inter. Am. Ct. H.R., Advisory Opinion OC-18/03, p. 11 (Sept. 17, 2003).

³⁸ See supra para. 25.

³⁹ Petitioner’s submission dated Mar. 7, 2008, paras. 5-6.

⁴⁰ Petitioner’s submission June 16, 2006, p. 2.

⁴¹ State’s response submitted April 26, 2006, p. 1.

under the American Declaration.⁴² Consequently, the State requests that the petition be deemed inadmissible under Article 34 of the Commission's Rules of Procedure.

34. The State asserts that the relevant U.S. Attorney's Office and the Cochise County Attorney's Office "have conducted investigations and filed charges when there is sufficient evidence to warrant prosecution within their jurisdictions." The State stresses that many times a state or federal prosecutor will not press charges if, after a thorough review of the evidence, he or she determines that there is insufficient evidence to prove a criminal violation "beyond a reasonable doubt," the U.S. standard of proof for criminal convictions.⁴³

35. The State further opines that an Arizona law, permitting the threat of deadly force or use of non-deadly physical force to protect other persons or one's property, played a significant role in the prosecutors' decision not to press charges in at least 12 of the incidents specified in the petition.⁴⁴ Arizona Statute 13-407(A) states:

A person or his agent in lawful possession or control of premises is justified in threatening to use deadly physical force or in threatening or using physical force against another when and to the extent that a reasonable person would believe it immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by the other person in or upon the premises.⁴⁵

36. In addition, the State contends that the prosecutors' ability to press charges in a number of the incidents was complicated by the victims' refusal to press charges and unwillingness to testify in court.⁴⁶

37. Despite these obstacles, the State claims that prosecutors have pressed charges in anti-immigration vigilante cases when they can secure convictions. The State presents six criminal cases, some brought against individuals connected to anti-immigrant vigilante activities, from various jurisdictions along the U.S.-Mexico border.⁴⁷ One of the State's examples was brought by the U.S. prosecutor with jurisdiction over Cochise County, Arizona against individuals, who were convicted of harboring illegal aliens, people smuggling, kidnapping, and aggravated assault.⁴⁸

38. The State emphasizes that civil suits provide an additional adequate avenue of redress, in part because of the lower standard of proof.⁴⁹ The State recounts the four civil lawsuits cited by the petitioners, along with two others—one of which was filed in Texas.⁵⁰

39. Finally, the State contends that, even if the Inter-American Commission determines that the victims are exempt from exhausting domestic remedies, the petitioners do not allege facts that present a colorable claim of the State's violation of its obligation under Articles I, II, and XVIII of the American Declaration.⁵¹ The State avers that its officials have investigated and prosecuted

⁴² State's response submitted April 26, 2006, p. 9.

⁴³ State's response submitted April 26, 2006, p. 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 4-5.

⁴⁷ See *id.* at 5-7.

⁴⁸ *Id.* at 7; "Man guilty in torture of entrants," ARIZONA DAILY STAR (Feb. 3, 2005).

⁴⁹ State's response submitted April 26, 2006, p. 7.

⁵⁰ *Id.* at 8.

⁵¹ *Id.* at 9.

claims when it could secure convictions. Moreover, the right to bring civil lawsuits was available to all the victims, irrespective of their race and national origin.⁵² Therefore, the State asserts that the petition should be ruled inadmissible under Article 34 of the Commission's Rules of Procedure.⁵³

III. ANALYSIS ON ADMISSIBILITY

A. Competence *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

40. Upon considering the record before it, the IACHR considers that it has competence *ratione personae* to entertain the claims presented in the petition on behalf of the identified, alleged victims determined to be exempt from exhausting domestic remedies in subsection III.B. below.

41. Under Article 23 of the Commission's Rules of Procedure, the petitioners are authorized to file complaints alleging violations of rights protected under the American Declaration. The alleged victims are persons whose rights are protected under the American Declaration. The Inter-American Commission's rules and jurisprudence recognize scenarios in which it is not possible to identify every victim by name. Article 28(e) of the Commission's Rules of Procedure states that petitions shall contain "if possible, the name of the victim..." Article 28(e) deliberately does not require full identification of all alleged victims under every circumstance at the admissibility stage. The IACHR recognizes that certain human rights violations, by their nature or circumstances, may affect a given individual or group of persons who cannot be fully identified, due to extraneous circumstances, but who is identifiable according to specific criteria.⁵⁴

42. In recent jurisprudence from the Inter-American Court on Human Rights, the Court has treated the requirement to identify individual victims differently in the context of individual cases and resolutions about provisional measures. The Court has established two different standards: a lower one for provisional measures, in the sense that the beneficiaries must only be "identifiable."⁵⁵ And a higher one for contentious cases, like the present case, in which the victims must be concretely identified.⁵⁶ In light of these decisions, the Commission has recently decided that "the jurisprudence of the Commission has been guided by its interpretation of Article 44 of the American Convention, according to which, for a petition to be admissible, there must be specific individually identified victims or refer to a specific and set group of victims composed of distinguishable individuals."⁵⁷

43. Consequently, the Inter-American Commission determines that it has competence *ratione personae* to entertain the claims presented on behalf of only the fully identified alleged

⁵² *Id.*

⁵³ *Id.* at 10.

⁵⁴ Mariano Lopez et al. (Operation Genesis), Petition 499-04, Inter. Am. C.H.R. 86/06 (Admissibility) (Colombia) (Oct. 21, 2006) (recognizing the difficulty of identifying all potential victims who allegedly were displaced by the Colombian Government).

⁵⁵ *See, e.g.*, Inter. Am. Ct. H.R., *Matter of Haitians and Dominicans of Haitian Origin in the Dominican Republic*, Resolution of 18 August 2000, Considering 8; Inter. Am. Ct. H.R., *Matter of the Peace Community of San José de Apartadó*, Resolution of 24 November 2000, Considering 7 and Resolving Point 3 (adopting provisional measures "to project the life and personal integrity of all [] members of the Peace Community of San José de Apartadó").

⁵⁶ *See* Inter. Am. Ct. H.R., *Case of the "Juvenile Reeducation Center"*, Judgment of 2 September 2004, para. 108 (stating that, "this identification requirement is different than the one applied in the case of provisional measures [...] [when] the beneficiaries of the measures need only be identifiable", and para. 109: "In view of the foregoing, and in order to guarantee the [...] effective protection of the rights of the alleged victims, the latter must be properly identified").

⁵⁷ Inter-Am. C.H.R. Interstate Case 01/06. Report 11/07, para. 189.

victims listed in Annex No.1, who the Inter-American Commission determines are exempt from exhausting domestic remedies in Section III. B., below, based on the facts alleged in the petition.

44. With regards to petitioners' broader claim for all alleged victims of anti-immigrant vigilante violence and intimidation and any unidentified alleged victims of the 24 incidents, based on the Inter-American Court's jurisprudence and the Commission's own cases discussed above, the Commission finds that it does not have *ratione personae* over this larger group of unidentified alleged victims.

45. The United States is bound by the obligations under the American Declaration in conformity with the OAS Charter, Article 20 of the Commission's Statute and Article 49 of the Commission's Rules of Procedure. The United States has been bound by the obligations of the American Declaration since June 19, 1951, the date on which it deposited its instrument of ratification of the OAS Charter.

46. The Inter-American Commission also considers that it is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred subsequent to the date on which the United States' obligations under the American Declaration took effect.

47. In addition, the Inter-American Commission finds that it is competent *ratione loci*, given that the petition indicates that the identified, alleged victims were under the jurisdiction of the United States at the time the alleged events occurred, which reportedly took place within the territory of that State and this has not been contradicted by the State.

48. Finally, the Inter-American Commission has competence *ratione materiae* to examine the petitioners' claim that the State violated Articles I, II, and XVIII of the American Declaration by failing to fully investigate, prosecute, and/or provide other adequate, effective domestic remedies to prevent anti-immigration vigilante violence and intimidation perpetrated against the identified, alleged victims, who the Inter-American Commission determines are exempt from exhausting domestic remedies.

B. Exhaustion of domestic remedies

49. Article 31(1) of the Commission's Rules of Procedure provides that for a petition to be admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to give the domestic authorities an opportunity to look into the alleged violation of a protected right and, if appropriate, resolve it before it is taken up by an international forum.

50. The rule of prior exhaustion applies when the domestic system actually affords remedies that are adequate and effective in remedying the alleged violation. Article 31(2) of the Commission's Rules of Procedure provides that this requirement shall not apply (a) when the domestic system of laws does not afford due process for the protection of the right in question; (b) or if the alleged victim did not have access to the remedies under domestic law; (c) or if there has been an unwarranted delay in rendering a final judgment on those remedies. As Article 31 stipulates, when the petitioners allege any of these exceptions, it is up to the State to demonstrate to the Inter-American Commission that adequate, effective domestic remedies have not been exhausted, unless that is clearly evident from the record.⁵⁸

⁵⁸ See Inter-Am. Ct. H.R., *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Series C No. 1, paras. 79-97 (June 26, 1987).

i. Domestic Criminal Remedies

51. The petitioners recount 24 specific incidents of alleged human rights violations under the American Declaration that occurred in Cochise County, Arizona. In the course of those 24 incidents, the petitioners allege that the vigilante perpetrators committed at least 10 different state and federal criminal violations, often multiple times. The record shows that law enforcement authorities and/or the Mexican Consulate reported each of these incidents, except for Incident No. 8, to the Cochise County prosecutor and/or the U.S. Attorney's office, putting the proper authorities on notice to open criminal investigations.⁵⁹ Moreover, the record demonstrates that the ACLU followed-up with both the local and federal prosecutors' offices after it had received many of the police reports contained in Appendix W of the petitioner's initial submission.⁶⁰ The petitioners allege that the local and federal prosecutors only performed cursory investigations into some of the incidents and did not press charges in any of the incidents. The record demonstrates that no criminal charges have ever been filed in any of the alleged incidents.⁶¹

52. The State stresses that the prosecutors would press charges only if they felt confident of securing convictions—i.e., satisfy the “beyond a reasonable doubt” standard in criminal cases. The State contends that a landowner's right to threaten deadly force to protect his property, under Arizona Statute 13-407(A) quoted above in paragraph 38, presents a significant obstacle to securing convictions in many of the incidents presented by the petitioners. However, as the petitioners' note, Arizona Statute 13-407(A) only permits a landowner to threaten deadly force in the event a *reasonable person* would believe it necessary to prevent or terminate a *criminal trespass*. Under Arizona Statute 13-1502, the minimum form of criminal trespass requires that the person “[k]nowingly enter[ed] or remain[ed] unlawfully on any real property after a reasonable request to by the owner or any other person having control over such property, or reasonable notice prohibiting entry.”⁶² The State provides no evidence that the alleged victims were warned by the alleged vigilante landowners or that the alleged victims ignored a request to leave the property. No evidence has been presented that the alleged victims disobeyed “no trespass” signs. Indeed, the petitioners' submissions, including the Cochise County Sheriff reports, indicate that many of the presumed incidents occurred off the property of alleged vigilantes, in which case the cited statute would not be relevant.⁶³

53. The State further presents six different examples where prosecutors pressed charges against alleged perpetrators of anti-immigrant vigilante violence. The State's six examples, however, appear to be largely irrelevant or tangential to the types of complaints alleged in the petition. The six cases, as presented, do not demonstrate that criminal remedies exist for the alleged victims in Cochise County, Arizona. The State presents a number of cases that appear only to be tangentially related to anti-immigrant vigilantism or were not prosecuted in Cochise County, Arizona, where all of the identified, alleged incidents occurred and where jurisdiction would reside. The State has only presented one criminal case brought by the federal or state prosecutor with jurisdiction over Cochise County, Arizona, which involved individuals ultimately convicted for

⁵⁹ See Petitioner's submission August 19, 2005; Petitioner's submission April 28, 2005, Apps. W. Appendix W contains the police reports from 11 of the alleged incidents (W1, W2, W5-W8, W11, W12, and W14-W16). These incident reports were forwarded to proper prosecutorial authorities for criminal investigation. Likewise, with regards to the other admissible alleged incidents, the petitioner's August 19th submission contains evidence that the Mexican Consulate notified proper authorities regarding those incidents, putting them on notice to open criminal investigations.

⁶⁰ Petitioner's submission April 28, 2005, Apps. BB-CC.

⁶¹ Compare Petitioner's submission April 28, 2005, Apps. W and DD3 with Petitioner's submission June 16, 2006, p. 7, quoting Cochise County Deputy Attorney Festa stating to the media that “as long as [vigilantes] don't use deadly force, no criminal action has taken place.”

⁶² Ariz. Stat. 13-1502, available at <http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp>.

⁶³ Petitioner's submission April 28, 2005, App. W.

people-smuggling amongst other crimes as part of an apparent coyote operation to assist individuals entering the United States illegally. The petitioners' petition focuses on anti-immigrant vigilante violence, not crimes committed in the course of facilitating illegal immigration. Consequently, this one case from the jurisdiction principally in question would seem to be largely irrelevant to the pattern of activities alleged in the petitioners' petition.

54. In the United States, the State holds a complete monopoly on bringing criminal prosecutions, and the system does not provide the presumed victim with a participatory role in the decision to prosecute or with any ordinary judicial appeal against a decision not to prosecute. Beyond notifying the proper authorities, which they did, there are no other measures the alleged victims could pursue to exhaust criminal domestic remedies. There is no indication that criminal investigations are still on-going in any of the alleged incidents. Therefore, based on the evidence presented, the Commission concludes that alleged victims, except for those in Incident No. 8, have exhausted criminal domestic remedies or satisfy one of the exceptions under Article 31(2).

ii. Domestic Civil Remedies

55. During its 131st Period of Sessions, the Commission held a hearing in this case that focused in part on whether civil domestic remedies were adequate and effective and needed to be exhausted by the alleged victims. The petitioners cite to a series of Inter-American precedents that hold that civil lawsuits, exclusively, do not provide an adequate or effective form of domestic remedy for certain types of crimes.⁶⁴ The petitioners quote from those cases that the requirement to exhaust domestic remedies is excused when human rights violations represent "crimes of public action" and the State fails to comply with its "non-delegable" duty to criminally prosecute.⁶⁵ A State has "a duty to maintain public order, and therefore [has] an obligation to set the criminal law system into motion and to process the matter until the end."⁶⁶

56. The facts of those cases, however, are distinguishable from those in the present case. In each of those cases, the State was alleged to be a principal actor in an underlying human rights violation of a criminal nature. The cases cited involved State participation in murder, forced disappearance, and torture.⁶⁷ In the present case, the alleged incidents were presumably committed by non-state actors, so the standards cited with respect to the prosecution of state agents do not apply in the same way. The Commission finds in the present case that a criminal domestic remedy is not the only adequate, effective domestic remedy. Without more evidence that local and federal prosecutors refused to investigate the petitioners' criminal complaints, the Commission will reserve judgment on the local and federal prosecutors' failure to ever bring criminal charges in any of the alleged incidents.

57. The State contends that civil remedies are available to all the alleged victims of the 24 alleged incidents. While this is true in the formal sense, the Commission concludes that civil remedies are not available in an equal and nondiscriminatory basis to all the alleged victims.

⁶⁴ See, e.g., Inter-Am. C.H.R., *Armando Alejandro, Jr., Carlos Costa, Mario De La Pena, and Pablo Morales*, Report N° 86/99, Case 11.589, (Cuba) (2000); *Jose Ruben Rivera*, Report N° 53/05, (Admissibility), Petition 880/01 (El Salvador) (Oct. 12, 2005); *Michael Gayle*, Report No. 8/03 (Admissibility), Petition 191/02 (Jamaica) (Feb. 20, 2003).

⁶⁵ Petitioner's submission dated April 28, 2005, para. 64; Petitioner's submission dated June 16, 2006, p. 2, citing Case 11.589 (Cuba), Inter-Am. C.H.R. 586, OEA/Ser.L/V/II.106 doc.3 rev. para. 47 (2000).

⁶⁶ *Armando Alejandro, Jr., Carlos Costa, Mario De La Pena, and Pablo Morales*, Case 11.589 (Cuba), Inter-Am. C.H.R. 586, OEA/Ser.L/V/II.106 doc.3 rev. para. 47 (2000); *Jose Ruben Rivera*, Report No. 53/05, (Admissibility), Petition 880/01 (El Salvador), Inter. Am. C.H.R., par. 11 (Oct. 12, 2005).

⁶⁷ See *supra* note 64.

58. As the Inter-American Court for Human Rights held in its advisory opinion on the "Juridical Condition and Rights of the Undocumented Migrants," "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure and national and international public order rests on it and it is a fundamental principle that permeates all laws."⁶⁸ The Court found that from this fundamental principle flowed the obligation that "[under] domestic laws, States must ensure that all persons have access, without any restriction, to a simple and effective recourse that protects them in determining their rights, irrespective of their migratory status."⁶⁹

59. In the present case, all of the identified alleged victims in incidents No. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 were deported from the United States within hours or a few days of the alleged incidents. During the time that they were in the country, they were detained and had limited to no access to legal counsel. The State contends that once returned to their home country, each of these alleged victims could have pursued a civil lawsuit in the United States against the alleged perpetrators. While this is theoretically possible, the Commission concludes that the identified alleged victims with an undocumented status do not have effective access to pursue civil remedies in the United States. For example, any undocumented alleged victim would have to obtain an attorney in the United States from outside the country,⁷⁰ would not be able to meet with his or her attorney unless the attorney came to the undocumented migrant's home country, and the alleged undocumented victim would not be able to participate in any trial held in the United States. In a similar case, *José Sánchez Guner Espinales et al. v. Costa Rica*, the Commission held undocumented migrants exempt from exhausting domestic remedies due to their immediate deportation.⁷¹ Based on the barriers affecting the alleged victims access to pursue domestic civil remedies and inter-American system precedents, the Commission concludes that the identified undocumented alleged victims of incidents No. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 are exempt from exhausting domestic remedies under Article 31(2)(a)&(b) because they were not afforded an adequate and effective domestic remedy.

60. In contrast, to the incidents referenced in paragraph 60, the alleged victims in Incidents No. 12 and 13 are U.S. nationals. In the case of Incident No. 13, the alleged victims pursued a civil lawsuit and won a judgment of US\$98,500. The Commission concludes, under the facts of this case, that the alleged victims of incident No. 13 have had access to an effective remedy and that no further review would be warranted. Likewise, it is the Commission's understanding that the alleged victim of incident No. 12 is still in civil litigation against the alleged perpetrators. Consequently, the Commission rules that the alleged victim's claim regarding incident No. 12 is currently inadmissible for failure to exhaust domestic remedies.

C. Timeliness of petition

61. Under Article 32(2) of the IACHR's Rules of Procedure: "In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission." The Inter-American Commission is permitted to assess this criterion for admissibility on a case-by-case basis, based on the circumstances of the given case.

⁶⁸ Inter-Am. Ct. H.R., "Juridical Condition and Rights of the Undocumented Migrants," Advisory Op. OC-18/03, para.101 (Sept. 17, 2003).

⁶⁹ *Id.* at para. 107.

⁷⁰ Moreover, many undocumented migrants are indigent implicating a possible exception to exhaustion under Inter-Am Ct. H.R., Advisory Op. OC-11/90 (Aug. 10, 1990).

⁷¹ Inter-Am. C.H.R., Report N° 37/01, Case 11.529, *José Sánchez Guner Espinales et al. v. Costa Rica* (Feb. 22, 2001).

62. As discussed in section III.B. above, the Inter-American Commission has determined that the identified alleged victims of one of the incidents enumerated in paragraph 60 are exempt from exhausting domestic remedies under Article 31(2). The petitioners aver an incident that occurred as late as October 30, 2004. Moreover, the record indicates that prosecutors were in contact with the petitioners and the ACLU as late as March 2005 regarding possible criminal charges related to the alleged incidents.⁷² The petitioners filed their petition on April 28, 2005. The State argues that investigations into the specified incidents are either still on-going, or prosecutors have determined that they cannot secure criminal convictions.⁷³ To date, the Inter-American Commission has not received information that the relevant prosecutors have pressed charges, intend to press charges, or are continuing to investigate any of the incidents. It is understandable that certain amount of time must pass before the petitioners could determine whether prosecutors intended to file any criminal charges. Once discussions broke down with the relevant prosecutors in March 2005, the petitioners filed their petition within weeks. Consequently, the Inter-American Commission determines that the petition was filed within a reasonable amount of time under Article 32(2) of the Commission's Rules of Procedure.

D. Duplication

63. Article 33(1)(a) stipulates that for a petition to be admitted by the Inter-American Commission, the subject of it cannot be pending in another international proceeding. Article 33(1)(b) stipulates that the Inter-American Commission shall declare inadmissible any petition or communication that is substantially the same as one previously studied by the Inter-American Commission or another international organization.

64. From the submissions of the parties and documents on file it does not appear that the subject of the petition is not pending in another international proceeding or settlement, and that it is not substantially the same as one previously studied by the Inter-American Commission or by another international organization. The Inter-American Commission thus deems that the admissibility requirements contained in Article 33(1)(a) & (b) have been met.

E. Colorable claim

65. Under Articles 27 and 34(a) of the Commission's Rules of Procedure, for admissibility purposes the Inter-American Commission must decide whether a petition states facts that could tend to establish a violation of the rights protected under the American Convention, American Declaration, or other applicable instruments.

66. The standard for assessing admissibility is different from the one used to decide the merits of a petition. For admissibility purposes, the Inter-American Commission need only make a *prima facie* analysis whether the complaint establishes the apparent or potential violation of a right guaranteed under the American Declaration. Such an examination is a summary analysis that does not imply any prejudgment or preliminary opinion on the merits.

67. The petitioners allege the State has violated Articles I, II, and XVIII of the American Declaration. The Inter-American Commission has outlined in Part II of this report the substantive allegations of the petitioners, as well as information submitted by them in support of those allegations. The State's response to the petition does not repudiate the petitioners' *prima facie* case at this stage in the proceeding. After carefully review of the information and arguments provided by

⁷² Petitioner's submission April 28, 2005, Apps. BB-EE.

⁷³ It is worth noting that the State does not specifically allege that the October 30, 2004 incident is still being investigated.

the petitioners and the State and without prejudging the merits of the matter, the Inter-American Commission considers that the petition states facts that make a *prima facie* case of violations of Articles I, II, XVIII of the American Declaration and is not manifestly groundless or out of order. At the merits stage the Commission will examine the State's duty, if any, to exercise due diligence to prevent (and investigate and sanction) these armed vigilante groups. Accordingly, the Inter-American Commission concludes that the petition should not be declared inadmissible under Article 34 of the Commission's Rules of Procedure.

IV. CONCLUSION

68. By virtue of the above considerations, the IACHR concludes that the petition complies with the requirements of admissibility set forth in Articles 23, 31-34 of its Rules of Procedure with regards to the identified alleged victims of Incidents No. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 in the petitioners' submissions, who allegedly had their rights under Articles I, II, XVIII of the American Declaration violated during events that took place in Cochise County, Arizona.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES TO:

1. Declare this case admissible with regards to the identified alleged victims (Appendix 1) of Incidents No. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 presented in the petitioner's submission of August 19, 2005, alleging violations of Articles I, II, XVIII of the American Declaration that occurred in Cochise County, Arizona.
2. Declare this case inadmissible with regards to alleged victims of alleged incident No. 8, because they have not exhausted domestic remedies and do not satisfy one of the exceptions to this requirement, under Article 31(2) of the Commission's Rules of Procedure.
3. Declare this case inadmissible with regards to the presumed victim of alleged incident No. 12, because the presumed victim is pursuing a civil domestic remedy and thus has not exhausted domestic remedies and does not satisfy one of the exceptions to this requirement, under Article 31(2) of the Commission's Rules of Procedure.
4. Declare this case inadmissible with regards to the presumed victims of alleged incident No. 13, because they were able to obtain access to an effective remedy under civil domestic law.
5. Defer consideration of the other rights invoked by the petitioners until examination of the merits of the case, if the facts are proven.
6. Notify the parties of this decision.
7. Continue with the analysis of the merits of the case.
8. Publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 5th day of the month of August, 2009. (Signed): Luz Patricia Mejía, President; Víctor E. Abramovich, First Vice-Chairman; Felipe González, Second Vice-Chairman; Sir Clare K. Roberts and Paulo Sergio Pinheiro, Commissioners.

The undersigned, Elizabeth Abi-Mershed, Assistant Executive Secretary of the Inter-American Commission on Human Rights, in keeping with Article 47 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.

A handwritten signature in black ink, consisting of a stylized 'E' followed by a long horizontal line.

Elizabeth Abi-Mershed
Assistant Executive Secretary