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Decided by: President: Florentin Melendez;
First Vice-President: Paolo Carozza;
Second Vice-President: Victor Abramovich;
Commissioners: Evelio Fernandez Arevalos, Clare K. Roberts, Paulo Sergio Pinheiro, Freddy Gutierrez.
Dated: 9 March 2007
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I. SUMMARY

1. On December 28, 2004 the Inter-American Commission on Human Rights (hereinafter “the Commission or the Inter-American Commission or the IACHR”) received a complaint lodged by Mrs. Morina Fahmy (hereinafter, “the petitioner”) on behalf of her son, Mr. Hanny Fahmy (hereinafter “the alleged victim”) against the State of Costa Rica (hereinafter “the State” or “the Costa Rican State” or “Costa Rica”) for the alleged violation of Articles 7 (personal liberty), 8 (judicial guarantees), 9 (legality and non-retroactivity), 24 (equality before the law) and 25 (judicial protection), all of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), in relation to Article 1(1) (obligation to respect and guarantee) of that instrument.

2. The petitioner claims that the alleged victim was arbitrarily deprived of his liberty, then criminally prosecuted, and finally convicted, for crimes he never committed, without regard for judicial guarantees and based on evidence obtained through illegal means such as the search of his home and statements taken from girls under the influence of drugs. She also claims that the alleged victim was tried twice for the same incident and was misled by his trusted defense attorneys to agree to an abbreviated criminal procedure without an oral and public trial and to admit to the charges against him by the respective Public Prosecutor’s Office. She further states that as the alleged victim is a foreigner, he did not have access to an interpreter at some stages of the proceedings. She indicates that a law was applied to him retroactively, which was not applicable as it took effect after the alleged events. She adds that the alleged victim did not have appropriate access to justice and was subject to discrimination due to his status as a foreigner. In relation to the admissibility requirements, she claims that the domestic jurisdiction has been

exhausted since September 2, 2004, when a final judgment was handed down in a review proceeding.

3. The State of Costa Rica, for its part, deems the petitioner's claims unacceptable inasmuch as the alleged victim was arrested lawfully, prosecuted, and convicted in accordance with conventional and constitutional due process guarantees, and no law was applied to him retroactively. The State adds that the alleged victim was able to pursue domestic remedies and enjoyed full access to justice. In terms of the admissibility requirements, the State indicates that the domestic remedy of amparo has not been exhausted in relation to the alleged violation of Articles 9 and 24 of the American Convention.

4. After analyzing the positions of the parties, the Commission concluded that it was competent to decide the complaint lodged by the petitioners and that the case was inadmissible in light of Articles 46 y 47 of the American Convention. Consequently, the Commission decided to notify the parties and to publish the instant Inadmissibility Report and include it in its Annual Report.

II. PROCESS BEFORE THE COMMISSION

5. On December 28, 2004, the Executive Secretariat of the Inter-American Commission received the initial petition.

6. On January 26 and March 3, 2005, subsequent communications were received in the form of annexes and additional information to the complaint.

7. On November 4, 2005, the Commission forwarded the relevant portions of the complaint to the State of Costa Rica, granting it two months to submit its observations.

8. On February 23, 2006, the Commission received the State's observations with respect to the initial petition and on March 20, 2006, the Commission forwarded to the petitioner the information sent by the State, granting her one month to submit her opinions.

9. On March 31, 2006, the petitioner submitted her observations concerning the State's response, which were forwarded to the latter on April 20, 2006, with one month in which to comment.

10. On June 1, 2006, the Commission forwarded to the State the new communication submitted by the petitioner, granting it one month to comment.

11. On July 18, 2006, a communication was received from the State requesting that the Commission declare the instant petition inadmissible based on the "fourth instance" formula.

12. On September 21, 2006, the Commission forwarded to the petitioner the relevant portions of the information provided by the State.

III. POSITION OF THE PARTIES

A. The petitioners

13. The petitioner states that Mr. Hanny Fahmy was accused by an international organization called Casa Alianza, and by “several women 15 to 20 years of age,” of the offenses of corruption of minors and indecent assault. She alleges that as a result his residence was searched on November 18, 1999; that since that time, he has been detained illegally, presumably because drugs were found in his residence; that none of the complainants was found on the premises; and that the complaint had not even been filed as of that date, and was not formally presented until November 30 of that year.

14. The petitioner claims that during the preliminary hearing in the case, held on February 7, 2001, an abbreviated criminal procedure was applied, because the alleged victim was misled by his defense attorneys into accepting such a procedure without knowing what he was agreeing to. This was the case because his native language is not Spanish and his translator, whom he trusted, was not present, having been barred from being present during several stages of the proceedings.

15. A reading of the annexed material submitted indicates that on April 6, 2001, a judgment of conviction was handed down in the first instance, which established the criminal liability of Mr. Hanny Fahmy in the following terms:

“for the offense of corruption of minors “en concurso ideal” (when an action results in various crimes) with an offense of statutory rape, an offense of rape, and an offense of sexual abuse of a minor, “en concurso material” (when various crimes are committed by the same person) with the offense of distributing drugs to a minor, to the detriment of L.V.G.; for the offense of corruption of minors “en concurso ideal” with the offense of production of pornography, and “en concurso material” with the offense of distributing drugs to a minor to the detriment of M.S.Q.; and an offense of sexual relations with a minor to the detriment of A.M.M., “en concurso material” with the offenses committed to the detriment of L.V.G. and M.S.Q., and on this basis he is sentenced to a prison term of 22 years, 8 months.”

16. The petitioner points out that this judgment was the result of a signed agreement in which two of the girls would be “removed from the case” in their status as victims or complainants, if the accused agreed to the abbreviated criminal procedure. Nonetheless, she claims that immediately upon signing the “compromise,” the respective public prosecutor began to object to it and to request that “a separate judgment be issued for those complainants.” This occurred on February 10, 2003, at which time a sentence of 10 years in prison was imposed for those offenses. She indicates that as a result, he was given two separate judgments in the same criminal case.

17. The petitioner claims that the alleged victim was sentenced to 30 years in prison, 20 of those in relation to the three complainants in the abbreviated procedure and 10 to the two complainants who supposedly were to be “removed from the case” as part of the agreement reached with the Public Prosecutor’s Office, precisely in exchange for the abbreviated procedure.

18. She indicates that the complainants were under the influence of drugs when they provided their original statements to the Judicial Investigations Office [Organismo de Investigación Judicial] (hereinafter, the "OIJ"), that they have stated this repeatedly and that they were never called on to testify at the trial to clarify the events, which in her opinion, constitutes a violation of the right to a defense to the detriment of Mr. Fahmy.

19. She further claims that the criminal offenses for which he was convicted were applied retroactively since, based on the legislation in force when the events occurred, in order for a crime to have been committed the affected individuals would have to have been decent women, a term that was not met in his case, as they were "prostitutes" and "drug addicts." She also asserts that one of the complainants was described by the Public Prosecutor's Office as a minor under the age of 15, and that to the contrary, she was 15 years old,[FN1] a circumstance that had several repercussions for the application of criminal law. Specifically, she claims that according to the code in force when the acts were committed, the sexual relations would have had to have been with individuals over the age of 12 and under age 15, even with their consent, as long as they were "decent women."

[FN1] The civil register is attached establishing the date of birth as June 4, 1984.

20. She points out that the alleged victim's defense filed habeas corpus petitions to object to his deprivation of freedom and that they also pursued extraordinary appeals for cassation and for review, as shown in the annexes submitted, at which time pleas were entered for each of the alleged violations mentioned in this point. The petitioner states that the decisions handed down at all levels [instancias] have resulted in the denial of justice to the detriment of the alleged victim.

21. Finally, she claims that all of the foregoing events reflect the discrimination to which the alleged victim has been subjected due to his status as a foreigner, especially with regard to certain due process guarantees necessitated by his status as a foreigner and non-Spanish speaker, such as the good offices of the official translator.

B. The State

22. With regard to the allegations of fact, the State indicates that on October 18, 1999, the child L.V.G., age 14, disappeared from her home, leading her mother to file a missing person report with the Judicial Investigations Office on November 2 of that year. The girl returned home on that same night and apparently told her mother that she had spent the entire time in the apartment of Mr. Hanny Fahmy, where other people allegedly were also present, some of them minors, using drugs and being forced to engage in sexual relations.

23. The State continues that on November 4, 1999, the mother of the aforementioned girl returned to the OIJ to file a complaint against Mr. Hanny Fahmy for the alleged sexual abuse committed against her daughter. Five months earlier, in June of that year, the organization Casa Alianza had filed a complaint concerning anonymous telephone calls that they allegedly had

received relating to sexual activities and drug use involving girls under age 18, that was occurring on a regular basis at Mr. Fahmy's residence.

24. According to the State, on November 30, 1999, the girl L.V.G., accompanied by her mother, went to the OIJ and stated that Mr. Fahmy had given drugs and alcohol to her and to other minors and had forced her to have sexual relations.

25. The State indicates that Mr. Fahmy's residence was searched on November 19, 1999, and that the court order for this procedure is found in the file, together with the report documenting the presence of the judicial authority and Mr. Fahmy's public defenders, and the translation into English of the explanation for everything that was taking place and his rights. The State claims that all procedures were conducted with an official translator present.

26. According to the annexes submitted, the evidence collected through this procedure included photographs of naked girls in pornographic positions, materials with highly pornographic content, objects termed "sexual toys," and cocaine.

27. The State reports that the same November 19, it also took a preliminary statement [diligencia de indagatoria], at which time Mr. Fahmy's private defense attorney was present, and he refused to make a statement.

28. The State continues that on the same date, Mr. Fahmy was placed in pretrial detention pursuant to a court order. Specifically, the State points out that Mr. Fahmy's technical defense – which changed more than 6 times during the course of the proceedings – filed a large number of habeas corpus petitions on his behalf, which were declared without grounds in substantiated decisions. It also states that all of the decisions relating to the extension of pretrial detention were substantiated based on serious evidence implicating him as the author of grave punishable acts, the flight risk, and the risk of obstruction of evidence.

29. On the latter point, the State points out that the file documents the pressure and threats that Mr. Fahmy attempted to bring to bear on L.V.G. through his attorney, who visited the girl to tell her that the solution to secure Hanny's release from jail was to marry him since in Costa Rica a spouse is not obliged to testify against the other spouse. The State adds that the aforementioned attorney assured her that they would later divorce and that she (the girl) would be given a monetary pension.

30. Continuing with its chronological narrative of the events, the State indicates that on May 12, 2000, a supervisory judge (Juez de Garantías) ordered the opening of the electronic evidence seized from Mr. Fahmy's home and that this was done in the presence of his defense attorney. Despite this, the latter filed an incidental plea of "procedural defect," claiming the invalidity of all the procedures conducted during the search. This remedy was declared without merit inasmuch as the legality of the procedure was clear.

31. The State continues that on December 5, 2000, the Office of the Public Prosecutor issued a formal indictment against Mr. Fahmy, and a preliminary hearing was held on February 7, 2001. The State indicates that by then, the accused had changed his private defense attorney on several

occasions that the defense attorney appointed for the latter proceeding requested an abbreviated procedure, and that Mr. Fahmy verbally accepted the charges against him to the detriment of the girls and the imposition of a 24-year prison sentence pursuant to those charges.

32. The State continues that in judgment #420 of August 29, 2001, the Criminal Court upheld the abbreviated procedure and imposed a sentence of 22 years, 8 months of prison, which subsequently was reviewed by the Court of Cassation. The latter sustained the defense's charge concerning the "lack of grounds for the sentence," proceeded to duly substantiate it and imposed a 20 year prison sentence in a judgment handed down on December 21, 2001.

33. According to the State, on July 2, 2002, Mr. Fahmy's technical defense filed appeals for cassation [casación] and review against the same judgment that upheld the abbreviated procedure, which ultimately were dismissed.

34. It also indicates that, despite the foregoing, this procedure was requested with respect to the events involving three of the aggrieved girls, whereas in the case of the other two individuals who also appear as complainants, an oral and public trial was held for the offenses of distributing drugs and indecent assault. According to the State, in this second proceeding, Mr. Fahmy was convicted and sentenced to 10 years in prison for the offense of distributing drugs, and was acquitted of indecent assault. The State also points out that Mr. Fahmy's defense attorney filed an appeal for cassation against this judgment, which was dismissed on September 26, 2003, resulting in a final judgment.

35. With respect to the law, the State argues that in relation to the alleged violation of Art. 7 of the American Convention, the alleged victim, Mr. Hanhy, was legally detained at all times, as he was first deprived of his freedom under pretrial detention status, which was lawfully imposed and extended[FN2] by means of well-founded decisions based not only on solid evidence implicating him in punishable acts, but also on the other legal terms of flight risk and obstruction of evidence.[FN3] Secondly, it indicates that following his conviction in the respective criminal proceedings, he was deprived of his freedom pursuant to the prison sentence imposed in the course of those proceedings.

[FN2] Criminal Procedures Code. Article 238.- Application of pretrial detention. Pretrial detention may only be decided in accordance with the provisions of this Code, through a well-founded judicial resolution, within the limits strictly necessary to ensure the discovery of the truth and to carry out the law. It shall be applied in such a way as to cause the least possible harm to the affected parties. The deprivation of liberty during the criminal proceedings should be proportional to the sentence that could be imposed in the case. Article 239.- Legal grounds for pretrial detention. The court shall order pretrial detention for the accused as long as the following circumstances are present: a) There are reasonable grounds to sustain that the accused is, in all likelihood, the author of a punishable act or a participant in it; b) There is a reasonable presumption, upon assessing the circumstances of the particular case, that he will not submit to the proceeding (flight risk); that he will obstruct efforts to establish the truth (risk of obstruction); or that he will persist in the criminal activity. c) The offense is punishable by a prison term. Article 240.- Flight risk: to decide whether there is a risk of flight, the following

circumstances in particular shall be taken into account: a) Roots in the country, as determined by the domicile, habitual residence, family location, business activities or job, and ability to leave the country permanently or remain in hiding. False information, lack of information or failure to update the address of the accused shall constitute a presumption of flight. b) The penalty that could be imposed in the case. c) The magnitude of the harm caused. d) The behavior of the accused during the proceedings or in previous cases, inasmuch as it indicates his intent to submit to prosecution. Article 241.- Risk of obstruction. In order to decide whether there is a risk of obstruction of efforts to establish the truth, consideration shall be given, in particular to the serious suspicion that the accused will: a) Destroy, modify, hide, or falsify evidence. b) Influence codefendants, witnesses or experts to give false information, behave in a dishonest manner or withhold information, or induce others to engage in such conduct. The grounds may only be the basis for imprisonment until the arguments are concluded.

[FN3] The State annexes the respective judgments of the Constitutional Chamber of the Supreme Court of Justice which heard the arguments challenging the pretrial detention and subsequent extensions brought by the alleged victim's defense, through the habeas corpus remedy. The judgments correspond to the following dates: May 23, 2000; July 18, 2000; and December 19, 2000.

36. With respect to the alleged violation of Article 8 of the Convention, the State points out that judicial guarantees have been fully respected and that there are no grounds whatsoever for the allegation of a violation of the right to equality before the law, since his status as a foreigner was taken into consideration and additional protections were provided in view of this status, such as ensuring the presence of an official translator at all stages of the proceedings. The State points out that the petitioner does not state the basis for her claim that the State violated the right to equality before the law, especially in view of the fact that this issue has not been examined by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, before which she could have presented an amparo remedy to argue the violation of the principle of equality and nondiscrimination set forth in Article 33 of the Costa Rican Political Constitution.[FN4] For these reasons, the State also discards any alleged violation of Article 24 of the Convention.

[FN4] Article 33: "Everyone is equal before the law and no acts of discrimination shall be carried out against human dignity."

37. The State transcribes sections of the judgment from the final review, which establishes that the criminal case file documents the presence of the official translator, Marcela Miranda Montenegro, with particular emphasis on the preliminary hearing in which Mr. Fahmy supposedly was compelled to sign an agreement for an abbreviated procedure without understanding its true content.

38. Continuing its argument that there has been no violation of Article 8 of the Convention, the State points out that the application of the abbreviated procedure cannot imply a disregard for judicial guarantees, inasmuch as it is explicitly provided for in domestic law as a voluntary option,[FN5] just as occurred in the instant case and can be verified in the judgment of

conviction handed down at the first instance level and annexed by the petitioner herself to the initial complaint.

[FN5] Criminal Procedures Code. Article 373.- Admissibility. At any moment prior to initiating the trial, the application of an abbreviated procedure may be proposed when: a) The accused admits to the charges attributed to him and consents to the application of this procedure. b) The Public Ministry, the complainant, and the civil actor express their agreement. Article 374.- Initial procedure. The Public Ministry, the complainant, and the accused, jointly or separately, shall express their desire to apply the abbreviated procedure and shall attest that it fulfills all legal requirements. The Public Ministry and the complainant, for their part, shall formulate the accusation, if they have not already done so, which shall contain a description of the imputed conduct and its legal characterization, and they will request the sentence to be imposed. For this purpose, the minimum penalty allowed for the criminal offense may be reduced by one third. The victim of known address shall be heard, but his opinion shall not be binding. If the court considers the request to have merit, it shall grant it and forward the matter for the consideration of the court [Tribunal de Sentencia]. Article 375.- Procedure before the court [Tribunal de Juicio]. Once the proceedings have been received, the court shall issue a judgment unless it deems it pertinent to first hear the parties and the victim of known address, in an oral hearing. In its decision, the court may reject the abbreviated procedures and, in this case, return the matter to the ordinary venue for processing or for the issuance of the appropriate judgment. Should it order the case returned, the previous sentence request shall not be binding upon the Public Ministry during the trial, nor shall the admission of the facts by the accused be considered a confession. If it decides to convict, the sentence imposed may not exceed that requested by the plaintiffs. The judgment shall include the requirements set forth in this Code, in a succinct manner, and shall be appealable in an cassation proceeding.

39. The State also indicates that in terms of access to the appeal level [segunda instancia], Mr. Fahmy, in effect, was able to appeal the decisions he considered unfavorable through domestic mechanisms such as the appeal for review and for cassation, which were decided on the merits with regard to each one of the charges presented by the defense.

40. In relation to the argument that there were two trials for the same events to the detriment of Mr. Fahmy, the State claims that a reading of the files corroborates that the events were different, although similar in nature, and committed against different individuals.

41. With regard to the right to a defense, the State points out that the alleged victim was assisted at all times by private attorneys whom he trusted and had retained himself, and that he also had total freedom, as documented in the file, to change the respective attorneys and continuously replace them, each time with other private attorneys whom he trusted.

42. With respect to the alleged violation of the right to legality and non-retroactive application of the law embodied in Article 9 of the Convention, the State points out that the petitioner's argument is unclear in terms of which criminal offense was applied erroneously. It added that the reform to the Penal Code which the petitioner claims should not have been

applied, actually entered into force on August 17, 1999, while the judgment of conviction was handed down for events that occurred after that date. In the State's opinion, a ruling on this point by the Inter-American Commission would be tantamount to a higher court review, for which it is not competent by virtue of the fourth instance formula.

43. Further more, concerning the alleged violation of Article 25 of the American Convention, the State claims that the alleged victim had the opportunity, at all levels, to appeal the decisions that he deemed unfavorable and that, in all cases, he obtained rulings on the merits, through the cassation and review proceedings, as well as through the many habeas corpus remedies presented by his counsel.

44. In relation to the admissibility requirements, the State claimed that the petitioner had not exhausted domestic remedies with respect to the alleged violations of the rights enshrined in Articles 9 and 24 of the American Convention, as the constitutional remedy of amparo was the appropriate venue in which to address these sorts of violations.

45. Finally, the State argues that the petitioner intends for the Commission to conduct a review of the case as if it were a court of jurisdiction, which in its opinion, is outside the Commission's sphere of competence, since it would entail a ruling on possible errors of fact and of law committed by the Costa Rican judicial authorities. In the State's view, the discussion in the framework of the IACHR should be confined solely to whether or not due process exists and its application in the case at hand, the terms of which were guaranteed to Mr. Fahmy as can be observed in the sections annexed to the file.

IV. ANALYSIS OF ADMISSIBILITY

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

46. The petitioner is eligible under Article 44 of the American Convention to lodge petitions on behalf of the alleged victim. For its part, Costa Rica has been a State Party to the American Convention since April 8, 1970, the date on which it deposited its ratification instrument. Therefore, the Commission is competent *ratione personae* to examine the petition.

47. Moreover, the Commission is competent *ratione loci* to take up the petition insofar as it claims violations of rights protected in the American Convention which allegedly occurred under the jurisdiction of the Costa Rican State. The Commission is competent *ratione temporis* to study the complaint insofar as the obligation to respect and guarantee the rights protected in the American Convention were in force for the State on the date on which the events allegedly occurred.

48. Finally, the Commission is competent *ratione materiae* to take up the instant case, insofar as the petition claims possible violations of human rights protected by the American Convention.

1. Other admissibility requirements for the petition

a. Exhaustion of domestic remedies

49. Article 46(1)(a) of the American Convention establishes that, for a complaint lodged before the Inter-American Commission to be considered admissible in accordance with Article 44 of the Convention, the remedies available under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. The Commission observes that throughout the process, the same alleged due process violations were claimed through the habeas corpus remedy in the constitutional venue and through the appeals for review and cassation in the criminal venue as are being claimed in the international venue. Bearing in mind that the final judgment handed down in this matter was the review by the Criminal Court of Cassation of the Second Circuit Court of San José [Tribunal de Casación Penal del Segundo Circuito Judicial] dated September 2, 2004, and that the allegations concerning violations of judicial guarantees, retroactive application of the law, and discrimination were aired at that time, in the Commission's understanding, that was the judgment that resulted in the exhaustion of domestic remedies.

50. The Commission observes that the State filed the objection for failure to exhaust domestic remedies in regard to the alleged violations of Articles 9 and 24 of the American Convention, arguing that the alleged victim's defense failed to exhaust the amparo remedy. With regard to this objection, it is sufficient, in the Commission's view, that the petitioners pursued this argument in the framework of the cassation and review proceedings, which were the appropriate remedies in the ordinary venue – since the alleged victim was involved in a criminal proceeding – to challenge the specific resolutions that it considered to be in violation of the principle of non-retroactivity as well as discriminatory. In light of this, the conclusion of the preceding paragraph concerning the decision that resulted in the exhaustion of domestic remedies is sustained and, in consequence, the State's objection is rejected.

51. The Commission concludes that the requirement of prior exhaustion of domestic remedies has been met in the instant case.

b. Time period for lodging the complaint

52. Article 46(1)(b) of the Convention establishes that for a petition to be declared admissible, it must be presented within six months of the date on which the interested party was notified of the final judgment in the domestic jurisdiction.

53. The judgment that the Commission deems to have resulted in the exhaustion of domestic remedies was handed down on September 2, 2004, and the initial petition was lodged on December 28, 2004. Therefore, the requirement of the 6 month time period for presenting the petition has been met.

c. Duplication of proceedings and international res judicata

54. Article 46(1)(c) provides that the admission of petitions is contingent upon the requirement that the subject "is not pending in another international proceeding for settlement," and Article 47(d) of the Convention stipulates that the Commission shall not admit a petition that

is “substantially the same as one previously studied by the Commission or by another international jurisdiction.” There is nothing in the file to indicate that the matter is pending a decision in another international proceeding, nor that it duplicates a petition already examined by this or by another international organ. Therefore, the requirements set forth in the aforementioned Articles have been met.

d. Characterization of the alleged facts

55. It is not the Commission’s task at this stage of the proceeding to decide whether the alleged violations of the Articles of the American Convention actually occurred with respect to the alleged victim. For the purposes of admissibility, the Commission must resolve at this time only whether the facts described, should they be proved, tend to establish violations of the Convention, as established in Article 47(b) of the American Convention, and whether the petition is “manifestly groundless” or “obviously out of order” in accordance with subparagraph (c) of that Article.

56. The criterion used to assess these aspects is different from those required to rule on the merits of a claim. The Commission must conduct a prima facie evaluation to determine whether the complaint substantiates the apparent or potential violation of a right protected by the Convention, but it need not establish the existence of that violation. The examination it must carry out at this time is simply a summary analysis that does not imply a bias or a prejudging of the merits of the matter. By establishing two clear stages, one of admissibility and the other on the merits, the Commission’s Rules of Procedure reflect this distinction between the evaluation that the Commission must undertake to declare a petition admissible and the evaluation required to establish that a violation has occurred.

57. The petitioner claims violations of the rights enshrined in Articles 7, 8, 9, 24, and 25 of the American Convention, in relation to Article 1(1) of that same instrument.

58. With relation to the alleged violation of Article 7 of the American Convention, the Commission observes that the State annexed several decisions in the domestic venue that served as the basis for the imposition of pretrial detention and are compatible with the standards found in the jurisprudence of the organs of the inter-American system on this subject,[FN6] inasmuch as they invoke exceptional criteria to justify the imposition of this measure. In this sense, the petitioner’s arguments do not tend to establish violations of Article 7 of the Convention.

[FN6] I/A Court H.R., Suárez Rosero Case. Judgment of November 12, 1997. Series C No. 35. I/A Court H.R., Tibi Case. Judgment of September 7, 2004. Series C No. 114. I/A Court H.R., García Asto and Ramírez Rojas Case. Judgment of November 25, 2005. Series C No. 137.

59. With regard to the alleged violation of Article 8 of the Convention, the Commission notes that the petitioner’s arguments are as follows: the violation of the right to a defense based on the poor technical defense provided by attorneys retained by the alleged victim, who allegedly misled him into agreeing to the abbreviated procedure; the absence of an official interpreter

during a considerable number of procedures throughout the case; the inability to introduce during the trial the testimony of the aggrieved girls in which they recanted their initial statements; and the holding of two trials for the same set of events. In the Commission's view, these arguments also do not tend to establish violations of the Convention.

60. With relation to the possible lack of expertise of the technical defense, it is the Commission's opinion that this circumstance in and of itself does not fit any of the conventional provisions insofar as the defense was retained by the defendant himself. Therefore, the defense's expertise or lack thereof cannot be imputed to the State, unless there is evidence that the judicial authorities responsible for the many decisions taken in the domestic venue with regard to the accusations against the alleged victim ignored clear indications of negligent behavior on the part of the legal professionals in charge of Mr. Fahmy's defense, which in practice would constitute a lack of defense.[FN7] The Commission finds that the situation denounced by the petitioner in this regard is subjective and not substantiated in the documentation by means of objective arguments or evidence. There are no indications of a lack of expertise on the part of the private defense, or that such a circumstance had come to the attention of the judicial authorities, or that the latter would have permitted such a situation had it existed.

[FN7] Albert Berry v. Jamaica, Communication No. 330/1988 : Jamaica. 26/04/94, issued by Human Rights Committee para. 11.3, 50th session, U.N. Doc. CCPR/C/50/D/330/1988. (Jurisprudence) "11.3 ... The Committee is of the opinion that the failure of the author's representative to bring these issues to the attention of the trial judge, which purportedly resulted in the negative outcome of the trial, cannot be attributed to the State party, since the lawyer was privately retained."

61. With respect to the absence of an official interpreter or translator, the State and the petitioner both submitted as an annex the final judgment from the review which confirms that, as documented in the file, the alleged victim had the services of the official translator, in particular at the preliminary hearing during which he agreed to the abbreviated procedure and accepted the truth of the allegations against him. There is also a record of the use of private translators working at the behest of the petitioner who, being the mother of the alleged victim, accompanied Mr. Fahmy, together with the aforementioned translators, to a significant number of official proceedings. Therefore, this argument also must be rejected as manifestly unfounded.

62. With regard to the inability to introduce new evidence at the trial in favor of the alleged victim, the Commission observes that this situation began when the abbreviated procedures were applied at the request of the defense, at which time the alleged victim accepted his authorship of events. This situation in and of itself does not characterize a violation of the American Convention, inasmuch as the file shows that the alleged victim presented an appeal for review requesting the introduction of the new documentary evidence (sworn statements by the alleged aggrieved parties in which they supposedly assert that their previous testimony had been false, given under pressure, and under the influence of drugs). Through a simple reading of the judgment from the review proceeding, it can be established that the new statements were indeed introduced through that remedy and that the competent Court, in effect, determined that, despite

those statements, the evidence collected throughout the proceedings was sufficient to establish the criminal liability of the alleged victim and dismissed the review proceeding.[FN8] Therefore, the Commission deems the evidence to have been duly incorporated and evaluated.

[FN8] Resolution of the Criminal Cassation Court, Second Circuit Court, San Jose Goicoechea, dated September 2, 2004: “The Court does not find the arguments of the declarants to have sufficient credibility to sustain that the events for which the offender [encartado] was convicted were false, as there is other evidence that was supplied by the Public Ministry, such as the statements of other minor victims of the act, the seizure of drugs, photographs and videos from the home of the offender, the forensic medicine, psychological, and social examinations conducted on the minors and the extensive police reports, all of which were evaluated in judgment 420-2001, leading to a determination of the commission of the crime and the liability of the accused.”

63. In relation to the possibility of two trials for the same events, the Commission observes prima facie that two parallel proceedings were conducted based on two different sets of circumstances presumably committed to the detriment of different individuals. The fact that the proceedings were initiated as part of the same criminal case, and that an abbreviated procedure subsequently was applied to one set of circumstances and the regular proceeding to the other, does not establish a violation of the right not to be tried twice for the same events. In effect, one of the criminal prosecutions (the abbreviated one) was undertaken at the first instance level for offenses against three minors (girls) and led to a judgment of conviction and a prison sentence of 22 years and 8 months, handed down on April 6, 2001. This judgment subsequently was upheld by the Criminal Court [Tribunal Penal] on August 29, 2001; and finally, it was reviewed in a judgment by the Court of Cassation on December 21, 2001, handed down in response to a complaint brought by the defense, leading to a modification of the sentence, which was then set at 20 years in prison. In a different criminal proceeding, an oral and public trial was held for offenses to the detriment of two minors, which resulted in a judgment of conviction and a 10 year prison sentence issued on February 10, 2003. Against this judgment, Mr. Fahmy’s defense attorney filed an appeal for cassation which was dismissed on September 26, 2003, leaving in place a final judgment.

64. With regard to the ex post facto application of the law, the Commission does not find that the instant petition tends to establish such a situation, given that the events for which the alleged victim was convicted were reported for the first time on November 2, 1999, and the Costa Rican Penal Code was reformed through Law N° 7899 of August 3, 1999 and published in La Gaceta N° 159 of August 17, 1999. This leaves the Commission no doubt concerning the amendment introduced to the penal code concerning the ages of the minors subject to protection with regard to the criminal offenses codified therein relating to sexual offenses.

65. Moreover, in the particular circumstance of the inaccuracies claimed by the petitioner in relation to the age of one of the aggrieved girls, a reading of the respective judgment of conviction indicates that Mr. Fahmy was not found liable for committing the offense of sexual relations with persons under the age of 15 years (the criminal offense which was amended in

terms of the age of the protected minor), but rather was found guilty of the offense of distributing drugs. The Commission, therefore, does not find that the instant petition tends to establish a violation with regard to this argument.

66. In the Commission's opinion, the petitioner also did not present sufficient elements that would tend to establish discriminatory treatment based on the national origin of the alleged victim.

67. Finally, with regard to the alleged denial of justice, it can be established, *prima facie*, that the alleged victim had access to the Costa Rican judicial authorities to pursue all of the remedies it deemed pertinent and that, in every case, he obtained judgments that addressed his arguments. For this reason, the Commission does not find evidence that would tend to establish the alleged violation of denial of justice.

68. In conclusion, the State of Costa Rica has annexed the relevant portions of the criminal case, which enable the Commission to reject the events alleged by the petitioner and the alleged victim to be in violation of the American Convention. This means that the petition is manifestly unfounded in the terms of Article 47(b) of that instrument, and therefore, the Commission must declare the inadmissibility of the instant case.

V. CONCLUSIONS

69. The Commission concludes that it is competent to take up this matter and that the petition is inadmissible under Articles 46 and 47 of the American Convention. Based on the foregoing arguments of fact and law.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. Declare the instant petition inadmissible.
2. Notify the parties of this decision.
3. 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 9th day of the month of March, 2007.
(Signed): Florentín Meléndez, President; Paolo G. Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Evelio Fernández Arévalos, Clare K. Roberts, Paulo Sérgio Pinheiro, and Freddy Gutiérrez, Commissioners.