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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 18/02; Petition 12.274
Session: Hundred and Fourteenth Regular Session (25 February – 15 March 2002)
Title/Style of Cause: Cesar Verduga Velez v. Ecuador
Doc. Type: Decision
Decided by: President: Juan Mendez;
First Vice-President: Marta Altolaguirre;
Second Vice-President: Jose Zalaquett;
Commissioners: Robert K. Goldman, Clare K. Roberts.
Dr. Julio Prado Vallejo, of Ecuadorian nationality, did not take part in the discussion of this case in accordance with the Article 17 of the Commission's Rules of Procedure.

Dated: 27 February 2002
Citation: Verduga Velez v. Ecuador, Petition 12.274, Inter-Am. C.H.R., Report No. 18/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)

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I. SUMMARY

1. On 9 November 1999, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a complaint presented by the former Minister of Government and Police of the Republic of Ecuador, César Verduga Vélez (hereinafter "the petitioner") against the Republic of Ecuador (hereinafter "the State" or "Ecuador") alleging that the State had violated his following human rights: (a) the right to personal liberty (Article 7), the right to a fair trial (Article 8), the right to participate in government (Article 23), the right to judicial protection (Article 25), and the duty to adopt provisions of domestic law (Article 2), all enshrined in the American Convention on Human Rights in breach of the obligations set forth in Article 1(1) thereof. For its part, the State responded that the petitioner had not exhausted his domestic remedies and requested the Commission to file the complaint.

2. On 10 November 1998, César Verduga Vélez, then Minister of Government and Police of Ecuador, was accused by the President of the Supreme Court of Justice of misuse of funds and public documents in the exercise of his functions, and was ordered to be placed in preventive custody. The petitioner indicates that he was out of the country at the time that criminal prosecution was initiated against him and has remained out of the country until the present time. The petitioner also alleged that he had not been afforded the basic judicial guarantees necessary for him to appear before the courts in Ecuador.

3. In this report, the Commission analyzes the information presented in the light of the American Convention and concludes that the petitioner has not exhausted domestic legal

remedies for his situation in Ecuador. The Commission therefore decides to declare the petition inadmissible in accordance with Articles 46(1)(a) and 47(a) of the American Convention and Article 31(1) of the Commission's Rules of Procedure,[FN2] to notify the parties accordingly, to make its decision public, and to arrange for its publication in the Commission's Annual Report. The State, moreover, maintains that the petitioner should exercise his rights and appear in court in Ecuador.

[FN2] The new Rules of Procedure of the Inter-American Commission on Human Rights entered into force on May 1, 2001.

II. PROCEEDINGS BEFORE THE COMMISSION

4. On 1 May 2000, the Commission took up the petition, under the number 12.274, and transmitted the relevant portions thereof to the Ecuadorian state, allowing 90 days for the presentation of information.

5. The State presented a detailed response on 10 August 2000, and the relevant portions thereof were transmitted to the petitioner for his observations. On 15 September 2000, the petitioner presented additional information, which was remitted to the State with a deadline of 30 days. On 5 December 2000, the Commission reiterated its request for information to the State. On 22 January 2001, the petitioner presented additional information, which was transmitted to the State for its observations.

6. On 26 January 2001, the State presented its observations, and the relevant portions thereof were transmitted to the petitioner. On 30 January 2001, the petitioner presented additional information, which was remitted to the State with a deadline of 30 days. On 5 March 2001, the petitioner presented new additional information, which was remitted to the State. On 28 March 2001, the State requested an extension, which was duly granted by the Commission. On 16 November 2001, the petitioner presented additional information to the Commission.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

7. The petitioner affirms that during the period from 12 February 1997 to 30 January 1998 he served as Minister of Government and Police of Ecuador, during the administration of the Interim President of the Republic, Dr. Fabián Alarcón Rivera. The petitioner affirms that by virtue of the functions assigned by Ecuadorian domestic law to the Ministry of Government and Police, a special budgetary allocation was made to that agency for expenses which were to remain secret or confidential.[FN3] According to the petitioner, the accounts covering the use of these confidential expenses were subject to approval by the Comptroller General of the State, pursuant to the applicable regulation.

[FN3] Article 3 of the Regulations for the Handling of Public Funds Allocated for Confidential or Secret Expenses, in force at the time the events took place, provided that: "funds for confidential or secret expenses shall be allocated only to the budgets of the Ministries of Government and Police and National Defense".

8. The petitioner indicates that during his term as Minister of Government and Police he contracted professionals who prepared studies in connection with work being performed by the Ministry. He also affirms that upon the delivery of these studies, the agreed amounts were paid and that, given the secret or confidential nature of these expenses, the law authorized direct contracting without the need for any kind of public or private offer or bidding process.

9. The petitioner indicated that the accounts covering the use of confidential or secret expenses were presented to, and reviewed and approved by, the Comptroller General of the State, who was authorized by law to approve the use of such public funds. The petitioner affirms that the law required the Comptroller General of the State, after approving the final balance sheets for the confidential expense accounts, to order the incineration of instruments documenting the secret contracts and corresponding payments, and that the official had a legal obligation to destroy them. The petitioner also affirms that, in accordance with the applicable provisions and a good-faith interpretation thereof, his Ministry had also incinerated the reports containing the studies he had commissioned.[FN4]

[FN4] Communication of 9 November 1999 from the petitioner.

10. The petitioner affirms that even though the Comptroller General of the State had reviewed and approved the accounts for the confidential expenses incurred by his ministry, the President of the Supreme Court of Justice, Dr. Héctor Romero Parducci, ordered an investigation of the allegations against him and ordered his preventive detention.[FN5] The petitioner alleges that during the preliminary proceedings, when the Court ordered the investigation, he tried to demonstrate and convince the President of the Supreme Court of Justice that the acts of which he was accused did not constitute an offense of any kind and that the Comptroller General of the State had already approved the accounts for the confidential expenses of the Ministry of Government, which demonstrated that the State agency under his authority had correctly used these funds. The petitioner maintains that without considering all of the evidence and arguments put forward by his defense, the President of the Supreme Court, on November 10, 1998, ordered a full trial for the crime of embezzlement--not for the offenses that had motivated the preliminary proceedings. The petitioner's brief indicates that this decision was appealed by his attorneys and subsequently confirmed by the First Criminal Chamber of the Supreme Court of Justice.

[FN5] In the complaint he presented to the Commission on November 9, 1999, the petitioner affirmed that the "investigation had been ordered against him for not having withheld taxes payable by the service providers concerned and for destroying original documents or instruments of the national government and public authorities."

11. The petitioner argued before the Commission that on 22 March 1999, the Ecuadorian State had requested his extradition from the Mexican Government, accusing him of having committed a criminal offense. The petitioner indicated, as proof of his innocence of the charges against him, that the extradition request was denied by the Department of Foreign Relations of Mexico, based on a ruling by the Third District Judge for Criminal Proceedings in the Federal District. The denial indicates that Mexico was on the view that Ecuador had not provided sufficient evidence to establish probable responsibility for the charge of embezzlement. The petitioner argued before the IACHR, that for this reason, he was a victim of political persecution by the President of the Supreme Court of Ecuador, and this demonstrated that his actions as Minister of Government had been lawful.

12. In addition to the foregoing, the petitioner affirms that a series of irregularities arose during the criminal proceedings, which included: (a) that an investigation and preventive detention had been ordered for acts that did not constitute an offense; (b) that he was being tried by a court without jurisdiction; (c) that he was not being judged by an impartial judge, since the President of the Supreme Court had demonstrated clear antagonism towards him in order to prevent him from presenting his candidacy for Parliament; (d) that the proceedings were initiated in connection with two acts and that he was being judged for a third act that had not been addressed by the proceedings; (e) that he was being judged in the first and second instance by the Supreme Court, in violation of his right to adjudication at two different levels; (f) that his political rights to be a candidate for popular election had been violated; and (g) that he had no swift or effective recourse for stopping the violations against him.

13. With respect to the exhaustion of domestic remedies, the petitioner maintains that his petition is admissible by virtue of the absence of due process rules in Ecuador.[FN6] He also affirms that the absence of such rules notwithstanding, he filed an appeal against the order to hold a full trial which was dismissed by the First Criminal Chamber of the Supreme Court of Justice. The petitioner maintains that given the absence of due process rules, the exception contained in Article 46(2)(a) of the American Convention is applicable and that, in the light of the case law of the Inter-American Commission on Human Rights, it should be concluded that domestic remedies in the present matter have been exhausted.

[FN6] Communication of 9 November 1999 from the petitioner.

14. Based on these arguments, the petitioner requests that the Commission declare the State responsible for violating the following human rights: (a) the right to personal liberty (Article 7), the right to a fair trial (Article 8), the right to participate in government (Article 23), the right to judicial protection (Article 25), and the duty to adopt provisions of domestic law (Article 2), all enshrined in the American Convention on Human Rights in breach of the obligations set forth in Article 1(1) thereof.

B. Position of the State

15. The State maintains that the petitioner has not exhausted domestic remedies for his complaint and requests, accordingly, that the Commission declare the petition presented by former Minister César Verduga Vélez inadmissible.

16. In response to the petitioner's arguments, the State "requests that the economist Verduga return to the country and exercise his rights before national courts of law, which (...) have all of the fundamental characteristics recognized in the Convention". The State also affirms that pursuant to Article 254 of the Code of Criminal Procedure,[FN7] the criminal proceedings against the economist César Verduga Vélez have been suspended at the full-trial stage, inasmuch as the petitioner is at-large, and that the petitioner, therefore, cannot affirm that domestic remedies have been exhausted or even that the criminal proceedings initiated in the case have concluded. The State adds that the petitioner has not been prevented from using any recourse afforded by the law to contest judicial decisions, including recourse to cassation.

[FN7] Article 254(1) of the Code of Criminal Proceedings, in force when the acts in question occurred, provides: "If, when the order for a full trial is issued, the accused is at-large, the judge having issued the order shall suspend the full-trial stage until the accused is apprehended or presents himself voluntarily. For as long as the accused remains at-large, the order for a full trial shall not be executed, and he shall be notified personally of the order at such time as he presents himself or is apprehended."

17. The State indicates that the petitioner has, moreover, had free access to domestic remedies and has never been denied access to the bodies that have the authority to clarify his legal situation, and that his right to due process, subject to judicial guarantees, has been fully respected.

18. The State maintains that it is incumbent upon the petitioner to prove to the Commission that he has taken the steps necessary to exhaust remedies existing under Ecuadorian domestic law. With respect to the procedural anomaly mentioned by the petitioner, the State affirms that it has not omitted any step or formality during the course of the proceedings that could have a bearing on any substantive decision, and that it has adhered, throughout the proceedings, to the principles of legality, impartiality, and due process. The petitioner has also been assured of his right to access to justice, having been free to present evidence in his defense and to pursue effective forms of recourse; the exercise of his right to defend himself has been fully guaranteed.

19. It should be noted, finally, that in its communication of 21 December 2001, the State ratified its initial position and again requested that the Commission declare the initial petition inadmissible, inasmuch as domestic remedies have not been exhausted.

IV. ANALYSIS

A. The Commission's jurisdiction *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae*

20. The petitioner is entitled, under Article 44 of the American Convention to present complaints to the IACHR. The petition identified an individual person as a victim whose rights under the American Convention Ecuador has undertaken to respect and guarantee. With respect to the State, the Commission observes that Ecuador has been a State party to the American Convention since 28 December 1977, when it deposited the instrument of ratification. The Commission therefore has jurisdiction *ratione personae* to examine the petition.

21. The IACHR has jurisdiction *ratione loci* to review the petition, inasmuch as violations of rights protected in the American Convention have been alleged to occur within the territory of a state party to that treaty.

22. The IACHR has jurisdiction *ratione temporis*, inasmuch as the obligation to respect and guarantee the rights protected in the American Convention was in force for the State on the date when the acts alleged in the petition were said to have occurred.

23. Finally, the Commission has jurisdiction *ratione materiae*, inasmuch as the petition complains of violations of human rights protected by the American Convention.

B. Other requisites for admissibility

24. The Inter-American Court of Human Rights has held, in the Velázquez 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.”[FN8] In its first response to the petition, in a manner consistent with the Court's ruling, the State cited the non-exhaustion of domestic remedies.

[FN8] Inter-American Court of Human Rights, Velázquez Rodríguez, Preliminary Objections, Judgment of 26 June 1987, Series C , N° 1, para. 88.

25. It is also a fundamental rule in the inter-American system that the State alleging nonexhaustion bear the burden of indicating the domestic remedies that must be exhausted, and their effectiveness. The Commission notes that the State has indicated that the proceedings against the petitioner for misuse of public funds, initiated on 10 November 1998, have been suspended at the full-trial stage, in accordance with Articles 254 and 255 of the Code of Criminal Procedure--the accused having fled--by the President of the Supreme Court, the appropriate judge for the accused in his capacity as Minister of Government and Police at the time that the alleged offenses were said to have been committed. This demonstrates the nonexhaustion of domestic remedies. According to the State, "these proceedings have still not concluded, and the appropriate courts must proceed to resolve the matter in accordance with the law. The determination reached through this process, be it favorable or unfavorable, is the appropriate remedy for the petitioner's situation (...)".

26. Given the subsidiary nature of the human rights treaties, the rule of exhaustion of domestic remedies was created and enshrined in Article 46(1)(a) of the American Convention. The rule of exhaustion enables the State to resolve the complaint at the domestic level before being faced with international proceedings.

27. The State has proven the existence of effective domestic remedies for the petitioner's legal situation.[FN9] The Inter-American Court has held 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)."[FN10]

[FN9] In its response of 10 August 2000, the State indicated that resolution of the case initially brought before domestic courts against the petitioner is still pending. The State also indicated that the petitioner would be entitled to appeal and to obtain a review of the judgment eventually reached in the criminal proceedings that have been brought against him.

[FN10] Inter-American Court of Human Rights, Velásquez Rodríguez, Judgment of 29 July 1988, Series C and D N° 4, para. 60.

28. The petitioner maintained that domestic remedies had been duly exhausted and that his petition was admissible, inasmuch as the exception to the rule of exhaustion of domestic remedies provided for in an Article 46(2)(a) of the American Convention was applicable. This exception, for denial of justice, refers to the absence of due process of law under the domestic legislation of Ecuador.

29. The Commission considers that in this case the exception is not applicable. The Commission considers that due to the subsidiary nature of the American Convention, the petitioner must first use the remedies offered by the domestic system for resolving the alleged due process violations.[FN11] The petitioner must appear before the State so that it can decide the disputed point. The Commission considers that in the present case the exceptions set forth in Article 46(2) of the American Convention are not applicable. It has not been shown through these proceedings that the petitioner has been denied access to a remedy or that he has been impeded from exhausting it, in light of the fact that he has not even appeared in the courtroom. It is also not possible to allege that in the present case there has been an unjustified delay in the administration of justice.

[FN11] Report N°82/98, Gustavo A. López Gómez, Annual Report 1998, p. 21; Report N° 93/01, Alberto Dahik Garzozzi, Annual Report 2001, p. 30. Report N° 43/99, Alan García Pérez, Annual Report 1998, p. 18.

30. The Commission considers it necessary to refer to the petitioner's allegations regarding the alleged lack of independence and impartiality of the judges in charge of the proceedings against him. In this context, the Commission wishes to reiterate that the decisive element is not

the subjective fear of the affected person as regards the tribunal's impartiality, but whether the fears can be justified objectively. The European Court has stated that: "In principle, the personal impartiality of the members of a tribunal must be presumed until there is proof to the contrary." [FN12] The Commission cannot conclude, in the abstract and without concrete and reliable evidence that the future decisions of a tribunal will be taken in a biased manner and without regard for the due process norms.

[FN12] European Court H.R., *Albert and Le Compte v. Belgium*, February 10, 1983, Series A, N° 58, para. 32.

31. For the reasons set forth above, the Inter-American Commission considers that the petitioner has not exhausted the domestic remedies available and therefore concludes that his petition is inadmissible pursuant to Articles 46(1)(a) and 47(a) of the American Convention and Article 31(1) of the Commission's Rules of Procedure.

V. CONCLUSIONS

32. Based on the arguments of fact and law set forth above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible.
2. To notify the petitioner and the State of this decision.
3. To publish this decision and 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 27 day of the month of February in the year 2002. (Signed) Juan Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Commissioners: Robert K. Goldman and Clare K. Roberts.