Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 93/01; Petition 12.259
Session:	Hundred and Thirteenth Regular Session (9 – 17 October and 12 – 16 November 2001)
Title/Style of Cause:	Alberto Dahik Garzozi v. Ecuador
Doc. Type:	Decision
Decided by:	President: Claudio Grossman; First Vice President: Juan Mendez; Second Vice-President: Marta Altolaguirre; Commissioners: Helio Bicudo, Robert K. Goldman, Peter Laurie. Dr. Julio Prado Vallejo, an Ecuadorian national, did not participate in the discussion of this case in compliance with Article 17 of the Commission's Rules of Procedure.
Dated:	10 October 2001
Citation:	Dahik Garzozi v. Ecuador, Petition 12.259, Inter-Am. C.H.R., Report No. 93/01, OEA/Ser./L/V/II.114, doc. 5, rev. (2001)
Represented by:	APPLICANT: Carlos Vargas.
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I. SUMMARY

1. On June 22, 2000, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a complaint submitted by the former Vice President of the Republic of Ecuador, Alberto Dahik Garzozi, and his Costa Rican attorney Carlos Vargas, (hereinafter "the petitioner") against the Republic of Ecuador (hereinafter "the State" or "Ecuador"), in which he alleged that the State of Ecuador violated his human rights, to wit: the right to a fair trial (Article 8), the principle of legality (Article 9), the right to equal protection of the law (Article 24), and the right to judicial protection (Article 25), enshrined in the American Convention on Human Rights, in breach of the obligations set forth in Article 1(1) thereof. In turn, the State replied that the petitioner has not exhausted the remedies provided by domestic jurisdiction and asked the Commission to dismiss the complaint.

2. In July 1995, the National Congress accused the serving Vice President of Ecuador, Alberto Dahik, of bribery and corruption in the performance of his functions. On August 4, 1995, two members of Congress filed a criminal complaint in connection with those charges and, on August 16, the president of the Supreme Court decided to begin proceedings. The investigation conducted by the legislature ended on October 6, 1995, when the bid to remove Mr. Dahik from office failed to receive the majority vote required. In the judicial investigation, however, the Court issued a preventive custody order on October 11, 1995. On that same day, Mr. Dahik was allowed to enter Costa Rica and, on March 29, 1996, he was given political asylum.

3. In this report, the Commission analyzes information submitted in accordance with the American Convention and it concludes that the petitioner has not exhausted the domestic judicial remedies available in Ecuador for resolving his situation. Consequently, the Commission decides to declare the petition inadmissible pursuant to Articles 46(1)(a) and 47(a) of the American Convention and Article 31(1) of its Rules of Procedure,[FN1] to transmit it to the parties, to make it public, and to order its publication in its Annual Report.

[FN1] The new Rules of Procedure of the Inter-American Commission on Human Rights came into force on May 1, 2001.

II. PROCESSING BY THE COMMISSION

4. On October 21, 1999, the Commission received the complaint. On March 27, 2000, the Commission began processing the petition and transmitted the relevant communications to the State and the petitioner. The State sent a detailed reply on July 17, 2000, which was forwarded to the petitioner on July 26, 2000, for him to submit his comments within a period of 30 days. On August 18, 2000, the petitioner asked the Commission to make itself available to attempt to reach a friendly settlement in this matter. The petitioner sent no comments on the State's reply of July 17, 2000; and the State, in a communication dated November 1, 2000, rejected the possibility of a friendly settlement.

III. POSITIONS OF THE PARTIES

A. Petitioner

5. The petitioner claims that in his capacity as vice president of Ecuador during the administration of President Sixto Durán Ballén, he suffered political persecution at the hands of his political adversaries in the leadership of the Christian Social Party. According to the petitioner, this persecution began in reprisal for public statements he made in Guayaquil, Quito, and several main provincial cities, expressing his government's concern about growing corruption in Ecuador. Consequently, according to the complaint, the National Congress began impeachment proceedings against him so criminal charges could be brought and he could be removed from office.[FN2] The National Congress ruled in the petitioner's favor and acquitted him of the charges.

[FN2] Article 104 of the Organic Law of the Legislative Branch in force at that time provided as follows: "The National Congress's resolution shall determine the offense committed and shall impose the punishment set by Article 59(f) of the Constitution of the Republic, remitting the accused to the competent judge when appropriate."

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6. The petitioner claims that on August 15, 1995, in spite of his acquittal by the National Congress, the president of the Supreme Court of Justice, Dr. Miguel Macias Hurtado, a Christian Social Party sympathizer, arbitrarily and illegally began legal proceedings against him and several public officials for two crimes committed against the state.[FN3] According to the petitioner, the president of the Supreme Court would only have been entitled to begin criminal proceedings if the National Congress had found him guilty; this, however, was not the case. On October 11 of that year, Dr. Macias Hurtado ordered him placed in preventive custody arrest and, subsequently, issued a declaration of commencement of the investigatory phase—a measure he was not authorized to adopt, on account of the petitioner's immunity as vice president of the Republic of Ecuador.[FN4]

[FN3] The two crimes were bribery and embezzlement of public funds.
[FN4] The petitioner maintains that the president of the Supreme Court could have only begun criminal proceedings if the National Congress had not ruled in his favor in the impeachment hearing.

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7. The petitioner claims that Article 59(e) of the Ecuadorian Constitution in force at that time only allowed criminal charges to be brought against the vice president if so decided by Congress following impeachment proceedings. Article 59 reads as follows:

The National Congress shall meet, in plenary session but without needing convocation, in Quito, on August 10 of each year, and shall hold sessions for a period of no more than sixty days, with the sole purpose of dealing with the following petitions:

(e) To undertake the impeachment, during their period of office or up to one year thereafter, of the country's president or vice president (...) for offenses committed in the performance of their functions, and to resolve their censure, if declared guilty, the result of which shall be their removal and disqualification from holding public office for the same period.

The president and vice president may only stand trial for treason, bribery, or any other offense that gravely affects the nation's honor.

8. Because of the illegal warrant issued for his arrest by the president of Supreme Court and the political persecution he was facing, the petitioner reports that he fled Ecuador on the day his preventive custody was ordered, October 11, 1995; arriving in Costa Rica, he requested political asylum, which was granted by the Costa Rican authorities on April 1, 1996. The petitioner has been living in that country since 1995.

9. In addition, the petitioner claims that those criminal proceedings were plagued by a string of irregularities. For example: (a) he was not personally notified that criminal proceedings had been initiated against him until he went to the courts to provide his statement for the investigatory phase; (b) his attorneys were not allowed to submit evidence of his innocence, including documents provided by the Office of the General Comptroller of the State dealing with his spending in his capacity as vice president; (c) his attorneys were not allowed to attend the

expert inspections carried out at the Ecuadorian Central Bank of the documents dealing with how the funds allocated to the vice president's office were managed-this, in the petitioner's opinion, was a flagrant breach of his right of defense;[FN5] and (d) he was not allowed direct participation in the criminal proceedings brought against him, and the procedural timeframes established by law were not respected.

[FN5] The petitioner maintains that the inspections carried out at the Central Bank of Ecuador were illegal because only the experts were present, and not the judge.

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10. The petitioner reports that as a result of this unfair criminal action, he filed for a motion of annulment with the first chamber of the Supreme Court of Justice; however, this motion was dismissed on trivial grounds, thus curtailing his right of defense.

11. As regards the remedies offered by Ecuadorian law, the petitioner holds that he has duly exhausted them all by pursuing the following: (a) revocation of the preventive custody order, which the Supreme Court dismissed on the grounds that there were elements indicating that the petitioner could be responsible for the crimes of which he was accused; (b) an amparo suit, which was dismissed for trivial reasons, violating his human rights and constitutional guarantees; and (c) revocation of the dismissal of the amparo suit, which was also ruled inadmissible.

12. The petitioner concludes by claiming that the State of Ecuador has violated the following human rights: the right to a fair trial (Article 8), the principle of legality (Article 9), the right to equal protection of the law (Article 24), and the right to judicial protection (Article 25), all of which are enshrined in the American Convention. In consideration whereof, he entreats the Commission to admit this petition and allow him to return to Ecuador.

B. State

13. According to the State, the petitioner has not exhausted the remedies offered by domestic jurisdiction for dealing with his claim; consequently, the State asks the Commission to declare Alberto Dahik Garzozi's petition inadmissible.

14. As regards the petitioner's arguments, the State "implores Mr. Dahik to return to the country and to assert his rights before the national courts, which (...) comply with all the fundamental characteristics set forth in the Convention." Moreover, the State reports that the criminal proceedings filed against Alberto Dahik have been suspended at the investigatory phase because the petitioner is currently a fugitive from justice, in accordance with Article 254 of the Code of Criminal Procedure;[FN6] the petitioner cannot therefore claim that the domestic remedies have been exhausted if the first criminal proceedings have not ended. The State adds that the petitioner has available to him all the remedies provided by law to challenge judicial decisions or to pursue annulment.

[FN6] Article 254(1) of the Code of Criminal Procedure in force at the time reads as follows: "If, when the declaration of commencement of the investigatory phase is issued, the accused is a fugitive from justice, the judge shall, after issuing said declaration, order the suspension of the investigatory phase until such time as the accused is apprehended or presents himself voluntarily. While the accused remains at large, the declaration of commencement of the investigatory phase shall not be considered served; this declaration shall be notified to him in person when he reports to the court or is apprehended."
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15. The State points out that the petitioner himself, in the appeal lodged with the first criminal chamber of the Supreme Court, stated that breaches of Article 59(e) of the Constitution are categorized as criminal acts under Article 216 of Criminal Code, which provides as follows: "judges and other employees who, without the authorization described in the Constitution, request, issue, or sign a ruling or judgment against the country's president or his deputy, shall be punished with fines of between fifty and two hundred sucres and prison terms of between one and three years." Consequently, the State adds, if Mr. Dahik held that the actions of the president of the Supreme Court violated the principles of legality and due process, he should have filed criminal proceedings against the magistrates in order to exhaust that domestic remedy.

16. The State further notes that the petitioner has enjoyed free access to domestic remedies and that he has never been denied access to the competent tribunals in order to clarify his legal situation; his right to due process has been respected in accordance with judicial guarantees.

17. With respect to the immunity from prosecution claimed by the petitioner, in its reply of July 12, 2000, the State referred to this as "a legal subterfuge to keep the crime from being punished," since although the National Congress issued the petitioner an acquittal, that decision applies solely to the impeachment proceedings and has no effect in the regular criminal courts. According to the State, "the National Congress's authorization for bringing charges against the nation's president and vice president is limited to the instances specifically identified in the Constitution, to wit: treason, bribery, or any other offense that gravely affects the nation's honor. However, this authorization is not necessary to prosecute those officials for other offenses proscribed in criminal law."

18. In addition to the above, the State notes that the provision of the Constitution must not be taken as meaning that the president or vice president are exempt from criminal responsibility for common crimes; this precept serves to uphold the principle of equality before the law. In this regard, the State concludes by stressing that Alberto Dahik's case involves two independent and separate trials: first, the impeachment proceedings, the aim of which was his removal from office, and, second, the criminal proceedings, the aim of which was to determine criminal responsibility.

19. With respect to the procedural anomalies described by the petitioner, the State maintains that the proceedings omitted no formality or procedure that could have had an impact on any substantive decision in the trial, and that the proceedings observed the principles of legality, impartiality, and due process. Similarly, the petitioner has enjoyed the right of access to justice, in that he has been able to submit evidence in his defense and to pursue effective remedies.

20. The State says it agrees that the reasonable time guaranteed by Article 7(5) of the Convention begins at the moment the person is accused, taking the moment of accusation as meaning the official notification issued by the competent authority: in the petitioner's case, that was August 16, 1995. However, the guarantee of a reasonable time does not apply to Alberto Dahik Garzozi's complaint, because he is not in Ecuador and, in accordance with the law, the proceedings have been suspended. Hence, any argument regarding failures to observe procedural timeframes is invalid.

IV. ANALYSIS

A. Competence of the Commission Ratione Personae, Ratione Loci, Ratione Temporis, and Ratione Materiae

21. The petitioner is entitled, under Article 44 of the American Convention, to lodge complaints with the IACHR. The petition names, as its victim, an individual person with respect to whom Ecuador had assumed the commitment of respecting and ensuring the rights enshrined in the American Convention. With respect to the State, the Commission notes that Ecuador has been a party to the American Convention since December 28, 1977, when it deposited the corresponding instrument of ratification. The Commission therefore has competence ratione personae to examine the complaint.

22. The Commission has competence ratione loci to deal with the petition, since it alleges violations of rights protected by the American Convention occurring within the territory of a state party thereto.

23. The Commission has competence ratione temporis, since the obligation of respecting and ensuring the rights protected by the American Convention was already in force for the State on the date on which the incidents described in the petition allegedly occurred.

24. Finally, the Commission has competence ratione materiae, since the petition describes violations of human rights protected by the American Convention.

B. Other Requirements for Admissibility

25. The Inter-American Court of Human Rights has maintained, in the Velásquez Rodríguez case, that "the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed."[FN7] In its first reply to this petition, and in compliance with the Court's ruling, the State lodged an objection claiming that domestic remedies had not been exhausted.

[FN7] Inter-Am.Ct.H.R., Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, Series C, No. 1, paragraph 88.

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26. Another fundamental rule in the inter-American system is that a State claiming the nonexhaustion of domestic remedies is required to identify the unexhausted remedies available and indicate their effectiveness. The Commission notes that the State has reported that the trial of the petitioner for embezzlement of public funds was, on August 25, 1995, suspended at the investigatory stage by the president of the Supreme Court—the judge eligible to try the accused, given his position as vice president at the time the alleged crimes were committed—because the accused was a fugitive from justice, in compliance with Articles 254 and 255 of the Code of Criminal Procedure; this shows that domestic remedies have not been exhausted. The State has said: "this trial has not ended, and the competent tribunals must proceed to resolve the matter in accordance with law. This favorable or unfavorable resolution will be the ideal way to resolve the petitioner's situation (…)."

27. In reply to the petitioner's claim that the State violated his right to be tried within a reasonable period of time, the State replied that Mr. Dahik could have filed a motion challenging the judge who committed that violation, under the provisions of Article 871(10) of the Code of Civil Procedure, applicable to criminal matters on a supplementary basis. This provision stipulates the following:

Art. 871: A judge, of either a tribunal or court, may be challenged by any of the parties and must recuse himself from the proceedings for any of the following reasons:

10. Failing to substantiate the proceedings within three times the time set forth in law.

In this connection, the State notes that: "The deadline for issuing a ruling is 10 days following the end of the period for arguments increased by one additional day for each 100 pages of the proceedings (see Arts. 409 and 410 of the Code of Criminal Procedure and Art. 292 of the Code of Civil Procedure). In this case, given the legal suspension of proceedings, the investigatory phase of this trial has not even begun; consequently, no remedy could have been exhausted in these proceedings."

28. Continuing with the possible domestic remedies available to the petitioner, the State addresses the possibility of filing criminal action against the president of the Supreme Court. The State points out that in his appeal filed with the first criminal chamber of the Supreme Court of Justice, the petitioner himself acknowledged that breaches of Article 59(e) of the Constitution are categorized as criminal acts by Article 216 of Criminal Code, which provides as follows:

Art 216. [Proceedings against senior authorities.] Judges and other employees who, without the authorization described in the Constitution, request, issue, or sign a ruling or judgment against the country's president or his deputy, shall be punished with fines of between fifty and two hundred sucres and prison terms of between one and three years (...); the same shall apply to an order intended to prosecute them or bring them to trial, or when they have issued or signed the order or warrant for such arrest or detention.

The State says that if the petitioner believed that the actions of the president of the Supreme Court violated the principles of legality and due process, he should have filed criminal proceedings against the magistrates in order to exhaust that domestic remedy.

29. Because of the subsidiary nature of human rights treaties, the rule requiring the prior exhaustion of domestic remedies was created and is set forth in Article 46(1)(a) of the American Convention. This exhaustion allows the State to resolve the problem under its domestic law before having to face international proceedings.

30. The State has shown that domestic remedies effective for resolving the petitioner's legal situation do exist. The Inter-American Court has maintained that if a State "which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46(2)."[FN8]

[FN8] Inter-Am.Ct.H.R., Velásquez Rodríguez Case, Merits, Judgment of July 29, 1988, Series C & D, No. 4, paragraph 60.

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31. On July 26 2000, the State's reply detailing the possible remedies offered by domestic jurisdiction was forwarded to the petitioner for him to submit comments within a period of 30 days. The petitioner, as of today's date, has submitted no such comments. The Commission believes that this failure to comment on the State's reply is tantamount to tacit acceptance of its position.

32. One requirement of juridical stability is that "an objection to admissibility on the ground of non-exhaustion of local remedies is to be raised only in limine litis, to the extent that the circumstances of the case so permit. If that objection, which benefits primarily the respondent State, is not raised by this latter at the appropriate time, that is, in the proceedings on admissibility before the Commission, there comes into operation a presumption of waiver-albeit tacit-of that objection by the respondent Government."[FN9] Similarly, the petitioner has the obligation of submitting his comments at the appropriate point in the proceedings. If the petitioner fails to explain why he did not exhaust the domestic remedies identified by the State or why those remedies are not effective, there comes into operation a presumption of waiver, albeit tacit, on the part of the petitioner. In the Commission's opinion, that is what has happened in this complaint.

[FN9] Inter-Am.Ct.H.R., Gangaram Panday Case, Preliminary Objections, concurring opinion of Judge Cançado Trindade, paragraph 3.

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33. For the reasons given above, the Inter-American Commission holds that the petitioner has not exhausted the available domestic remedies and, consequently, it concludes that his petition is

inadmissible under Articles 46(1)(a) and 47(a) of the American Convention and Article 31(1) of the Commission's Rules of Procedure.

V. CONCLUSIONS

34. Based on the foregoing considerations of fact and law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this petition inadmissible.
2. To give notice of this decision to the petitioner and to the State.
3. To publish this decision and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the tenth day of October, 2001. (Signed): Claudio Grossman, President; Juan Méndez, First Vice-President; Marta Altolaguirre, Second Vice-President; Commissioners Hélio Bicudo, Robert K. Goldman, and Peter Laurie.