

REPORT No. 64/10
PETITION 245-05
ADMISSIBILITY
JUAN CARLOS JAGUACO ASIMBAYA
ECUADOR
June 21, 2010

I. SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition on March 8, 2005 submitted by the Ecumenical Human Rights Commission [*Comisión Ecuménica de Derechos Humanos – CEDHU*] (hereinafter "the petitioners") claiming that the Republic of Ecuador is responsible for the death of Juan Carlos Jaguaco Asimbaya which occurred on March 26, 2001, in the city of Quito, Republic of Ecuador, and for the lack of judicial clarification of the facts.

2. The petitioners contended that the State was responsible for the violation of the rights to life, to humane treatment, to a free trial, and to judicial protection, provided for by articles 4, 5, 8, and 25 of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention") in connection with article 1(1) of same. The State, in turn, claimed that the petitioners' claims were inadmissible due to the lack of exhaustion of domestic remedies and that the petition did not contain facts tending to establish a violation of the rights established in the American Convention.

3. After examining the positions of the parties and the matter of compliance with the requirements established by articles 46 and 47 of the American Convention, the Commission decided to declare the claims admissible regarding the alleged violation of articles 4(1), 5(1), 8(1) and 25, in connection with article 1(1), and, in application of the principle of *iura novit curia*, regarding the violation of articles 2 and 7 of the American Convention, and articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. The Commission also decided to notify the parties of its decision and to order the report be published in its Annual Report to the General Assembly.

II. PROCESSING BEFORE THE COMMISSION

4. The Commission registered the petition under number P-245-05 and on May 2, 2008 transmitted a copy of its relevant parts to the State, granting it two months to submit information, pursuant to article 30(2) of the Commission's Rules of Procedure. On December 8, 2008 the IACtHR reiterated its request for information to the State. On January 6, 2009 the State submitted its response, which was transmitted to the petitioners, granting them one month to present their observations.

5. The Commission received the petitioners' brief with their observations on March 23, 2009, which was forwarded to the State for it to submit its own observations. On April 21, 2009 the State requested a 30 day extension, which was granted by the Commission. On July 14 and September 1, the Commission reiterated its request for the State to provide information. The State submitted a brief with its observations on September 11, 2009. The petitioners presented a brief with additional information on October 26, 2009, which was transmitted to the State for its observations. On December 16, 2009, the State submitted its final observations.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

6. The petitioners claim that on March 24, 2001, at approximately 3:00 AM, Juan Carlos Jaguaco Asimbaya (23) was on his way to his residence in the Chimbacalle sector of the city of Quito. They contend that on his way he stopped by the ground floor of the "Rosa Pérez Pallares" community center. When he was approached by a second sergeant of the police who, as he asked his partner to pass him the handcuffs, struck Mr. Jaguaco Asimbaya in the face with his firearm and accused him of attempting to steal his car radio. The petitioners state that a neighbor came out when he heard the cries and, recognizing Juan Carlos Jaguaco said to the second sergeant "what is going on? Why are you beating him – don't you see he lives in this neighborhood?"¹ They further contend that after this, the second sergeant went to his car to retrieve the handcuffs and when he tried to put them on Juan Carlos Jaguaco there was a scuffle and Mr. Jaguaco managed to escape towards the community center. In the light of the way things had turned out, the second sergeant left, after which the alleged victim went home.

7. The petitioners maintain that Juan Carlos Jaguaco again left his house and met with a group of friends who were consuming alcoholic beverages at Primero de Mayo and Cayambe streets, and narrated the incident to them. They state that at 3:25 AM a patrol car arrived and the second sergeant and two other police officers² arrested Juan Carlos Jaguaco, while the second sergeant continued to beat him. They claim that witnesses stated that the alleged victim was put in to the back seat of the patrol car in the custody of the second sergeant and another officer. They also claim that, according to the witnesses, they had demanded that they be told why he was being arrested, in response to which one of the officers told them to leave.

8. The petitioners state that on that same day at 4:00 AM Juan Carlos Jaguaco's friends informed his next of kin regarding his arrest. The next day the alleged victim's next of kin began to search for him, but the petitioners affirm that there was no record of his detention by the Judicial Police, the Center for Provisional Detention, nor at the 23rd Neighborhood Brigade, to which the police officers belonged. Furthermore, there was no registered report of his arrest. They state that on March 26, 2001, a neighbor of the next of kin informed them that the body of Juan Carlos Jaguaco had been found that same day in a ravine of the Machangara River close to the Land Terminal [*Terminal Terrestre*] and that it was in the Morgue of the National Police. The petitioners state that the conclusion of the report on the examination and autopsy of the body of Juan Carlos Jaguaco was that "[...] the person whose body was submitted for autopsy, according to its post-mortem characteristics, died [...] as a victim of laceration, cerebral hemorrhage [and] cranioencephalic trauma."³

9. The petitioners affirm that the next of kin of the alleged victim filed a complaint with the police, which gave rise to an investigation. They state that the result of this investigation was Police Report No. 1378 of April 16, 2001 that concluded, *inter alia*, that:

[...] there was negligence on the part of the police officers [...] of the 23rd Neighborhood Brigade in their transfer of the detainee Juan Carlos Jaguaco; since they did not take the proper precautions and did not follow proper procedure regarding the custody and transfer of detainees he was able to escape. However, there is no evidence that the officers had any direct involvement in the death of the escaped detainee.

¹ The petitioners cite the testimony of Manuel Pacheco. The original petition was received by the IACtHR on March 8, 2005.

² The petitioners state that the officers of the patrol were Second Sergeant Milton Bolívar Fuentes Vela and corporals Luis Quishpe Visarrea and Néstor Armando Cañar Chamba. Original petition received by the IACtHR on March 8, 2005.

³ Autopsy No. 312-1-ML-PA-2001, March 27, 2001. Annex to the original petition received by the IACtHR on March 8, 2005.

The petitioners state that, due to the dissatisfaction of the alleged victim's next of kin with the conclusions of the aforementioned report, the brother of the alleged victim filed a criminal complaint and on June 5, 2001, the 14th Criminal Judge of Pichincha took cognizance of the written complaint and ordered the initiation of a preliminary investigation as well as the preventive detention of the five police officers involved.

10. The petitioners contend that after gathering several evidentiary items the 14th Criminal Judge of Pichincha closed the inquiry and forwarded the case file to the Office of the Prosecutor for it to issue a decision according to law. On December 10, 2001, the District Prosecutor of Pichincha decided against charging the police officers; his opinion was ratified on January 24, 2002. The petitioners maintain that the prosecutor did not consider the evidence at his disposal and that only considered the version of the accused. They state that on February 20, 2002 the 14th Criminal Judge ordered the trial of four accused individuals: three of them as perpetrators of the crime of involuntary manslaughter and the fourth as an accomplice, and confirmed the order for their preventive detention. The judge also ordered dismissal without prejudice of the proceeding and dismissal with prejudice of another accused individual. They affirm that two of the accused filed an appeal which was granted on March 5, 2002.

11. The petitioners affirm that on May 16, 2002 the Superior Court of Quito ruled on the appeals, overturning the entire proceeding, beginning with the order to initiate a preliminary inquiry, based on the consideration that the accused police officers were on duty at the time of the facts, and therefore should have been tried by the Judge of Police. The Superior Court ordered the case to be forwarded to the president of the District Police Court.

12. They contend that on July 15, 2002 the Third Court of the First District of the National Police ordered the initiation of a judicial inquiry regarding three police officers. The Third Court also ordered the immediate release of two police officers who had been in preventive detention since July 11, 2001, since the amount of time they had been held had exceeded the period provided for by article 24, paragraph 8 of the Constitution in force at the time of the facts. On June 4, 2003, the Court declared the preliminary investigation closed and on July 28, 2003, the Prosecutor of the Third Court of the First District of the National Police decided against charging the police officers with a crime.

13. The petitioners state that on October 20, 2003, the Third Court of the First District of the National Police handed down a reasoned order for the arrest of two police officers for the alleged commission of the crime typified by article 232, paragraph one of the Criminal Code of the National Police as involuntary manslaughter [*homicidio preterintencional*].⁴ According to the order the officers should be held in the holding cells for non-commissioned police officers and other police [*clases y policías*] of the First Quito Regiment. The Court stated in its decision, *inter alia*, that "there is no evidence whatsoever that the detainee really [...] was transferred in a patrol car of the 23rd Brigade, without the appropriate security measures; moreover, it is implausible that two non-commissioned police officers [*clases*] with 12 and 7 years of service, at the time of the facts, would not know the procedures for the transfer of a detainee." The petitioners also state that the judge dismissed without prejudice the case against another policeman.

14. They maintain that the alleged victim's next of kin appealed the dismissal without prejudice ruling before the First District Court of the National Police. On May 17, 2004 the First Court forwarded the case file to the Office of the Prosecutor for an opinion regarding the appeals. On July 8, 2004, the Police Prosecutor of the First District Court issued his opinion charging the three policemen with the death of the alleged victim. The petitioners assert that five years and seven months after the criminal proceeding was initiated, on September 27, 2004, the First District Court handed down a ruling in favor of the prosecutor's opinion, confirmed the appealed order, reversed the dismissal without prejudice of the case against the other policeman, and called him to trial. They further state that on October 27,

⁴ The petitioners cite article 232 of the Code of the National Civil Police: "When voluntarily inflicted injuries or blows, without the intention of causing death, do cause death, the guilty party will be punished with three to six years of minor imprisonment. He or she will be punished with six to nine years of minor imprisonment if he or she has committed these acts of violence under any of the circumstances listed by article 228."

2004 the Court ordered the arrest of the accused, but that the Third Court of the National Police which took cognizance of the case on January 31, 2005 did not order their arrest; this failure in compliance allowed the accused parties to remain free.

15. The petitioners state that on December 28, 2005 the Criminal Tribunal of the First District of the National Police acquitted the three policemen. They affirm that as a result of this ruling the facts went unpunished. For this reason, the next of kin of the alleged victim filed an appeal with the First District Court of the National Police which, on October 17, 2006 affirmed the ruling of the first instance. The Court, they say, held that the policemen were not responsible for the death of Juan Carlos Jaguaco since it was not caused by the blows allegedly inflicted on him by the policemen but by indirect blows caused due to a fall from a high elevation. The petitioners further claim that the Police Court did not offer any opinion regarding the other direct injuries on the alleged victim's body that, although they did not kill him, would prove that he had been the victim of physical assault by the policemen and would constitute evidence of the maltreatment he was subjected to, to the point that he was pushed into the ravine, thus causing his death.

16. They affirm that the next of kin of Juan Carlos Jaguaco requested a clarification of the ruling but that in a November 7, 2006 decision the Court denied the petition, stating that the ruling was clear. The next of kin then filed a third instance appeal, which was denied by the First District Court of the National Police on November 20, 2006, on the grounds that it was inadmissible according to the provisions of article 224.1 of the Police Code of Criminal Procedure.⁵

17. The petitioners contend that the Ecuadorian State is responsible for the violation of the right to life protected by article 4 of the American Convention because the alleged victim had been arrested by three policemen and was still alive when he had been taken away in a police patrol car. Days later his body was found at the bottom of a ravine. They claim that Juan Carlos Jaguaco was under police custody and that the policemen had the duty to protect him; in not doing so they incurred in "commission by omission"⁶ because "the accused knew full well their obligation to protect all citizens and more so if a citizen was in their custody, as they knew [...] the rules for the custody of criminals or alleged criminals."

18. They further claim that the State is responsible for the violation of the right to humane treatment protected by article 5 of the American Convention because the autopsy report showed that the alleged victim had received several injuries when he still was alive. They also assert that, according to testimony in the court record of the case, these injuries were caused by policemen.

19. The petitioners also maintain that the State is responsible for the violation of the rights to a fair trial and to judicial protection provided for by articles 8(1), 8(2)(h) and 25(1) of the American Convention because, after the inquiry was initiated under ordinary jurisdiction, it was quashed and then forwarded to the police jurisdiction, which violates the right to an independent and impartial tribunal. They claim that the police jurisdiction

[...] is competent only to hear and rule on those crimes that affect institutional objectives and interests, i.e., crimes of a police character, but when the matter relates to a common crime it has no jurisdiction, which belongs to ordinary justice, and even more so when there has been a violation of human rights: both regional and universal case law have been consistent in their opinion that in these cases trial and punishment belong to ordinary jurisdiction.⁷

⁵ The petitioners cite to article 224.1 of the Code of Criminal Procedure of the Police, which provides that "A third instance appeal will be granted in the following cases: 1. Of a sentence of the second instance, in trials for crimes punishable by imprisonment, except where there has been an acquittal in the first instance [...]."

⁶ The petitioners cite article 12 of the Criminal Code which establishes: "Commission by omission. Not to prevent an event when there is a legal obligation to do so is equivalent to causing it." Petitioners' brief received by the IACtHR on October 26, 2009.

⁷ Petitioners' brief received by the IACtHR on December 19, 2006. The petitioners cite several decisions by the Inter-American Court of Human Rights; *inter alia*: I/A Court H.R., *Castillo-Petrucci et al. v. Peru Case*. Judgment of May 30, 1999. Series C No. 52, I/A Court H.R., *Constitutional Court v. Peru Case*. Judgment of January 31, 2001. Series C No. 71, I/A Court H.R., *19 Merchants v. Colombia Case*. Judgment of July 5, 2004. Series C No. 109, I/A Court H.R., *Lori Berenson-Mejía v. Peru Case*. Continúa...

20. They claim that, as case law in the inter-American system has held, judicial organs dependent on the executive branch, such as the police jurisdiction, do not satisfy the requirements of independence and impartiality established by article 8 of the American Convention; therefore the Ecuadorian State did not provide an effective judicial remedy for the human rights violations allegedly committed by its agents, which is in violation of article 25 of the American Convention. In addition, the First District Court of the Police denied them the possibility of appealing the judgment in a third instance, which is in violation of article 8(2)(h). They emphasize that the proceeding under police jurisdiction was destined to protect the accused policemen and not to deliver justice to the victim's next of kin; to that degree the trial of the policemen constituted a fraudulent *res judicata*.⁸

21. They claim that the Ecuadorian State is responsible for the violation of article 1(1) of the American Convention due to its failure to comply with its obligation to respect the alleged victim's right to life and to humane treatment as well as the right of his next of kin to obtain access to justice delivered by a competent, independent, and impartial tribunal, and to an effective remedy.

22. With respect to compliance with the requirement of prior exhaustion of domestic remedies, the petitioners claim that the exception provided for by article 46(2)(c) of the American Convention is applicable, given the unjustified delay in the processing of the case by the police jurisdiction.

B. Position of the State

23. The State contends that the petitioners are attempting to adjust their claims so that the Inter-American Commission on Human Rights will assume the role of a fourth instance of review of the merits of the criminal proceeding which was judicially held in Ecuador. It states that the petitioners baselessly claim that the court that tried the accused was not competent, independent or impartial and that therefore the proceeding was defective. It maintains that the petitioners' dissatisfaction with the domestic judgment does not grant them the possibility of lodging a complaint before the Commission, since the Commission does not have jurisdiction to "establish whether a crime has been committed and even less so to initiate any kind of trial."⁹

24. It also maintains that the petitioners' central argument is that the proceedings under police jurisdiction were intended to protect police personnel and not to deliver justice to the next of kin of the alleged victim. This argument, it contends, is illogical since in the instant case there the police prosecutor intervened in several phases of the trial, there was evidence given by the parties, and reports were compiled at the appropriate procedural stages.

25. The State argues that the petition does not provide facts that tend to establish violations of the rights guaranteed by the American Convention, as required by its article 47. Specifically, it considers that it is evident from the facts in the record of the proceeding that the state agents, due to their manifest negligence, lost their control over the alleged victim; therefore, since he was not under their protection they could not guarantee his physical and psychological integrity. The State also argues that only the necessary force was used in the arrest and that a verification of the facts indicates that none of Juan Carlos Jaguaco Asimbaya's rights were violated.

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Judgment of November 25, 2004. Series C No. 119, and I/A Court H.R., *Palamara-Iribarne v. Chile Case*. Judgment of November 22, 2005. Series C No. 135.

⁸ The petitioners cite I/A Court H.R., *Heliodoro-Portugal v. Panama Case. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of August 12, 2008. Series C No. 186, para. 140 and I/A Court H.R., *Ticona-Estrada et al. v. Bolivia Case. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 191, para. 78. Petitioners' brief received by the IACtHR on October 26, 2009.

⁹ The State cites Report No. 122/01, Petition 15/00, Wilma Rosa Paredes, Argentina, October 10, 2001, para. 10. Communication 002812 of the Office of the Attorney General of the State of August 28, 2008, transmitted in Note No. 4-2-001/2009 of January 6, 2009.

26. The State reports that the modern doctrine of police protection, both in its investigation policy and in its arrest procedures, has decisively included clearly dissuasive mechanisms known as "soft control or blocking of the detainees," but in no case any protocols opposed to human rights.

27. It argues that in the instant complaint domestic remedies have not been exhausted, as the American Convention requires. Regarding the reasonableness of the duration of the criminal proceeding, the State maintains that "due to mistakes made by the petitioners themselves, anomalies occurred during the proceedings." It further argues that the petitioners had several appeals at their disposal that they should have lodged which would have been adequate and effective to remedy the facts of the complaint.

28. Specifically, the State cites the trial for recusal whose objective is to move forward the administration of justice and not allow judges to obstruct normal judicial performance. It states that the petitioners had the civil legal venue to file a claim for damages. It also states that the petitioners could have chosen to open a disciplinary proceeding regarding an alleged human rights violation, on the grounds of negligence in the control of a detainee, or on the grounds of alleged omissions in the police report.¹⁰ Finally, the State maintains that the country's new Constitution provides the extraordinary appeal for protection which allows the review, by the Constitutional Court, of judgments or final decisions where it can be proven, procedurally and substantively, that both in the judgment and at some stage of the proceeding there was a flagrant violation of the rights provided for by the Constitution.

¹⁰ The State cites articles 15 and 22 of the Disciplinary Regulations of the National Police. Communication 002812 of the Office of the Attorney General of the State of August 28, 2008, transmitted in Note No. 4-2-001/2009 of January 6, 2009.

IV. ANALYSIS REGARDING COMPETENCE AND ADMISSIBILITY

A. Competence

29. Pursuant to article 44 of the American Convention, the petitioners have standing, in principle, to lodge petitions before the Commission. The petition identifies as the alleged victim an individual person whose rights, provided for by the American Convention, the Ecuadorian State undertook to respect and guarantee. Regarding the State, the Commission notes that Ecuador is a State Party to the American Convention since December 28, 1977, when it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

30. The Commission is also competent *ratione loci* to examine the petition, because it claims that rights protected by the American Convention have been violated within the territory of Ecuador, a State Party to said treaty. The Commission is competent *ratione temporis* because the obligation to respect and guarantee rights protected by the American Convention was in force for the State at the time the petition's alleged events took place. In its exercise of its competence *iura novit curia*, the Commission also notes that Ecuador deposited its instrument of ratification of the Inter-American Convention to Prevent and Punish Torture on November 9, 1999 and therefore the Commission is competent *ratione temporis*. Finally, the Commission is competent *ratione materiae* because the petition reports possible violations of human rights protected by the American Convention.

B. Requirements for admissibility

1. Exhaustion of domestic remedies

31. Article 46(1)(a) of the American Convention requires the prior exhaustion of available remedies under domestic law in accordance with generally recognized principles of international law for the admission of a petition regarding an alleged violation of the American Convention. Article 46(2) of the Convention provides that the requirement of prior exhaustion of domestic remedies is not applicable when:

- a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

According the IACtHR's Rules of Procedure, when the petitioner claims that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.¹¹

32. In the instant case the State asserts that the petitioners' claim does not satisfy the requirement of prior exhaustion of domestic remedies established by article 46(1) of the American Convention: they had adequate and effective remedies such as the trial for recusal, the civil venue to obtain an indemnity for damages, the police disciplinary venue and the extraordinary appeal for protection. The petitioners, in turn, argue that the exception provided for by article 46(2)(c) of the American Convention is applicable, due to the unjustified delay in processing the case before the police judicial system: it had taken more than five years. They further maintain that according to police criminal law a trial for recusal was out of order,¹² that use of the civil venue was not required since the petitioners

¹¹ Article 31(3) of the Commission's Rules of Procedure. Also see I/A Court H.R., *Case of Velásquez Rodríguez*. Judgment of July 29, 1988, paragraph 64.

¹² Article 229 of the Code of Criminal Procedure of the National Civil Police provides that a trial for recusal of a district judge may not be pursued, nor may an incidental motion of any kind suspend the course of a trial.

were not seeking compensation, and that an administrative complaint in the disciplinary venue, pursuant to the Disciplinary Regulations was not required either; however, a complaint was nevertheless filed with the police, ending with a police report of April 16, 2001 which concluded that the policemen had been negligent in their custody of the arrested person.

33. First, a clarification is required regarding the domestic remedies that should be exhausted in the instant case. The Inter-American Court has held that only those remedies which are adequate to redress alleged violations should be exhausted. Adequate domestic remedies are those

which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.¹³

34. The Commission notes that since the instant petition claims the alleged responsibility of State agents in the arrest, torture, and death of a civilian, the adequate remedy to clarify the facts is a criminal investigation under ordinary jurisdiction to establish the criminal responsibility of the State agents involved.

35. As can be seen from the pleadings of the parties, after the facts of March 24, 2001, a criminal proceeding was initiated under ordinary jurisdiction. This proceeding was subsequently quashed and the case was forwarded to the police jurisdiction by the Superior Court of Quito, based on the consideration that the accused policemen were on duty at the time of the facts, and therefore should be tried by a Judge of the Police. After it was forwarded to the police criminal jurisdiction, the proceeding ended with a decision in the second instance handed down by the First District Court of the National Police on October 17, 2006, which acquitted the three accused policemen. The Court held that the policemen did not cause the death of Juan Carlos Jaguaco, since it did not occur as a consequence of direct blows but of indirect blows he received when he fell from a high elevation.

36. The Commission has reiterated that special jurisdictions, like those of the military or the police, are not an appropriate venue and therefore do not provide an adequate remedy to investigate, try, and punish violations of human rights protected by the American Convention, allegedly committed by members of the public security forces.¹⁴ Consequently, the trial under police jurisdiction of members of the National Police involved in acts linked to the death of civilians does not constitute an adequate remedy to establish their responsibility in the reported violations, pursuant to article 46(1)(a) of the American Convention.

37. The Commission notes that in the course of the proceeding under police criminal jurisdiction the next of kin filed appeals to defend their interests, but the fact that the State forwarded and processed the case before a police criminal court kept them from accessing a suitable remedy.

38. Therefore, given the characteristics of the instant case, it is the opinion of the Commission that the complaint filed by the petitioners is covered by the exception to the exhaustion of domestic remedies provided for by article 46(2)(b) of the American Convention, which establishes that this exception shall apply when “the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.” Consequently the prior exhaustion of domestic remedies is not required.

¹³ I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*. Judgment of July 29, 1988, Series C No. 1, paragraph 64.

¹⁴ IACtHR, Report No. 11/02, Joaquín Hernández Alvarado *et al.*, Ecuador, February 27, 2002, para. 18; IACtHR, Report No. 59/09, Petition 489-02, Admissibility, Joffre Antonio Aroca Palma, Ecuador, July 16, 2009, para. 33; IACtHR Report No. 113/09, Petition 1101-04, Admissibility, Carlos Arístides Lara Silva and David Eduardo Delgado Galarza, Ecuador, November 10, 2009, para. 31.

39. Regarding the trial to seek recusal and the use of the civil jurisdiction to which the State refers in its pleadings, the Commission notes that because of their characteristics they are not adequate to remedy the petitioners' complaint regarding the determination of criminal responsibility for the facts surrounding the death of Juan Carlos Jaguaco. With respect to the proceedings before the disciplinary jurisdiction, the Commission has repeatedly held¹⁵ that this venue does not constitute a suitable remedy for the analysis of the admissibility of a complaint of this nature filed with the Commission. The disciplinary jurisdiction does not constitute a sufficient means for prosecuting, punishing, and repairing the consequences of human rights violations. Finally, the extraordinary appeal for protection was established in the Constitution of the Republic of Ecuador of 2008 and is an extraordinary appeal enacted after the occurrence of the facts which are the subject of the instant petition.

40. The invocation of Article 46(2)'s exceptions to the prior exhaustion rule bears an intimate relation with the possible violation of certain rights protected by the Convention, such as its guarantees of access to justice. However, by its very nature and purpose, Article 46(2) is a provision with autonomous content *vis-à-vis* the Convention's substantive precepts. So, the decision as to whether the exceptions to the exhaustion of domestic remedies rule are applicable in the case at hand must be taken before the merits of the case are examined and in isolation from that examination, since it depends on a different criterion from the one used to determine whether Articles 8 and 25 of the Convention were violated.

2. Timeliness of the petition

41. The American Convention provides that for a petition to be admitted by the Commission, it must be lodged within a period of six months from the date on which the alleged victim of a rights violation was notified of the final judgment. Article 32 of the Commission's Rules of Procedure establishes that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

42. In the instant case, the facts which are the subject of the complaint took place on March 24, 2001; they were followed by an investigation under police jurisdiction that concluded with a conviction handed down by the First District Court of the National Police on October 17, 2006, and the petition was received on March 8, 2005. The Commission also takes into consideration that the next of kin of the alleged victim filed supplementary appeals in order to defend their interests, whose processing continued until November 2006. Therefore, in the light of the context and characteristics of the case at hand, the Commission considers that the petition was lodged within a reasonable time period and that the requirements of article 32 of the Commission's Rules of Procedure were met regarding the filing deadline for the admissibility of the petition.

3. Duplication of procedures and international *res judicata*

43. Article 46(c) of the Convention provides that for a petition to be admitted by the Commission it shall be required that "the subject of the petition or communication is not pending in another international proceeding for settlement," and article 47(d) of the Convention establishes that the Commission shall consider inadmissible any petition or communication if "the petition or communication is substantially the same as one previously studied by the Commission or by another international organization." There is no indication in the case file that the substance of the petition is pending in any other international settlement proceeding or that it is substantially the same as another petition already examined by this Commission or any other international body. Hence, the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Characterization of the facts alleged

¹⁵ IACtHR, Report No. 74/07, Admissibility, José Antonio Romero Cruz *et al.*, October 15, 2007, para. 34.

44. Considering the information provided by the parties and the nature of the matter of which it has taken cognizance, the Commission finds in the instant case that the petitioners' claims regarding the alleged violation of the rights to life, to humane treatment, to a fair trial, and to judicial protection, if proven, could tend to establish possible violations of the rights protected by articles 4(1), 5(1), 8(1) and 25 in connection with article 1(1) of the American Convention, and, at the merits stage will also examine, *iura novit curia*, the alleged violation of article 5 of the American Convention with prejudice to the next of kin of the alleged victim.

45. In addition, given the stated facts of the instant petition and, in application of the principle of *iura novit curia*, the Commission must establish whether the State is or is not responsible for the alleged violation of its duty to adopt domestic legislation as provided for by article 2 of the Convention with respect to its application of its system of police criminal justice. Even though the State affirms that a police criminal proceeding has been legally carried out in Ecuador, and hence contends that the petition is inadmissible because it would constitute a "fourth instance," the Commission notes that the alleged facts and arguments set forth require, under the Convention, an examination of their merits.

46. In the case at hand it is claimed that Juan Carlos Jaguaco was strongly beaten by police officers; therefore it is the opinion of the Commission that, considering these allegations and, in application of the principle of *iura novit curia*, the claims could tend to establish the violation of articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

47. It has also been claimed that Juan Carlos Jaguaco was violently arrested by police officers. Therefore, it is the opinion of the Commission that, considering these allegations and, in application of the principle of *iura novit curia*, the claims could tend to establish the violation of the right to personal liberty provided for by article 7, in connection with article 1(1) of the American Convention, with prejudice to Juan Carlos Jaguaco.

48. Since it cannot be inferred from the record that these elements of the petition are groundless or obviously out of order, it is the opinion of the Commission that the requirements established by articles 47(b) and (c) of the Convention have been met.

V. CONCLUSIONS

49. The Commission concludes that it is competent to examine the claims submitted by the petitioners regarding the alleged violation of articles 4(1), 5(1), 8(1), and 25, in connection with article 1(1), and, in its application of the principle of *iura novit curia*, of articles 2 and 7 of the American Convention, and articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, and that these claims are admissible, pursuant to the requirements established by articles 46 and 47 of the American Convention.

50. Based on the foregoing arguments in fact and in law, and without prejudging on the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the claims on the alleged violation of articles 4(1), 5(1), 7, 8(1), and 25 of the American Convention, in connection with articles 1(1) and 2, and articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture admissible.

2. To notify the Ecuadorian State and the petitioners of this decision.
3. To continue with its examination of the merits of the case.

4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Approved by the Commission on the 21st day of the month of June 2010. (Signed: Felipe González, President; Paulo Sérgio Pinheiro, First Vice-Presidente; Dinah Shelton, Second Vice-President; María Silvia Guillén, José de Jesús Orozco Henríquez, and Rodrigo Escobar Gil, members of the Commission).