

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 48/05; Petition 12.194
Session:	Hundred Twenty-Third Regular Session (11 – 28 October 2005)
Title/Style of Cause:	Euclides Rafael Moreno Morean v. Venezuela
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, Florentin Melendez. Commissioner Freddy Gutierrez, of Venezuelan nationality, did not participate in the deliberations and the vote on this report, in keeping with Article 17(2)(a) of the Commission’s Rules of Procedure.
Dated:	12 October 2005
Citation:	Moreno Morean v. Venezuela, Petition 12.194, Inter-Am. C.H.R., Report No. 48/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANT: Douglas Cassel
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I. SUMMARY

1. On May 29, 1999, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition submitted by Douglas Cassel (hereinafter “the petitioner”) on behalf of Euclides Rafael Moreno Moreán (hereinafter “the alleged victim”) in which it is alleged that the Bolivarian Republic of Venezuela (hereinafter “the State” or “the Venezuelan State”) is responsible for alleged violations of his minimal due process guarantees and of his right to personal liberty, which allegedly occurred in the processing of a trial for embezzlement of public funds.

2. The petitioners alleged that the State was responsible for violating his right to personal liberty, right to defense, right to property, and right to judicial protection, established at Articles 7, 8, 21, and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), as well as the generic obligation to respect and ensure the rights protected, set forth at Article 1(1) of the Convention. In addition, the alleged victim argued that the domestic remedies available had been exhausted through the final judgment handed down by the Supreme Court of Justice on December 2, 1998. In response, the Venezuelan State argued that the Commission could not act as a judicial fourth instance, reviewing a proceeding that had already been resolved in keeping with due process standards, and, accordingly, it asked that the petition be found inadmissible, under Article 47(b) and (c) of the Convention.

Subsequently, the State argued that the guilty verdict alleged to be a violation had prescribed, and, accordingly, that the motives that allegedly had given rise to the complaint did not subsist.

3. After analyzing the parties' positions, the Commission concluded that it was competent to decide the claim presented by the alleged victim, and that the case was admissible, in light of Articles 46 and 47 of the American Convention. Accordingly, the Commission decided to notify the parties and make public this report on admissibility and include it in its Annual Report.

II. PROCESSING BEFORE THE COMMISSION

4. On May 29, 1999, the Commission received a petition on behalf of Rafael Euclides Moreno Moreán. On June 14, 1999, the petitioner filed documents additional to that petition, which was assigned number 12,194. On August 2, 1999, the petition was forwarded to the State, which was given 90 days to submit its observations. On January 4, 2000, the State submitted its observations to the Commission; these were forwarded to the petitioner on January 27, 2000. On February 29, 2000, the petitioner submitted his observations on the State's response, asking the Commission to extend its good offices to analyze the possibility of reaching a friendly settlement. In this same communication, the petitioner communicated a new sentence imposed on the alleged victim, with respect to which he alleged similar irregularities. On March 15, 2000, the Commission made itself available to the parties in order to reach a friendly settlement. On August 24, 2001, the petitioner informed the Commission that the parties had not reached a friendly settlement agreement. On October 19, 2001, the State communicated to the Commission its intent to continue to take initiatives to reach a friendly settlement.

5. On August 9, 2002, the petitioner submitted additional information in which he submitted additional information indicating that the new efforts to reach a friendly settlement had failed, and, accordingly, he asked that a hearing be called to discuss issues of admissibility and the merits. On September 13, 2002, the Commission informed the parties that it was calling a hearing, which was held October 15, 2002. On July 16, 2004, the petitioner asked that the Commission, in keeping with Article 37(3) of its Rules of Procedures, adopt a report on admissibility and the merits in this case. The Commission forwarded the request to the State, for observations; it received an answer from the State on December 14, 2004.

III. THE PARTIES' POSITIONS

A. The petitioner's position

6. The petition notes that the alleged victim served as President of the Instituto Venezolano de los Seguros Sociales (Venezuelan Social Security Institute) from 1989 to 1992. During that period, as President of the Institute, the alleged victim was authorized to request that checks be issued in the name of the Institute by several financial institutions. In 1992, the alleged victim was accused of the crime of willful embezzlement (*peculado doloso*) for irregularities in the handling of two checks in the name of the Instituto Venezolano de los Seguros Sociales that were held in the safe kept by the Institute's treasurer for 90 days. The petition notes that a secret investigation was investigated into these facts to which the accused had no access. On October 28, 1992, pursuant to that investigation, it was ordered that the accused be held in pretrial

judicial detention of the accused was ordered, denying the possibility of release on bond pending the conclusion of the secret investigative phase and the trial. The petitioner argues that in the wake of that decision, he decided to leave the country to avoid being unjustly detained.

7. The petitioner indicates that after five years of proceedings, on August 13, 1997, Mr. Moreno was acquitted, in absentia, by the Superior Court for Safeguarding Public Property, of the crime of willful embezzlement (*peculado doloso impropio*). The Office of the Attorney General appealed the decision, which was affirmed by the Chamber of Cassation for Criminal Matters of the Supreme Court of Justice on December 2, 1998. Notwithstanding that acquittal, the petitioner notes that the Chamber of Cassation for Criminal Matters ordered the alleged victim to serve a seven-and-a-half month prison sentence, and to pay compensation for the crime of negligent embezzlement (*peculado culposo*).

8. The petitioner alleges that throughout the processing of the criminal trial his rights to due process and defense were violated. Thus, it is noted that during the investigative phase (*sumario*) and prior to the issuing of the order for arrest with no possibility of release, the alleged victim was prevented from having access to and participating in the different aspects of the investigative phase, except for his statement not under oath to the Superior Court for Safeguarding Public Property on September 3, 7, and 10, 1992. According to the petitioner, except for this statement and throughout the proceedings, the alleged victim was unable to know of or contradict the evidence or witnesses presented against him, he could not present evidence or witnesses on his own behalf, and he did not have the right to the assistance of counsel, nor to his defense through such assistance.

9. The petition also alleges that on October 28, 1992, an arrest warrant was issued for the alleged victim, with no possibility of release on bond, and without him being afforded the opportunity to defend himself against this measure. The alleged victim, “in the face of the possibility of remaining locked up for several years pending trial in one of Venezuela’s dangerous prisons,” escaped Venezuela and sought refuge abroad. This entailed freezing all of his assets pending the outcome of the trial and the beginning of his prosecution in absentia. Based on these facts, the petitioner alleges that Articles 7 and 21 of the American Convention have been violated. The petitioner notes that Article 21 was also violated insofar as his assets were frozen pending trial, and he was subsequently ordered to pay monetary compensation stemming from a trial in which his due process rights were violated. This freezing and subsequent impossibility of the alleged victim and his heirs from taking charge of the assets, according to the petitioner, entailed the “real disappearance of his net worth in the country, and the loss of his real property.”

10. The petition argues that this inquisitorial model of criminal procedure, violative of minimum due process guarantees, through which the alleged victim was tried and convicted, has been condemned by the Commission in its Report 50/00 in the case of Reinaldo Figueredo Planchart against Venezuela. According to the petitioner, even though Venezuela subsequently amended its Code of Criminal Procedure, the reform was not applied to the alleged victim, whose case was processed under the rules of the former Code of Procedure, which extensively violated the right to due process on establishing a secret investigative phase (*una fase sumarial*

secreta), and, for cases involving the safeguarding of public property, providing that pre-trial detention did not allow for release on bond or by any other means in any case.

11. Similarly, the petitioner adduces that during the proceedings in a second case against the alleged victim; once again his rights to defense and due process were violated. Accordingly, the Superior Court for Safeguarding handed down a guilty verdict “behind closed doors” against Mr. Moreno Moreán on June 28, 1999, two days prior to the entry into force of the new criminal procedure regime.[FN2] Neither the petitioner nor any of his lawyers was informed of the time for appeal; accordingly, once those two days had elapsed, the new procedural law entered into force, thus depriving him of the real and effective possibility of appealing the guilty verdict. With this second verdict, the alleged victim was sentenced to two years and eleven months in prison, and ordered to pay monetary compensation.

[FN2] The Superior Court for Safeguarding Public Property, by judgment of June 28, 1999, sentenced Mr. Euclides Rafael Moreno Moreán to the penalty of two years and eleven months in prison, as perpetrator liable for and guilty of committing the crime of generic embezzlement (malversación genérica), provided for at Article 60 of the Organic Law on Safeguarding Public Property.

12. The petitioner concludes that the facts described show that the State has violated, to the detriment of the alleged victim, the guarantees and rights enshrined in Articles 7 (sections 3, 5, and 6), 8 (sections 1, 2(b)(c)(d)(f), and 5), 21, and 25 of the Convention, in conjunction with the general obligations set forth at Articles 1(1) and 2 of the American Convention. As regards admissibility requirements, the petitioner concluded that the complaint was filed within six months of the December 2, 1998 Supreme Court judgment, with which domestic remedies were exhausted, and that there is no other international petition or communication pending.

B. The State’s position

13. In its first observations on the petition, the State argued that throughout the processing of this criminal inquiry, both in the Superior Court for Safeguarding Public Property and in the Chamber of Criminal Cassation of the Supreme Court of Justice, there was full compliance with the procedural steps established by Venezuelan procedural law, and defense counsel for the alleged victim were able to exercise all the means of defense they saw fit to pursue for their client. Accordingly, the State argued that the alleged victim enjoyed complete procedural guarantees of access to justice, equality before the law and before the courts, the right to defense and to be heard, to have judicial representatives, and the free enjoyment of his procedural options. These rights were respected, even in the absence of the accused, for whom, pursuant to the Organic Law for Safeguarding Public Property, which allows for trial of the accused in absentia after issuing an arrest warrant, a provisional defender was appointed, and subsequently two definitive defense attorneys, who on his behalf and in his representation made use of the means of evidence deemed pertinent.

14. Similarly, the State adduced that it did not violate the right to liberty of the alleged victim, since he fled the country upon issue of the arrest warrant, eluding the justice system, which is why he was not arrested. Moreover, the State indicated that the arrest warrant was issued in keeping with the legislation in force of the Venezuelan Code of Criminal Procedure (Código de Enjuiciamiento Criminal) at the same time abiding by the terms of Articles 5 and 6 of the American Convention.

15. With respect to the alleged victim's right to property, the State argued that in no way was its use and enjoyment impeded; rather, they were subject to a judicial measure of prohibition on alienation or encumbrance, measures that are provided for in judicial systems around the world, and, therefore, recognized as not violating human rights.

16. Following these considerations, the State argued that the petitioner turned to the Commission in order to use the inter-American system as a fourth judicial instance, without the case fitting within any of the situations established by the Commission as exceptions to the rule by which "fourth instance" claims lie outside the scope of the Commission's competence. Accordingly, the State asked that the petition be found inadmissible, as it was manifestly groundless and out of order, arising merely from the petitioner's disagreement with the ruling of the Venezuelan courts.

17. In a subsequent communication, in the context of the procedure on admissibility the State reiterated its request that the petition be found inadmissible. On that occasion, the State argued that with the entry into force of the Organic Code of Criminal Procedure, the alleged victim's case was heard by the First Court of First Instance for Enforcement of this Criminal Judicial Circuit, where on August 26, 2004, it was decreed that the penalty imposed on citizen Euclides Rafael Moreno Moreán had prescribed, in keeping with the provisions of Article 112(1) of the Criminal Code, and consistent with Article 479(1) of the Organic Code of Criminal Procedure. With this decision, the State adduced, any arrest warrant that may have been issued for him was voided. The State reiterated that due process was respected in reaching the decision, and, given that the result was favorable to the alleged victim, it asked that the petition be found inadmissible.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

18. The petitioners are authorized by Article 44 of the American Convention to submit complaints to the Commission. The petition describes Euclides Rafael Moreno Morean as the alleged victim, accordingly, the Commission is competent *ratione personae* to examine the petition. The State ratified the American Convention on August 9, 1977.

19. The Commission is competent *ratione loci* to take cognizance of the petition, insofar as it alleges violations of rights protected in the American Convention in the territory of a state party to that treaty. In addition, the Commission is competent *ratione temporis* insofar as the obligation

to respect and ensure the rights protected in the American Convention was already in force for the State as of the date on which the facts set forth in the petition are alleged to have taken place.

20. As regards competence *ratione materiae*, the Commission notes that the petitioners argue that the State violated the rights to personal liberty (Article 7), to a fair trial (Article 8), private property (Article 21), and judicial protection (Article 25), all set forth in the American Convention, in relation to the obligations that derive from Article 1 of the Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

21. Article 46(1) of the American Convention establishes the admissibility requirement of prior exhaustion of domestic remedies. The alleged victim argued that the domestic remedies available were exhausted through the final judgment handed down by the Supreme Court of Justice on December 2, 1998. The State did not file preliminary objections alleging failure to exhaust domestic remedies. Accordingly, the Inter-American Commission considers that the requirement to exhaust domestic remedies has been met.

2. Time period for submission

22. Article 46(1)(b) of the Convention establishes that every petition must be submitted within six months of the date on which petitioners were notified of the final decision exhausting domestic remedies. The petitioners allege that the violations were consummated with the December 2, 1998 judgment of the Supreme Court. The petitioner submitted his complaint to the Commission on May 29, 1999. Accordingly, the Commission concludes that the petition was submitted within the period established in Article 46(1)(b) of the Convention.

3. Duplication of proceedings and *res judicata*

23. The record in the instant case does not contain any information that might lead one to determine that this matter is pending before any other international procedure for settlement or that it has been previously decided by the Inter-American Commission. Accordingly, the Commission concludes that the exceptions provided for at Article 46(1)(d) and Article 47(d) of the American Convention do not apply.

4. Characterization of the facts alleged

24. For the purposes of admissibility, the Commission must determine whether the facts set forth in the petition tend to establish a violation of rights provided for in the American Convention, in keeping with the requirement of Article 47(b), or whether the petition, in keeping with Article 47(c), must be dismissed as “manifestly groundless” or because it is “obviously out of order.” The criteria for evaluating these rules are different from what is called for to determine the merits of a petition. The Commission must make a *prima facie* evaluation, not to establish the existence of a human rights violation, but to examine whether the petition sets forth facts that characterize a potential or apparent violation of a right guaranteed by the Convention. That

examination is a succinct analysis that does not imply any prejudgment or anticipation of opinion regarding the merits of the petition.

25. Based on the allegations in the petition and the Commission's case-law[FN3], the Commission finds that the petitioner has formulated allegations that are not "manifestly groundless" or "obviously out of order" and which, if found to be true, could constitute violations of Articles 8 and 25 of the Convention. Accordingly, without prejudging on the merits of the case, the Commission considers that the requirements of Articles 47(b) and (c) of the American Convention have been met.

[FN3] See IACHR, Report No. 50/00 (Merits), Case 11.298, Reinaldo Figueredo Planchart v. Venezuela, April 13, 2000.

26. In contrast, the Commission finds that the alleged violation of Article 7 of the Convention is groundless, insofar as the alleged victim did not argue that he was deprived of liberty at any time. Consequently, the Commission will not study that charge in its considerations on the merits. Similarly, the Commission finds no basis for concluding that the freezing of the alleged victim's assets could constitute prima facie a violation of the right to property (Article 21), insofar as that measure, in keeping with the legal framework in force, was adopted as a reasonable and temporary sanction of a person who refused to appear at a judicial proceeding. For those reasons, the Commission will refrain from studying that charge in the merits phase.

27. Finally, the Commission notes that the State, in its communication of May 9, 2005, asked that the petition be declared inadmissible, since on August 26, 2004, it was decreed that the statute of limitations had run on the penalty imposed on the alleged victim. The Commission finds that notwithstanding that decision, when the Commission took cognizance of the case, the acts alleged to produce the violation had already occurred, and, accordingly, the State may have already become internationally responsible.[FN4] In any event, the IACHR shall take that situation into account when deciding on the merits of this petition.

[FN4] In this respect, the Inter-American Court has held:

This Court should recall that the international responsibility of the State arises immediately with the internationally unlawful act attributed to it, even though it can only be enforced after the State has had an opportunity to make reparation for it by its own means. A possible subsequent reparation carried out under domestic law does not keep the Commission or the Court from taking cognizance of a case that has already been initiated under the American Convention. That is why the State's position of having duly investigated cannot be accepted by the Court to find that the State has not violated the Convention.

I/A Court H.R. Case of the Gómez Paquiyauri Brothers v. Peru. Judgment of July 8, 2004, para. 75.

V. CONCLUSIONS

28. The Commission concludes that the case is admissible and that it is competent to examine the claim presented by the petitioners as to the alleged violation of Articles 8 and 25, in conjunction with Article 1(1) of the Convention, in keeping with the requirements established in Articles 46 and 47 of the Convention. In addition, the Commission did not find any grounds for determining the admissibility of the alleged violations of Articles 7 and 21 of the Convention, and, accordingly, declares the petition inadmissible with respect to those charges.

29. Based on the foregoing arguments of fact and law, and without prejudging on the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To find the instant case admissible, in relation to Articles 8 and 25 of the American Convention, in conjunction with Article 1(1) of the same treaty.
2. To find inadmissible the alleged violations of Articles 7 and 21 of the American Convention.
3. To notify the State and the petitioner of this decision.
4. To proceed to examine the merits issues in this case.
5. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 12 day of the month of October, 2005.
(Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett and Florentín Meléndez, Commissioners.