REPORT No. 65/12
PETITION 1671-02
ADMISSIBILITY
ALEJANDRO PEÑAFIEL SALGADO
ECUADOR
March 29, 2012

I. SUMMARY

1. On July 12, 2002, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition lodged by Francisco Correa and Alejandro Peñafiel (hereinafter "the petitioners")[1] alleging the responsibility of the Republic of Ecuador (hereinafter "the State" or "Ecuador") for the absence of effective judicial protection in a series of multiple trials brought against Mr. Alejandro Peñafiel (hereinafter "the alleged victim" or "Mr. Peñafiel") and for failing to ensure judicial guarantees by holding him in preventive custody for longer than is permitted by law. The petitioners also allege violations of the right to life, freedom from ex-post facto laws, to privacy, to freedom of expression and property, within a context of political persecution caused by the closure of a financial institution of which Mr. Peñafiel was the president.

2. They contend that the State is responsible for violating Articles 4, 7, 8, 9, 11, 13, 21, and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") in conjunction with Article 1.1 thereof. In turn, the State claims that the petition is inadmissible given that the available domestic remedies were not exhausted and that no violations of the American Convention were committed.

3. After analyzing the positions of the parties and in compliance with the requirements set forth in Articles 46 and 47 of the American Convention, the Commission decided to rule the petition admissible in order to examine the alleged violation of Articles 7, 8, 9, 21 and 25 of the American Convention, in conjunction with Article 1.1 thereof. It also decided to rule the petition inadmissible as regards the alleged violation of Articles 4, 11 and 13 of the American Convention, to notify the parties that a report had been adopted, and to order its publication in its Annual Report.

II. PROCEEDING BEFORE THE COMMISSION

4. The IACHR recorded the petition as No. P-1671-02 and, after carrying out a preliminary analysis, conveyed the relevant parts to the State for its comments on July 30, 2002. On September 23, 2002, the petitioners submitted additional information, which was forwarded to the State for its comments. The petitioners submitted additional information on November 21, 2002, and January 9, 2003, and by means of a submission dated February 3, 2003. The State submitted its response on February 6, 2003, which was forwarded to the petitioners for their comments. On February 21 and 26, 2003, the petitioners submitted comments and additional information, which were conveyed to the State. On March 6, 2003, the petitioners submitted additional information, which was forwarded to the State for its comments. The State submitted its reply on April 3, 2003, which was forwarded to the petitioners for their comments.

5. On May 8, 2003, the Commission received a request for precautionary measures on account of the attacks allegedly suffered by Mr. Peñafiel while held in preventive custody. On May 14, 2003, the IACHR granted him precautionary measure No. MC 506-03, for a period of six months.

[1] By means of a submission dated July 18, 2002, Mr. Peñafiel indicated that he was also authorizing Mr. Juan Pablo Albán to serve, either separately or in concert, as a petitioner in the processing of the case by the IACHR. According to the information set out in the record before the IACHR, the last submission lodged by Mr. Albán as a petitioner in the case was dated February 18, 2003. Subsequently, Mr. Peñafiel's representation was taken over exclusively by Mr. Francisco Correa.

6. On May 22, 2003, additional information was received from the Office of the People's Defender of Ecuador, which was conveyed to the State for informative purposes. The State submitted its reply on June 19, 2003, which was forwarded to the petitioners for their comments. The petitioners submitted additional information on June 30 and July 3, 2003. On July 2, 2003, the petitioners submitted additional information, which was forwarded to the State for informative purposes. On October 10, 2003, the State asked the IACHR to send it a copy of the case file. The petitioners submitted additional information on January 8, January 30, and March 1, 2004.

7. On March 4, 2004, a working meeting was held at the headquarters of the IACHR's Executive Secretariat. On September 1, 2004, the petitioners submitted additional information, which was forwarded to the State for its comments. The petitioners presented additional information on September 29, 2004. The State submitted its comments on February 23, 2005, and they were forwarded to the petitioners for their comments. The petitioners submitted their reply on July 19, 2005. On January 23, 2008, the petitioners submitted additional information, which was forwarded to the State for its comments. On June 19 and July 11, 2008, the State presented its reply and additional information, which were forwarded to the petitioners for their comments.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

8. As background, the petitioners report that Alejandro Peñafiel was the Executive President of the Banco de Préstamos in Ecuador up until August 1998, when the "forced liquidation" of that bank was ordered. They claim that measure was unjustified since the bank was solvent; however, national authorities had publicly stated that it had seriously harmed the financial situation in Ecuador. Consequently, the office of Ecuador's public prosecutor instituted criminal proceedings No. 1342/98 for the crime of fraud. They state that during those proceedings, the prosecutor's office asked the Fourteenth Criminal Court of Pichincha to request the extradition of Mr. Peñafiel, who at the time was living outside the country.

9. The petitioners report that the extradition request was denied by the Criminal Court on two occasions. On August 3, 2000, however, the Criminal Court issued a third ruling, admitting the prosecutor's motion and allowing the extradition request to proceed, following which the corresponding formalities were pursued with the Supreme Court of Justice.[2] They contend that this decision was ungrounded and that during the extradition proceedings, due notice was not served on Mr. Peñafiel's legal representative.

10. The petitioners state that in August 2000, the extradition request was finally lodged by the Government of Ecuador with the authorities of the Republic of Lebanon, where Mr. Peñafiel had been arrested by INTERPOL on July 24, 2000. They claim that the document sent by the Ecuadorian authorities to the Government of Lebanon stated that Mr. Peñafiel had already been convicted and sentenced to a prison term, when in fact only a trial commencement deed and a preventive custody order had been issued.[3] The Lebanese authorities agreed to the extradition request; however, they report, his journey was interrupted by local authorities during a stopover in France, after Mr. Peñafiel informed them that he had lodged a request for political asylum with the Government of Spain. The petitioners state that the request for political asylum was later denied and that Mr. Peñafiel was finally extradited to Ecuador, where he arrived on March 8, 2001, whereafter he was held in custody by the Ecuadorian authorities.[4]

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2 The petitioners claim that this decision was handed down in the afternoon of the very day on which the Court denied the request lodged by the prosecution service for the second time.

[3] On this point, the petitioners state that the Ecuadorian law in force at the time established that extradition was admissible in cases in which a final conviction had been handed down, which was not true in Mr. Peñafiel's case. However, they report that a new Extradition Law was enacted on August 18, 2000; this legislation, which had been processed and adopted with unusual swiftness, included the existence of a preventive custody order among the grounds for an extradition request to be ruled admissible.

[4] In addition, the petitioners claim that the request for political asylum was processed by the Spanish authorities somewhat

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11. The petitioners claim that following Mr. Peñafiel's return to Ecuador, some fourteen criminal prosecutions were instituted against him, in which he was accused on at least seven occasions of the crime of bank embezzlement[5]. They allege there were a series of irregularities in the processing of each of those cases and that they represented a form of "governmental persecution" intended to secure Mr. Peñafiel's conviction and to maximize the duration of his arrest. They claim that every time a resolution in his favor was handed down, a new prosecution was instituted immediately. They hold that this situation left Mr. Peñafiel defenseless, on account of the "large number of cases" in which he was forced to defend himself simultaneously.

12. As evidence of their claims, the petitioners first point to two of the cases brought against Mr. Peñafiel: proceedings No. 1342/98, for the crime of fraud, referred to above; and proceedings No. 1070/2000, for an alleged illegal increase in the capital of Banco de Préstamos. They state that the Fourth Criminal Court of Pichincha handed down an acquittal in case No. 1342/98 on February 21, 2002, and issued the corresponding release warrant.[6] In the second case, they report that the Seventh Criminal Court of Pichincha ordered the provisional dismissal of the proceedings on November 12, 2001, along with the corresponding release warrant. An appeal against that decision was lodged by the prosecution service, which was referred for consultation to the Second Chamber of the Superior Court of Justice in Quito. The petitioners claim that on February 22, 2002, the day after the Fourth Criminal Court issued the acquittal referred to above, the Second Chamber of the Superior Court of Justice of Quito overturned the dismissal of the proceedings and issued a trial commencement deed in which it modified the charges to the crime of embezzlement: a more serious offense.[7] They state that on April 18, 2002, in this second stage of the proceedings, the Second Criminal Court of Pichincha handed down a conviction for the crime of bank embezzlement, along with an eight-year prison sentence.

13. The petitioners state that appeals were lodged for the annulment of the decisions of the Fourth and Second Criminal Courts, which were joined on February 17, 2004, under an order issued by the First Criminal Chamber of the Supreme Court of Justice. They contend that during another of the prosecutions brought against Mr. Alejandro Peñafiel (case No. 159/2001),[8] the Second Criminal Court of Pichincha handed down a conviction for the crime of embezzlement on February 6, 2003.[9] In a ruling

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irregularly. As a result of this, Mr. Peñafiel filed an application with the European Court of Human Rights and a precautionary measure was granted temporarily suspending his extradition to Ecuador; however, it was later lifted and the application to the ECHR was ruled inadmissible.

[5] The petitioners point out that this would have happened despite that the rules of private international law applicable to extradition proceedings, and that were binding to the State of Ecuador, provided that it could only be tried for the offense for which he was charged when his extradition was requested. In this regard, they quote the relevant provisions of the Convention on Private International Law (Bustamante Code), from which Ecuador is a party.

[6] The petitioners claim that this prosecution was instituted for the crime of fraud; however, when the plenary proceedings initiation deed was issued, the alleged victim was charged with the crime of embezzlement as defined in Article 257 of the Ecuadorian Criminal Code. They report that an appeal against this decision was filed by Alejandro Peñafiel's defense team, as a result of which the Fifth Chamber of the Superior Court of Justice of Quito amended the challenged ruling to exclude the potential commission of the crime in question and issued a new plenary proceedings initiation deed based on Articles 131 and 134 of the General Law of Financial System Institutions. In this new stage in the proceedings, the case was heard by the Fourth Criminal Court of Pichincha, which handed down the aforesaid acquittal. They also claim that under the provisions of the Criminal Procedures Code applicable in that time, in Article 319, given that this decision had acquitted Mr. Penafiel, his "immediate release" should have proceeded, even though an appeal had been filed and it was pending its resolution.

[7] The petitioners note that this situation arose in several of the criminal cases brought, in that the charges for which he was finally prosecuted were based on crimes other than those initially cited and in accordance with which he had prepared his defense.

[8] The petitioners point out that this case involved a civil matter related to a private accusation presented for alleged nonfulfillment of a sales contract. They report that at the first instance, the Tenth Criminal Court of Pichincha issued a deed of provisional dismissal that was overturned by the Superior Court of Quito on appeal; the appeals court then ordered the opening of plenary proceedings for the crime of embezzlement, with the new stage in the case assigned to the Second Criminal Court of Pichincha.

[9] The petitioners point out that this court had already convicted Mr. Peñafiel for the same crime in a decision of April 18, 2002. They claim that instituting proceedings for a civil matter and later imposing a custodial sentence constitutes a violation of the
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dated July 5, 2004, the president of that Court found that Mr. Peñafiel had already served his sentence and consequently ordered his release from custody.[10] They report that on that same date, the First Criminal Chamber of the Supreme Court of Justice resolved the appeal for annulment pending for the other two joined criminal proceedings referred to above, and handed down a conviction for the crime of embezzlement with an eight-year prison sentence. The petitioners state that by means of an order of September 27, 2004, the Fourth Criminal Court of Pichincha, in executing the judgment handed down by the Supreme Court of Justice, ordered the return of Mr. Peñafiel to prison to complete the remainder of his sentence; in addition, it placed a ban on his leaving the country. Pursuant to this order, Mr. Peñafiel was again taken into custody.

14. The petitioners report that the judges who issued the favorable rulings in these cases faced prosecutions and, in some cases, were removed from their positions.[11] They claim this undermined the guarantee of the independence and impartiality of the judicial authorities that heard the cases brought against Alejandro Peñafiel, in that those measures were intended to send a message to any judges inclined to rule in his favor. They thus maintain that the competence of the judiciary was "invaded" through "pressure" allegedly brought to bear by senior government officials.

15. They argue that Mr. Peñafiel remained illegally and arbitrarily detained under a regime of preventive custody for a length that exceeded the time permitted by law, since the Ecuadorian Constitution then in force, stipulated a maximum duration of one year of custody without a conviction.[12] They thus claim that Mr. Peñafiel was denied his freedom for four years because of the succession of proceedings instituted by the public prosecutor, to the extent that when a conviction was finally delivered, he had already served the duration of his sentence. They state that although the judicial authorities issued as many as eight release warrants ordering his release from prison, and although the convictions handed down were not finalized, Mr. Peñafiel remained in custody until he had served the sentence established for the crime for which he was prosecuted on more than one occasion. They also note that, due to a "request of pre-release" presented by Mr. Peñafiel, the National Directorate of Social Rehabilitation Ministry of Government of Ecuador, could have issued a report on January 22, 2004, with the detail of the various criminal causes initiated against Mr. Peñafiel and would have recommended his release based on the constitutional provision for the regime of preventive custody.[13] They maintain that this situation also undermined his right to the presumption of innocence.

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provision that no one shall be detained for debt contained in Article 7 of the American Convention, since "nonfulfillment of a sales contract causes a civil debt."

[10] The petitioners report that the order of the president of the Second Criminal Court of Pichincha took into consideration the sentencing reductions established by the National Directorate of Social Rehabilitation and the time he had been kept in custody since his arrest in Lebanon.

[11] Specifically, they report that the judges of the Fourth Criminal Court who issued the decision of February 21, 2002, were charged with the crime of prevarication, and that the magistrates of the Fifth Chamber of the Superior Court of Justice of Quito were "suspended" from their positions after handing down the decision of October 24, 2001. They state that criminal proceedings were also brought against the president of the Second Criminal Court of Pichincha and the director of the prison who ordered Mr. Peñafiel's release in July 2004.

[12] In this regard the petitioners cite the content of Article 24, section 8 of the constitutional provision which stated that "Article 24. – To ensure due process, the following basic guarantees must be observed, without prejudice to other guarantees established by the Constitution, international instruments, laws or case law […] 8. Preventive detention may not exceed six months in cases involving offenses punishable by imprisonment, or a year, in cases of offenses punishable by imprisonment. If these limits were exceeded, the order of preventive detention shall be void, under the responsibility of the judge trying the case. In any case, without exception, given the order of dismissal or acquittal, the detainee shall immediately regain his liberty without prejudice to any inquiry or appeal pending."

[13] In this regard, they cite as indicated in that report which states that "in accordance with the decision of the Supreme Court […] on January 23, 2003 […] 'in the criminal proceedings before the January 13, 2003, there is no need to issue an arrest warrant firm…' Thus in these procedures (not resolved) the Judge or Court that is in charge of the case, must repeal the warrant due to its nugatory effect, including those in judgment calls, and instead confirm the order or remand and leave no effect when appropriate, having spent the period specified in paragraph 24-8 of the Constitution of the Republic (needless to say that [Mr. Peñafiel] recorded release warrant orders based on the constitutional provision invoked)."

16. They further state that during the criminal proceedings brought for the offense of bank embezzlement, several resolutions were adopted that established the impossibility of assigning Mr. Peñafiel criminal responsibility for the commission of that crime.[14] That notwithstanding, the domestic courts pursued various prosecutions "to review and [repeatedly] judge the same facts and applicable law," thus violating the *non-bis-in-idem* principle. They also contend that the offense of bank embezzlement was defined with the enactment of an amendment to the Criminal Code published in Law No. 99-26 of May 13, 1999, whereby Mr. Peñafiel was convicted for a crime that did not exist at the time of the facts related to the closure of the Banco de Préstamos.[15]

17. The petitioners claim that the authorities adopted a "systematic" practice of failing to enforce the decisions that were favorable to Mr. Peñafiel, thus violating the obligation set out in Article 25.2.c of the Convention. They believe this case involves "persecution for political reasons," in which not only was Mr. Peñafiel convicted beforehand, he was also denied the use of the remedies normally available for challenging the rulings issued by the domestic courts in accordance with the guarantees set out in Article 8 of the Convention. They further state that some pending proceedings have been "shelved" by the prosecution service and could be reactivated again, with which Mr. Peñafiel is currently in a situation of "complete legal insecurity."

18. In addition, the petitioners claim that the Deposit Guarantee Agency (AGD), the "government-dependent" body responsible for the banking institutions in which the government had intervened since 1998 – including the Banco de Préstamos – ordered the seizure of certain assets belonging to Mr. Peñafiel by means of an "enforced debt collection procedure."[16] They state that the property in question belonged to family companies that, while related to Mr. Peñafiel, owed nothing to the Banco de Préstamos. They therefore contend that the proceedings instituted by the AGD were a form of "pressure" on Mr. Peñafiel, and that in processing them, the guarantees of Article 8.1 were not observed.[17]

19. They also claim that after the closure of the Banco de Préstamos was ordered, senior government authorities publicly accused Mr. Peñafiel of criminal acts not substantiated at any judicial venue, thereby affecting "his name and his reputation." [18] They add that the Ecuadorian authorities that

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[14] The petitioners note, *inter alia*, that during the criminal proceedings brought by the prosecution service (cases Nos. 292/98 and 8012/2001), the Fourth Chamber of the Superior Court of Guayaquil, on February 24, 2003, and the Ninth Criminal Court of Guayas, on May 16, 2002, issued irrevocable dismissal orders, and those decisions were final and acquired the status of *res judicata*. They also state that the Supreme Court of Justice's ruling of February 17, 2004, ordering the joinder of the cases covered by the annulment remedy, was grounded on the fact that both cases were based on the same facts and that Mr. Peñafiel was being charged with the same crime.

[15] They add that on June 12, 2002, a new Organic Law of the Comptrollership General of the State came into force that repealed Article 257 of the Criminal Code. The petitioners state that Alejandro Peñafiel lodged a request for his release with the judiciary, claiming that he was eligible for "favorable retroactivity" with the enactment of the new Organic Law of the Comptrollership. However, the Supreme Court of Justice issued a ruling on June 25, 2002, published in Official Register No. 604, addressing the "uncertainties" that had arisen with the entry into force of the new Organic Law of the Comptrollership and clarifying that it did not affect the provisions governing the crime defined in Article 257 of the Criminal Code.

[16] Regarding the nature of this procedure, the petitioners stated that: "it has no equivalent in comparative law [...] the manager of the AGD is invested with jurisdictional powers [and he acts] in his dual role as manager and judge of enforced collections and, without initiating adversarial proceedings, proceeds to seize property from thousands of companies based on information held by the Agency itself."

[17] The petitioners state that an amparo remedy was lodged with the Thirteenth Criminal Court of Pichincha against one of the seizure orders issued by the AGD. That court ordered the suspension of the AGD's resolution while the remedy was ruled on, but the filing was dismissed on February 1, 2008.

[18] The petitioners remark, for example, declarations of former Ecuadorian president Rafael Noboa to the mass media, where he might have affirmed that "as long as he was President of the Republic, Alejandro Peñafiel would not leave jail." In order to sustain their affirmation, petitioners have incorporated to the procedure before the IACHR, a number of press releases with the mentioned declarations referring to the case of Alejandro Pe;afiel, in the media..

would have participated in the investigation of the facts concerning the case Banco de Préstamos, also acted in detriment of their right to honor and reputation.[19]

20. Similarly, they allege a violation of the right to life based on that in the year 2003, while Mr. Penafiel was detained, was allegedly assaulted by inmates of the detention center where he was, without the prison authorities had stopped the aggression. They point out that these facts were what prompted the adoption of precautionary measures granted by the Commission in due course.

21. Finally, in their initial filing the petitioners claimed that after the Fourth Criminal Court of Pichincha handed down the acquittal on February 21, 2002, Mr. Peñafiel was not allowed to make statements to the media, thereby undermining his right of freedom of expression.

B. Position of the State

22. The State contends that the claim is inadmissible since when the petitioners submitted their petition to the Commission, the remedies afforded by domestic jurisdiction had not yet been exhausted. Specifically, in its initial submission the State maintains that the judgment issued by the Second Criminal Court of Pichincha on April 18, 2002, in which Mr. Alejandro Peñafiel was convicted of the crime of bank embezzlement, was appealed through a special remedy for annulment that was still pending resolution by the First Chamber of the Supreme Court of Justice. It holds that the remedy was "suitable," "effective," and needed to be exhausted, in accordance with Ecuador's domestic laws. It therefore claims that the IACHR cannot rule the petition admissible until a final ruling is issued in those proceedings.[20]

23. In addition, the State claims that under the Ecuadorian Code of Criminal Procedure, Mr. Peñafiel's defense could have filed for a review remedy at any point, after any conviction against him had become enforceable. It maintains that, as was applicable, it was necessary for the petitioner to exhaust that remedy, in that it was also a suitable mechanism available within domestic jurisdiction for repairing the allegedly violated legal situation. Thus, the State contends that the petitioners' argument regarding an "unwarranted delay in deciding the matter" is inadmissible until it is resolved by the domestic venues.

24. Ecuador further holds that the exceptions to the rule requiring the prior exhaustion of domestic remedies cannot be triggered, since in the case at hand, Mr. Peñafiel has had full access to the remedies offered by domestic law and the domestic agencies have acted in accordance with law and in compliance with due process.

25. Regarding the alleged violation of the guarantees of due process, the State maintains that a review of the criminal proceedings indicates that Mr. Peñafiel has enjoyed the effective right of defense, has obtained judgments grounded on current law and adopted by independent and impartial judges, and has had at his disposal the remedies offered by domestic jurisdiction.[21] Regarding the petitioners' claim of an alleged violation of the right to be tried within a reasonable time, the State first maintains that Mr. Peñafiel could have brought recusal proceedings against any court guilty of such a violation and, in that way, allow the national authorities to resolve the alleged abridgment of his right to

[19] They affirm, for example, that the Civilian Control of Corruption Commission, ("CCCC")- organ created under article 220 of the past Constitution- had published in some opportunity in its web page a link called "paper jail", in which one could make a choice of "applicable penalty" to the image of Mr. Alejandro Peñafiel. This way, they motivated the internet user to virtually execute the selected person, having a list of several possible procedures, in order to choose some as "burn him, squash him", among others.

[20] In its initial submission, the State also spoke of the protective measures requested by the petitioners, in which they sought the IACHR to order the lifting of the custodial measure imposed by the domestic authorities in Mr. Peñafiel's case. Thus, it claimed that the Commission lacked jurisdiction to rule on alleged violations of the provisions of Ecuadorian national law and that the petitioners' requests on the matter were related to matters that should, in any event, be analyzed at a future merits stage and not at the current admissibility stage.

[21] In a submission dated June 27, 2008, the State sent a report with a summary of 14 criminal cases brought against Mr. Peñafiel.

due process. It holds that recusal proceedings are duly provided for in domestic law and represent the suitable and effective way to address the irregularities allegedly committed through the duration of the proceedings brought against him.

26. Second, the State maintains that as established by the precedents set by the Inter-American Court of Human Rights (I/A Court H. R.) and the European Court of Human Rights (ECHR), there is no "exact quantum" to be taken into account in connection with the right to be tried within a reasonable time; instead, consideration must be given to the particular circumstances of the case and so, in the matter at hand, it must be considered that the domestic proceedings were resolved "within a period in accordance with the type of trial involved [and] within the possibilities that the State [had] available to it." Consequently, the State contends that it cannot be accused of alleged violations of the guarantees established in Article 8.1 of the American Convention.

27. Finally, the State holds that the seizure proceedings carried out by the Deposit Guarantee Agency (AGD) were in accordance with the terms of the Law on Economic Reorganization in the Financial Fiscal Area.[22] It reports than a motion for *amparo* constitutional relief was lodged against the AGD's seizure order, which was later dismissed by the Thirteenth Criminal Judge of Pichincha on February 1, 2008. In short, Ecuador contends that the procedure followed by the AGD was carried out with full observance of the guarantees of due process through "legitimate" administrative resolutions and in strict compliance with law.

28. In consideration of the above arguments, the State requests that the Commission rule the petition inadmissible.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence of the Commission *Ratione Materiae*, *Ratione Personae*, *Ratione Temporis*, and *Ratione Loci*

29. First of all, the petitioners are entitled, under Article 44 of the American Convention, to lodge complaints with the Commission. The petition names, as its alleged victim, an individual person with respect to whom the Ecuadorian State had assumed the commitment of respecting and ensuring the rights enshrined in the American Convention. With respect to the State, the Commission notes that Ecuador has been a party to the American Convention since December 8, 1977, when it deposited the corresponding instrument of ratification. The Commission therefore has competence *ratione personae* to examine the petition. The Commission has also competence *ratione loci* to deal with the petition since it alleges violations of rights protected by the American Convention occurring within the territory of Ecuador, which is a state party to that treaty.

30. The Commission has competence *ratione temporis* since the obligation of respecting and ensuring the rights protected by the American Convention was already in force for the State on the date on which the incidents described in the petition allegedly occurred. Finally, the Commission has competence *ratione materiae* since the petition describes possible violations of human rights that are protected by the American Convention.

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[22] The State cites the contents of Article 29 of that law, which provides as follows:

"In cases in which administrators declare unrealistic technical equity, alter balance sheets, or charge interest on interest, they shall guarantee with their personal assets the deposits of the financial institution, and the Deposit Guarantee Agency may seize those goods that are publicly known to belong to those shareholders and transfer them to a security trust while their true ownership is determined, in which case they shall become resources of the Deposit Guarantee Agency and may not during this period be divested.

Document No. 01552 of the Office of the Attorney General of the State, June 27, 2008, p. 2.

B. Admissibility Requirements

1. Exhaustion of Domestic Remedies

31. Article 46.1.a of the American Convention requires the prior exhaustion of the resources available under domestic law, in accordance with generally recognized principles of international law, as a requirement for the admissibility of claims regarding alleged violations of the American Convention.[23] In turn, Article 46.2 of the Convention states that the prior exhaustion of domestic remedies shall not be required when: (i) the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated; (ii) 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 (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

32. In the matter under analysis, the State claimed in its initial filing that domestic remedies had not been exhausted, specifically because a decision was pending in the appeal for annulment lodged against the judgment of the Second Criminal Court of Pichincha of April 18, 2002, whereby Alejandro Peñafiel was convicted of the crime of bank embezzlement. It also claimed that Ecuadorian law provided, first, for the review remedy, which was the available mechanism that Mr. Peñafiel should exhaust in the event that a final conviction were handed down, and second, for recusal proceedings, as the ideal mechanism for alleging, before the domestic courts, violation of the principle of reasonable time caused by the duration of the proceedings against Mr. Peñafiel.

33. In turn, the petitioners alleged that in light of the particular circumstances of the case, the resources available under domestic law were illusory, given the judicial authorities' lack of independence and impartiality, which in general had given rise to a pattern of justice denied. In connection with the remedies cited by the State, the petitioners first referred to the extraordinary nature of the annulment and review remedies, according to which they were not ideal mechanisms for remedying the failings in guarantees in the pre-trial stages of the proceedings. They also maintained that on account of its nature, a review remedy could be lodged without an expiration limit and only after a conviction had been handed down, and thus it did not represent an effective mechanism for resolving the violations alleged in this case. The recusal of judges was, they said, a remedy admissible only in certain cases provided for in law and that it would have been equally ineffective given the allegations made regarding the lack of judicial independence. To summarize, they maintained that the State had failed to establish the effectiveness of the cited remedies and that invoking them would have been a meaningless formality; consequently, the exceptions provided for in Article 46.2 were fully applicable to the situation, relieving them of the requirement of exhausting domestic remedies that, in practice, would not have attained the goal they sought.

34. The Commission notes that on the date the petition was filed, the petitioners claimed that Mr. Peñafiel had been detained for longer than the time allowed by the Constitution of Ecuador for the regime of preventive custody in which he was being held, and that the remedies available under domestic law had proved illusory for repairing the alleged violations. In addition, the Commission notes that according to the information furnished by the parties, Mr. Peñafiel is currently at liberty following his conviction for the crime of bank embezzlement.

35. As has been established on other occasions, the situation to be taken into account to determine whether the remedies offered by domestic jurisdiction have been exhausted is the one that prevails when deciding on admissibility, since the time at which the complaint is lodged and the time when the admissibility ruling is given are different.[24] The Commission therefore believes that regardless of

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[23] I/A Court H. R., *Case of the Moiwana Community*, Judgment of June 15, 2005, Series C No. 124, para. 48; *Case of Tibi*, Judgment of September 7, 2004, Series C No. 114, para. 48; and *Case of Herrera Ulloa,* Judgment of July 2, 2004, Series C No. 107, para. 80.

[24] IACHR, Report No. 52/00, *Dismissed Congressional Workers*, June 15, 2000, para. 21.

the analysis it must perform of the nature of the appeal for annulment and the requirement that it be exhausted pursuant to the Convention, the objection raised by the State in connection with it no longer applies at the time of this report's drafting in that the remedy in question was exhausted by the decision handed down on July 5, 2004, by the First Criminal Chamber of the Supreme Court of Justice.

36. Furthermore, the Commission notes that the purpose of this petition refers specifically to the alleged violations of the right to property, personal liberty, and due process in the proceedings brought against Alejandro Peñafiel, including excessively lengthy preventive custody, repeated prosecutions for the same facts, failure to enforce favorable judgments, failure to enforce more favorable subsequent legislation, absence of a criminal definition of the offense at the time it was allegedly committed, a lack of judicial independence, and a lack of effective domestic remedies for rectifying the alleged violations.

37. Consequently, the remedies still to be exhausted in the case at hand must be identified. The Inter-American Court has ruled that only those remedies appropriate for resolving the alleged violations need be exhausted. Adequate domestic remedies means:

> 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.[25]

38. It does not fall to the IACHR to rule on the finding of guilt or innocence of a defendant in a criminal trial. However, it is competent to analyze whether the guarantees of due process protected by the Convention have been undermined and – in order to rule on the admissibility of a claim – whether domestic remedies have been exhausted or whether their exhaustion may be waived on account of the circumstances of the claim. In the case at hand, the petitioners claim that factors such as the institution of proceedings, the removal of judicial authorities who issued decisions favoring Mr. Peñafiel, and the failure to enforce those decisions affected the guarantees of independence and impartiality.

39. The Commission notes that even though the petitioners have called for the exceptions to the rule requiring the prior exhaustion of domestic remedies to apply, the claims described above were presented before the domestic courts by means of a series of recourses lodged by Mr. Peñafiel's defense team in the different cases brought against him. The table below, drawn up by the IACHR, summarizes the information furnished by the parties on the rulings that were challenged in those proceedings.

Case	Decisions challenged
1342/98	Plenary proceedings initiation deed for the crime of bank embezzlement, issued by the Fourteenth Criminal Court of Pichincha on January 30, 2001.
1070/2000	Decision of the Second Criminal Court of Pichincha of April 18, 2002, convicting Mr. Peñafiel of the crime of embezzlement.
159/2001	Decision of the Second Criminal Court of Pichincha of February 6, 2003, convicting Mr. Peñafiel of the crime of embezzlement.
307/2000	Summons to plenary proceedings issued by the Thirteenth Criminal Court of Guayas on February 19, 2002.
615/2001	Summons to plenary proceedings issued by the Thirteenth Criminal Court of Pichincha on July 24, 2002.
315/2001	Summons to plenary proceedings for the crime of embezzlement issued by the Thirteenth Criminal Court of Pichincha.
873/2000	Decision of the Third Criminal Court of Pichincha of October 4, 2002, convicting Mr. Peñafiel of the crime of falsification.

[25] I/A Court H. R., *Velásquez Rodríguez Case,* Judgment of July 29, 1988, para. 63.

357/2002	Remedy for "release amparo" lodged with the president of the Superior Court of Quito on December 9, 2002,[26] against the Twelfth Criminal Court of Pichincha that heard the case and had issued a preventive custody order on September 18, 2002.
11/2003	Summons to plenary proceedings issued by the First Criminal Court of Ambato.
Seizure proceedings initiated by the AGD	Constitutional amparo suit lodged with the Thirteenth Criminal Judge of Pichincha against the administrative seizure resolutions issued by the general manager of the Deposit Guarantee Agency on October 12, 2006, and November 29, 2007.

40. Consequently, in light of its analysis of the allegations and information presented by both parties, the Commission concludes that the claims regarding the alleged violation of Articles 7, 8, 9, 21, and 25 were presented on different occasions to the domestic authorities, as a result of which the judicial authorities proceeded to examine Mr. Alejandro Peñafiel's legal situation.

41. In addition, the IACHR again notes that in accordance with how the burden of proof applies, a State alleging nonexhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness.[27] The Commission thus notes that the State has not specified the suitability and effectiveness offered by the review and recusal remedies in resolving the allegedly affected legal situation caused by the purported unwarranted delay in the proceedings that Mr. Peñafiel faced and during which he was deprived of his freedom under the preventive custody regime.

42. Neither has the State offered any specific arguments regarding the petitioners' contentions on the factors that could have affected the resolution of those recourses, specifically as regards the absence of the guarantee of impartiality and independence. In contrast, the petitioners have given specific arguments on the impact that claims on that matter would have had within the judicial proceedings. The Commission finds that the circumstances described by the petitioners could have affected access to the remedies offered under domestic law referred to by the State and, consequently, it concludes that it would be admissible to exempt that aspect of the claim from the requirement in question.

2. Deadline for Submitting the Petition

43. The American Convention states that for a petition to be admissible, it must be lodged within a period of six months following the date on which the alleged victim was notified of the final judgment adopted by the domestic courts. Similarly, Article 32 of the Commission's Rules of Procedure establishes that in cases in which the exceptions to the prior exhaustion requirement are applicable, the petition must be presented within what the Commission deems to be a reasonable period of time.

44. The petition was received on July 12, 2002, and in this case, the Commission has already determined, first, that at the time it was presented, the exceptions to the exhaustion of domestic remedies were applicable in accordance with Article 46.2 and, second, that Mr. Peñafiel's legal situation had been definitively settled by the decision of July 5, 2004, handed down by the First Criminal Chamber of the Supreme Court of Justice. Consequently, considering the context and characteristics of this case, the Commission believes that the petition was lodged within a reasonable time and that the admissibility requirement regarding the timeliness of the petition must be deemed met.

[26] According to the information furnished by the petitioners, this remedy was later dismissed.

[27] IACHR's Rules of Procedure, Article 31.3. See: IACHR, Report No. 32/05, Petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral *et al.* (persons living with HIV/AIDS), Guatemala, March 7, 2005, paras. 33-35; I/A Court H. R.*, The Mayagna (Sumo) Awas Tingni Community Case,* Preliminary Objections, para. 53; *Durand and Ugarte Case,* Preliminary Objections, Judgment of May 28, 1999, Series C No. 50, para. 33; and *Cantoral Benavides Case,* Preliminary Objections, Judgment of August 3, 1998, Series C No. 40, para. 31.

3. Duplication of International Proceedings

45. Nothing in the case file indicates that the substance of the petition is pending in any other international settlement proceeding or that it is substantially the same as any other petition already examined by this Commission or another 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 Alleged Facts

46. For the purposes of admissibility, the Commission must decide whether or not the petition states facts that tend to establish a violation of rights as stipulated in Article 47(b) of the American Convention and whether or not the petition is "manifestly groundless" or "obviously out of order," according to subparagraph c) of the same article. The rule governing evaluation of these particulars is different from the one required to decide on the merits of a complaint. The Commission must conduct a *prima facie* evaluation to examine whether the complaint substantiates the apparent or potential violation of a right guaranteed by the Convention and not to establish the existence of a violation. This review is a summary analysis that does not involve any prejudgment or advanced opinion on the merits of the case.[28]

47. In this case, the petitioners have presented several arguments related to possible violations of different rights established in the American Convention, allegedly committed as part of the several criminal processes initiated in Ecuador against Mr. Peñafiel. Particularly, they sustain that the fact that successive criminal procedures were initiated against Mr. Peñafiel could have damaged his right to a fair trial since, considered as a whole, different processes would have constituted a "prosecution" measure against him. The State, on the other hand, presented arguments referring to the compliance of the requisite of exhaustion of local remedies, and in general, has sustained that Mr. Peñafiel's right to a fair trial and to be judged in a reasonable time was respected.

48. In light of the foregoing considerations, and given the elements of fact and law placed before it, the IACHR finds that the petitioners' allegations refers to facts that, in case they were proven, could constitute violations of rights protected by the American Convention, in articles 7, 8, 9, 21 and 25 in connection with Article 1.1 of Mr. Alejandro Peñafiel.

49. The petitioners argue that under the various criminal proceedings that were initiated against Mr. Peñafiel, he would have remained under preventive custody beyond the time stated in the Constitution for that purpose. They have also argued that in due time it was determined that his freedom could have been ordered based on the applicable constitutional provision, however, he would have remained under the regime of preventive custody[29]. In this respect and in a preliminary way, the Commission notes that, according to the arguments of the parties and the available information, several of these criminal proceedings would have taken place requesting his preventive detention. The Commission finds *prima facie* that the arguments raise questions related with the right to personal freedom and therefore require an analysis of merits in regard to the duty to respect and guarantee the right recognized in article 7 of the American Convention, therefore it must be declared admissible.

50. The Commission also notes that the allegations of the petitioners regarding an alleged sentence imposed on Mr. Peñafiel for an offense of bank embezzlement which would not have been in

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[28] IACHR, Report No. 21/04, Petition 12.190, Admissibility, *José Luis Tapia González et al*, Chile, February 24, 2004, para. 33.

[29] In this regard, the Commission notes that according to the information contained in the file, it appears that on January 22, 2004, the National Directorate of Social Rehabilitation Ministry of Government of Ecuador, have issued a report on the status of Mr. Peñafiel, with the detail of the various criminal causes initiated against him, and in which also stated that "according to the documentation submitted, and knowingly there were causes still pending, as the constitutional rule 24-8 is only an incident that takes effect for custody, because it continues the pursuit of judgment until final settlement, so it was suggested that [Mr.] Peñafiel […] through his defense attorney sought the relevant mechanisms in order to solve the pending causes, and it should be proceed to take the appropriate action to order his pre-release […]."

force for the time the events occurred against him –related to the closing of the financial institution that he was the President of until 1998-, could constitute a violation of Article 9 of the Convention.

51. Regarding the claim of an alleged violation of the right to privacy enshrined in Article 11 of the Convention, the Commission notes that it is covered by the claim related to the alleged violation of Article 8.2 of the American Convention and must therefore be ruled inadmissible.

52. In the case under study, petitioners also have presented arguments regarding the possible violation to due process and judicial protection. In this case, the Commission observes that this aspect of the claim would be principally related to: i) the prosecution and conviction that Mr. Peñafiel would have been object for the same offense in more than one occasion; ii) the possible damage to the guarantee of impartiality and independence of the judiciary at the beginning of his procedures, presumably of sanctions, to authorities that decided on his favor: and iii) the possible damage to the right to be presumed innocent and to be tried within reasonable time, referred to the time that he would have been under the regime of preventive custody, which supposedly exceeded the time permitted by law. Likewise, it is alleged that the decisions favorable to Mr. Peñafiel's interests in the framework of the several criminal procedures, were not executed despite what was established in the Ecuadorian legislation applicable by then, as well as in the judicial decisions; and that as a consequence, the alleged victim did not have enough effective recourses seeing that, despite having been exhausted, these were, in the practice, incapable to solve the situation presumably violated. The IACHR, in accordance with these allegations, believes that if they were proven, they could constitute violations to articles 8 and 25 of the Convention, hence they must be declared as admissible to proceed with the analysis of the merits afterwards.

53. In addition, the Commission notes that the claims made regarding the administrative proceedings through which certain items of Mr. Peñafiel's property were seized demand a detailed analysis, given that they involve matters related to the scope of the right contained in Article 21 of the American Convention, in connection with the guarantees of Article 8 thereof.

54. Regarding the alleged violation of the right enshrined in Article 13 of the American Convention, the Commission notes that the petitioners have claimed that the alleged violation of that right arose from one of the cases brought against Alejandro Peñafiel but that they have not presented sufficient evidence to demonstrate that the alleged facts could tend to establish a violation thereof; it must therefore be ruled inadmissible.

55. Finally, the Commission considers that the petitioners have not presented basic elements to establish *prima facie* a claim concerning a potential violation of the right to life, protected under Article 4 of the American Convention. Therefore, the IACHR declares that this petition is inadmissible in this respect, according to Article 47.b of the American Convention.

V. CONCLUSIONS

56. The Commission concludes that it is competent to hear the petitioners' claims regarding the alleged violation of Articles 7, 8, 9, 21 and 25 of the American Convention, in conjunction with Article 1.1 thereof, and that those claims are admissible under the requirements established by Articles 46 and 47 of the American Convention. In addition, it concludes that the claims regarding the alleged violation of Articles 4, 11 and 13 of the American Convention must be ruled inadmissible.

57. Based on the foregoing considerations of fact and law.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this case admissible as regards Articles 7, 8, 9, 21 and 25 of the American Convention, in conjunction with Article 1.1 thereof.

2. To declare this case inadmissible with respect to Articles 4, 11 and 13 of the American Convention.

3. To give notice of this decision to the Ecuadorian State and to the petitioners.

4. To continue with its analysis of the merits of the complaint.

5. To publish this decision and to 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 29th day of March, 2012. In favor: José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rosa María Ortiz (dissenting), and Rose-Marie Belle Antoine (dissenting), Members of the Commission.