

REPORT No. 156/11
PETITION 11.777
ADMISSIBILITY
DIEGO PATRICIO JACOME MALDONADO
ECUADOR
November 2, 2011

I. SUMMARY

1. On July 7, 1997 the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition submitted by the Ecuadoran Pro Human Rights and Development Center (hereinafter “the petitioners”) alleging responsibility on the part of the Republic of Ecuador for the prolonged preventive detention of Diego Patricio Jacome Maldonado from August 13, 1990 to September 1997 under the Law on Control and Monitoring of the Trafficking of Narcotic and Psychotropic Substances.

2. The petitioners alleged that the State was responsible for violating the rights to humane treatment, personal liberty, and judicial protection established in Articles 5, 7, and 25 of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”). For its part, the State alleged that the petitioners’ claims were inadmissible because they had failed to exhaust the domestic remedies.

3. After analyzing the positions of the parties and compliance with the requirements provided in Articles 46 and 47 of the American Convention, the Commission decided to declare the complaints admissible regarding the alleged violation of Articles 5(1), 7, 8 and 25 in accordance with Article 1(1) and 2 of the American Convention, to notify the parties, and to order publication of the report in its Annual Report to the General Assembly.

II. PROCESSING BY THE COMMISSION

4. The Commission recorded the petition under No. 11.777 and on January 28, 1998 it proceeded to forward copy of the relevant sections to the State, granting it a period of 90 days to submit information in accordance with the Rules of Procedure in effect. On May 18, 1998 the State submitted its response, which was forwarded to the petitioner, with a 45-day period for submitting its observations.

5. On November 17, 1998 the Commission received the petitioners’ observations, which were forwarded to the State for its observations. On January 11, 1999 the State submitted its observations. On August 8, 2005, the petitioners were asked for updated information on the case at hand. On September 2, 2005 the petitioners asked for an extension, which was granted by the Commission. On April 9, 2009 the petitioners and the State were asked for updated information on the case at hand.

6. On June 15, 2009 the State sent a communication asking for copy of the documentation in the case file, which was forwarded on June 22, 2009. On July 27, 2009 the State asked for an extension, which was granted by the Commission. On April 12, 2011 the Commission again asked the State for updated information. On May 20, 2011 the State asked for a complete copy of the petition case file, which was forwarded on July 5, 2011. On June 2, 2011 the State submitted updated information, which was forwarded to the petitioners for their information. On August 5, 2011 the Commission sent a communication to the petitioners asking them to submit updated information within one month regarding whether the grounds for the complaint still existed. Otherwise, the Commission could proceed to archive the matter.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

7. The petitioners allege that various "joints" of marijuana were found on Diego Patricio Jacome Maldonado, for which he was arrested on August 13, 1990 and criminally prosecuted under the Narcotics and Psychotropic Substances Law starting on August 20, 1990. They allege that this law establishes a penalty of six months to five years in prison with an option to regain freedom if the accused demonstrates that he is a consumer.

8. They allege that the trial conducted in the Third Criminal Court of Pichincha lasted for more than five years. They state that an order was issued for the full court to meet in 1996 and on July 12, 1996 the Second Criminal Court of Pichincha decreed that the statute of limitations had run out on the criminal action, and this ruling was referred to the Superior Court of Justice in Quito. On September 9, 1997 the Superior Court of Justice confirmed that the statute of limitations had lapsed and on September 16, 1997 the alleged victim regained his freedom.

9. The petitioners allege that a *habeas corpus* appeal was filed with the Mayor of the Metropolitan District of Quito on August 24, 1997. A hearing was held before that Mayor on August 27, 1997, for which Diego Patricio Jacome Maldonado was led from Social Rehabilitation Center No. 1 (García Moreno Prison) to the Office of the Mayor. They state that on September 30, 1997 the Mayor of the Metropolitan District of Quito denied the *habeas corpus* appeal because he considered the petitioner's detention to be duly and demonstrably legal.

10. The petitioners allege that keeping the alleged victim in preventive detention for more than seven years, in addition to the delay incurred by the State in its handling of the criminal proceeding beyond the time limits established by domestic legislation, constitute violations of his rights to humane treatment, personal liberty, and judicial protection under Articles 5, 7, 8, and 25 of the American Convention.

11. With respect to meeting the requirement of prior exhaustion of the domestic remedies, the petitioners allege that an exception is applicable given that the alleged victim was not afforded access to the domestic remedies. Specifically, they maintain that the *habeas corpus* appeal was denied.

B. Position of the State

12. The State alleges that the petitioners have not exhausted the domestic remedies as required by the American Convention. It also maintains that the petitioners had various remedies available to them that they should have filed and that are adequate and effective for remedying the issues that are the subject of the complaint.

13. Specifically, the State indicates that the alleged victim could have filed the challenge action, which is designed to expedite the administration of justice and to prevent judges from obstructing the normal conduct of the work of the court. It thus maintains that Diego Patricio Jacome Maldonado should have filed this action "when he realized that the Third Criminal Judge of Pichincha" was excessively delaying the handling of his case. It also states that if the alleged victim could not submit the complaint because he was in prison he could have given a third party power of attorney to do so in his name.

14. The State also argues that the alleged victim also had available to him a suit against the judge for damages and injuries. Thus, it states that the delay in conducting the criminal case could have been remedied by the State itself. Finally, it argues that as of October 1995 the alleged victim could have filed a petition for release since he already had the order indicating that the statute of limitations had run out on the matter for which he was charged. It indicates that "the violation of excessive detention" of the alleged victim should be considered from the moment the order was issued on lapse of the statute of limitations in the criminal cases. Based on the above, the State contends that in addition to the *habeas corpus* action the petitioners could have filed a petition for release. In summary, it asks the Commission to declare the petition inadmissible.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

15. In principle, the petitioners are authorized by Article 44 of the American Convention to submit petitions to the Commission. The petition indicates as the alleged victim an individual with respect to whom the Ecuadorian State committed to respect and guarantee the rights enshrined in the American Convention. As regards the State, the Commission indicates that Ecuador has been a State Party to the American Convention since December 28, 1977, the date it deposited its ratifying instrument. Therefore, the Commission is competent *ratione personae* to examine the petition.

16. The Commission is also competent *ratione loci* to hear the petition in that it alleges violations of rights protected in the American Convention that would have occurred within the territory of Ecuador, a State Party to that instrument. The Commission is competent *ratione temporis* in that the obligation to respect and guarantee the rights protected in the American Convention was already in effect for the State on the date when the events alleged in the petition would have occurred. Finally, the Commission is competent *ratione materiae* because the petition reports possible violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

17. Article 46.1.a of the American Convention requires the prior exhaustion of domestic remedies in accordance with generally recognized principles of international law as a requirement for the admission of complaints regarding the alleged violation of the American Convention.

18. 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.

As established by the Commission's Rules of Procedure and expressed by the Inter-American Court, when a State alleges that the petitioner has failed to exhaust the domestic remedies, it has the burden of identifying which remedies should have been exhausted and demonstrating that the remedies that have not been exhausted are "adequate" for remedying the alleged violation, meaning that the function of those remedies within the system of domestic law is suitable for protecting the legal right that has been violated.¹

19. In the instant case, the State alleges that the petitioners' complaint does not meet the requirement of prior exhaustion of domestic remedies provided in Article 46.1 of the American Convention given that they had adequate and effective remedies available to them for remedying the issues that are the subject of the complaint such as the challenge action, the suit for damages and injuries, and the petition for release. For their part, the petitioners allege that an exception is applicable given that the alleged victim was not afforded effective access to the domestic remedies.

20. The first order of business is to clarify which domestic remedies must be exhausted in the instant case. The Inter-American Court has indicated that only the domestic remedies suitable for

¹ Article 31.3 of the Commission's Rules of Procedure. See also, I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, para. 64.

remedying the violations alleged to have been committed must be exhausted. Adequate domestic remedies are those that

are suitable to address the 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.²

21. As the parties' allegations indicate the alleged victim was arrested on August 13, 1990 and prosecuted under the Narcotics and Psychotropic Substances Law starting on August 20, 1990. An order was issued for the full court to meet in 1996 and on July 12, 1996 the Second Criminal Court of Pichincha decreed that the statute of limitations had run out on the criminal case, and this ruling was referred to the Superior Court of Justice in Quito. On September 9, 1997 the Superior Court of Justice confirmed that the statute of limitations had lapsed and on September 16, 1997 Diego Patricio Jacome Maldonado was released.

22. On August 24, 1997 the alleged victim filed a *habeas corpus* appeal with the Mayor of the Metropolitan District of Quito, which was denied on September 30, 1997 because the arrest was deemed duly and properly legal based on Article 114 of the Ecuadoran Penal Code in effect at the time Diego Patricio Jacome Maldonado was arrested, which code excluded from the maximum terms of detention "those prosecuted for crimes punished under the Narcotics and Psychotropic Substances Law."

23. The Commission understands that the Narcotics and Psychotropic Substances Law (Law 108 of August 7, 1990), under which Diego Patricio Jacome Maldonado was prosecuted, established in Article 115 that proceedings brought under this law "[...] shall not allow for bond, nor shall conditional release, pre-release, parole, or the benefits of the Law on Reprieves and Pardons be granted [...]".

24. In addition, Article 121 established mandatory referral to a higher body of the order revoking preventive detention, as follows

Mandatory referral. The order revoking preventive detention, suspension, or cassation of arrest, detention, and seizure measures shall not have effect unless confirmed by a higher body, with a prior mandatory and favorable opinion from the respective Prosecutor, which body shall issue an opinion within twenty-four hours of receiving the proceeding.

25. Article 122 established that, whether a conviction or acquittal is involved, referral to a higher body shall be required. As long as this referral is not settled, the accused shall not be released [...].

26. The Commission notes that on the date the events that are the subject of the petition occurred two remedies were in effect in Ecuador for challenging imprisonment: (i) the constitutional *habeas corpus* appeal and (ii) the petition for release or legal *habeas corpus*.

27. Regarding the petition for release or legal *habeas corpus* established in the Code of Criminal Procedure,³ the Commission believes that it did not represent a suitable remedy for seeking the immediate release of Diego Patricio Jacome Maldonado once the order revoking preventive detention was issued or after the decision on dismissal was issued, given that the legal basis for depriving him of liberty was Articles 121 and 122 of the Narcotics Law. The IACHR has evaluated the suitability of this remedy for persons accused under the Narcotics Law in a series of cases and has found that said Law

² I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*, Judgment of July 29, 1988, Series C, No. 1, para. 64.

³ Provided in Article 458 of Ecuador's 1983 Code of Criminal Procedure.

excludes persons accused under that law from the protections usually available through the *habeas corpus* appeal.⁴

28. For its part, the constitutional *habeas corpus* appeal must be filed with the Mayor or Council Chairman.⁵ In this regard, both the Commission⁶ and the Inter-American Court have established that the submission of a *habeas corpus* appeal before an administrative authority does not constitute an adequate remedy under the standards of the American Convention.⁷

29. The Commission notes that although Diego Patricio Jacome Maldonado had already been free for about 15 days when the *habeas corpus* appeal was denied, he was arrested on August 13, 1990 and remained subject to a precautionary detention measure for more than seven years, despite the fact that the statute of limitations had lapsed two years earlier.

30. Therefore, the Commission believes that at the time of the events the constitutional *habeas corpus* appeal did not constitute an adequate remedy. In view of the above, the Commission deems that there was no effective remedy for challenging the provisions related to mandatory referral under the Narcotics Law and thus for obtaining the release of the alleged victim. Thus, given the characteristics of the instant case, the Commission deems that the exception provided in Article 46.2.a of the American Convention is applicable.

31. Regarding the challenge action and the suit for damages and injuries against the judge to which the State refers in its allegations, the Commission notes that based on their characteristics these remedies are not adequate for remedying the situation reported by the petitioners with reference to the alleged prolonged preventive detention of the alleged victim.

32. Invoking the exceptions to the prior exhaustion of domestic remedies rule provided in Article 46.2 of the Convention is closely tied to the determination of possible violations of certain rights enshrined therein, such as the guarantees on access to justice. However, Article 46.2, given its nature and purpose, is a standard with autonomous content *vis à vis* the substantive standards of the Convention. Therefore, the determination as to whether the exceptions to the exhaustion of domestic remedies rule are applicable to the case at hand must be performed prior to and separate from the analysis of the merits of the case, in that it depends on a standard of evaluation different from that used to determine the possible violation of Articles 8 and 25 of the Convention. It should be clearly noted that the causes and effects that prevented the exhaustion of domestic remedies will be analyzed in the report adopted by the Commission on the merits of the dispute, in order to determine whether they constitute violations of the American Convention.

2. Deadline for submitting the petition

33. The American Convention establishes that in order for a petition to be considered admissible by the Commission it must be submitted within a period of six months of the date when the alleged injured party is informed of the final decision. In the complaint under review, the IACHR has established the application of the exceptions to the exhaustion of domestic remedies in accordance with Article 46.2.a of the American Convention. In this regard, Article 32 of the Commission's Rules of Procedure establishes that in cases where the exceptions to the prior exhaustion of domestic remedies

⁴ See, among others, I/A Court H.R., *Suárez Rosero v. Ecuador Case*. Judgment of November 12, 1997. Series C, No. 35; I/A Court H.R. *Tibi v. Ecuador Case*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 7, 2004. Series C, No. 114; IACHR. Admissibility Report No. 90/00, Daniel David Tibi, Ecuador, October 5, 2000; and IACHR. Report on the Situation of Human Rights in Ecuador, OAS/Ser.L/V/II.96 Doc. 10 rev. 1, April 24, 1997, Chapter VII, The Right to Personal Liberty.

⁵ Article 19(17)(j) of the Ecuadorian Constitution of 1979.

⁶ IACHR Report No. 66/01 *Dayra María Levoyer Jiménez* of June 14, 2001, paras. 78-81.

⁷ I/A Court H.R., *Chaparro Álvarez and Lapo Íñiguez Case*. Judgment of November 21, 2007. Series C, No. 114, para.

are applicable, the petition must be submitted within a reasonable period of time in the judgment of the Commission. To this end, the Commission must consider the date on which the alleged violation of rights occurred and the circumstances of each case.

34. In this petition, Diego Patricio Jacome Maldonado was detained from August 13, 1990 until September 16, 1997. The petition before the IACHR is dated July 7, 1997 and was submitted while the alleged victim was being held in preventive detention. In view of the characteristics of the instant case, the Commission deems that the petition was submitted within a reasonable period of time and that the admissibility requirement referring to the deadline for submission should be considered as having been met.

3. Duplication and international *res judicata*

35. Article 46.1.c of the Convention provides that in order for a petition to be admitted by the Commission, the requirement is that “the subject of the petition or communication is not pending in another international proceeding for settlement” and Article 47.d of the Convention provides that the Commission shall declare inadmissible any petition or communication that is “substantially the same as one previously studied by the Commission or by another international organization.” The case file does not indicate that the subject of the petition is pending settlement in any other international proceeding nor that it reproduces a petition already examined by this or any other international body. Therefore, it is appropriate to consider the requirements established in Articles 46.1.c and 47.d of the Convention to have been met.

4. Characterization of the alleged facts

36. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

37. Given the evidence submitted by the parties and the nature of the matter before it, the Commission finds it appropriate in the instant case to establish that the allegations of the petitioners regarding the prolonged preventive detention of Diego Patricio Jacome Maldonado could tend to establish possible violations of the rights to humane treatment, personal liberty, and judicial protection under Articles 5.1, 7, and 25 in accordance with Article 1.1 of the American Convention. It shall also consider in the merits phase the alleged violation of Article 8 of the American Convention.

38. In addition, the Commission notes that the legislation in effect during the detention of Diego Patricio Jacome Maldonado provided time limits for preventive detention, but excluded from this protection persons who, like him, were accused under the Narcotics and Psychotropic Substances Law. Accordingly, the IACHR deems that the alleged facts could tend to establish violations of Article 7 of the American Convention, in connection with Articles 1.1 and 2 thereof.⁸

V. CONCLUSIONS

39. The Commission concludes that it is competent to examine the complaints submitted by the petitioners regarding the alleged violation of Articles 5.1, 7, 8 and 25 in accordance with Article 1(1) and 2 of the American Convention, and that these complaints are admissible in accordance with the requirements established in Articles 46 and 47 of the American Convention.

40. Based on the factual and legal arguments presented above and without thereby prejudging the merits of the case,

⁸ Compare. I/A Court H.R., *Suárez Rosero v. Ecuador Case*. Judgment of November 12, 1997. Series C, No. 35, para. 98.

THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS,**DECIDES:**

1. To declare admissible the complaints regarding the alleged violations of Articles 5.1, 7, 8, and 25 of the American Convention in connection with Articles 1.1 and 2 of the same instrument.
2. To notify the Ecuadorian State and the petitioners of this decision.
3. To continue with analysis 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.

Done and signed in the city of Washington, D.C., on the 2nd day of November 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero and María Silvia Guillén, Commissioners.