

REPORT No. 22/12
PETITION 398-02
INADMISSIBILITY
JOSÉ XAVIER GANDO CHICA
ECUADOR
March 20, 2012

I. SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition on June 5, 2002, lodged by Mario Antonio Viñales (hereinafter "the petitioner"), which alleges the responsibility of the Republic of Ecuador (hereinafter "the State" or "Ecuador") for the alleged violation of his procedural guarantees, including unwarranted delay in the criminal proceedings against José Xavier Gando Chica (hereinafter "the alleged victim") and on account of the unexecuted order for his arrest in effect since May 1997.

2. The petitioner maintains that the State is responsible for violation of the right to humane treatment, right to a fair trial, rights of the family, right to property, right to equal protection, and right to judicial protection set forth in Articles 5, 8, 17, 21, 24, and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), in conjunction with Articles 1.1 and 2. For its part, the State alleges that the petitioner's claims are inadmissible because of failure to comply with the prior exhaustion of domestic remedies requirement, stipulated in Article 46.1.a) of the American Convention.

3. After analyzing the positions of the parties and compliance with the requirements set forth in Articles 46 and 47 of the Convention, the Commission decided to declare the petition inadmissible because domestic remedies were not exhausted. The Inter-American Commission has also decided to notify the parties of this decision, to publish it, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE IACHR

4. The petition was registered and assigned number 389-02 and, on June 9, 2005, a copy of its pertinent parts was transmitted to the State for its observations. Following an extension of the deadline, on October 3, 2005, the State submitted its response, which was forwarded to the petitioner for his observations. On December 5, 2005, the petitioner presented his observations, which were forwarded to the State for comments. On December 9, 2005, the petitioner submitted additional information, which was relayed to the State for its information. On February 3, 2006, the State requested an extension and presented its response on May 11, 2006, which was transmitted to the petitioner for his observations.

5. The petitioner replied on August 28, 2006 and on November 1, 2006 the State presented its observations. The petitioner submitted his response on February 2, 2007, and it was transmitted to the State for its observations. On September 24, 2007, at the request of the petitioner, the Commission reiterated its request to the State for information.

6. The State presented its response on October 17, 2007, and it was transmitted to the petitioner for comment. On November 9, 2007 and January 28, 2008, the petitioner submitted additional information, which was relayed to the State for its information and comments, respectively. The State presented its response on June 12, 2008, and it was transmitted to the petitioner for comment. Additional information furnished by the petitioner on September 19, 2008 and on May 7, 2011 was likewise forwarded to the State for its information. On October 28, 2008, the petitioner replied to the observations of the State submitted on June 12, 2008. His reply was forwarded to the State for its information.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

7. As background, the petitioner alleges that the Ministry of Education and Culture (hereinafter "the Ministry") had formed a Technical Commission to study a bid for a State contract (hereinafter "the Technical Commission") and that that Commission had called upon him to study the framework of a bid submitted by a Colombian company called "Promotora del Cambio S.A." (hereinafter "the Colombian company").

8. He maintains that, in September 1996, the Ecuadorian State accepted the Colombian company's bid and, in October 1996, declared the educational system to be in a state of emergency. Moreover, through decrees, the State had exempted the Ministry's programs from pre-contract procedures and that exemption had been applied to the contract with the Colombian company, which was awarded in November 1996.

9. The petitioner points out that in March 1997, the State initiated criminal proceedings for the crime of embezzlement against José Xavier Gando Chica (an Engineer), among other people¹, and that, in May 1997; it issued an arrest warrant against him. The petitioner alleges that the offense he was charged with committing has to do with his involvement as an outside consultant in the drafting of an internal document that was non-binding for conclusion of the contract between the State and the Colombian company.

10. He indicates that, in June 1998, the Attorney General resolved to refrain from charging the alleged victim "in view of the fact that he was unaware of the fraudulent intentions of the perpetrators of the crime" (and he points out that Article 251 of the Code of Criminal Procedure establishes that there has to be a charge for the second or oral argument phase of a trial to proceed [*para la apertura de la etapa del plenario*]). However, in August 1998, the Supreme Court of Justice (hereinafter SCJ) allegedly opened the oral argument phase of the trial in respect of some members of the Technical Commission, including the alleged victim, while dismissing the case against others.

11. The petitioner alleges that the trial was opened against him on charges of alleged responsibility as an accessory to the crime and that an order was issued to detain him pending trial² and to attach his property, despite the fact that accessories after the fact are not liable to incarceration pending trial³. The petitioner points out that all the accused lodged an appeal with the Second Chamber of the Supreme Court (hereinafter "the Second Chamber") and that, in April 2001, the Second Chamber ratified the decision to proceed to the second phase of trial (*apertura a plenario*). He also states that the Second Chamber had found that there were no more appeals that could be brought and that it had returned the case to the SCJ.

12. The petitioner states that he filed applications and requests with the SCJ, which went unanswered, and that in June 2001 the Second Chamber had referred the proceedings to the President of the SCJ. He states, also, that, in March 2005, the President of the SCJ had issued a judgment annulling the trial, had lifted the arrest warrants, and had revoked the precautionary measures taken out against the accused. However, the measures ordered were allegedly not in fact lifted and the Substitute Attorney General had asked the President of the SCJ to revoke the annulment of the proceedings, to which the President of the SCJ had allegedly agreed. The petitioner alleges that no judgment was

¹ The petitioner also names: Abdalá Bucaram Ortiz, former President of the Republic; Sandra Correa, former Minister of Education and Culture; and the members of the Technical Commission.

² The petitioner does not say whether the alleged victim was actually detained. Nevertheless, he alleges prolonged detention pending trial because the arrest warrant was issued.

³ He also argues that, in the event that the proceedings should prove some degree of complicity, Article 47 of the Criminal Code establishes that such crimes must be punished with half the sentence applicable to the perpetrators. He points out that said law prescribes a sentence of four to eight years imprisonment for the perpetrators, so that the sentence corresponding to accessories after the fact would be between two and four years in prison.

handed down in the criminal proceedings against him, even though, according to the Criminal Code in force, proceedings could not last more than six months.

13. He alleges that the SCJ acknowledged that the Executive Decrees (see *supra* para. 8) were the elements given rise to fraudulent exemption from the requirements applicable to the contract in question. He also states that the SCJ had referred to the report drawn up by the petitioner as a document that had only served as technical support. Accordingly, the petitioner alleges that the State violated his right to equal protection of the law, given that the Second Chamber dismissed the case against the President and various members of the Technical Commission, in all cases on the grounds that the report in question had been a "legal", but not a binding "obligation."

14. The petitioner adds that the alleged victim had lost all his property and had had to leave the country, which had disrupted his family and professional life. He maintains that the warrant for arrest pending trial has been in effect since May 1997, even though legally it had prescribed, and that "the proceedings were suspended under Article 254 IBIDEM⁴ and until such time as the accused turns himself (or turn themselves) in or is/are apprehended." The petitioner also argues that the alleged victim "cannot return to Ecuador to claim his rights without risking inhumane treatment."

15. Regarding the exhaustion of domestic remedies, the petitioner states that the judges did not reply to applications and requests for explanation, extensions, annulment of the order to proceed to the oral phase of trial, and appeals filed by the alleged victim. He also alleges that Ecuadorian law does not contemplate an action that can be brought against an order to proceed to the oral phase of trial without a criminal indictment. Furthermore, regarding a possible recusal request, the petitioner maintains that it would be "illogical to seek recusal when no indictment or judgment exists as grounds for recusal"⁵.

16. The petitioner points out that actions under civil law (see, *infra* III B) do not address the substance of the violations denounced and do not constitute a remedy for stopping violations of rights. They merely offer indemnification and are a consequence of the violation itself. He adds that it is not "humane to talk of this remedy because reparation to victims of human rights violations cannot be reduced merely to compensation in the form of an indemnification." The petitioner also claims the absence of due process, because the only way he can have access to justice is as a detainee; because of the impediment to such access due to the threat of detention; and because of the unwarranted delay in the proceedings.

17. In 2005, the petitioner also argued that, under the new Code of Criminal Procedure (hereinafter "CCP") in force (since 2002), criminal proceedings for embezzlement are not suspended and are heard even in the absence of the accused. For that reason, the decision to proceed to the second phase of trial and the judgment in the absence of the accused should both be annulled. He maintains that the CCP would be applicable to the case given that, in its first transitional provision, it establishes that criminal proceedings already under way shall continue being heard under the previous procedure until they conclude, without prejudice to observance of the rules of due process set forth in the Constitution. Accordingly, he argues that the Constitution establishes that no one may be convicted without a judgment and since the rule regarding the impossibility of suspending the proceedings for embezzlement due to the absence of the defendant favors the accused, that rule should have been applied in the proceedings against the alleged victim.

⁴ Ecuadorian Code of Criminal Procedure of 1983. (L.134-PCL. RO 511: June 10, 1983).

⁵ From information in the file it transpires that the alleged victim filed an appeal with the Second Chamber against the decision to proceed to the oral phase of trial and that the Second Chamber ratified the decision in April 2001. Nevertheless, with regard to the exhaustion of domestic remedies, the petitioner does not say what appeals, applications, or requests for clarification he submitted to what authorities and on what dates. At the same time, regarding the recusal, he states that he submitted six writs and petitions to the SCJ that have not been resolved, nor have dates for hearings been set that would allow the period allowed by law for filling a recusal request to begin to run.

B. Position of the State

18. The State argues that the petitioner's claim is inadmissible because not all remedies provided for under domestic law have been exhausted, as the American Convention requires. In that regard, it points out that the petitioner could have exhausted the remedy of recusal to request that the judge responsible for delaying the hearing of the case be removed from it for not having heard the case in three times the time (6 months) provided for by law. The State also alleges that the petitioner did not exhaust the remedy of appealing against the opening of the second phase of trial and did not exhaust the remedy of indemnification through actions under civil law to claim damages for the alleged detention of the alleged victim.

19. The State maintains that the petitioner's claim stems from his disagreement with the judge's resolution to proceed to the second phase of the trial against him and that the petitioner was using the Commission as a fourth instance court. It adds that the Commission should restrict itself to verifying whether the proceedings were fair and in accordance with the parameters of the American Convention. In that regard, the State points out that the Commission has previously established that "national courts are responsible for interpreting domestic laws, and the IACHR is not competent to determine the correct interpretation of local provisions unless the interpretation in itself constitutes a violation of the Convention"⁶.

20. Responding to the petitioner's argument regarding the opening of the second stage of trial despite the absence of an indictment (see *supra* III A), the State notes that the refusal to indict is not legally binding for the criminal law judge hearing the case. Furthermore, the State argues that the SCJ's criteria in assessing the evidence in order to disregard the prosecutor's decision and open the second stage of the proceedings against the alleged victim may not be reviewed by the Commission.

21. As regards the duration of the criminal proceedings, the State argues that the trial was suspended in its second phase, because the principal defendant in the case, Abdalá Bucaram, was a fugitive from justice. Finally, the State avers that the petitioner does not establish a causal link between the facts of the instant petition and the alleged violation of the American Convention.

IV. ANALYSIS OF COMPETENCY AND ADMISSIBILITY

A. Competence

22. The petitioner is entitled under Article 44 of the American Convention to lodge petitions with the Commission. The petitioner identifies the alleged victim as an individual for whom the Ecuadorian State undertook to observe and guarantee the rights established in the American Convention. As for the State, the Commission notes that Ecuador has been a State Party to the American Convention since December 28, 1977, the date on which it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition. The Commission is also competent *ratione loci* because the petition alleges violations of rights protected under the American Convention that took place within the territory of Ecuador, a State Party to that treaty.

23. The Commission is competent *ratione temporis* because the obligation to observe and guarantee the rights protected by the American Convention was already in force for the State at the time when the facts alleged in the petition occurred. Finally, the Commission is competent *ratione materiae*, given that the petition alleges possible violations of human rights protected under the American Convention.

B. Admissibility requirements

⁶ To substantiate its argument, the State cites: IACHR Report No. 120-01, Petition 122/01 (Atanasio Franco Cano), October 10, 2001, para. 4.

1. Exhaustion of domestic remedies

24. Article 46.1.a) of the American Convention requires prior exhaustion of remedies available under domestic law in accordance with generally recognized principles of international law, as a prerequisite for admitting claims regarding alleged violation of the American Convention.

25. Article 46.2 of the Convention establishes that the prior exhaustion of domestic remedies requirement shall not be 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.

26. As the Inter-American Court of Human Rights has established, whenever a State argues that a petitioner has not exhausted domestic remedies, it is incumbent upon the State to show that the remedies that were not exhausted were capable of rectifying the alleged violation, in other words that the function served by those remedies under domestic law is ideal for protecting the person whose rights were violated.

27. In the instant case, the State argues that the petitioner failed to exhaust the possibility of challenging the judge who allegedly committed the violation and failed to exhaust the remedy of appealing the decision to proceed to the second stage of proceedings without an indictment. Furthermore, the State avers that the petitioner could have filed a claim for damages under civil law. For his part, the petitioner replies that there has been unwarranted delay in the criminal proceedings. He argues that an action under civil law does not go to the heart of the violations denounced and is merely an indemnification remedy. As for the remedy of recusal, he argues that it is "illogical to seek recusal when no indictment or judgment exists as grounds for recusal."

28. The Commission must clarify which domestic remedies need to be exhausted in the instant petition. The Inter-American Court has pointed out that only remedies capable of rectifying the alleged violations must be exhausted. Saying that the remedies must be capable of that means that

under domestic law the function performed by those remedies is best suited to protecting the person whose rights have allegedly been violated. All domestic legal systems have multiple remedies, but not all of them are applicable under any circumstances. If, in a specific case, a remedy is not adequate, obviously there is no reason to exhaust it. That can be seen from the principle that a provision is meant to produce an effect and cannot be construed as having either no effect or one that is manifestly absurd or irrational⁷.

29. The Commission observes that the content of the instant petition refers specifically to facts relating to and derived from the alleged violations of the right to personal liberty and to due process of criminal law in the proceedings against José Xavier Gando Chica. Those violations include the alleged prolonged detention pending trial and violation of the presumption of innocence principle, as well as unwarranted delay in the proceedings. Moreover, the petition refers to possible violations of the right to private property, due to the alleged attachment of the petitioner's property.

30. With respect to the exhaustion of domestic remedies, the defense filed an appeal with the Second Chamber against the decision of the SCJ (on August 6, 1998) to open the second stage of the proceedings for embezzlement against the alleged victim. On April 10, 2001, the Second Chamber ratified the decision against which the appeal had been filed and dismissed the case with respect to some

⁷ I/A Court H.R., *Case of Velásquez Rodríguez vs. Honduras*. Judgment of July 29, 1988. Series C, N° 4, para. 63. See IACHR Report No. 57/00, *La Granja, Ituango*, Case 12.050, Colombia, October 2, 2000.

of the defendants. On March 29, 2005, the SCJ allegedly annulled the trial and lifted the arrest warrants against the accused, and revoked and set aside the personal and property-related precautionary measures taken against all the accused; however, its orders were allegedly not executed. The Attorney General is alleged to have asked the SCJ to revoke that annulment, which it allegedly did. More than 13 years are alleged to have passed without a judgment being handed down in respect of the alleged victim.

31. The Commission notes that the criminal proceedings against the alleged victim and other persons⁸ for embezzlement were heard in two instances: first the SCJ and, second, the Second Chamber. Regarding the State's argument of failure to exhaust the remedy of appealing against the decision to enter the second phase of proceedings, the Commission notes that the petitioner's defense attorney appears to have appealed that decision, which is why the Second Chamber ratified the decision to move to the second stage (*apertura a plenario*). However, from the information presented by the petitioner, it transpires that, pursuant to Article 254 of the CCP⁹ the second stage of the trial was suspended because the principal defendant was at large. The Commission also notes that the alleged victim is also outside Ecuador¹⁰ so that under that same provision of the CCP, the criminal proceedings against him are also suspended.

32. As regards the petitioner's arguments concerning (i) the absence of due process given that the only possibility of accessing justice is as a detainee and (ii) the impossibility of accessing domestic remedies given the threat of arrest; the rule is that the petitioner must present himself and exhaust the remedies that domestic law offers him to resolve the alleged violations of due process¹¹. Throughout the proceedings, it has not been demonstrated that the petitioner has been denied access to a remedy or has been prevented from exhausting it, given that he has not appeared in court¹². The Commission considers that in the instant case, the exceptions contemplated in Article 46.2.a) and b) of the American Convention are not applicable.

33. Furthermore, while the petitioner alleges unwarranted delay as an argument justifying application of an exception to the prior exhaustion of domestic remedies rule, the Commission observes that the delay in the case of this petition is due to the suspension ordered because the principal defendant and the alleged victim are fugitives from justice. That being so, the Commission considers that the delay in the criminal proceedings cannot be attributed to the State¹³. Therefore, the Commission does not find that the unwarranted delay exception established in Article 46.2.c) of the American Convention is applicable to this petition.

34. Regarding the petitioner's argument relating to application of the non-suspension of proceedings rule in cases of embezzlement established in the CCP of 2002¹⁴, as a rule more favorable to

⁸ A former President of the Republic is the principal implicated.

⁹ Article 254.-Suspension of the order to proceed to the second stage of trial (*apertura del plenario*).-If at the time the order to proceed to the second stage of trial is given, the accused is at large, the Judge shall order the suspension of that state until the defendant is apprehended or hands himself/herself in.

¹⁰ The information provided by the petitioner does not say on what date the alleged victim left Ecuador.

¹¹ IACHR Report No. 18/02, Petition 12.274 César Verduga Vélez, Ecuador, February 27, 2002, para. 29. See Report No. 82/98, Gustavo A. Gómez López, Case 11.703, Venezuela, para. 21. Report No. 93/01, Alberto Dahik Garzozzi, para. 30. Report No. 43/99, Alan García Pérez, Case 11.688, Peru, para. 18.

¹² IACHR Report No. 18/02, Petition 12.274, César Verduga Vélez, Ecuador, February 27, 2002, para. 29.

¹³ See IACHR Inadmissibility Report No. 18-02, Petition 12,274 César Verduga Vélez, Ecuador, February 27, 2002, para. 29 and Inadmissibility Report No. 97-09, Petition 84-07, Allan R. Brewer Carías, Venezuela September 8, 2009, para. 87 (admitted taking into consideration the fact that a judicial appeal was pending and that the judges were provisional appointees).

¹⁴ Art. 233.- Suspension.- If at the time the summons to court is issued the defendant is a fugitive from justice, the judge shall, after issuing that order, order the suspension of the trial phase until the defendant is apprehended or turns himself/herself in, except in criminal proceedings for the crimes of embezzlement, bribery, extortion, and illicit enrichment.

Art. 234.- Suspension and continuation.- If there are several defendants and some are fugitives from justice and some are present, the hearing shall be suspended in respect of the former and shall continue in respect of the latter.

the accused, the Commission notes that the petitioner appears not to have sought domestic remedies to attempt to make that request internally, so that it considers that in this aspect of the petition the exhaustion requirement was not met.

35. As for the alleged failure to exhaust the remedy of recusal and action under civil law, this Commission considers that said remedies are not applicable to the instant case. In that regard, it reiterates that the delay in respect of which a judge could possibly be subjected to recusal cannot be attributed to the judicial authorities; rather it was due to the fact that the defendant was not physically present during the proceedings.

36. For lack of substance, the Commission refrains from examining the other admissibility requirements provided for in the Convention¹⁵.

¹⁵ IACHR, Report No. 135/09, Petition 291-05, Jaime Salinas Sedó (Peru), November 12, 2009; Report No. 42/09, Petition 443-03, David José Ríos Martínez (Peru), March 27, 2009; Report No. 87/05, Petition 4580/02, Ricardo Antonio Cisco Ferrer (Peru), October 24, 2005; Report No. 73/99, Ejido "Ojo de Agua", Case 11.701 (Mexico), May 4, 1999; Report No. 24/99, Case 11.812, Ramón Hernández Berríos *et al.* (Mexico), March 9, 1999; and Report No. 82/98, Case 11.703, Gustavo Gómez López (Venezuela), September 28, 1998, among others.

V. CONCLUSIONS

37. Based on the foregoing arguments of fact and law, the Commission considers the petition inadmissible pursuant to Article 46.1.a) of the American Convention and, therefore,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible in accordance with Article 46.1.a) of the American Convention.
2. To notify the State and the petitioner of this decision.
3. To publish this decision and include it in the Annual Report to be presented to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 20th day of the month of March 2012.
(Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz, and Rose-Marie Antoine, members of the Commission.