

REPORT No. 31/13
PETITION 725-01
ADMISSIBILITY
OSCAR MAURICIO CAÑETE
PARAGUAY¹
March 21, 2013

I. SUMMARY

1. On October 17, 2001, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition lodged by Oscar Mauricio Cañete (hereinafter “the petitioner” or “the alleged victim”), alleging that the Republic of Paraguay (“Paraguay” or the “State”) was responsible for the arbitrary dismissal from his position as an employee of the Office of the Assistant to the Military Staff of the Office of the President of the Republic, where he worked for more than 20 years, in retaliation for serving as Secretary General of the Civil Servants’ Union of the Military Staff of the Office of the President of the Republic (hereinafter “the Union”).

2. The petitioner claimed that, in addition to requesting his dismissal, the Chief of the Military Staff of the Office of the President of the Republic instituted proceedings for the dissolution of the Union and filed a criminal complaint against him for allegedly breaching a confidentiality agreement. He also claimed that he had exhausted domestic remedies.

3. In response, the State requested the Commission to find the petition inadmissible, because the petitioner did not exhaust domestic remedies, in addition to arguing that the facts do not tend to establish violations of the American Convention.

4. Without prejudice to the merits of the petition, after examining the positions of the parties and in keeping with the requirements set forth in Articles 46 and 47 of the American Convention on Human Rights (hereinafter the “American Convention”), the Commission decides to find the petition admissible to examine whether there may have been a violation of the alleged victim’s rights as provided for in Articles 8, 9, 16 and 25 in connection with Article 1.1 of said treaty. The Commission also decides to notify the parties of this decision, publish it and include it in its Annual Report to the OAS General Assembly.

II. PROCEEDING BEFORE THE COMMISSION

5. The petition was received by the IACHR on October 17, 2001, and assigned number P-725-01. The petitioner provided additional information on November 8, 2001, November 13, 2001, November 19, 2001, December 10, 2001, January 31, 2002, May 7, 2002, December 18, 2009 and April 21, 2010.

6. The IACHR forwarded the petition and the additional information to the State on March 2, 2011. On May 10, 2011, the State requested and was granted an extension from the Commission in

¹ Commission Member Rosa Maria Ortiz, a Paraguayan national, did not take part in the deliberations or the decision-making process on the instant petition, in accordance with Article 17.2.a of the Rules of Procedure of the Commission.

order to provide its response. The Commission received the State's response on August 1, 2011, which was duly forwarded to the petitioner.

7. The petitioner provided additional information on April 24, 2011, May 29, 2011 and August 28, 2011, and the State provided additional information on August 11, 2011 and March 15, 2012. The information and replies were duly forwarded to each party.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

8. Based on the petition and the appeals filed in domestic courts, the petitioner contended that on November 19, 2001, he was arbitrarily dismissed from his position as an employee of the Office of the Assistant to the Military Staff of the Office of President of the Republic, where he had been working for more than 20 years and that said dismissal was in retaliation for serving as the Secretary General of the Union and for defending several union member employees.

9. He claimed that on August 9, 2001, after punching his time card for the 13:00 to 19:00 shift, he was told that his office (work place) had been moved to the basement of the building at the orders of the Chief of the Military Staff of the Office of the President of the Republic. He stated that when he reported to where his office had been moved to, he confirmed that it was an clerical section of the Office of the Assistant to the Military Staff of the Office of the President of the Republic and not the actual Office of the Assistant to the Military Staff of the Office of the President of the Republic, even though no administrative order had been issued or summary proceeding instituted in order to transfer him to another section, as prescribed in the Manual of Organization, Duties and Rules of Procedure of the Military Staff and even though said clerical section did not appear in said manual.

10. He contended that on August 13 and 14, 2001, his entry to the Office of the Assistant to the Military Staff of the Office of the President of the Republic was blocked at the orders of the Chief of the Military Staff and that, even so, he punched his time card as usual without leaving his position. He stated that on August 27, 2001, the Chief of the Military Staff instituted summary proceedings for dereliction of duties, which was adjudicated by a judge, who allegedly belonged to the Office of the President and was pressured to issue the final judgment.

11. He argued that the Chief of the Military Staff of the Office of the President of the Republic and the Ministry of Justice and Labor violated his right to job stability in issuing a decree on November 19, 2001 dismissing him, which he contended was based on a spurious charge, specifically, an alleged three-day absence from his work place, and argued it was significantly prejudicial to him. Additionally, he claimed that because he belonged to the Union, in order to be transferred, he was entitled to prior notice and a competent judge adjudicating the case, as provided by applicable legislation. Lastly, he argued that even if he had committed an offense, the punishment of dismissal was improper for the particular offenses he is alleged to have committed, as set forth in the decree of November 19, 2001, specifically under subsections "a" and "b" of Article 68 of Law No. 1626/2001.

12. He alleged that his dismissal was connected to his duties as Secretary General of the Union, inasmuch as he believes that the Chief of the Military Staff was unhappy with him for having "confronted the inequities and arbitrariness to the detriment of my co-workers and the charges fabricated by the superiors," within a context of "systematic union persecution by officials of the Office

of the President of the Republic.” The petitioner contended that several officials, including the Chief of the Military Staff of the Office of the President of the Republic and the Minister of Justice and Labor, had abused their authority and engaged in “a labor persecution effort” against him and other Union member employees, particularly the most vulnerable ones.

13. As for pursuing domestic remedies, he contended that he had filed a lawsuit to get the decree overturned and was granted a stay of the administrative act along with reinstatement to his position and that, despite this ruling, he was commissioned to serve in the Secretariat of the Environment, a department under the Office of the President of the Republic, and not to serve in his prior position. He argued that the stay and reinstatement order issued by the First Chamber of the Court for Administrative Matters had been ignored and not been enforced by the competent authorities. He contended that the First Chamber of the Court for Administrative Matters did not notified him until May 24, 2011 that the lawsuit seeking to overturn the dismissal decree he was pursuing was found groundless and thus Decree No. 15.373 of November 19, 2001, which ordered his dismissal, was thereby upheld. Accordingly, he stated that he filed an appeal against said judgment, which is currently pending before the Supreme Court of Justice.

14. Additionally, the petitioner argued that the Chief of the Military Staff of the Office of the President of the Republic had brought criminal charges against him for allegedly making public a recorded conversation with the Chief over a radio program, which became the factual basis for the criminal charge of “breach of confidentiality,” and was dismissed on April 13, 2004.

15. Moreover, with regard to the Union, he contended that on August 22, 2001, the Chief of the Military Staff of the Office of the President of the Republic requested the Vice Minister of Labor and Social Security to dissolve the Union, based on documents allegedly proving the resignation of 31 of its members, even though the Union had no original record of any such resignations. Additionally, he asserted that the Minister of Justice and Labor instituted proceedings before the labor court to revoke the Union’s legal status. He noted that, in his capacity as Secretary General of the Union, the alleged victim filed a motion for the court to find the deadline to bring such an action to have lapsed due to inactivity (*perención*). This motion was granted and on October 8, 2002, the First Trial Court for Labor Matters found that the deadline to bring these proceedings had lapsed and the Union was not dissolved.

16. As to his retirement, the petitioner alleged that he was compelled to retire from the civil service as a result of threats leveled at him by one of members of the First Chamber of the Court for Administrative Matters and contended that if he had continued in his original position, he would have earned much more than what he currently receives as retirement pension as an employee of the Military Staff of the Office of the President of the Republic.

17. The petitioner’s last argument was that, because he was blocked from entering the Military Staff of the Office of the President of the Republic, he was unable to attend the ceremony to transfer authority to the new Union officials and, therefore, said act was illegal. He contended that the Union continued to operate but that its leaders’ “feet and hands were tied by the military.”

B. Position of the State

18. The State claimed that the Chief of the Military Staff of the Office of the President of the Republic, in accordance with Article 4, subsections a, j and k of Decree No. 7208 of September 28, 1990, which was in force at the time of the events, ordered the relocation of the clerical section of the Office

of the Assistant to the Military Staff of the Office of the President of the Republic, which was located in the same physical space as the Office of the Chief Assistant. It asserted that said section, in turn, was located in the waiting area (antechamber) of the chambers of the Chief of the Military Staff of the Office of the President of the Republic. The State contended that the alleged victim was unhappy about the relocation of his office, and refused to report to work in the new location contending that a court order had to be issued for this purpose.

19. The State claimed that, because the alleged victim did not report to work at his new office, an administrative proceeding was instituted against him, which led to the issuance of Executive Decree No. 15.373 of November 19, 2001, dismissing him from the position he was serving in. The State noted that the alleged victim filed a motion to overturn the decree before the First Chamber of the Court for Administrative Matters of Asuncion, which is competent to hear matters of an administrative nature.

20. The State noted that, in the context of the administrative proceedings, the alleged victim was granted a stay of execution of Decree No. 15.373, until final disposition was issued under an order dated December 28, 2001. It claimed that pursuant to the stay, the alleged victim was supposed to be reinstated to his position and was consequently rehired and located in the Secretariat of the Environment, a department under the Office of the President of the Republic. In this regard, it argued that the alleged victim never challenged his reinstatement through a "commission" to the Secretariat of the Environment and it was therefore assumed that he was in agreement.

21. Additionally, it claimed that on June 28, 2010, the court ruled on the administrative claim, upholding Decree No. 15.373 and vacating the injunctive order, which temporarily granted the stay. The State asserted that the alleged victim appealed said judgment and that said appeal is currently pending before the Supreme Court of Justice, Office of Clerk IV.

22. The State argued that remedies were available to the alleged victim under domestic law. It contended that the alleged victim never appealed on the grounds of improper delay by the First Chamber of the Court for Administrative Matters of Asuncion in settling the lawsuit to overturn the decree. Additionally, it argued that remedies had not been exhausted, inasmuch as the Supreme Court of Justice has yet to hand down judgment in the appeal brought by the alleged victim.

23. With respect to revoking the Union's legal status, the State claimed that it practically had no members as a result of the resignation of a number of members and, therefore, the Chief of the Military Staff requested the Ministry of Justice and Labor to revoke the legal status of the union. It maintained that the Ministry of Justice and Labor brought a lawsuit and that the competent court found, in an order of October 8, 2002, that the case was filed after the deadline had lapsed.

24. The State argued that the Ministry of Justice and Labor recognized and granted legal status to the Union and claimed that, based only on objective evidence, as was the massive resignation of its members, did it bring the lawsuit to revoke its legal status. It argued that pursuing this lawsuit, as a case of union persecution is nothing more than a pretext for what the First Chamber of the Court for Administrative Matters of Asuncion called "insubordination." Consequently, the State concluded that it never deprived the alleged victim or any of the other employees of the Military Staff of the Office of the President of the Republic of the opportunity to freely associate.

25. The State argued that as a consequence of the broadcast of recorded conversations of the Chief of the Military Cabinet of the Office of the President of the Republic, the alleged victim was criminally charged with “breach of confidentiality,” which was dismissed with prejudice in a court order of April 13, 2004.

26. The State contended that even though the petitioner had not indicated what articles of the American Convention were violated, he had argued alleged violations of several rights. It contended that the facts alleged in the petition do not tend to establish violations of his rights to humane treatment (Article 5), personal liberty (Article 7), freedom of thought and of expression (Article 13), right of reply to inaccurate or offensive statements (Article 14), freedom of association (Article 16) or equal protection (Article 24).

IV. ADMISSIBILITY ANALYSIS

A. Competence of the Inter-American Commission *ratione personae, ratione materiae, ratione temporis* and *ratione loci*

27. The petitioner is entitled under Article 44 of the Convention to lodge petitions before the Commission. The petition identifies as the alleged victim an individual, for whom the Paraguayan State pledged to respect and ensure the rights recognized in the American Declaration. As for the State, the Commission notes that Paraguay is a State Party to the Convention, having duly deposited its instrument of ratification on August 24, 1989. Therefore, the Commission is competent *ratione personae* to examine the instant petition

28. The IACHR is competent *ratione loci* to entertain the petition, inasmuch as violations of rights protected in the American Convention are alleged therein to have taken place within the territory of a State Party to said convention. The IACHR is competent *ratione temporis*, being that the facts alleged in the petition presumably occurred when the obligation to respect and ensure the rights protected in the Convention was already in effect for the State. Lastly, the IACHR is competent *ratione materiae*, because the petition charges potential violations of human rights protected by the American Convention.

B. Other Admissibility Requirements

1. Exhaustion of Domestic Remedies

29. In order for a claim of an alleged violation of the provisions of the American Convention to be admitted, it must meet the requirements set forth in Article 46.1 of said international instrument and Article 31 of the Rules of Procedure of the Commission. Article 46.1.a) of the American Convention provides that for a petition or a communication filed with the Commission to be admissible in keeping with Articles 44 or 45 of said treaty and 32.2 of its Rules of Procedure, it is necessary for domestic remedies to be pursued and exhausted in accordance with generally recognized principles of international law. Moreover, Article 46.2 of the American Convention and Article 31.2 of the Rules of Procedure of the Commission stipulate that the requirement for prior exhaustion of domestic remedies does not apply 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.

30. This Commission notes that both the State and the petitioner maintained that the lawsuit brought by the petitioner was still pending before the Supreme Court of Justice, whose Chamber for Administrative Matters had randomly assigned a justice to provide a preliminary opinion on February 16, 2012. Moreover, the State alleged that the petitioner had not filed an appeal on the grounds of improper delay in the proceedings to overturn the original decree (*recurso de queja*). The petitioner, however, claimed to have exhausted all remedies and filed several motions with the First Chamber of the Court for Administrative Matters in order for it to rule in the lawsuit to overturn the decree.

31. Both the Commission and the Inter-American Court of Human Rights (hereinafter “the IA Court of HR”) have held that only remedies that are suitable to correct the alleged violations need be exhausted; that is to say, those remedies that are suitable to protect against the infringement of a legally protected right, so rights that negate this effect or are patently absurd or unreasonable, are not required to be exhausted.² Additionally, the IACHR has held that the purpose of the exhaustion of domestic remedies requirement is to ensure that the State in question is informed of the alleged violation of a protected right and has the opportunity to resolve those disputes within the domestic legal framework before they are brought before an international body.³ In the view of the IACHR, “if the alleged victim endeavored to resolve the matter by making use of a valid, adequate, alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled.”⁴

32. The Commission notes that the alleged victim filed suit to overturn Decree No. 15.373 of November 19, 2001, whereby he was dismissed, and a decision was handed down against him in a judgment of June 28, 2001 of the First Chamber of the Administrative Court. The IACHR also notes that the alleged victim filed an appeal of said judgment and, according to the evidence in the case file of the Commission, it is on record that the Administrative Chamber of the Supreme Court of Justice has not handed down a ruling as of the present date.

33. Given that more than 10 years have elapsed since the alleged victim filed the lawsuit to overturn Decree No. 15.373 of November 19, 2001, inasmuch as according to the evidence in the case file, as of the present date, the judgment of June 28, 2010 of the First Chamber of the Administrative Court is not dispositive and in view of the fact that based on the evidence in the case file and the arguments of the parties, the delay would seem to be attributable to the State, the Commission finds that the exception to the rules of prior exhaustion of domestic remedies set forth in Article 46.2.c of the American Convention is applicable.

34. It must be noted that Article 46.2, due to its very nature and purpose, is a norm of autonomous content vis-à-vis the substantive norms of the American Convention. Therefore, the

² IA Court of HR, *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment July 29, 1988. Series C No. 4, pars. 63 and 64. IACHR, Report No. 4/12, Petition 4115-02, Admissibility, *Ricardo Javier Kaplun and family*, Argentina, March 19, 2012, par. 28.

³ IACHR, Report No. 18/12, Petition 161-06, Admissibility, *Juvenile offenders sentenced to life imprisonment without parole*, United States, March 20, 2012, par. 46.

⁴ IACHR, Report No. 18/12, Petition 161-06, Admissibility, *Juvenile offenders sentenced to life imprisonment without parole*, United States, March 20, 2012, par. 46.

determination as to whether the exceptions to the rule of exhaustion of domestic remedies is applicable to the case at hand must be made as a prior and separate matter from the merits of the case, since it depends upon a different standard of evaluation from that used to determine a possible violation of the Convention.⁵ The foregoing is applicable as well to Article 31.2 of the Rules of Procedure of the Commission.

35. Lastly, with regard to the proceeding to revoke the Union's legal status and the criminal proceeding against the alleged victim for breach of confidentiality, the IACHR notes that the competent courts issued judgments on October 8, 2002 and April 13, 2004, respectively, thus disposing of these proceedings and, therefore, it finds that domestic remedies have been exhausted.

2. Timeliness of the Petition

36. Pursuant to Article 46.1.b of the Convention, in order for a petition to be admitted, it must be lodged within a period of six months from the date on which the alleged victim was notified of the final judgment exhausting domestic remedies. In the claim in question, the IACHR has established the application of one of the exceptions to the rule of prior exhaustion of domestic remedies under 46.2.c of the American Convention and 31.2.c of the Rules of Procedure of the Commission. In this regard, Article 32 of the IACHR Rules of Procedure establishes that, in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be lodged within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

37. With respect to the law suit by the petitioner to overturn the decree brought, the IACHR notes that the suit was filed after October 17, 2001, the date the petition was lodged with the Commission; that with respect to said lawsuit, the competent court issued a judgment on June 28, 2010 and the appeals filed subsequently have not been resolved by the competent authorities more than 10 years after the filing of the original suit and, therefore, the IACHR finds that the petition was lodged within a reasonable period of time.

38. With regard to the proceeding to revoke the legal status of the Union and the criminal proceeding against the alleged victim for breach of confidentiality, the Commission notes that these proceedings were still being processed at the time of the filing of the petition and then were subsequently adjudicated and, therefore, it finds that they were filed in keeping with Article 46.1 of the American Convention.⁶

⁵ IACHR, Report No. 13/09, Petition 339-02, Admissibility, *Vinicio Poblete Vilches*, Chile, March 19, 2009, par. 54.

⁶ IACHR, Report No. 62/12, Petition 1471-05, Admissibility, *Yenina Esther Martínez Esquivia*, Colombia, March 20, 2012, par. 42.

3. Duplication of International Proceedings and *res judicata*

39. Even though the petitioner made reference to contacting different international agencies, such as the International Labor Organization and the United Nations High Commissioner for Human Rights, the case file does not contain any evidence that the subject matter of this petition is pending in another proceeding before an international adjudicatory body, or that the petition is substantially the same as any petition previously examined by the IACHR or any other international body. Therefore, the IACHR concludes that the exceptions set forth in Articles 46.1.c and 47.d of the American Convention are not applicable.

4. Colorable Claim

40. For purposes of admissibility, the IACHR must rule at this point in time only as to whether the facts laid out in the petition, if proven, would tend to establish violations, as stipulated in Article 47.b of the American Convention, or whether the petition is “manifestly groundless” or it is “obviously out of order,” as provided in subparagraph (c) of the same article. The standard for evaluating these factual requirements is different from the requirement for deciding on the merits of a petition. The IACHR must conduct a *prima facie* evaluation to determine whether the petition establishes grounds for the apparent or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation of rights. This determination constitutes a preliminary analysis that does not entail prejudgment on the merits of the matter.⁷

41. Neither the American Convention nor the Rules of Procedure of the Inter-American Commission on Human Rights requires petitioners to identify the specific rights allegedly violated by the State in matters submitted to the Commission, even though the petitioners may do so. However, it is the duty of the Commission, in following the system of legal precedents, to determine in its admissibility reports, what provision of relevant Inter-American instruments is applicable and could be concluded to have been violated, should the alleged facts be proven by means of sufficient evidence and legal argument.

42. With regard to the alleged arbitrary transfer of office, allegedly unwarranted dismissal and alleged commission to duties other than those originally performed in breach of labor and union rights under domestic law, the Commission finds that these allegations could tend to establish violations of Articles 8 and 25 in connection with Article 1.1 of the American Convention. The Commission finds that these allegations could also tend to establish violations of Articles 8 and 25 in connection with Article 1.1 of the American Convention, as a result of unwarranted delay in the lawsuit to overturn the decree and other potential due process violations.

43. Additionally, given that the petitioner alleged that the punishment of dismissal that was imposed on him was not commensurate with the factual circumstances established in the laws that he allegedly broke, the Commission finds that this could tend to establish a violation of Article 9 in connection with the obligations set forth in Article 1.1 of the American Convention, inasmuch as said provision establishes the principle of legality as it pertains to criminal or administrative sanctions under

⁷ See IACHR, Report No. 3/11, Petition 491-98, Admissibility, *Néstor Rolando López et al*, Argentina, January 5, 2011, par. 37.

which a punishment more serious than that which is applicable at the time of the commission of the crime or administrative infraction may not be imposed.

44. The Commission finds that, because the alleged victim contended that he was dismissed in retaliation for his duties as the Secretary General of the Union, this too could tend to characterize violations of Article 16, in connection with the obligations provided for in Article 1.1 of the American Convention.⁸

45. Lastly, with respect to the proceeding to revoke the legal status of the Union and the criminal proceeding against the alleged victim for breach of confidentiality, since sufficient evidence is lacking to reach the conclusion that the respective authorities acted in such a way that would tend to establish any violation of the American Convention, the Commission concludes it must find the petition inadmissible with regard to these allegations, without prejudice to some of the facts alleged in the petition possibly being considered to put the alleged violations into context.

VI. CONCLUSIONS

46. The Commission concludes that it is competent to examine the claims brought forth in the instant matter and that the petition is admissible, in keeping with Articles 46 and 47 of the American Convention. Based on the foregoing arguments of fact and law, and without prejudice to the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To find the instant claim admissible with regard to the alleged violations of the rights recognized in Articles 8, 9, 16 and 25, in connection with 1.1 of the American Convention;
2. To notify the parties of this decision;
3. To proceed to examine the merits of the matter;
4. To release the instant report and publish it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 21th day of March 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rose-Marie Belle Antoine, Felipe González (vote with partial dissent respect to the Article 9 of the American Convention) and Dinah Shelton, Commissioners. The Commissioner Rodrigo Escobar Gil dissent.

⁸ The Commission notes that under the judgment of June 28, 2010, the petitioner also argued in the domestic courts that his dismissal was due to "systematic union persecution by the authorities of the Office of the President of the Republic, simply because of belonging to the Union."