Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 57/08; Petition 283-06
Session:	Hundred Thirty-Second Regular Session (17 – 25 July 2008)
Title/Style of Cause:	Mario Roberto Chang Bravo v. Guatemala
Doc. Type:	Decision
Decided by:	Chairman: Paolo Carozza; First Vice-Chairwoman: Luz Patricia Mejia Guerrero; Second Vice-Chairman: Felipe Gonzalez; Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Victor E. Abramovich, Florentin Melendez.
Dated:	24 July 2008
Citation:	Chang Bravo v. Guatemala, Petition 283-06, Inter-Am. C.H.R., Report No. 57/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008)

I. SUMMARY

1. On March 27, 2006, the Inter-American Commission on Human Rights (hereinafter, the "Commission", the "Inter-American Commission" or the "IACHR") received a petition lodged by Mr. Mario Roberto Chang (hereinafter "the petitioner," or the "alleged victim") against the Republic of Guatemala (hereinafter, "the State" or "the Guatemalan State," or "Guatemala"), which claimed the international responsibility of the latter for a series of alleged irregularities in connection with the elections held in Guatemala on November 9, 2003.

2. The petitioner holds that the State of Guatemala is responsible for violation of Articles 1, 8, 23, 24, and 25 of the American Convention on Human Rights (hereinafter, "the American Convention" or the "Convention") as well as infringement of Articles 2, 3, 5.2, 25, and 26 of the International Covenant on Civil and Political Rights. In particular, he alleges that on November 9, 2003, general elections were held in Guatemala, in which he purports to have taken part as a candidate of the political party Democracia Cristiana Guatemalteca for the position of District Deputy in the Department of San Marcos. He says that in the course of those elections there were disturbances, including the burning of ballot papers, and the Supreme Electoral Tribunal annulled the mayoral and municipal council elections, but not the district deputy elections. Accordingly, the petitioner is said to have filed a motion to review that decision, which was rejected. He also says he filed an action for amparo (injunctive relief) with the Supreme Court of Justice, which was ruled as unfounded, a decision that was upheld by the Constitutional Court on appeal. As to the admissibility of the petition, the petitioner holds that his claim is admissible as he has exhausted the remedies available under domestic law for restitution of his infringed rights.

3. The State argues that the decisions of the Supreme Electoral Tribunal, the Supreme Court of Justice, and the Constitutional Court were issued in accordance with domestic law. It argues that the petitioner's mishandling of domestic remedies does not give him standing to institute proceedings in the inter-American system for protection of human rights, because the latter is of a subsidiary nature. It adds that it is not lawful for the petitioner to seek to correct in a proceeding in the inter-American system material errors that he committed in bringing his action for amparo. As regards admissibility, the State adds that under Article 44 of the Convention the petition is not admissible as it does not contain a violation of the American Convention.

4. Having examined the positions of the parties, the Commission has concluded that it is competent to take up the petition sub lite and that the case is inadmissible under Articles 46 and 47 of the American Convention. Finally, the Commission has decided to publish the instant report in its Annual Report to the OAS General Assembly and to notify both parties of its decision.

II. PROCESSING BY THE COMMISSION

5. On March 27, 2006, the Commission received a petition dated March 25, 2006, and assigned it case number 283-06. The petitioner submitted additional information on June 9, 2006. On December 21, 2006, the IACHR transmitted a copy of the pertinent portions of the petition to the State and gave it two months in which to submit its reply, in keeping with Article 30(2) of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter the "Rules of Procedure").

6. The Commission received the reply of the State on February 23, 2007, and forwarded it to the petitioner on February 28, 2007, granting him one month in which to present such comments as he deemed pertinent. The IACHR receive the comments of the petitioner on April 12, 2007, and conveyed them to the State on April 23, 2007, giving the latter one month to submit its observations. The State presented its observations on May 21, 2007, and on May 31, 2007, the IACHR transmitted them to the petitioner, granting him one month to submit relevant observations.

7. On June 20, 2007, the Commission received the observations of the petitioner and forwarded them to the State on the 28th of said month. On August 8, 2007, the State presented its observations, which were relayed to the petitioner on August 15, 2007.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

8. The petition holds that on Sunday,[FN1] November 9, 2003, nationwide general elections were held in Guatemala, in which he took part as a candidate for the position of deputy for the political party Democracia Cristiana Guatemalteca, representing the District of San Marcos. The petitioner claims that in a number of municipalities the aforesaid elections were disrupted by leaders, members, and supporters of certain political parties, as occurred in the Municipality of El Quetzal, Department of San Marcos. According to the petitioner, papers were burned at 16

polling stations set up in three voting places, a fact reportedly corroborated in an official letter dated November 9, 2003, from the members of the Municipal Electoral Board of El Quetzal, Department of San Marcos, to the president of the respective Departmental Electoral Board.[FN2]

[FN1] Brief of the petitioner of March 27, 2006.
[FN2] The record contains a letter dated November 9, 2003, addressed to the president of the San Marcos Departmental Electoral Board and signed by the members of the Municipal Electoral Board of El Quetzal.

---

9. The petitioner holds that pursuant to Article 234 of the Elections and Political Parties Act (hereinafter, the "Elections Act"),[FN3] on November 17, 2003, the Supreme Electoral Tribunal, adopted resolution 0390-2003 by which it annulled the mayoral and municipal council election held in the Municipality of El Quetzal, on the grounds that the electoral documents for the general elections held in the aforesaid municipality were all destroyed before the polling stations had counted the votes cast at them. However, the petitioner adds, said decision did not void the district deputy elections for the Department of San Marcos, contrary, according to the petitioner, to Article 210 of the Elections Act and,[FN4] therefore, in violation of Article 136(b) of the Guatemalan Constitution.[FN5]

[FN3] Elections and Political Parties Act. Article 234. Nullity of Ballots. A ballot at a polling station is void when:
a) The bag that contains the ballots has been unlawfully opened;
b) It becomes otherwise evident to the Committee that the polling station officials or citizens have been subject to misrepresentation, coercion, violence or intimidation in the course of the election process; and,
c) Any other act has been committed that might reasonably be surmised to have affected the outcome of the ballot.
[FN4] Elections and Political Parties Act. Article 210. Repetition of an electoral process. The Supreme Electoral Tribunal having declared annulled an electoral process, the latter shall be repeated and, to that end, the respective notice shall be issued within 15 days counted from the declaration of nullity, whereupon the new process shall be carried out within 60 days.
[FN5] Constitution of Guatemala. Article 136. Political rights and duties. Citizens have the right and duty to: a) Register themselves in the Citizens' Register; b) Vote and be elected; c) Ensure free and effective suffrage and fairness in the electoral process; d) Stand for election to public office; e) Participate in political activities; and, f) Defend the principle of non reelection of the President of the Republic.

---

10. According to the petition, in the Department of San Marcos Partido Unionista won 10,126 votes while Democracia Cristiana Guatemalteca won 10,020 votes, which means that the difference in votes between the two parties was 106. According to the petitioner, given such a slim difference, if the Electoral Tribunal had ordered a repeat of the district deputy elections in

the Municipality of El Quetzal, the result could have been different because that municipality officially contains 8,948 eligible voters. According to the petitioner, the failure to repeat the elections in that district deprived him of the possibility to win the ninth deputy's seat for the Department of San Marcos.

11. The petitioner says that in view of the failure of the Supreme Electoral Tribunal to abide by the Elections Act, in particular Article 210, on November 20, 2003, he filed a motion to review resolution 0390-2003, in order that the annulment ordered in the Municipality of El Quetzal might extend also to the district deputy election and, in turn, so that that new elections be called in the aforesaid municipality.

12. The petition says that on November 22, 2003, the Supreme Electoral Tribunal, by resolution 0450-2003, had refused the motion filed by Democracia Cristiana Guatemalteca because the number of polling stations that functioned in the Municipality of El Quetzal did not constitute a significant percentage that might warrant voiding the elections for deputies for the District of San Marcos, inasmuch as they only amounted to 2.70% of the total polling stations that were set up in the Department of San Marcos. In the opinion of the petitioner, in deciding the claim, the Tribunal overlooked the evidence that provided the basis for voiding the mayoral and municipal council elections in the Municipality of El Quetzal and he further adds that the election process should have been repeated irrespective of the outcome.

13. According to the petition, on December 1, 2003, Democracia Cristiana Guatemalteca filed an action for amparo (injunctive relief) with the Supreme Court of Justice against the decision of November 22, 2003, of the Supreme Electoral Tribunal. The petitioner holds that on September 8, 2004, the Supreme Court of Justice returned a judgment in which it dismissed the action for amparo as inadmissible, even though it had found in its Whereas clause II that harm may possibly have been caused to the alleged victim and his political party. The petitioner adds that he was notified of said ruling on November 17, 2004.

14. The petitioner says that in order to protect his rights he filed an appeal with the Constitutional Court against the decision of the Supreme Court of Justice. The petitioner adds that the Constitutional Court issued a decision on August 22, 2005, in which it upheld the appealed judgment. The petitioner says that he was informed of that decision on September 26, 2005.

15. The petitioner claims that also affected were the 8,000 eligible voters in the Municipality of El Quetzal, Department of San Marcos, whose right to vote was allegedly violated.

16. As regards admissibility of the petition under examination, he says he has exhausted the suitable remedies under domestic law to protect his allegedly violated rights. Accordingly, he requests the IACHR to declare the instant petition admissible.

17. In his brief received on April 12, 2007, the petitioner argues that the action for amparo is the suitable and effective remedy: suitable because its function in the domestic system in Guatemala is appropriate to protect infringed legal rights; and effective because, according to doctrine, it should be capable of producing the result for which it was designed, that is, "to

protect persons from the threat of violation of their rights or to restore such rights, should they have been violated."

18. The petitioner believes that in his case, as a result of being an ordinary citizen without political or financial backing, he was denied the opportunity to receive the effective judicial protection that the State is obliged to provide to all of its inhabitants since it is clear that in a number of instances where the Constitution of the Republic of Guatemala expressly prohibits or limits certain rights these provisions have been arbitrarily manipulated in favor of certain persons, which, according to the petitioner, has been unlawful. He adds that if in some cases legal doctrine in Guatemala has been altered, at times with the twisting of constitutional precepts, he cannot see why, in keeping with the principle of equality, he should not have been permitted to participate as a candidate for the position of deputy.

19. The petitioner also says that in its reply the State of Guatemala plainly and simply accepts the violation of the constitutional rights and guarantees denounced in the petition by its insistence on drawing attention to the fact that the decision that harmed his interests is the one that refused the motion to review resolution 0390-2003, which fact, the petitioner says, constitutes express acceptance of the harm that was caused to him and which has not as yet been repaired through the administrative and judicial remedies available under the Guatemalan law. Accordingly, he argues that he was compelled to invoke international justice with jurisdiction in Guatemala to seek the effective judicial protection that was denied him by the denial of constitutional justice at the domestic level.

20. According to the petitioner, the Supreme Court of Justice and the Constitutional Court failed to observe or ensure his right to effective judicial protection against the arbitrary acts of the Supreme Electoral Tribunal as the governing body that supervises the correctness of proceedings in the electoral process and that abides by and enforces the law in such matters. According to the petitioner, this was demonstrated during the delay in the amparo proceedings and in spite of that, the rulings ran contrary to legal logic, the law, and, in particular, his human rights.

21. The petitioner concluded with the assertions that: a) The State of Guatemala, violated the rights as alleged in the petition, through its administrative and judicial organs and, therefore, is responsible for said violations due to the denial of constitutional justice and the principle of effective judicial protection. b) The observations of the State are contradictory and unfounded and are in opposition to the principles and values that underpin the Constitution of the Republic of Guatemala and the American Convention, as well as the principle of sufficient cause inasmuch as the decision challenged in this petition injured his fundamental rights, which, having failed to find redress through the regular and special legal mechanisms afforded by Guatemalan law, can only be repaired through international justice in a proceeding for effective judicial protection as invoked. c) The observations of the State lack any legal merit since in its last paragraph it says that the elections of November 2003 were monitored by observers from international agencies, such as the Organization of American States and the European Union, as well as national organizations, which approved the results of the elections. That fact, says the petitioner, is derisory because it merely denotes that since they are bereft of any valid arguments to defend their position, they resort to subjective elements whose sole aim is to mislead the

Commission, given that the purpose of the complaint is to seek effective judicial protection that he claims was systematically denied to him in Guatemala.

B. Position of the State

22. In its reply, the State noted that according to information provided by the Supreme Electoral Tribunal, on November 9, 2003, in the Municipality of El Quetzal, dissatisfied constituents proceeded violently to burn the ballot papers at all 16 polling stations in each of the three polling places. Therefore, on November 17, 2003, the Supreme Electoral Tribunal adopted resolution 0390-2003 declaring void the mayoral and municipal council election in the Municipality of El Quetzal, Department of San Marcos. The State added that after the political party Democracia Cristiana Guatemalteca was notified of the aforesaid resolution, its secretary general, Marco Vinicio Cerezo Arévalo, filed a motion to review resolution 0390-2003. The State further mentions that by resolution 0450-2003, the Supreme Electoral Tribunal considered that the number of polling stations that functioned in the Municipality of El Quetzal, Department of San Marcos, did not constitute a significant percentage that might warrant voiding the elections for deputies for the District of San Marcos, inasmuch as they only amounted to 2.70% of the total polling stations that were set up in said Department. Based on the foregoing, the State explains, the Supreme Electoral Tribunal decided to refuse the motion to review resolution 0390-2003.

23. The State adds that Democracia Cristiana Guatemalteca considered that resolution 390-2003 violated its right to vote and be elected and, therefore, filed for a writ of amparo against said resolution, challenging the resolution that voided the mayoral and municipal council elections of the Municipality of El Quetzal because that decision failed also to annul the district deputies election in the Department of San Marcos. The appellant also sought a provisional writ of amparo.

24. The State informs that the Supreme Court of Justice constituted as an Amparo Tribunal took up the proceeding and admitted it for processing as case 778-2003 of. 2º. Having reviewed the appropriate information, it decided not to issue a provisional writ of amparo on the grounds that the circumstances in the case did not warrant it and because the requirements set forth in Article 28 of the Amparo, Habeas Corpus, and Constitutionality Act were not met. Said article provides the following:

Ex officio provisional writ of amparo. A provisional suspension of, inter alia, the challenged act, resolution, or proceeding shall be ordered in the following cases:

a) Should the act or resolution, were it to remain in effect, give rise to a danger of deprivation of the life of the person seeking relief, or pose a threat to their wellbeing or a risk of serious or irreparable harm thereto;
b) When enforcement of the act or resolution in question would render amparo inoperable or worthless inasmuch as it would make a return to the status quo ante difficult, onerous, or impossible;
c) When the authority or entity against which amparo is sought is clearly acting outside the law, their jurisdiction, or their authority; and

d) When the acts concerned are not legally enforceable by any authority or person.

25. The State notes that the Supreme Electoral Tribunal acted in accordance with its constitutionally recognized authority to call and annul an election and it considered that it was appropriate only to annul the mayoral and municipal council election in the Municipality of El Quetzal, pursuant to Article 235 of the Elections Act, which provides that "The Supreme Electoral Tribunal may declare annulled elections held in any municipality when nullity is declared or acts of destruction or violence occur at more than half of the polling stations before, during, or after the election."

26. In that connection, the State mentioned that the aforesaid tribunal adopted decision 653-2003 in which it declared that the election for Congressional Deputies in the District of San Marcos was valid, and adjudicated the posts in accordance with an analytical table by means of the proportional representation of minorities method recognized at Article 203 of the Elections Act.[FN6]

[FN6] Elections and Political Parties Act. Article 203. Proportional representation of minorities. Elections for deputies through national and district lists, and of municipal council members, shall be conducted by the method of proportional representation of minorities.
Under this system, election results shall be entered on a spreadsheet that consists of one line for each participating list and several columns. Entered in the first column shall be the number of valid votes won by each list; in the second shall be that number divided by two; in the third, the number divided by three, and so on successively, as the necessary for the purposes of adjudication.
Of these, the amounts that correspond to the number of posts up for election shall be selected in descending order.
The smallest of these amounts shall be the lowest common denominator, and the number of candidates elected from each list will be the product of the division of the number of votes won by the lowest common denominator, without counting fractions.
All adjudications shall be done strictly in the order established in the lists, starting with the person who heads it and continuing with those that come after them, in accordance with the number of candidates elected.
For the election of national deputies lists shall be linked to the respective presidential candidate of the parties or coalitions and, therefore, separate candidacies shall not be admitted.
Votes shall be tallied based on the results of the first round of the presidential election.

---

27. The State notes that the Office of the Attorney General mentioned in the amparo proceeding that the tribunal acted in legitimate use of its powers under Article 235 of the Elections and Political Parties Act, without any evidence of the violations alleged by the applicant, on which basis, the amparo action should be REFUSED upon pronunciation of the respective judgment, wherein the applicant should be ordered to pay court costs and a suitable fine imposed on his counsel."

28. The State adds that the Supreme Court of Justice considered that in order for the amparo action to be admitted the applicant had the obligation precisely to identify the denounced act and the challenged authority alleged to have committed the injury caused to him, these being factual elements of the action, which, as such, cannot be substituted by the Tribunal of Amparo and, therefore, the action should be denied if they are misstated. The State also notes that an amparo action is not admissible when the challenged authority is within its legal powers in issuing a denounced decision and its acts do not constitute a violation of constitutional rights.

29. The State mentions that the Supreme Court of Justice found that the decision that could possibly have harmed the alleged victim was resolution 0450-2003, which rejected the motion to review. Therefore, the petitioner committed an error in identifying resolution 0390-2003, which ordered the annulment. Based on the foregoing, on September 8, 2004, the Supreme Court of Justice decided to reject the writ of amparo sought by Democracia Cristiana Guatemalteca as inadmissible. The State adds that the aforementioned political party filed an appeal with the Constitutional Court against the decision of the Supreme Court of Justice. On September 9, 2004, the Constitutional Court upheld the Supreme Court's decision.

30. The State offered the following conclusions in its first reply:[FN7]

a) The Supreme Electoral Tribunal acted within its legal powers under Article 235 of the Elections Act. Accordingly, it decided only to declare void the mayoral and municipal council elections.
b) Article 248 of the Elections Act provides that amparo is admissible against final decisions of the Supreme Electoral Tribunal in the instances prescribed by the law on such matters,[FN8] provided that the remedy provided at Article 247 of the aforesaid law, [FN9] which governs the motion to review, is first exhausted.
c) The motion to review presented by Democracia Cristiana Guatemalteca against the decision that declared the annulment is the last internal remedy before the Supreme Electoral Tribunal and, therefore, is considered final.
d) The Supreme Court of Justice constituted as a Tribunal of Amparo found that resolution 390-2003 was not the decision which the amparo applicant should have appealed since resolution 450-2003, which decided the motion to review, is the one considered final and, as Article 248 of the Elections Act provides, an action for amparo is admissible against a decision on a motion to review but not against an annulment resolution.
e) Therefore, upon hearing the appeal against the ruling of September 8, 2004, the Constitutional Court upheld the decision of the Tribunal of Amparo.

[FN7] Brief of the State of February 23, 2007.
[FN8] Elections and Political Parties Act. Article 248. (As amended by Article 67 of Decree 74-87). Action for amparo. The action for of amparo is admissible against final decisions of the Supreme Electoral Tribunal in the instances prescribed by the law on such matters, provided that the remedy provided in the preceding article is first exhausted.
[FN9] Elections and Political Parties Act. Article 247. (As amended by Article 66 of Decree 74-87). Motion to review. A motion to review is admissible against decisions of the Supreme Electoral Tribunal and must be filed with it within three business days following notification of

the person concerned. The motion shall be decided within three days following its filing, which time limit may be extended, if necessary, by two days, in order to collect such evidence as may be relevant.

---

31. The State also notes that the elections held in Guatemala on November 9, 2003, were monitored by observers from international agencies.

32. The State considers that the petitioner's mishandling of domestic remedies does not give him standing to institute proceedings before the inter-American system, bearing in mind that the decisions of the Supreme Electoral Tribunal, the Supreme Court of Justice, and the Constitutional Court where issued in accordance to law.

33. In the brief received by the Commission on May 21, 2007, the State says that the petitioner insists on arguing that Article 21 of the Habeas Corpus and Constitutionality Act does not require identification of the denounced act. However, the State holds that it is a necessary and formal requirement and in that connection transcribes the above-cited Article 21.[FN10] The State adds that it has not accepted that the petitioner's rights were violated and that the detail concerning the decisions adopted in this matter at the domestic level had to do solely with the need to demonstrate to the IACHR that the refusal of the action for amparo was due to a material error committed by the petitioner in filing the appeal.

[FN10] Amparo, Habeas Corpus and Constitutionality Act. Article 21. Requirements for the petition. The action for amparo shall be submitted in writing and meet the following requirements:

a) Designation of the tribunal with which the petition is filed;

b) Mention of the names and surnames of the applicant or of the person who represents them; their age, marital status, nationality, profession or trade, domicile, and postal address. If the matter is handled by a third party, they must be accredited as representatives;

c) When the petitioner is a legal person, brief mention should be made of the particulars as to their existence and legal status.

d) Specification of the authority, officer, employee, person, or entity against which the action for amparo is brought;

e) Description of the events that gave rise to the action for amparo;

f) Indication of other constitutional provisions that support the action for amparo, together with other legal arguments and opinions;

g) Include any documents that have a bearing on the case, in the original or as copies, or indicate where they are located; also state the names of the persons who are privy to the facts and the places where they may be summoned, and mention any other evidentiary proceedings that might lead to clarification of the case;

h) Place and date;

i) Signatures of the applicant and the licensed attorney who represents them, as well as the seal of the latter. If the applicant is unable to sign, a third party or the attorney who assists them shall do so for them;

j) Include a copy for each of the parties along with an additional copy for the use of the tribunal.

---

34. The State adds that the act of authority that allegedly violated the petitioner's rights is what the analysis of merits performed by the tribunal that takes up the action for amparo would focus on, since such an action is designed to elicit a decision from said judicial organ as to the lawfulness of the challenged act of authority. In the instant case, according to the State, the petitioner misidentified the act of authority when he filed his action with the Supreme Court of Justice specially constituted as a tribunal of amparo, which made it impossible for that organ to pronounce a decision on the alleged violation of the rights of the amparo applicant.

35. The State asks the IACHR not to admit the instant decision on the grounds that it does not meet the requirement contained in Article 44 of the American Convention. The foregoing is based on the fact that the State played no part in the petitioner's mishandling of domestic remedies and, therefore, the State cannot be held accountable for the allegedly infringed rights.

IV. ANALYSIS

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

36. The petitioner has standing under Article 44 of the American Convention to lodge petitions with the Commission. The petition names as alleged victim an individual on whose behalf the State undertook to respect and ensure the rights enshrined in the American Convention. The Commission also notes that Guatemala ratified the American Convention on May 25, 1978. Thus, the Commission has ratione personae competence to examine the petition.

37. The Commission finds that the petition also refers to a group of victims in abstract, namely, the 8,000 persons eligible to vote in the Department of San Marcos, whose right to vote was allegedly violated.

38. The Commission has consistently interpreted Article 44 of the American Convention to require that for a petition to be admissible that there must be concrete victims, who have been individualized and identified, or a group of specific and identified victims which is comprised of identifiable individuals.

39. The Commission finds that, pursuant to Article 44 and related provisions of the American Convention and the jurisprudence of the inter-American system, the petition warrants admissibility in respect of the alleged victim who has been duly individually identified and distinguished, in order to initiate proceedings pursuant to Articles 46 et seq. of the American Convention. However, with regard to the 8000 eligible voters, the Commission finds that these alleged victims are inadmissible since they have not been identified individually or by specific characteristics, and that the claim on their behalf is in the form of an actio popularis.[FN11]

[FN11] See IACHR; Report Nº 1/07, Case 11.878, Admissibility, Azucena Ferry Echaverry, Rommel Antonio Martínez Cabezas, Carlos Alberto Jirón Bolaños, Constantino Raúl Velásquez, Julio César Roca López, Bayardo Ramón Altamirano López, Jorge Ulises González Hernández, and Manual Martínez José (Nicaragua), February 27, 2007, par. 31; Report Nº 51/02, Case 12.404, Admissibility, Janet Espinoza Feria et al. (Peru), October 10, 2002, para. 35; see also IACHR, Report Nº 88/03, Case 11.533, Inadmissibility, Metropolitan Nature Reserve (Panama), Annual Report 2003, para. 34.

---

40. The Commission is competent ratione loci to consider the petition since it alleges violation of rights protected by the American Convention which are said to have taken place in the territory of Guatemala, a state party to said treaty. The Inter-American Commission is competent ratione temporis to examine the petition inasmuch as the obligation to observe and ensure the rights protected in the American Convention was already binding upon the State at the time the events described in the petition are alleged to have occurred. Finally, the Commission has ratione materiae competence because the petition alleges possible violations of human rights protected by the American Convention.

41. With respect to the petitioner's request that the Guatemalan State be declared to have breached the International Covenant on Civil and Political Rights, the Commission lacks competence in that regard. Having said that, the Commission may rely on other international instruments, such as the International Covenant on Civil and Political Rights (even though they may not recognize its competence), as guidelines or to interpret treaty-based obligations in light of the corpus juris of international human rights law,[FN12] as well as the provisions set forth in Article 29 of the American Convention.[FN13]

[FN12] See I/A Court H.R.: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, par. 115 et seq.; Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, pars. 20 to 24; Case of the "Mapiripán Massacre". Judgment of September 15, 2005. Series C No. 134, para. 115; Case of the Serrano Cruz Sisters. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, para. 119; Las Palmeras Case. Preliminary Objections. Judgment of February 4, 2000. Series C No. 67, pars. 32 to 34; and Bámaca Velásquez Case. Judgment of November 25, 2000. Series C No. 70, paras. 208 to 209.

[FN13] IACHR, Report N° 62/04. Case 167/03, Admissibility, The Kichwa Peoples of the Sarayaku Community and Its Members (Ecuador), October 13, 2004, para. 49.

B. Other Admissibility Requirements

1. Exhaustion of Domestic Remedies

42. Article 46(1)(a) of the American Convention provides that for a petition lodged with the Inter-American Commission to be admissible in accordance with Article 44 of the Convention, it

is necessary that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. This rule is designed to allow national authorities to examine alleged violations of protected rights and, as appropriate, to resolve them before they are taken up in an international proceeding.

43. The prior exhaustion rule applies when the domestic system affords remedies that are adequate and effective remedies to repair the alleged violation. In that connection, Article 46(2) specifies that the rule does not apply when: a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right in question; b) the alleged victim did not have access to the remedies under domestic law; and, c) there has been unwarranted delay in rendering a final judgment under said remedies. As Article 31 of the IACHR Rules of Procedure provides, when the petitioner invokes one of these exceptions, it is incumbent upon the State concerned to demonstrate that the remedies under domestic law have not been exhausted, unless that is clearly evident from the case file.

44. According to generally recognized principles of international law, in keeping with the burden of proof, the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness.[FN14]

[FN14] IACHR, Report 32/05, Case 642/03, Admissibility, Luis Rolando Cuscul Pivaral et al. (Persons Living with AIDS) (Guatemala), March 7, 2005, paras. 33-35; I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections, supra note 3, para. 53; Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33; and Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31.

---

45. In the instant case, the petitioner claims to have exhausted the remedies under domestic law, which culminated with the judgment issued on August 22, 2005 by the Constitutional Court, which confirmed the decision of the Supreme Court Justice regarding the inadmissibility of the action for amparo.

46. For its part, the State argued that the decisions of the Supreme Electoral Tribunal, the Supreme Court of Justice, and the Constitutional Court were adopted in accordance with domestic law. The State further indicated that the mishandling of domestic remedies by the petitioner does not give him standing to institute proceedings before the inter-American system since the latter is of a subsidiary nature and, therefore, it is not lawful for the petitioner to seek to correct in a proceeding in the inter-American system material errors that he committed in filing his action for amparo.

47. According to the facts alleged in the petition and evidence put forward by the parties, the record shows the following:

a. On November 17, 2003, the Supreme Electoral Tribunal adopted resolution 0390-2003 in case 1522-2003,[FN15] by which it declared void the mayoral and municipal council election in

the Municipality of El Quetzal, Department of San Marcos. The decision was grounded on the fact that on November 9, 2003 "general elections were held in every electoral district of the Republic and that in the Municipality of El Quetzal, Department of San Marcos, the electoral documents were destroyed before the respective tally was made, with the result that it was not possible to count the votes cast for each election."[FN16] The resolution also found that "it was conclusively determined that the electoral documents for the general elections held in the Municipality of El Quetzal, Department of San Marcos, were all destroyed before the polling stations had counted the votes cast at them, and therefore, it was appropriate to declare annulled the mayoral and municipal council election in El Quetzal, Department of San Marcos"[FN17].

b. On November 20, 2003, Mr. Marco Vinicio Cerezo Arévalo, in his capacity as a secretary general of the political party Democracia Cristiana Guatemalteca and its members, filed in Case 1522-2003 a motion to review with the Supreme Electoral Tribunal. The motion to review included a request that resolution 0390-2003 be broadened so as to also declare void the district deputies election held in the Municipality of El Quetzal, Department of San Marcos, on November 9, 2003.[FN18]

c. On November 22, 2003, the Supreme Electoral Tribunal, by resolution 0450-2003, rejected the motion to review entered by the secretary general of Democracia Cristiana Guatemalteca. Paragraph 4 of the Whereas clause to the decision of the Supreme Electoral Tribunal states that "this Tribunal, in adopting the appealed resolution, found that the number of polling stations that functioned in the Municipality of El Quetzal, Department of San Marcos, on November 9 of the year in progress, on the occasion of the general elections, did not constitute a significant percentage that might warrant voiding the elections for deputies for the District of San Marcos, inasmuch as they only amounted to 2.70% of the total polling stations that were set up in the Department of San Marcos."[FN19] The decision adds that the "motion does not offer any other evidence that might counter the considerations of this Tribunal in adopting the resolution challenged, for which reason the motion filed is disallowed."[FN20]

d. On December 1, 2003, the secretary general of Democracia Cristiana Guatemalteca filed a constitutional action for amparo with the Supreme Court of Justice against the Supreme Electoral Tribunal. The denounced act was "the unlawfulness of the resolution" 0390-2003 of November 17, 2003, which declared void only the mayoral and municipal council election held in the Municipality of El Quetzal, Department of San Marcos.[FN21] That same day, the Supreme Court, Chamber for Amparo and Preliminary Hearings, admitted the amparo action for processing and on December 15, 2003, ordered the appellant, appellee, the Office of the Attorney General, and interested third parties (the other political parties that took part in the election) to submit the necessary records or, in the absence thereof, a detailed report of the facts.

e. On January 7, 2004, Mr. Mario Chang Bravo, as an interested third party, submitted a brief to the Supreme Court Justice in the framework of the proceedings in the constitutional action for amparo filed by the secretary general of Democracia Cristiana Guatemalteca.

f. Having received the records, on September 8, 2004, the Supreme Court of Justice rejected the constitutional action for amparo filed by Democracia Cristiana Guatemalteca as inadmissible. The Supreme Court found that "for an amparo action to be admissible the applicant has the obligation precisely to identify the denounced act and the challenged authority alleged to have committed the injury caused to him, these being factual elements of the action, which, as such, cannot be substituted by the tribunal of amparo and, therefore, it should be denied if they are misstated. Amparo is not admissible when the challenged authority, in issuing a denounced decision, is within its legal powers and its acts do not constitute a violation of any

constitutional right.[FN22] The decision adds, "This Court, having appropriately reviewed the related record, the records on which the latter is based, and the evidence adduced, finds that the applicant identifies the denounced act as the resolution [0390-2003] adopted by the tribunal challenged in the case [1522-2003], which concerned the annulment of the mayoral and municipal council election in the Municipality of El Quetzal, Department of San Marcos. In that regard, this Court finds that the decision that could possibly have harmed him is the resolution that denied the motion to review presented at the time by the applicant, which the latter identified as the denounced act. Therefore, the appellant committed an error in identifying the decision that ordered the annulment and, therefore, the action for amparo is inadmissible owing to that misstatement.

g. On August 22, 2005, the ruling of the Supreme Court was upheld by the Constitutional Court on appeal. The Constitutional Court found that an amparo action is inadmissible when it is not brought against the final decision that may have given rise to the alleged injury.[FN23] The Constitutional Court finds that the resolution of November 22, 2003, "which refused the motion to review, could possibly have caused the alleged injury since that was the suitable remedy to determine whether or not to admit the applicant's claim as regards successfully securing a declaration of nullity of the district deputy election in the department in question and the calling of new elections. Accordingly, the latter becomes final in nature and is apt to be examined in an amparo proceeding."[FN24]

[FN15] Case 1522-2003 concerning the General Elections held on November 9, 2003, in the Municipality of El Quetzal, Department of San Marcos.

[FN16] Case 1522-2003, Resolution 0390-2003 of the Supreme Electoral Tribunal of November 17, 2003. Preamble, para. 1.

[FN17] Case 1522-2003, Resolution 0390-2003 of the Supreme Electoral Tribunal of November 17, 2003. Preamble, para. 5.

[FN18] Case 1522-2003, Resolution 0450-2003 of the Supreme Electoral Tribunal of November 17, 2003. Preamble, para. 1.

[FN19] Case 1522-2003, Resolution 0450-2003 of the Supreme Electoral Tribunal of November 17, 2003. Preamble, para. 4.

[FN20] Case 1522-2003, Resolution 0450-2003 of the Supreme Electoral Tribunal of November 17, 2003. Preamble, para. 5.

[FN21] Amparo 778-2003. Constitutional action for amparo filed with the Supreme Court of Justice on December 1, 2003.

[FN22] Amparo 778-2003. Ruling of the Supreme Court of Justice of September 8, 2004, Preamble, par. I.

[FN23] Amparo 778-2003. Ruling of the Constitutional Court of August 22, 2005, Preamble, par. I.

[FN24] Amparo 778-2003. Ruling of the Constitutional Court of August 22, 2005, Preamble, par. II.

---

48. Based on the foregoing considerations, in the instant case the parties do not dispute that the remedies under domestic law were exhausted. The discrepancy arises because the State

argues that the petitioner improperly exhausted the remedies provided to rectify the alleged violation.

49. In the instant case, the Supreme Court of Justice, Chamber for Amparo and Preliminary Hearings, found that the decision that could possibly have caused injury to the appellant was resolution 0450-2003 of November 22, 2003, which denied the motion to review, inasmuch as it -not the appealed resolution, namely, 0390-2003- was of a final nature and apt to be appealed in an amparo proceeding. The Constitutional Court confirmed that decision.

50. In this connection, the Commission notes that Article 248 of the Elections Act provides as follows:

Article 248: (As amended by Article 67 of Decree 74-87). Action for amparo. The action for amparo is admissible against final decisions of the Supreme Electoral Tribunal in the instances prescribed by the law on such matters, provided that the remedy provided in the preceding article is first exhausted.

51. Under the aforesaid Act, where matters of electoral law are concerned, an action for amparo is only admissible against final decisions adopted by the Supreme Electoral Tribunal. In other words, pursuant to Article 248 of the Elections Act, the appeal should have been lodged against Supreme Electoral Tribunal resolution 0450-2003 of November 22, 2003, because that was the decision that decided the motion to review filed in the proceeding and was of a final nature. The Commission notes that the judgments adopted by the Supreme Court of Justice and the Constitutional Court were in accordance with domestic law.

52. By virtue of the foregoing and bearing in mind that for a petition to be admissible it is necessary for domestic remedies to have been pursued and exhausted in accordance with generally recognized principles of international law, the Commission finds that in the instant case, although the petitioner had access to the remedies under Guatemalan law, he did not appropriately exhaust them under the terms of Article 46(1)(a) of the American Convention.

53. Based on the foregoing, the Commission abstains, since the matter is rendered moot, from examining the other admissibility requirements provided in the Convention.[FN25]

[FN25] See, inter alia, Report Nº 2/08, Case 506/05, Bolivia, March 6, 2008; Report Nº 87/05, Case 4580/02, Peru, October 24, 2005; Report Nº 73/99, Case 11.701, Mexico, May 4, 1999; Report 24/99, Case 11.812, Mexico, March 9, 1999; and ReportNº 82/98, Case 11.703, Venezuela, September 28, 1998.

V. CONCLUSION

54. The Commission concludes with respect to the above-alleged violations of the Convention, that the petitioner failed appropriately to pursue the suitable procedure under

domestic law in order to meet the requirement of prior exhaustion of domestic remedies set forth in Article 46(1)(a) of the American Convention.

55. Based on the foregoing arguments of fact and law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the instant case inadmissible.
2. To notify the parties of this decision.
3. To make this decision public and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 24th day of the month of July, 2008. (Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice-Chairwoman; Felipe González, Second Vice-Chairman; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Víctor E. Abramovich, and Florentín Meléndez, members of the Commission.