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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 7/05; Petition 1103/03
Session:	Hundred Twenty-Second Regular Session (23 February – 11 March 2005)
Title/Style of Cause:	Ricardo Noboa Bejarano v. Ecuador
Doc. Type:	Decision
Decided by:	President: Clare K. Roberts; First Vice-President: Susana Villaran; Second Vice-President: Paulo Sergio Pinheiro; Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez Trejo, Florentin Melendez.
Dated:	23 February 2005
Citation:	Noboa Bejarano v. Ecuador, Petition 1103/03, Inter-Am. C.H.R., Report No. 7/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANT: Xavier A. Flores Aguirre
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## I. SUMMARY

1. On December 15, 2003, the Inter-American Commission on Human Rights (hereinafter “the Commission” or the “IACHR”) received a petition lodged by Xavier A. Flores Aguirre (hereinafter “the petitioner”), in which he alleges that the Republic of Ecuador (hereinafter “the State,” “the Ecuadorian State,” or “Ecuador”) acted to the detriment of Mr. Noboa Bejarano by depriving him of his right to freedom of expression and thought and the right to appeal a judgment to a higher court in the context of the criminal proceedings in which he was sentenced to three months in prison for committing the crime of serious non-calumnious defamation [injurias graves no calumniosas].

2. The petitioner alleges that the State is responsible for violation of Articles 8 (2)(h) (right to appeal the judgment to a higher court) and 13 (freedom of thought and expression), considered in relation to Articles 1(1) (obligation to respect rights) and 2 (duty to adopt domestic legislation) of the American Convention on Human Rights (hereinafter the “Convention,” or the “American Convention”). As regards the admissibility of the complaint, the petitioner alleges that the appropriate available remedies under domestic law for protection of the rights violated to the detriment of Mr. Noboa Bejarano were pursued and exhausted. The State, in turn requests that the IACHR not admit the present petition on the grounds that it lacks legal merit, since the facts of the case do not reflect a violation of the rights enshrined in the American Convention.

3. In this report, the Commission examines the available information in terms of the American Convention, and concludes that Petition 1103/03 meets the admissibility requirements set forth in Articles 46 and 47 of the Convention. Consequently, the Commission decides to

declare the case admissible, notify the parties of the decision, and continue its review of the merits with regard to the alleged violations of Articles 8, 13, 2, and 1(1) of the American Convention. The IACHR further decides to publish the present report.

## II. PROCESSING BY THE COMMISSION

4. The Commission registered the petition as Number P1103/2003, and on January 21, 2004, it acknowledged receipt of the petition and informed the petitioner that the complaint was under review, in accordance with the provisions of the Convention and the Rules of Procedure. In its communication dated March 2, 2004, the Commission transmitted to the State a copy of the relevant parts and gave it two months to submit information on the allegations made in the petition, in accordance with Article 30(2) of the IACHR Rules of Procedure.

5. In a communication dated September 10, 2004, the State submitted to the IACHR its brief containing observations on the complaint lodged by the petitioner. On December 15, 2004, the petitioner submitted additional information and requested the IACHR to draw up the corresponding admissibility report.

## III. POSITIONS OF THE PARTIES

### A. Position of the petitioners

6. The petition indicates that Ricardo Noboa Bejarano was President of the National Modernization Council (CONAM) and that, in that capacity, he was in charge of the privatization and adjudication of management of the state-owned telephone company, PACIFITEL. In these circumstances, on the night of May 30, 2002, Mr. Noboa Bejarano announced on a national television station that the adjudication for management of the telephone company had been unsuccessful. Immediately afterwards, on May 31, 2002, the privatization procedure was declared null and void.

7. More specifically, the petitioner states that Mr. Noboa Bejarano used “strong terms” in referring to several persons who, in his opinion, had launched a campaign to prevent foreign telephone operators[FN1] from privatizing management of PACIFITEL, and that this subsequently led to his conviction to three months in prison. In fact, the petitioner maintains that the public statements made by Ricardo Noboa Bejarano led to different reactions on the part of the persons implicated in them. In particular, the petitioner indicates that Christian Social Party Deputy José Alvear Icaza, whom Mr. Noboa Bejarano had referred to in his statements as the attorney for Cybertec and Alcatel companies, both of which had interests in the telephone sector, announced at a press conference that “he would sue the President of CONAM for the offense of defamation ...”. The petitioner further indicates that on June 6, 2002, Deputy José Alvear Icaza lodged a complaint [querrela] against Ricardo Noboa Bejarano with the Guayas Public Prosecutor’s Office, accusing him of the offense of defamation.

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[FN1] The petitioner points out that in the days leading up to the aforesaid statements by Ricardo Noboa Bejarano, the Telefeom S.A. company published a series of press releases for the general

public in which they denounced alleged irregularities in the procedure for awarding the contract for management of PACIFITEL. In this regard, they reported that on May 23, 2002, the Telefeom company filed an amparo petition against the process for selection of the private manager of PACIFITEL, which was declared without merit on May 31, 2002. However, the petition states that on that same day, the privatization procedure was declared void for lack of candidates. On May 29, 2002, the President of the Christian Social Party, José Alvear Campodonico, published an “open letter” addressed to the President of the Republic at the time, Gustavo Noboa Bejarano, in which he made serious accusations related to the privatization procedure.

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8. The petition indicates that the aforesaid complaint was dismissed, but that the criminal accusation [denuncia penal] was received by the Second Court for Criminal Matters in Pichincha on June 21, 2002. It goes on to report that in a judgment issued on March 5, 2003, the Second Court for Criminal Matters of Pichincha declared that Ricardo Noboa Bejarano was guilty of serious noncalumnious defamation and imposed a sentence of three months in prison and a token fine.

9. The petitioner states that once Mr. Noboa Bejarano was notified of the conviction, he filed an appeal [recurso de nulidad] against it, alleging that the Second Criminal Court of Pichincha did not have jurisdiction to hear the case, in accordance with the provisions of Article 330 of the Code of Criminal Procedure. The petition further indicates that Mr. Noboa Bejarano filed another appeal [recurso de apelación] in which he contended that the sentence imposed was disproportionate to the seriousness of the offense allegedly committed. He further alleged that there was no malicious intent in his public statements, since he was merely complying with his constitutional duty to report, pursuant to Article 97 of the Political Constitution of Ecuador.

10. With regard to the decision on these appeals, the petitioner states that in a judgment dated June 6, 2003, the Sixth Chamber of the Superior Court of Justice of Quito dismissed the first appeal [recurso de nulidad], on the grounds that the reasons for nullifying the proceedings alleged by the moving party did not have a determining influence on the decision handed down in the proceedings. With regard to the second appeal [recurso de apelación], the petitioner indicates that the Sixth Chamber of the Superior Court of Justice of Quito stated in its judgment dated July 16, 2003 that the expressions and references made by Mr. Noboa Bejarano had “unnecessarily exceeded the limit of the duty to inform and the right to report and combat acts of corruption established in the Constitution.” Consequently, the petitioner indicates that the Sixth Chamber of the Superior Court of Justice dismissed both appeals and upheld the appealed judgment, by which Mr. Noboa Bejarano was sentenced to three months in prison.

11. Subsequently, Mr. Noboa Bejarano filed an appeal [recurso de casación] with the Sixth Chamber of the Superior Court of Justice of Quito, against the judgment of July 17, 2003 in which that court had denied the recurso de apelación. The petitioner states that on July 22, 2003, the Sixth Chamber admitted that appeal and referred the case to the Supreme Court of Justice. Then the petitioner alleges that, in a judgment issued on September 25, 2003, the Supreme Court denied the “recurso de casación” on the grounds that the provisions of the Ecuadorian legal

system ruled out the use of such an appeal in cases of criminal action prosecuted by a private party.

12. In response, on September 26, 2003, Mr. Noboa Bejarano filed an appeal requesting reversal of the court's own decision [recurso de revocatoria], alleging that the provisions of the Code of Criminal Procedure made no reference to the fact that judgments appealable by recurso de casación were limited solely to judgments arising from proceedings involving crimes which may only be prosecuted by the government, and that furthermore this would entail a clear violation of the constitutional right to equality before the law. On October 23, 2003, the Supreme Court of Justice denied the recurso de revocatoria.

13. The petition then states that Mr. Noboa Bejarano filed a request for review of the decision denying the recurso de casación with the Pichincha Second Criminal Court. Here the petitioner points out that said petition was based on the provisions of Article 8.2.h of the American Convention and the retroactive application of Resolution No. 006-2003 DI of the Ecuadorian Constitutional Court, on the basis of which it was found that the restriction of recurso de casación [appeals] applicable to judgments issued with respect to crimes prosecuted by a private party constituted a violation of the guarantees of due process and the right to equality. The petitioner indicates that in its judgment of October 27, 2003, the Second Criminal Court of Pachincha declared the request for review inadmissible and therefore denied it.

14. At the same time, Mr. Noboa Bejarano filed an appeal [recurso de hecho] in accordance with the provisions of Article 82 of the Ecuadorian Criminal Code.[FN2] In a decision dated October 16, 2003, the Pichincha Second Criminal Court denied the petition. The Court in question consequently ordered execution of the sentence handed down by the Superior Court of Quito imposing three months of imprisonment on Mr. Noboa. In response, Mr. Noboa again requested that the Court revoke the decision of October 16, 2003, a request that was denied. Mr. Noboa then proceeded to appeal that decision, without success. Finally, the petitioner states that Mr. Noboa again filed a recurso de hecho, which was granted to him by the Court. As a result, proceedings were thereupon referred to the Sixth Chamber of the Superior Court.

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[FN2] Article 82 of the Ecuadorian Criminal Code establishes that: "In cases of a first conviction, if it pertains to a crime punishable by a maximum sentence of six months in prison or a crime to which only a fine is applicable, judges may order in the same judgment that execution of the sentence is suspended. This decision shall be based on the criteria of the overall character of the convicted person, and the nature of the crime and its surrounding circumstances, to the extent that they may serve to assess said character. Judges shall request the information they deem relevant to determine such criteria."  
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15. As regards the admissibility of this complaint, the petitioner alleges that the remedies under domestic legislation were exhausted on October 27, 2003 with the denial by the Second Court for Criminal Matters of Pichincha of the petition filed by Mr. Noboa Bejarano related to the judgment rejecting the recurso de casación.

16. As for the merits of the case, the petitioner alleges that the above-mentioned acts constitute a violation by the Ecuadorian State of the rights to a fair trial and freedom of expression and thought, established in Articles 8(2.h) and 13 of the American Convention, and of the general obligation to ensure respect for the rights protected by the Convention, pursuant to its Article 1(1), in addition to the obligation to adopt the provisions of domestic law stipulated in its Article 2.

17. With regard to the right to a fair trial, the petitioner alleges that the interpretation of the Supreme Court of Justice regarding the limitation of the viability of the recurso de casación to judgments derived from publicly prosecuted criminal proceedings, entails a violation of Article 8.2.h of the American Convention, in accordance with the specific terms of that provision and the jurisprudence of the system.

18. With respect to violation of the right to freedom of expression, the petitioner states that the jurisprudence of the inter-American system in this area establishes that in cases of defamatory statements made by public persons or in matters of public interest, only civil sanctions are applicable in accordance with the standard of real malicious intent. The petitioner alleges that the standard of real malicious intent implies the imposition of civil and not criminal sanctions, in cases in which there is false information produced with the express intent of causing harm. In such cases, the burden of proof falls on the persons who find or consider themselves to be harmed by the false or incorrect information.

19. On the basis of the foregoing arguments, the petitioner alleges that the State of Ecuador failed to respect or guarantee the rights established in Articles 8.2.h and 13 of the American Convention, and to take adequate steps to make such rights effective, in accordance with the provisions of Articles 1(1) and 2 of that international instrument, and that the relevant remedies under domestic law have been exhausted.

#### B. Position of the State

20. In the State's responding brief, it stated that Mr. Ricardo Noboa Bejarano held high-level offices during the administration of his brother, President Gustavo Noboa Bejarano. He was president of the National Modernization Council (CONAM) and, in that capacity, his views diverged from some sectors of national policy, especially with regard to privatization of the Ecuadorian State electric and telephone companies,[FN3] which gave rise to the problems that are at the origin of this case.

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[FN3] Office of the Attorney General of the State of Ecuador, communication No 11342, September 10, 2004, Quito, Ecuador.

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21. In this context, the State reports that Mr. Ricardo Noboa Bejarano appeared on a national television station and, as the petitioner acknowledges, he used "strong terms to refer to various persons who in his opinion had campaigned to prevent privatization of the management of PACIFITEL." The State further asserts that the result of that television appearance was the

criminal suit filed against him by Deputy José Alvear Icaza. More specifically, the State reports that Deputy José Alvear Icaza filed criminal charges with the Second Court for Criminal Matters of Pichincha on June 21, 2002, and that the case concluded with a conviction sentencing Mr. Noboa Bejarano to three months in prison.

22. The State advises that it does not intend to review all the procedural steps taken in this case, not to mention the judgments issued by the judges with jurisdiction in the case. It points out, however, that it is important to note that the State fulfilled all the guarantees of due process. The State contends that in the case in point, “there was no assumption of lack of defense, and that both the accused and the accuser offered their evidence, presented their arguments, and made use of all the remedies established by criminal legislation until the conviction became final.”

23. In fact, the State indicates that Mr. Noboa Bejarano pursued all available legal remedies. In this regard, the State points out that the Sixth Chamber of the Superior Court of Quito upheld the judgment that convicted Ricardo Noboa Bejarano to three months in prison, as it considered that his “expressions and references unnecessarily exceeded the limit of the duty to inform, and the right to report and combat acts of corruption established in constitutional provisions.” Subsequently Mr. Noboa filed an appeal [recurso de casación] with the Supreme Court of Justice, which was declared without merit, and then he requested revocation of that decision in an appeal that was also denied. The following month, he filed a request for review of the decision to dismiss the recurso de casacion with the Second Criminal Court of Pichincha, which was also denied. Finally, after filing the recurso de hecho, the proceedings in the case were referred back to the Sixth Chamber of Quito’s Superior Court.

24. As for petitioner’s arguments regarding his rights, the State contends that his complaints lack merit. Moreover, in its view it is legally and morally absurd for a person to allege that his rights were violated when his own acts, performed in a conscious and deliberate manner, constitute unlawful acts punishable under criminal law.

25. On this point, the State regards as untenable the petitioner’s contention that the guarantee of due judicial process was violated when the Supreme Court of Justice declared the recurso de casacion to be without merit. That would be tantamount to maintaining that whenever a recurso de casacion is declared to be inadmissible, a violation of due process is incurred. It alleges that in the matter of human rights, procedural simplification is to be avoided, and that the legal obligation of states parties to the Convention is not an obligation of result but rather of means, as has been established consistently in the jurisprudence of the Inter-American Commission and Court.

26. Hence the State alleges that it is a widespread practice throughout Latin America that recursos de casacion are not admissible in all cases. In this matter, the State maintains that the different national bodies of law determine the cases in which it is possible to file such an appeal, the purpose of which is to correct errors of law in earlier proceedings. It contends that in Ecuador, this type of appeal has been abused, and that it has been used as a third instance, so that the Supreme Court must examine the appropriateness or merit of this appeal in every case, in accordance with the law in force. On the basis of these considerations, the State alleges, with

respect to the petitioner's allegations to the effect that the Supreme Court gave a restrictive interpretation to the law when it found that said appeal is applicable only in the case of crimes of public prosecution, the State alleges that this does not amount to a violation of rights. It points out that the Supreme Court judgment denying the *recurso de casacion* was issued prior to Resolution No. 006-2003 DI of the Constitutional Court.

27. The State further emphasizes that it is neither ethical nor legal to accuse the Supreme Court of giving a restrictive interpretation to the *recurso de casacion*, because procedural justice is not meant to be viewed unilaterally, without observing the rights that assist the injured party.

28. As for violation of the right to freedom of expression, the State contends that there is no type of prior censorship in Ecuador, and that this was clearly apparent in the present case, since Mr. Noboa could address the entire country, without prior censorship, on a national television station. However, the State indicates that Ecuadorian legislation recognizes that this right may not be used to the detriment of other persons, and that, to this end, certain restrictions on the right to freedom of expression are established in the law, in accordance with the provisions of the National Constitution and Article 13(2) of the American Convention itself. In these circumstances, the State alleges that when judges, in full respect of guarantees of due process, issue a judgment of serious, non-malicious defamation, which is established as an offense in the Ecuadorian Criminal Code, and convicts a citizen to three months in prison, it is not possible to allege that the right to freedom of expression was violated.

29. Finally, the State requests that the IACHR, on the basis of the foregoing arguments, find the petition inadmissible and proceed to close the case.

#### IV. ANALYSIS ON JURISDICTION AND ADMISSIBILITY

##### A. Jurisdiction

30. In principle, the petitioner is authorized by Article 44 of the American Convention to lodge petitions with the Commission. The petition states that the alleged victim is a natural person, in respect of whom the Ecuadorian State undertook an obligation to respect and guarantee the rights established in the American Convention. Ecuador has been a state party to the American Convention since December 28, 1977. The Commission therefore has jurisdiction *in ratione personae* to examine the petition.

31. Similarly, the Commission has *ratione loci* jurisdiction to consider the petition, since it alleges violations of rights protected by the American Convention that took place under the jurisdiction of the State. The Commission has *ratione temporis* jurisdiction to study the complaint because the obligation to respect and guarantee the rights protected in the American Convention was already in effect for the State on the date that the acts alleged in the petition occurred. Finally, the Commission has subject matter jurisdiction, since possible violations of human rights protected by the American Convention are reported in the petition.

##### B. Admissibility Requirements

1. Exhaustion of domestic resources

32. Article 46(1)(a) of the American Convention establishes that petitions lodged with the IACHR must comply with the following requirement:

a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.

33. As established in the jurisprudence of the Inter-American Court of Human Rights, this rule of prior exhaustion of domestic remedies was conceived for the benefit of the states.[FN4] It is therefore a requirement which the state party in question may expressly or tacitly waive, without affecting the arguments of the petitioners. In this case, the state refrained from making allegations on application of Article 46(1) of the American Convention to the petition lodged by the petitioners. It may therefore be concluded that the state tacitly waived its authority to use the objection of lack of exhaustion of domestic remedies.

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[FN4] Inter-American Court, Matter of Viviana Gallardo et al, N° 101/81, Series A, Resolution of July 15, 1981, Decision of November 13, 1981, para. 26, Case of Velásquez Rodríguez, Preliminary Objections, Judgment of June 26, 1987, Series C N° 1, para. 88; Case of Fairén Garbi and Solís Corrales, Preliminary Objections, Judgment of June 26, 1987, Series C N° 2, párr. 87; Case of Godínez Cruz, Preliminary Objections, Judgment of June 26, 1987, Series C N° 3, para. 86; Inter-American Court, Case of Gangaram Panday, Preliminary Objections, Judgment of December 4, 1991, Series C N° 12, para. 38; Case of Neira Alegría y Otros, Preliminary Objections, Judgment of December 11, 1991, Series C N° 13, para. 30; Case of Castillo Páez, Preliminary Objections, Judgment of January 30, 1996, Series C N° 24, para. 40, and Case of Loayza Tamayo, Preliminary Objections, Judgment of January 31, 1996, Series C N° 25, para. 40.

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2. Deadline for the presentation of petitions

34. In the petition under study, the IACHR has found that the Ecuadorian State tacitly waived its right to enter the objection of failure to exhaust domestic remedies, and so Article 32 of the Commission's Rules of Procedure is not applicable. However, the regulatory requirements of exhaustion of domestic remedies and of presentation within six months of the judgment exhausting domestic remedies are independent of each other. The Inter-American Commission must therefore determine whether the petition under consideration was lodged within a reasonable time period. Accordingly, the IACHR notes that the original petition was lodged on December 15, 2003, within six months following the decision issued on October 27, 2003 by the Second Court for Criminal Matters of Pichincha, which denied the request for review of the judgment that rejected the appeal [recurso de casación], which was filed by the counsel for the defense of Mr. Noboa Bejarano. Consequently, the IACHR considers that it was presented within a reasonable time period.

3. Duplication of international proceedings and res judicata



35. The case files do not show that the subject matter of the petition is pending decision in another international proceeding for settlement, or that it replicates a petition already considered by this or another international organization. It is therefore concluded that the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

#### 4. Characterization of the alleged facts

36. The state requested the Commission to dismiss this petition on the grounds that it “lacks legal foundation in the light of the American Convention on Human Rights, because there was no violation of any kind of the petitioner’s rights.”

37. The Commission is of the opinion that at this stage of its procedures, it is not appropriate to determine whether or not there was a violation of the American Convention. For the purposes of admissibility, the IACHR must decide whether the acts described characterize a violation, as stipulated in Article 47(b) of the American Convention, and whether the petition is “manifestly groundless” or “obviously out of order,” according to paragraph (c) of that Article. The standard for assessing these requirements is different from the one required to decide on the merits of a petition. The IACHR must conduct a *prima facie* evaluation to determine whether the petition establishes a basis for an apparent or potential violation of a right guaranteed by the Convention, but not to determine the existence of a violation. This evaluation is a summary analysis and does not imply prejudice or an advance opinion as to the merits. The Commission’s Rules of Procedure, by establishing two clear stages of admissibility and merits, reflect this distinction between the evaluation to be carried out by the Commission for the purpose of determining the admissibility of a petition and the evaluation required to establish a violation.

38. In fact, Article 47(b) of the American Convention states that the Commission shall consider inadmissible any petition or communication that “does not state facts that tend to establish a violation of the rights guaranteed by this Convention.” The Commission considers that, *prima facie*, and in light of the jurisprudence of the inter-American system, the petitioner’s allegations regarding the presumed violation of the right to a fair trial and to freedom of expression may characterize violations of the rights guaranteed in Articles 8 and 13, considered in conjunction with Articles 1(1) and 2 of the American Convention. Since the groundless or inappropriate nature of these aspects of the complaint are not obvious, the Commission considers that the requirements established in Articles 47(b) and (c) of the American Convention have been met.

## V. CONCLUSIONS

39. The Commission concludes that it has jurisdiction to examine the complaints lodged by the petitioners regarding an alleged violation of Articles 8 and 13, considered in conjunction with Articles 1(1) and 2 of the American Convention, and that they are admissible, in accordance with the requirements established in Articles 46 and 47 of the American Convention.

40. On the basis of the factual and legal arguments set forth in this report, and on the understanding that they do not entail a prejudgment on the merits of the matter,

## THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

### DECIDES:

1. To declare the present case admissible, in relation to Articles 8, 13, 1(1), and 2 of the American Convention.
2. To notify the Colombian [sic] State and the petitioner of this decision.
3. To continue to analyze the merits of the case.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 23rd day of the month of February, 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Commissioners Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez Trejo, and Florentín Meléndez.