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Title/Style of Cause: Xavier Alejandro Leon Vega v. Ecuador
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Decided by: President: Evelio Fernandez Arevalos;
First Vice-President: Paulo Sergio Pinheiro;
Second Vice-President: Florentin Melendez;
Commissioners: Clare K. Roberts, Freddy Gutierrez Trejo, Paolo G. Carozza,
Victor E. Abramovich.
Dated: 2 March 2006
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I. SUMMARY

1. On April 17, 2002, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “IACHR”) received a petition lodged by Mr. Xavier Alejandro León Vega (hereinafter “the petitioner”), in which he alleges the violation by the State of Ecuador (hereinafter “the State” or “Ecuador”) of Articles 12 (Freedom of conscience and religion), 13 (Freedom of thought and expression), and 22.2 (Freedom of movement and residence) of the Inter-American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), and of Article 6 (Right to Work), and 13.1.2.3 (Right to Education) of the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights (hereinafter “Protocol of San Salvador”) to the detriment of his person.

2. The petitioner states that even though he made a declaration of conscientious objection on September 2, 1999, and from October 16, 1999 until October 15, 2000, carried out civic service in the community as a human rights extension worker in the Ecuadorian Peace and Justice Service (SERPAJE-E), as provided for in the 1997 Political Constitution of Ecuador, he has not been issued with the card which defines his status as conscientious objector or similar, that would have the same legal effects as the military card given to those who complete obligatory military service. According to the petitioner, this omission has directly affected his freedom of conscience, the continuation of his education, his freedom to leave and enter Ecuador freely, as well as his right to work and engage in free enterprise.

3. The State does not dispute that the petition complies with the requirements for admissibility in relation to the exhaustion of remedies available under domestic law. However, it considers that Mr. Xavier Alejandro León Vega’s dissent with the judicial decisions handed

down does not empower the Commission to examine those decisions. The State does not consider that any right recognized in the American Convention has been violated.

4. Having studied the positions of the parties, the Commission concludes that it has competence to examine the petition lodged by the petitioner and that the case is admissible in the light of Articles 46 and 47 of the American Convention. Consequently, the Commission decides to notify its decision to the parties and to publish the present report.

II. PROCESSING BY THE COMMISSION

5. The original petition was received by the Commission on April 17, 2002, and transmitted to the Government on July 19, 2004, with a period of two months in which to lodge observations.

6. On February 9, 2005, a response was received from the State and this was transmitted to the petitioners on July 18, 2005, so that they could lodge the observations they considered appropriate within the period of one month. To date, no reply has been received from the petitioner.

III. POSITIONS OF THE PARTIES

A. Petitioners

7. The petitioner, Mr. Xavier Alejandro León Vega, alleges that although the right of conscientious objection is recognized in Article 188 of the Political Constitution of Ecuador, the 1994 Law of Obligatory Military Service in the Armed Forces, in Article 108, subordinates the exercise of this right to the prior justification and definition of this condition by the Director of Mobilization of the Armed Forces. Furthermore, as stated by the petitioner, the same Article of the Law of Obligatory Military Service in the Armed Forces states that if the conscientious objection is accepted, the citizen must carry out his service in one of the development units of the armed forces. The regulations for applying the above-mentioned law, issued in 1997, state that once the request for conscientious objection is accepted, the beneficiaries are assigned to and receive an order of billeting in one of the development units of the armed forces. If the citizen does not report to the unit assigned by the mobilization office, he will be considered remiss and punished according to the law.

8. Therefore the petitioner alleges that the provisions of the Law of Obligatory Military Service are at variance with the provisions of the Constitution, which allows conscientious objectors to be assigned to civic service in the community, and this conflict should be resolved on the basis of the supremacy of the Constitution, according to Article 272 of same. For the petitioner, it is inadmissible that the assessment of a conscientious objection, and therefore its justification, should have to be carried out by an official who represents the state institution whose practices and philosophy is being rejected. Furthermore, according to the petitioner, by ordering the “billeting” of conscientious objectors, both the idea and the spirit of civic service as enshrined in the Constitution is contravened.

9. The petitioner alleges that on September 2, 1999, he made his public declaration of conscientious objection to obligatory military service to the General Secretariat of the National Congress, the Ombudsman [Defensoría del Pueblo], and the Office of the Director of Mobilization of the Joint Command of the Ecuadorian Armed Forces. Mr. Xavier Alejandro León Vega states that in accordance with Article 188 of the Constitution he carried out civic service in the community working in the programs of the Ecuadorian Peace and Justice Service (SERPAJ-E), as a human rights extension worker from October 16, 1999 to October 15, 2000. In addition, on September 18, 2000, the petitioner states that he made a sworn declaration before the Twenty-Seventh Notary of the Quito Canton, ratifying his declaration of conscientious objection and explaining the moral and philosophical reasons for his conscientious objection to military service.

10. Based on Article 23.15 of the Political Constitution, which states that persons have the right to direct complaints and petitions to the authorities and to receive either relevant attention or response within an reasonable period, the petitioner alleges that on December 13, 2000, he requested from the Director of Mobilization of the Joint Command of the Ecuadorian Armed Forces -- who has the highest military authority and is responsible for the obligatory military service -- the identity card for conscientious objectors or its equivalent, that has the same juridical effect as the military identity card issued to those who have completed their military service. The petitioner states that he never received a response to this request and this is causing him serious harm because without the military card or its equivalent, he can neither continue his studies, work, enter into contracts, or travel freely in and out of the country because as the Law of Obligatory Military Service and its provisions predates the Constitution, it lays down sanctions and limitations on certain rights for those without the military card. Mr. Xavier Alejandro León Vega states that in accordance with Article 28 of the Modernization of the State Law, any application or request to a public authority should be resolved within a maximum period of fifteen days. Where this period is exceeded, the same Article states that the request should be considered approved or that the claim has been resolved in favor of the applicant.

11. In view of the lack of a response to the request by the petitioner from the Director of Mobilization of the Joint Command of the Armed Forces, Mr. Xavier Alejandro León Vega lodged an action for constitutional amparo before the Fourth Civil Court in Pichincha, on January 30, 2001. According to the petitioner, the amparo was resolved without going to the merits stage because it was considered contrary to law because no constitutional or legal provision had been infringed given that it was the duty of the petitioner to comply with the Law of Obligatory Military Service in the national armed forces. The judge decided that the action brought by the petitioner was malicious in nature and therefore imposed a fine of ten minimum salaries.

12. Dissatisfied with the resolution of the action for amparo, the petitioner lodged an appeal with the Second Tribunal of the Constitutional Court, which published its resolution on August 14, 2001. This had to go to the Full Constitutional Court because there was a dissenting vote. On October 23, 2001, the Full Constitutional Court issued its findings (four votes in favor and 3 against) rejecting the action for amparo, thus, according to the petitioner, perpetuating the violation of his rights given that he has now exhausted all the remedies available under domestic law.

B. State

13. The State has lodged no objection regarding compliance with the requirement to exhaust all remedies available under domestic law. With regard to the remaining requirements for admissibility, the State is of the opinion that this petition is manifestly unfounded, contrary to law, and should therefore be rejected because it does not describe violations to rights protected in the American Convention.

14. The State alleges that the petitioner declared himself to be a conscientious objector and did not follow the procedure established for that effect, and on his own account engaged in activities such as human rights extension work in an organization unrelated to any military organization, which was in violation of national law. The State claims that by bringing the action of amparo, and now the current petition, the petitioner was attempting to evade his legal obligation to complete obligatory military service, in line with current law. The State maintains that Mr. Xavier Alejandro León Vega was declared remiss and sanctioned because he did not report for billeting at the second call for his levy on April 10, 1999 when he had been registered, selected in the draw for assessment, selection, and assignation which took place on October 26, 1998. The State says that the declaration of conscientious objection made by the petitioner on September 2, 1999, was brought to the attention of the office of the Director of Mobilization of the Joint Command on December 13, 2000, which was when Mr. Xavier Alejandro León Vega requested the Director of the Joint Command Mobilization Office to grant him the identity card corresponding to a conscientious objector or equivalent to the military card because he had completed community civic service in the offices of the Peace and Justice Service of Ecuador between October 16, 1999, and October 15, 2000. The State indicates that it did not process this request because it was extemporaneous given that by December 13, 2000 the petitioner had already been registered as remiss because he had not reported for billeting between October 26, 1998 and April 10, 1999, the latest date at which he could be billeted.

15. Even though the petitioner lodged an action for constitutional amparo to request he be granted immediately the conscientious objector's card, the Pichincha Fourth Civil Judge rejected it and declared it unlawful on February 7, 2001, being of the opinion that no legal or constitutional provision had been violated. This resolution was appealed by the petitioner to the Constitutional Tribunal who confirmed the findings of the lower court, rejecting the action of amparo constitutional and notifying the parties on October 31, 2002.

16. For the reasons stated above, the State claims that an unfavorable judgment is not in itself a violation of the rights enshrined in the American Convention, if the unfavorable judgment derives from a just hearing, as in effect was the case heard by the Ecuadorian courts.

IV. ANALYSIS

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

17. The petitioner is empowered by Article 44 of the American Convention to lodge complaints before the IACHR. The petition indicates the alleged victim as being an individual, whose rights under the American Convention Ecuador is committed to respecting and protecting. With regard to the State, the Commission points out that Ecuador has been a state party to the American Convention since December 28, 1977, the date when its respective instrument of ratification was deposited. Therefore, the Commission has competence *ratione personae* to examine the petition.

18. The Commission has competence *ratione loci* to examine the petition because it alleges violations of rights protected in the American Convention that will have taken place within the territory of a state party to the aforementioned treaty.

19. The IACHR has competence *ratione temporis* because the obligation to respect and protect the rights enshrined in the American Convention was already in force for the State at the date when the events alleged in the petition would have taken place.

20. Finally, the Commission has competence *ratione materiae* because the petition denounces violations to human rights protected in the American Convention.

B. Other requirements for admissibility

1. Exhaustion of remedies under domestic law

21. Article 46.1 of the American Convention states that one requirement for the admissibility of a petition is the prior exhaustion of remedies available under domestic law. However, the State did not present preliminary objections concerning the non-exhaustion of remedies under domestic law in the early stages of the proceedings. Consequently, the Commission considers that the State of Ecuador in this petition has not invoked the non-exhaustion of remedies under domestic law in the early stages of the proceedings.

22. The Inter-American Court on many occasions has stated that “in order to be timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceeding or, to the contrary, it will be presumed that the interested State has waived its use tacitly.”[FN1]

[FN1] I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case*. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53. In the same judgment, the Court stated that “in order to validly oppose the admissibility of the petition ...the State should have expressly and in a timely manner invoked the rule that domestic remedies should be exhausted.” (emphasis in the original). *Idem*, para. 54.

23. The Commission therefore considers that the State of Ecuador renounced the exception for non-exhaustion of remedies under domestic law given that it did not lodge it at the first

available opportunity during proceedings, that is, in its response to the petition that started the formalities.

2. Deadline for presentation of petitions

24. In the petition currently being examined, the IACHR has established the tacit renunciation by the State of Ecuador of its right to interpose the exception of non-exhaustion of remedies available under domestic law, so that the requirement of Article 46.1.a of the American Convention is not applicable. However, the two requirements under the Convention that all remedies available under domestic law have been exhausted and that the petition is lodged within a period of six months from the date on which the party was notified of the final judgment are independent. Therefore, the Commission must determine whether the petition being studied was lodged within a reasonable period.

25. In the petition currently being examined, the IACHR observes that the original communication was received on April 17, 2002. The decision by the Constitutional Tribunal of Ecuador that confirmed the rejection of the action of amparo constitucional was on October 31, 2001. On the basis of the particular circumstances of the petition currently being examined, the IACHR considers that it was lodged within the 6 month period, as provided by article 46.1.b of the Inter-American Convention.

3. Duplication of procedures and res judicata

26. Article 46.1.c states that a requirement for the admissibility of petitions is that the subject of the petition “is not pending in another international proceeding for settlement,” and Article 47.d states that the Commission will not admit any petition “that is substantially the same as one previously studied by the Commission or by another international organization.” In the present case, neither party has argued that either of these two conditions apply with regard to admissibility, and nor are they evident from the proceedings. Therefore, the requirements established in Articles 46.1.c and 47.d of the Convention have been met.

4. Description of the alleged facts

27. The State requested the Commission to declare the petition inadmissible on the grounds that it does not describe events that amount to a violation of the American Convention. This is because the petitioner did not follow the procedure established by the law of Ecuador to declare himself a conscientious objector and he worked as a human rights extension worker in an organization unconnected with the military, which was against the law. For this reason, he was declared remiss and punished. The State alleges that because a judgment that is unfavorable to the petitioner’s claims has been handed down, this does not imply a violation of his rights as enshrined in the American Convention, given that the action for amparo constitucional brought by the petitioner complied with all the guarantees necessary for a fair trial.

28. The petitioner maintains that even though the Ecuadorian Constitution recognizes the right of conscientious objection with the consequent obligation to carry out civic service in the community, the Law of Obligatory Military Service and its regulations that predate the 1997

Constitution, goes completely against the spirit of the constitution because the assessment of the justification and definition of the conscientious objection is carried out by the armed forces and if accepted, the conscientious objector is ordered to be “billeted” in one of the development units of the armed forces.

29. The Commission considers that it is not appropriate at this stage of the proceedings to establish whether or not a violation of the American Convention has taken place. In order to decide admissibility, the IACHR must decide if facts are stated that tend to establish a violation as determined by Article 47.b of the American Convention and if the petition is “manifestly groundless” or “obviously out of order” under the terms of paragraph (c) of the same Article.

30. The requirements for defining these matters differ from those needed to decide on the merits of a case. The IACHR must make a prima facie examination to determine whether the petition substantiates the apparent or potential violation of a right protected by the American Convention and not to determine the existence of a violation. This examination is summary in character and does not imply a prejudgment or opinion on the substance of the case. The Rules of Procedure of the Commission clearly distinguish between the stages of admissibility and the merits of the case and distinguishes between the examination that must be carried out by the Commission in order to declare a petition admissible and that needed to establish a violation.

31. The Commission considers that the right to refuse to comply with military service or conscientious objection is a right that could derive from Articles 11 and 12, read together with Article 6.3.b of the American Convention where conscientious objectors are expressly recognized in the legislation of the state under consideration.[FN2] The 1997 Constitution of Ecuador recognizes this right in Article 188. The question that has been lodged with the Commission and which must be resolved at the merits stage is whether the procedure used in Ecuador to regulate the condition of conscientious objector, and the different forms of substitute service permitted, are compatible with the provisions of the conventions quoted above. Therefore, the Commission must examine the allegations of the petitioner in relation to the alleged affectation of other rights such as the right to education and the right to freedom of movement caused by the lack of a military identity card.

[FN2] IACHR, Report 43/05, Case 12.219, Christian Daniel Salí Vera et al. (Chile), para. 86.

32. Therefore, the Commission considers that the allegations by the petitioner regarding alleged violations of the right to freedom of conscience and religion, to freedom of movement and residence, to education, and the inconsistency of domestic legislation with international commitments assumed by the State, could constitute violations to the petitioner’s rights as enshrined in Articles 1.1, 2, 11, 12.1, and 22.2 of the Convention and to Article 13.1 of the Protocol of San Salvador.

V. CONCLUSIONS

33. The Commission concludes that it has competence to examine the petition lodged by the petitioner relating to the alleged violation by the State of his right to freedom of conscience and religion, to freedom of movement and residence, to education, and the inconsistency of domestic legislation with international commitments, and its obligation to respect and protect the full and free exercise of the rights of all persons within its jurisdiction.

34. Based on the foregoing considerations of fact and law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible in relation to alleged violations of the rights protected by Articles 1.1, 2, 11, 12, 22.2 of the Convention, and by Article 13.1 of the Protocol of San Salvador.
2. To give notice of this decision to the parties.
3. To begin the analysis of the merits of the case, and
4. 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 2nd day of the month of March, 2006.
(Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President; Florentín Meléndez, Second Vice-President, Clare K. Roberts, Freddy Gutiérrez Trejo, Paolo G. Carozza and Víctor E. Abramovich, Members of the Commission.