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Decided by: Chairman: Helio Bicudo;
First Vice-Chairman: Claudio Grossman;
Second Vice-Chairman: Juan Mendez;
Commissioners: Marta Altolaguirre, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo
Dated: 16 October 2000
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I. SUMMARY

1. On August 5, 1997, the Inter-American Commission on Human Rights (hereinafter "the Commission," "the Inter-American Commission," or "the IACHR") received a petition against the State of Panama (hereinafter "the State," "the Panamanian State," or "Panama"), submitted by the Homsany siblings: Salomón Homsany Abadi, Marcela Homsany Abadi, and Ezra Homsany Abadi (hereinafter "the petitioners") for violation of the articles of American Convention on Human Rights (hereinafter "the American Convention," or "the Convention") pertaining to the right to a fair trial (Article 8), right to protection of their home (Article 11), right to freedom of movement (Article 22), right to equality before the law (Article 24), right to property (Article 21), right to personal liberty (Article 7), right to freedom of association (Article 16), and political rights (Article 23).[FN1]

[FN1] In the comments submitted by the petitioners on January 30, 2000, to the response of the State on December 17, 1999, they claim, in addition to the aforementioned violations, violation of the right to prompt and simple recourse (Article 25), violation of the right to family protection (Article 17), and violation of the right to physical, psychological, and moral integrity (Articles 5 and 11).

2. As a result of an economic and political crisis in Panama in 1988, the State decided to replace the currency with securities called "IOUs." As a result, the shops owned by the petitioners began to receive IOUs issued by the State, and, in order to redeem them, they put in

place a series of credit transactions with the National Bank of Panama [Banco Nacional de Panamá]. As a result of these credit transactions, Mr. Ezra Homsany and Ms. Marcela Homsany were detained. The petitioners allege that they were arbitrarily detained and also that Mr. Salomón Homsany was prosecuted in absentia and failed to receive the procedural due process, since he was out of the country when his siblings were detained.

3. The State views the petition as inadmissible since the trial has not been concluded at the first instance level, and the appellate and other remedies provided for in the Code of Civil Procedure of Panama are pending. The State argues that the petition is inadmissible because it was filed for the sole purpose of instituting proceedings concomitant with those currently taking place in Panama. Also, the State argues that the petition is unfair because all procedural guarantees have been accorded to the petitioners and that the petition is reckless, since an attempt is being made to furnish an international organization with information that is far removed from the reality.

4. After reviewing this case, the Commission concludes that the petitioners have not exhausted domestic remedies and that the exceptions provided for in Article 46(2) of the Convention are not applicable. Consequently, the Commission decides to declare the case inadmissible pursuant to Article 47(a) of the American Convention, to transmit this decision to the parties, to publish it, and to order its inclusion in its Annual Report.

II. PROCESSING BY THE COMMISSION

5. On August 4, 1997, the Commission received a petition involving the State of Panama, submitted by Costa Rican attorney Gonzalo Monge Núñez on behalf of Salomón Homsany Abadi, Marcela Homsany Abadi, and Ezra Homsany Abadi for violation of the articles of the Convention pertaining to the right to a fair trial (Article 8), the right to property (Article 21), the right to freedom of movement and residence (Article 22), and the right to equal treatment before the law (Article 24).

6. The Panamanian State responded on March 20, 1998, seeking the inadmissibility of the petition because the petitioners had or had had other proceedings instituted at the national level and consequently were free to avail themselves of all these legal resources in order to have their claims addressed. This response generated subsequent letters until the last one, which was received by the Commission from the State on February 25, 2000.

7. On September 24, 1999, the petitioners asked the Commission to begin proceedings aimed at achieving a friendly settlement. This friendly settlement proposal was rejected by the State on November 12, 1999. In its note, the Panamanian State maintained its position regarding the inadmissibility of the petition under the American Convention.

8. On February 16, 2000, the petitioners indicated that since they had not received a favorable response to the friendly settlement proposal, the processing of the case should continue in accordance with the Convention and Regulations. Lastly, on February 25, the Commission acknowledged receipt of the abandonment of friendly settlement proceedings by the petitioners

and of the desire to continue processing of the case pursuant to the provisions of the American Convention. This note was forwarded to the Panamanian State on March 1, 2000.

III. POSITION OF THE PARTIES

A. Position of the petitioners

9. Mr. Salomón Homsany Abadi is a Panamanian businessman involved in the sale of mass consumption goods and realty. He had a business in Panama called "Almacén El Depósito," which was arbitrarily seized by the State.

10. In 1988, an international embargo was imposed on Panama and, as a result, banks ceased all their operations. A liquidity problem ensued, which prevented the State from paying the salaries of government employees, and, in view of that situation, the Government decided to replace the currency by paying employees with securities called "IOUs," which were not accepted in the business community. The Almacén El Depósito business, owned by Mr. Salomón Homsany, was the only business that accepted the IOUs issued by the Government. Because of this, Mr. Manuel Solís Palma, then President of the Republic, visited Mr. Homsany to express the appreciation of the Government of Panama.

11. The President of the Republic of Panama offered him assistance through the National Bank of Panama. In light of the situation and of the offer of the Government, Mr. Salomón Homsany opened a line of credit with the National Bank of Panama in 1989 in order to operate the companies and redeem the instruments issued by the Government. After the United States invasion, the State, through the National Bank of Panama, closed the lines of credit opened for Mr. Homsany. This action was a breach of contract and led to a series of violations of the American Convention, namely:

a. Violation of the right to due process: the petitioners claim violation of this right, citing the following:

i. Violation of the principle of legality (Article 7(5) of the Convention). The petitioners claim violation of the principle of legality due to the fact that they were accused of "embezzlement," a charge that must meet a specific criterion: the person must be a civil servant and the petitioners are not and have never been civil servants.

ii. Violation of the right to defense (Article 8 of the Convention). The petitioners claim violation of the right to defense since Mr. Homsany's defense attorney, Marcela Homsany Abadi, was jailed, leaving Mr. Homsany unable to prepare his defense. The State, arguing that the attorney, who is the sister of Mr. Homsany, knew of and was an accomplice to the offenses of which he is accused, instituted proceedings against her. The petitioners also allege violation of Article 8(2)(c) of the American Convention with respect to the failure to grant the accused adequate time and means for the preparation of their defense. On May 27, 1997, the Fourth Criminal Judge of the First Judicial Circuit of Panama dismissed the attorneys defending the petitioners and replaced them with court-appointed attorneys. The petitioners maintain that because of this, the new attorneys did not have the time needed to prepare the defense, in view of the absence of the accused.

iii. Violation of the principle of the presumption of innocence (Article 8(2) of the Convention). The petitioners allege violation of the principle of the presumption of innocence in view of the fact that the Attorney General of Panama made statements condemning the petitioners before a ruling had been handed down with respect to their case.

iv. Violation of the right to a juez natural [an independent judge whose position is created by law with general jurisdiction over an issue before or at the time it arises] (Article 8(1) of the Convention). The petitioners allege violation of this principle due to the fact that the only judges that heard the case and declared that no laws had been violated were removed from their positions. They also claim that they were investigated by the Office for determining responsibility in matters related to state property, an administrative entity assigned to the Office of the Comptroller General of the Republic which has authority to investigate public officials, and that the petitioners involved in these proceedings are not public officials. They claim bias and partiality by the courts since the Fourth Criminal Judge of the First Judicial Circuit of Panama, Ms. Damaris Caballero, was removed from her position after dismissing the case against the petitioners on May 23, 1995 because of insufficient evidence linking them to the offense of embezzlement, and, as a result, ordering their immediate release. They also claim that the investigation conducted by the Office for determining responsibility in matters related to state property also violates the principle of juez natural, since it is an entity that was created after the acts under investigation.

v. Violation of the right to be informed of the nature and cause of the charge (Article 8(2), 7(4), and 7(5) of the Convention). The petitioners claim that they were subjected to prosecution without prior notification. Mr. Salomón Homsany also alleges that no statement was obtained from him and that he was prosecuted in absentia without observance of due process guarantees. He also alleges that he was not prosecuted within a reasonable time frame since more than ten years have elapsed since the occurrence of the events under investigation, and that a court ruling has been handed down at the first instance level only. More than eighteen months elapsed between the time of the public hearing and a ruling.

vi. Violation of the right to be present during proceedings (Article 8(1) of the Convention). The petitioners allege that they were prosecuted in absentia, since oral proceedings were held in the absence of Mr. Salomón Homsany, citing as an example the proceedings held on August 18, 1997.

vii. They were criminally prosecuted for debt (Article 7(7) of the Convention). The petitioners claim that they were criminally prosecuted for debt, in violation of Article 7(7) of the American Convention.

viii. Violation of the non bis in idem principle (Article 8(4) of the Convention). The petitioners claim that they were prosecuted several times for the same acts in the criminal and civil courts by the Office for determining responsibility in matters related to state property, and in the summary jurisdiction court established by the National Bank of Panama to collect this debt.[FN2]

[FN2] Proceedings instituted and handled by an internal organ of the National Bank of Panama.

(ix) Violation of the right to freedom of association (Article 16 of the Convention). The petitioners allege violation of the right to freedom of association due to the fact that the State of

Panama forced them to come together to form the Homsany Commercial Group, which did not exist, and prevented them from separating the debts of Mr. Homsany owed to the National Bank of Panama. A new commercial group was formed, and the right to freedom of association also covers the freedom to refrain from association. Also, the State lifted the property protection for all companies with which the petitioners were associated, seizing the assets of these companies, which are viewed as the property of the shareholders and not the legal entities.

x. Violation of the principle of the non-retroactivity of the law (Article 9 of the Convention). The petitioners allege that the acts of which they are accused occurred prior to 1989 and that the State issued Decree 36 on February 10, 1990 creating a special court for special proceedings and having the authority to prosecute acts that took place before the decree was enacted, in violation of Article 9 of the American Convention. The petitioners are citing the principle of non-retroactivity of the law as grounds for challenging this administrative entity.

b. Violation of the right to property (Article 21 of the American Convention). The petitioners allege violation of the right to property set forth in the American Convention due to the fact that their bank accounts were frozen and the assets of Mr. Homsany Abadi and his companies seized by the State forces, represented by an entity called "the Office for determining responsibility in matters related to state property," which the petitioners maintain was created to handle the Homsany case. The petitioners assert that the assets were confiscated by the State and no compensation was provided, and that if the assets had to be seized, this should have been done by a court rather than an administrative entity.

c. Violation of the right to equality before the law (Article 24 of the American Convention). The petitioners maintain that their release from prison on bond was denied, in violation of the rules governing the right to equal treatment before the law. In addition, they allege that a special court was created to prosecute them, an act that is also a violation of the principle of equal treatment before the law.

d. Violation of the right to personal liberty (Article 7 of the American Convention). The petitioners maintain that they are victims of persecution by the State, a situation that has resulted in psychological torture for the entire family. The petitioners claim that an arrest warrant has been issued for Mr. Salomón Homsany, the purpose of which is to detain him for debts owed to the National Bank of Panama.

e. Violation of the right to freedom of movement and residence (Article 22 of the American Convention). The petitioners allege violation of this right, since they were not allowed to live and move around freely in their country, in violation of Article 22 of the American Convention.

f. Violation of political rights (Article 23 of the American Convention). The petitioners allege that their political rights were violated when the ruling of July 22, 1999 was issued ordering the petitioners to 80 months in prison for "embezzlement" and barring them for life from the exercise of public functions. The petitioners also allege that they were ordered to long-term punishment, in violation of their fundamental rights. The petitioners also seek to prove political persecution by arguing that as a result of these proceedings, the Government of Mexico granted asylum to Mr. Rafael Arosemena, the Manager of the National Bank of Panama, after the State ordered his return for granting credit to the petitioners to redeem the IOUs that they had received.

B. Position of the State

12. As indicated in numbered paragraph 3 of this report, the State, in its response to the petition of March 20, 1998, sought to have it declared inadmissible on grounds that it was time-barred, improper, unfair, and reckless. It also advanced the following as the basis for its arguments:

a. The acts under investigation in the criminal proceedings against the petitioners pertain to charges related to the misappropriation of public funds from the National Bank of Panama amounting to US\$8,688,478.62. The State reports that Mr. Rafael Arosemena is responsible for this misappropriation of public funds in his capacity as Manager of the National Bank of Panama, and that he was aided and abetted by the petitioners. The State maintains that the criminal file on the accused shows that there was prior agreement among them to devise ways that would enable them to obtain the money without having to go through the administrative controls of the National Bank of Panama (approval of the Board of Directors) and, to that end, they arranged for the money to be obtained through the granting of overdrafts and the issuance of letters of credit to thirty-eight corporations that were formed for the sole purpose of opening accounts and obtaining the credit facilities previously agreed upon. The aim was to circumvent the control mechanisms of the National Bank of Panama by channeling massive sums through each of the thirty-eight companies. This was done without any type of bank guarantee, with workers of the companies of the petitioners serving as the legal representatives of these companies. These persons admitted that they did not know the manager of the National Bank of Panama and did not have any business dealings with Mr. Arosemena.

Of the few companies where the names of the Homsany brothers appeared on documents, they changed their boards of directors and workers to give the appearance that these workers were co-debtors of the National Bank of Panama, thereby ensuring that they could not be summoned to appear in civil court since their names did not appear on any document as debtors, underwriters, or guarantors of these debts.

The State reports that this matter did not involve simple commercial transactions as the petitioners have sought to demonstrate, but rather illegal operations involving misuse of Panamanian State funds. Of the thirty-eight overdrafts approved for the thirty-eight companies, the balance of thirty-two of these companies was only the minimum required by law, that is B 500.00 for opening current accounts. Despite this, they received B 3,650,000.00 in overdrafts. Also, the State maintains that these overdrafts were granted to the thirty-eight companies when only five of them were actually operating. The State maintains that it can be proven that the companies used by Messrs. Homsany for the misappropriation of millions from the National Bank of Panama were merely paper companies. In other words, they never engaged in any commercial or manufacturing business whatsoever other than to apply for an overdraft from the National Bank of Panama. Those companies did not have a commercial or industrial license, a single taxpayer's identification number, tax returns, stock records, instruments, or registers, as verified in the civil courts. In addition, of the five that were operating, three had reported losses on their tax returns in previous years and the other two had paid taxes on estimated returns, which indicates that these companies were used exclusively to withdraw funds from the National Bank of Panama. The State points to a number of unusual elements involving these credit transactions:

- Mr. Rafael Arosemena, in his capacity as Bank Manager, personally approved forty-three credit facilities for the June - November 1989 period, in clear violation of the internal auditing regulations and organic law of the National Bank of Panama.

- Thirty-eight of the credit facilities were given as temporary overdrafts without real guarantees and documented solely by IOUs, only two of which were signed before a notary.

- The five remaining credit facilities were granted in order to open letters of credit, again without real guarantees, and were documented only by letters of exchange.

- It was established that the legal representatives of the companies of Messrs. Homsany serving as co-debtors for these liabilities were totally insolvent and were unaware of the responsibilities assumed with respect to the Bank.

b. The State notes that although the offense of embezzlement is applicable to public officials, accessories to the offense do not have to be public officials. Consequently, the petitioners are being investigated for their criminal involvement with the Manager of the National Bank of Panama, Rafael Arosemena, who was a government official.

c. The State maintains that the petitioners were always in a position to defend themselves, and that they were duly represented at all times by attorneys who were always free to submit evidence and to avail themselves of the different resources provided for in domestic law. It also reports that Ms. Marcela Homsany was detained not because she is an attorney, but because of her active participation in the misappropriation of money from the National Bank of Panama. The State reports that in Panama, attorneys do not have immunity and thus may be prosecuted like any other citizen for criminal conduct, as happened with Ms. Marcela Homsany Abadi. The State also reports that the petitioners were informed throughout the proceedings of the charges against them. It maintains that the file related to the criminal proceedings contains the duly substantiated investigative order issued by the First Assistant Prosecutor and the statements related to the investigation provided by Ezra Homsany and Marcela Homsany. The State maintains that when Salomón Homsany learned that an order had been issued against him, he decided to go into hiding in order to avoid receiving summonses from the Panamanian judicial authorities. Consequently, the petitioners were duly represented at all times.

d. With regard to violation of the right to juez natural, the State reports that former Judge Damaris Caballero was removed by the appellate court for reasons unrelated to the case involving the petitioners.

e. With regard to the removal of attorneys, the State asserts that as the file indicates, the Fourth Criminal Judge of the First Judicial Circuit of Panama tried, over a period of one year, on six occasions, to hold a hearing on the merits and the attorneys made excuses in order to avoid this hearing. Their excuses included questionable medical certificates, since it was noted that one of the attorneys who had submitted a medical certificate was providing assistance to another client on the date and at the time of the hearing scheduled by the Fourth Criminal Judge of the First Judicial Circuit. In light of the foregoing, the Judge issued an order for a hearing that was agreed upon by all the attorneys and which permitted the intervention of court-appointed defendants if any of the attorneys for the defense continued to use delaying tactics. The hearing was finally held over the course of a few days, with the participation of the attorneys for the defense and the Office of the Public Prosecutor. After hearing from almost all the witnesses,

attorneys Sidney Sitton and Rafael Rodríguez asked that relatives who could not be located through subpoenas be summoned, even though they were aware of the fact that the hearing would be held. When the judge realized that this was another delaying tactic, he decided to continue the hearing and these attorneys did not attend. As a result, the court-appointed attorneys who had been alerted beforehand that they might have to serve until the matter was concluded, were called. After the hearing was concluded, the aforementioned attorneys, who, according to the State, were employing another delaying tactic, filed a motion for unconstitutionality against a number of articles of the Panamanian judicial code, which suspended the competence of the first instance Judge until a decision was made with regard to the application. Once the Supreme Court had made a decision on this legal action, the case was again returned to the First Instance Judge (the Fourth Judge), thereby permitting him to hand down a first instance ruling.

f. The State maintains that the Office for determining responsibility in matters related to state property is fully competent to hear and make decisions regarding the responsibility of public officials, individuals, or corporations with respect to the State. It also indicates that this is not a special office to which functions were assigned retroactively, since mention is made of it in the 1972 Panamanian Constitution. This Office was known as the Audit Office of Panama, and it was regulated and replaced in 1990 with a new entity called "the Office for determining responsibility in matters related to state property" (DRP), which was instructed to assume responsibility for matters that were pending. When it assumed the functions of the Audit Office of the Office of the Comptroller General of the Republic, the Office for determining responsibility in matters related to state property was given express authorization to hear and make decisions on all matters related to responsibility in the area of public property on the part of not only employees and fiscal agents, but also individuals or corporations who may have misused public property in any way for their own benefit, the benefit of a third party, and in general, all persons who may have improperly derived benefit from public property.

g. The State reported that the principle of freedom of movement and residence has not been violated since the petitioners are free to return to the country. It also states that the petitioners have been duly informed of all action taken in the context of the criminal proceedings against them; consequently, it is up to them to decide whether or not they should make a personal appearance at the proceedings.

h. The State argues that the petitioners have not been subjected to criminal prosecution for commercial debt but for the illegal misappropriation of millions from the National Bank of Panama, in clear violation of the laws and policies of that institution. Also, it maintains that they have not been convicted of the same offenses twice, since proceedings that take place in the criminal courts are separate from those instituted by the Office for determining responsibility in matters related to state property. Criminal proceedings are aimed at determining the criminal responsibility of persons who have engaged in conduct classified as an offense, while the Office for determining responsibility in matters related to state property in the Office of the Comptroller General of the Republic undertakes procedures, not investigations, that are aimed at determining responsibility for actions prejudicial to the State by the persons implicated, with the aim of recovering misappropriated assets or funds. Consequently, since they are two different legal structures, the claim cannot be made of dual prosecution of the same case.

i. With regard to violation of the right to association claimed by the petitioners, the investigation itself establishes that the petitioners conspired with the Manager of the National Bank of Panama to misappropriate funds through its employees.

j. The State reports that the petitioners were afforded every opportunity, from a procedural and defense standpoint, to avail themselves of their rights with respect to the proceedings. The State maintains that their claim of not having access to the legal resources provided for in Panamanian legislation is patently false. This is borne out in the file which indicates that the accused availed themselves of all the legal resources available to them to exercise their rights and refute the evidence, and which gave rise to the observations of the court. The actions taken, all contained in 28 volumes in the file, include:

- Application for certification responded to by the court by means of certification dated June 30, 1994;
- Application for certification responded to by the court on July 5, 1994;
- Application for nullity of proceedings; decision delivered by the court on March 21, 1995;
- Application for the lifting of precautionary measures; decision delivered on September 8, 1995;
- Application for the withdrawal of precautionary measures; decision delivered on December 19, 1994;
- Application for evidence of witnesses; decision delivered on December 29, 1995;
- Application filed in a personal capacity by Marcela Homsany regarding practice of the legal profession; decision delivered on October 6, 1995;
- Appeal for reconsideration with a supplementary appeal filed by Marcela Homsany as the representative for Ezra Homsany; decision delivered on November 16, 1995.
- Application for nullity of all the matters submitted for the technical defense; decision delivered on October 11, 1995;

k. The detention order for the petitioners was well-founded and supported by evidence. The State reiterates that this ruling does not pertain to civil debt but rather the commission of the offense of embezzlement.

l. Lastly, the State indicates that the proceedings against the petitioners are not political, but rather legal and criminal in nature. Consequently, the reasons advanced by the Government of Mexico for granting asylum to Mr. Arosemena cannot be cited as evidence.

IV. ANALYSIS

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

a. *Ratione personae*

13. Panama ratified the American Convention on June 22, 1978. As a result, the Commission has competence *ratione personae* to hear this case under Article 33 of the Convention. With regard to passive competence *ratione personae*, the petitioners attribute the violations to a State Party, which in this case is Panama. With regard to active competence *ratione personae*, petitioners allege that they were adversely affected by these violations, and are thus direct victims of these violations.

b. Ratione materiae

14. The acts alleged by the petitioners pertain to rights covered by the Convention (right to due process, right to freedom of domicile, right to freedom of movement, right to equality before the law, right to property, right to personal liberty, right to freedom of association, and political rights),[FN3] to which Panama is a Party. Consequently, the IACHR notes that it has competence *ratione materiae* to hear the petition.

[FN3] In the comments submitted by the petitioners on January 30, 2000 in response to the state's communication of December 17, 1999, they allege, in addition to the violations already mentioned, violation of the right to rapid and simple recourse (Article 25), violation of the right to family protection (Article 17), and violation of the right to physical, psychological, and moral integrity (Articles 5 and 11).

c. Ratione temporis

15. The Commission notes that it is competent to hear this case. First, it has competence *ratione temporis* with respect to the acts that violate the American Convention since Panama submitted the instrument of ratification of the American Convention on June 22, 1978 to the Secretary General of the Organization of American States.

B. Other admissibility requirements

a. Exhaustion of domestic remedies

16. Article 46(1)(a) and 47 of the American Convention indicate that the inter-American system is to be used on a supplementary basis, hence the need to have sought and exhausted remedies in local courts. In principle it is the State that must resolve violations based on its domestic law, and if it fails to do so, then the matter is referred to the inter-American system.[FN4]

[FN4] In stressing the need for member States to have domestic systems that have the capacity and competence to resolve their own conflicts, the IACHR has stated: "the rule related to the prior exhaustion of domestic remedies is based on the principle that when a State becomes a defendant, it must be in a position to provide remedies by itself and within the framework of its domestic judicial system," IACHR, 1996 Annual Report, Report No. 39/96, Case 11,673-Santiago Marzioni, Argentina, October 15, 1996, para. 49, page 89.

17. As a result of this supplementary feature, the State must raise an objection regarding the failure to exhaust remedies, and indicate, in such circumstances, the effective remedies that have not been exhausted.[FN5] In subsequent letters, the State indicated the different phases of the proceeding.[FN6] In analyzing the failure to exhaust these remedies, an indication must be

provided of the actual remedies that were available to the petitioner and which he failed to use, and when the State maintains that these remedies were not exhausted, it must indicate what these remedies are, as was done by the State of Panama.[FN7]

[FN5] With regard to the burden of proof in the case of the exhaustion of domestic remedies, see the case of Loayza Tamayo, Preliminary Exceptions, Judgment of January 31, 1996, para. 40.

[FN6] The State, in its note of November 12, 1999, explained the different phases of criminal proceedings in Panama, namely: the Investigative Phase, the Plenary Phase, the Appellate Phase, the Application for Judicial Review Phase, and the Application for Judicial Review of the Facts Phase. Guarantee institutions: In addition to legal resources, the law provides for mechanisms to protect fundamental guarantees, namely, habeas corpus, notification of unconstitutionality, protection of constitutional guarantees, action of unconstitutionality, etc.

[FN7] With regard to the burden of proof in the case of the exhaustion of domestic remedies, see Loayza Tamayo, Preliminary Exceptions, Ruling of January 31, 1996, para. 40.

18. In addition, the State of Panama reported that on the date of submission of the petition, a ruling had not been handed down at the first instance level of the criminal proceedings against the petitioners and Mr. Rafael Arosemena, the former Manager of the National Bank of Panama, and that a number of remedies had to be exhausted, in particular, the following legal actions:

- Appeal to a higher court against the ruling of July 22, 1999 issued by the Fourth Criminal Judge of the First Judicial Circuit of Panama. The decision related to this appeal is to be handed down by the appellate court of Panama.
- Appeal to the Supreme Court, in the event that the appellate court of Panama upholds the ruling of the first instance Judge.
- Motion for non-trial, which does not have to be filed for consideration of the exhaustion of domestic remedies and the other possibilities listed in the foregoing numbered paragraph.

19. The State points out that none of the aforementioned mechanisms was used by the petitioners, since the first instance criminal proceedings ended on July 22, 1999, with a ruling issued by the Fourth Criminal Judge of the First Judicial Circuit of Panama. The State goes on to argue that Messrs. Homsany were allowed to participate in the criminal proceedings and were offered maximum procedural guarantees, and that they were permitted to exercise fully their right to defense so much so that they abused that right, by seeking to block, through the use of appeals and legal actions permitted by law, a decision on the merits related to the criminal trial against them. Not only were they allowed to exercise their right to defense, the State maintains, but they took advantage of the judicial system by employing such a variety of delaying tactics that they managed to achieve postponement of a ruling against Mr. Rafael Arosemena, the former Manager of the National Bank of Panama until July 22, 1999, for perpetrating the offense of misappropriation and Messrs. Homsany, as the main accomplices to this offense.

20. The petitioners, in their comments to the response of the State on February 16, 2000, reported that although there are domestic remedies in Panama that have not been exhausted, this is not necessary in this case because of the absence of due process. Consequently, the exception

to the exhaustion of domestic remedies provided for in Article 46(2) of the Convention is applicable. The petitioners also report that they exhausted the remedies that were available to them, namely:

- Writ of habeas corpus, rejected
- Appeal for protection and constitutional guarantees, rejected
- Further appeal, rejected
- Motions, pleas, and nullities, all rejected[FN8]

[FN8] The petitioners refer to the doctrine derived from Article 46(2) that the victims of violations of the Convention do not have an obligation to exhaust domestic remedies when the remedies are not effective or in instances of serious violation of the right to due process.

21. The petitioners cite the case law of the Inter-American Court of Human Rights, which has determined that all domestic remedies do not have to be exhausted when they are delayed without justification or are not effective. Domestic remedies must be appropriate and effective, and, in the absence of these two elements, remedies do not have to be exhausted. In the view of the petitioners, the resources in Panama are not efficient, and they have indicated that:

Since the proceedings and investigations have taken place over a period longer than ten years and to date have not been concluded, then the State cannot seek, at this point, the exhaustion of domestic remedies.

22. Moreover, the petitioners maintain that in this case political persecution took place and the rules of due process were violated. The Inter-American Court has stated that the exhaustion of domestic remedies must be interpreted based on the circumstances, particularly when justice has been denied.

23. As has been stated, the petitioners allege that the proceedings lasted ten years and thus were not concluded within a reasonable time frame. Consequently, according to the petitioners, their case should be accepted. The Inter-American Court of Human Rights, following the case law of the European Court, stated, in the Genie Lacayo case, that in order to determine whether the time period for proceedings was reasonable, consideration must be given to the following:

(..) Three elements must be taken into account in determining whether the time period over which the proceedings took place is reasonable: (a) the complexity of the matter; (b) the procedural actions of the interested party; and (c) the conduct of the judicial authorities...[FN9]

[FN9] Inter-American Court, Genie Lacayo Case. Judgment of January 29, 1997, para. 77.

24. Based on the facts described by the Parties, it can be concluded that the matter is extremely complex. In terms of the conduct of the petitioner, the State has demonstrated that the petitioner sought repeatedly to block advancement of the proceedings.

25. Lastly, the Commission holds the view that it cannot be proven that the State employed tactics to delay advancement of the proceedings and that it failed to take the steps that it was supposed to. Consequently, the Commission holds the view that in this case, there are no grounds for the exception to the exhaustion of domestic remedies set forth in Article 46(2)(c) of the American Convention on Human Rights sought by the petitioners.

V. CONCLUSIONS

26. The Commission has established that the petition does not meet the requirements set forth in Article 46(1)(a) of the American Convention, and that the information provided by the parties does not permit application of the exceptions set forth in Article 46(2) thereof. Consequently, the Commission concludes that the petition is inadmissible, because of the failure to exhaust domestic remedies, pursuant to Article 47(a) of the American Convention.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES TO:

1. Declare this case inadmissible.
2. Notify the parties of this decision.
3. Publish this decision in its Annual Report to the OAS General Assembly.

Done and signed in Washington, D.C., on the 16th day of the month of October, 2000. (Signed): Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman, Marta Altolaguirre, Robert K. Goldman, Peter Laurie and Julio Prado Vallejo, Commissioners.