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File Number(s): Report No. 106/09; Petition 12.323  
Session: Hundred Thirty-Seventh Regular Session (28 October – 13 November 2009)  
Title/Style of Cause: Jorge Portilla Ponce v. Ecuador  
Doc. Type: Decision  
Decided by: President: Luz Patricia Mejia Guerrero;  
First Vice President: Victor Abramovich;  
Second Vice President: Felipe Gonzalez;  
Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez.  
Dated: 31 October 2009  
Citation: Portilla Ponce v. Ecuador, Petition 12.323, Inter-Am. C.H.R., Report No. 106/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)  
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## I. SUMMARY

1. On August 21, 2000 the Inter-American Human Rights Commission (hereinafter "the Commission") received a petition filed by Alejandro Ponce Villacis (hereinafter "the petitioner") in which he claims responsibility of the Republic of Ecuador (hereinafter "the State", "the Ecuadorian State" or "Ecuador") for the prolonged detention of Jorge Portilla Ponce (hereinafter "the alleged victim ") as well as financial obstacles to file a damages claim before the courts of that country.

2. The petitioner alleged that the State is responsible for the violation of the right to personal liberty, the right to a fair trial, the right to equal protection and judicial protection set forth in articles 7, 8, 24 and 25 of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention") in connection with articles 1(1) y 2 of that Treaty. On the other hand, the State argued that the claims of the petitioner were inadmissible in view that these did not meet the requirement of exhaustion of internal remedies provided for in article 46(1)(a) of the American Convention. Conversely, the petitioner argues that exemptions to the exhaustion of internal remedies provided for in article 46(2) of the American Convention apply.

3. After considering the positions of the parties in the light of the admissibility requirements set out in article 46 of the American Convention, the Commission decides to declare the petition inadmissible because it did not meet the requirement of article 46(1)(a). Notify to the parties, publish this report and include it in its Annual Report to the OAS General Assembly.

## II. PROCEDURE BEFORE THE COMMISSION

4. The IACHR recorded the petition under number 12,323, and after a preliminary analysis, proceeded to send copies of the relevant parts to the State, with a period of ninety days to submit information pursuant to Rules' article 34(3). The State submitted its comments on February 22, 2001, which were forwarded to the petitioner for comment. On May 23, 2001 IACHR received a communication from the petitioner, which was notified to the State for comments.

5. On September 27, 2001 the State submitted its written comments, which were conveyed to the petitioner for comment. On May 1, 2009 the IACHR requested the petitioner for up-to-date information on the above subject. On June 1, 2009 the IACHR received a communication from the petitioner, which was notified to the State. On June 8, 2009 the Commission communicated its availability to the parties to reach an amicable settlement and asked the State and the petitioner to let the IACHR know, within one month, if they were interested in initiating such proceedings. On July 9, 2009 the State submitted its final observations.

### III. POSITIONS OF THE PARTIES

#### A. Position of the petitioner

6. The petitioner states that on January 2, 1996, the Ecuadorian National Police conducted a narcotics operation during which Jorge Portilla Ponce was arrested. The petitioner notes that on January 10, 1996, the Seventh Criminal Judge of Pichincha issued an introductory order and ordered remand for the alleged victim. It argues that by decision of May 8, 1998, the Second Criminal Court of Pichincha absolved Jorge Portilla Ponce of responsibility and that on October 14, 1998 the Sixth Chamber of the Superior Court of Quito ratified the absolution. It contends that the alleged victim would have been in remand for more than two years and ten months, after which he was acquitted.

7. The petitioner notes that article 22 of the Constitution of the Republic of Ecuador, in effect at the time of the incident, states:

[t]he State shall be liable in cases of judicial error, for improper administration of justice, for acts resulting in the imprisonment of an innocent party or his arbitrary arrest, and for alleged violation of the rules laid down in Art. 24. The State shall have right of repetition against the judge or responsible officer.

It also notes that articles 2241, 2243 and 2258 of the Civil Code recognize the right to claim reparation for damages caused by the State as a result of acts performed by its agents.

8. The petitioner argues that despite the aforementioned regulatory recognition, the Rules on Judicial Services Fees[FN1] provide that all civil actions are subject to pay a court fee which varies depending on the amount of the claim. The petitioner argues that for civil actions for a value lesser than \$400 the payable fee would have been of \$ 0.40 and that for civil actions that exceed that amount the payable fee would have been the equivalent of 1% of the value claimed. The petitioner argues that Jorge Portilla Ponce estimated the value of his claim at \$100,000 taking into account the severity of the damage he suffered and the amount set in similar situations. He argues that in order to demand a reparation payment for the indicated amount the

alleged victim would have had to pay a court fee of \$1,000 and that he does not have the financial means to make such payment.

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[FN1] The petitioners point out that the Rules on Judicial Services Fees were published in Official Registry number 300 dated October 18, 1999.

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9. The petitioner states that the Ecuadorian judicial fees system was eliminated on October 20, 2008, but by that time the civil action that Jorge Portilla Ponce might have filed had prescribed.

10. Thus, the petitioner contends that the State is responsible for the violation of the right to personal liberty, the right to a fair trial, the right to equal protection and judicial protection set forth in articles 7, 8, 24 and 25 of the American Convention in connection with articles 1(1) and 2 of that Treaty, given the illegal detention of Jorge Portilla Ponce, then being kept on remand for an extended period of time and the impossibility of the alleged victim to access a reparation for damages caused due to high court fees that are imposed on civil actions.

11. In regards to the compliance with the requirement of prior exhaustion of internal remedies provided for in article 46(1)(a) of the American Convention, the petitioner argues that the exceptions provided for in article 46(2) of the American Convention are applicable given that the alleged victim would have been prevented from exhausting the appropriate remedy to obtain reparation for the damage, namely the ordinary civil action, due to his financial inability to pay the corresponding judicial fee.

12. In regards to the argument of the State which indicates that the alleged victim must reduce the amount of his claim in order to cover the judicial fee (see below III.B Position of the State), the petitioner contends that the amount of the claim not would be defined in terms of his ability to pay the judicial fee but in terms of actual damages caused, namely the consequential damages, lost profits, moral damage, and damage to his life project.

#### B. Position of the State

13. The State argues that the petitioner's claim is inadmissible, since the remedies under domestic jurisdiction were not exhausted, as required by article 46(1)(a) of the American Convention. Specifically, the State argues that pursuant to article 1031 of the Civil Procedure Code the alleged victim could have filed a remedy against the judge or magistrate in charge of "judicial error" for the damages caused.

14. The State contends that, as stated by petitioner himself, Ecuadorian law provides remedies to repair the alleged violation. On the petitioner's argument on Jorge Portilla Ponce's alleged defenseless condition, which would prevent him from paying the statutory judicial fee for his claim, the State argues that this situation does not constitute any of the exceptions to the requirement of prior exhaustion of internal remedies provided for in article 46(2) of the American Convention.

15. The State alleges that the claim from the petitioner exceeds the term of six months provided for in article 46(1)(b) of the American Convention. It argues that, according to the alleged victim, the Superior Court of Justice acquitted on October 14, 1998 and that the claim was filed before the Commission on October 2, 2000, that is two years after the final resolution.

16. Finally, the State notes that "in previous cases of similar nature, within the friendly resolution procedure established in the Convention, has never reached as high a compensation as the one sought by the petitioner"[FN2] and that if the alleged victim reduces the amount of his claim, the judicial fee would be considerably reduced. In view of the above arguments the State requests that the Commission declares the inadmissibility of the petitioner's claim and proceeds to file the case as closed.

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[FN2] Communication 16179 of the State Attorney General dated February 1, 2001, issued through Note number 4-2-41/01 dated February 21, 2001.

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#### IV. ANALYSIS ON COMPETENCY AND ADMISSIBILITY

##### A. Competency

17. The petitioner is competent, in principle, to present petitions before the Commission, as stipulated in article 44 of the American Convention. The petition indicates that an individual person is the alleged victim, whose rights, as enshrined in the American Convention, the Ecuadorian State was obliged to respect and protects. In that concerning the State, the Commission indicates that Ecuador is a Member State of the American Convention since December 28th, 1977, the date on which it presented its instrument of ratification. Therefore, the Commission has competency *ratione personae* to examine this petition.

18. Additionally, the Commission has competency *ratione loci* to hear the petition, as the violations of the rights protected by the American Convention are alleged that would have occurred within Ecuadorian territory, a member state of said treaty. The Commission has competency *ratione temporis* as the obligation to respect and guarantee the rights protected in the American Convention was already in effect for the State on the date in which the alleged acts occurred. Finally, the Commission has competency *ratione materiae*, because the petition alleges possible violations of the human rights protected by the American Convention.

##### B. Admissibility requirements

###### 1. Exhaustion of internal remedies

19. Article 46(1)(a) of the American Convention requires prior exhaustion of the remedies available in the respective domestic jurisdiction as established by universally recognized principles of international law, before the admission of any alleged American Convention rights violation claims.

20. Article 46(2) of the Convention stipulates that the prior exhaustion of internal remedies requirement is not applicable when:

- a) Internal state legislation does not have the necessary remedies for the protection of the right or rights allegedly violated;
- b) The alleged victim has not been given Access to the remedies of domestic jurisdiction, or has otherwise been impeded from exhausting the same, and
- c) There has been unjustifiable tardiness in a decision concerning said remedies.

According to the dictates established by the Inter-American Court, any time a State alleges the lack of exhaustion of internal remedies from the petitioner, it also has the burden of proof, particularly with regards to proving that the remedies yet to be exhausted are indeed “adequate” to resolve the alleged violation, meaning that the function of these resources within the internal legal system is suitable to address the legal situation[FN3].

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[FN3] Article 31.3 of the IACHR Rules. See also the I/A Court H.R., Velásquez Rodríguez v. Honduras Case. Judgment of July 29, 1988. Series C No. 4, paragraph 64.

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21. In this case, the State alleges that the petition does not meet the requirement of prior exhaustion of remedies in domestic jurisdiction, as provided for in article 46(1)(a) of the American Convention given that the petitioner did not file a remedy against the judge or magistrate responsible for the “judicial error” and damages caused.[FN4] The petitioner alleges that the exceptions stipulated in article 46(2) of the American Convention apply, as the alleged victim would have been prevented from exhausting available remedies, due to the economic impossibility of paying the corresponding judicial fees.

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[FN4] The State makes reference to article 1031 of the Civil Procedure Code, which states: “there will be space for a damages claim against the judge or magistrate that through his function causes economic damage to any of the interested parties, or the tardiness or outright denial of justice, breach of the laws expressed, usurpation of functions, denial or rejection of the resources established by law, either expressly or by altering a sentence upon its execution. Likewise, similar actions should be taken against functionaries and employees of the Judicial Branch, that by action or omission cause economic damages, be it through willful intent or negligence [...]”. Communiqué 16179 of the State Attorney General on February 1st, 2001, issued through Note number 4-2-41/01 on February 21st, 2001.

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22. In view of the parties’ allegations, firstly it is necessary to clarify which are the internal remedies that should be exhausted in a case such as this, and in accordance with the precedents of the inter-American system.

23. The Commission notes that the petitioner's claims refer in the first instance to the privation of liberty for a prolonged period; secondly to the impossibility of access to any reparation for damages caused as a result of this detention. Regarding the detention and privation of liberty for a prolonged period, the Commission notes that the petitioner did not refer to remedies filed to question the length of this detention, such as a habeas corpus or another like remedy, and accordingly the Commission does not have sufficient information to conclude that prior exhaustion of remedies in domestic jurisdiction existed regarding this claim.

24. Regarding the impossibility of attain reparations caused by his detention, the petitioner alleges he intended to pursue a civil action for damages upon confirmation of acquittal on October 14th, 1998. Nevertheless, no civil action was initiated for financial reasons related to the judicial fee.

25. Additionally, the Civil Procedure Code of the Republic of Ecuador, in force at the moment of the alleged events, established a procedure for access to justice in cases of extreme poverty[FN5]. According to the documents presented by the petitioner it is apparent that there was no attempt to utilize said resource. Neither, it is evident that the petitioner made no attempt to challenge the legitimacy of the judicial fee.

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[FN5] Civil Procedure Code of the Republic of Ecuador (Code No. 000. RO/ Sup 687 de 18 de Mayo de 1987). "In cases of poverty: Art. 905.-he who pleads poverty shall present himself before the competent judge with witnesses and information that support the claim of unemployment or any property that generates 500 sucres annually in income, or a farm valued at 1000 sucres. The claimant will notify the other party to the litigation, as well as the state agent or whomever its acting in said place. Art. 906.- If there is no opposition, sentence will be pronounced, which declares that the petitioner does not have to pay any of the related judicial fees and may carry on the case in a basic fashion. Art. 907.- Should there be opposition, 8 days will be given to prove the petition, and once said term has elapsed, sentence will be pronounced. Art. 908.- Pleading economic hardship will only apply to the case in question. Should the claimant be victorious, fees will be paid with whatever payments are received- contrarily, should the claimant be defeated, the judge will declare that the process was initiated in bad faith, and the claimant will cover all costs incurred by the other party. Art. 909.- Once granted a poverty waiver, the claimant will enjoy all of the rights and benefits accorded by law, but if said procedure is denied by judge's sentence, the claimant will pay all costs involved, as mentioned previously. Art. 910.- Said benefits expire should the claimant acquire goods and wealth. Art. 911.- Legal rights may be litigated using simple procedures and without payment: 1o.- The State and other public institutions; 2o.- defendants in criminal cases for crimes under investigation; 3o.- Litigation in a trial of expropriation".  
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26. The Commission notes as well that the petitioner did not bring to bear any of the remedies available in domestic jurisdiction to question the fee and thereby propose the supposed violation of his right of access to the proper administration of justice. Likewise, in the petition before the IACHR, there wasn't sufficient justification of exemption from the rule of exhaustion of internal remedies based on a presumed reality of extreme poverty[FN6].

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[FN6] I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11.  
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27. Based on the aforementioned, the Commission concludes that this petition does not meet the requirements for exhaustion of internal remedies as contemplated in article 46(1)(a) of the American Convention.

28. The Commission abstains, due to removal of claim, from examining the arguments presented by the Ecuadorian State regarding the other admissibility requirements as enshrined in the en la Convention.

#### V. CONCLUSIONS

29. The Commission concludes that it is competent to hear this case but that the petition is inadmissible for lack of exhaustion of internal remedies as stipulated in article 46(1)(a) of the American Convention.

30. Based on the aforementioned arguments of acts and rights,

THE INTER-AMERICAN HUMAN RIGHTS COMMISSION,

DECIDES:

1. To declare the present claim inadmissible.
2. Notify the Ecuadorian State and petitioner of this decision.
3. Publish said decision and include it in the Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 31st day of the month of October, 2009.  
(Signed): Luz Patricia Mejía Guerrero, President; Víctor E. Abramovich, First Vice-President; Felipe González, Second Vice-President; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, and Florentín Meléndez, members of the Commission.