

REPORT No. 91/13
PETITION 910-07
ADMISSIBILITY
DARÍA OLINA PUERTOCARRERO HURTADO
ECUADOR
November 4, 2013

I. SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition on July 16, 2007 presented by Mr. Alejandro Ponce Villacís and Mr. Farith Simon Campaña (“the petitioners”) alleging the international responsibility of the Republic of Ecuador (“the State” or “Ecuador”) for the illegal detention of Mrs. Daría Olinda Puertocarrero Hurtado, who had been charged with allegedly committing a crime of trafficking in narcotic drugs and psychotropic substances, and for the subsequent lack of judicial guarantees and judicial protection for her.

2. The petitioners maintain that the State is responsible for violation of the rights to personal liberty, a fair trial and judicial protection established in Articles 7, 8 and 25 of the American Convention on Human Rights (“the American Convention” or “the Convention”) in relation to its Articles 1.1 and 2 to the prejudice of the alleged victim. They argue that Mrs. Puertocarrero was deprived of her liberty under the legal concept of “definitive detention” [*detención en firme*]*, even after that form of detention had been declared unconstitutional in September 2006. In consequence, the petitioners filed a petition for *habeas corpus*, which was denied by the Metropolitan Municipality of Quito; and subsequently, lodged an appeal with the Constitutional Court, which was also denied. They maintain that domestic remedies were thus exhausted.

3. The State claims that Mrs. Puertocarrero could not be released after the “*detención en firme*” had been declared unconstitutional because in its decision, the Constitutional Court ruled that that declaration of unconstitutionality was not retroactive so as not to disturb the principle of legal certainty guaranteed by the Political Constitution. The State also alleges that the petitioners had not exhausted domestic remedies, given that the criminal case against Mrs. Puertocarrero had not yet concluded and was still being consulted with the Superior Court of Justice and given that the remedies of cassation and revision were still available. Lastly, it states that the IACHR is being used as a review court or fourth instance of the domestic criminal process.

4. Having examined the positions of the parties and compliance with the requirements set out in Articles 46 and 47 of the American Convention, and without prejudging the merits of the complaint, the Commission decided to rule the case admissible for purposes of examining the alleged violation of Articles 5, 7, 8, 9 and 25 of the American Convention in relation to Articles 1.1 and 2 thereof to the prejudice of the victim. It also decided to notify the parties of the report, and ordered that it be published in its annual report to the OAS General Assembly.

* Essentially, the so called *detención en firme* was a sort of irrevocable pre-trial detention by that could only cease with an acquittal, or when the conviction was quashed as a result of a cassation remedy.

II. PROCEEDINGS BEFORE THE COMMISSION

5. The Inter-American Commission received the petition on July 16, 2007, and its annexes on September 27, assigned it number P-910-07, transmitted the pertinent parts thereof to the State on March 27, 2008, and gave it a period of two months in which to present its observations, in accordance with Article 30 of the Rules of Procedure of the IACHR. On May 29, 2008, the State requested an extension, which was granted by the IACHR and notified on June 3, 2008.

6. The State's response to the petition was received in the IACHR on June 19, 2008, and transmitted to the petitioners on August 6, 2008. The petitioners' response was received on October 3, 2008 and transmitted to the State on October 15, 2008. The State presented its observations on December 2, 2008, which were finally transmitted to the petitioners on February 4, 2010.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

7. The petitioners stated that Mrs. Daría Olinda Puertocarrero Hurtado was detained on July 16, 2004 and transferred to the Quito Women's Social Rehabilitation Center, where she was being held on the date of the petition, for a period of approximately two years and ten months without having been sentenced.

8. They allege that on the basis of the concept of "*detención en firme*", which had been created by Law 2003-101 of January 13, 2003, Mrs. Puertocarrero continued in preventive detention in the Quito Women's Social Rehabilitation Center, even after that legal concept had been declared unconstitutional by the Constitutional Court in Decision 002-2006-TC of September 26, 2006. In its ruling, the Constitutional Court found that "*detención en firme*" ran counter to Article 24(8) of the Political Constitution of 1998, which stated that pre-trial detention could not exceed six months in cases of crimes punishable with jail, or one year for crimes punishable by incarceration. If these time limits were exceeded, the pre-trial detention order had to be annulled, at the responsibility of the judge in charge of the case. They therefore consider that the preventive detention of the alleged victim in excess of those constitutional time limits was illegal.

9. The petitioners allege that on November 18, 2006, they presented to the Quito Metropolitan Municipality a petition for *habeas corpus* in order to secure the release of Mrs. Puertocarrero from her alleged illegal detention. The Quito Metropolitan Municipality denied that petition on November 27, 2006.

10. The petitioners claim that the petition was handled in irregular fashion since it took 48 hours, longer than the period of 24 hours stipulated in Article 93 of the Constitution in force, and that the notification of the day and time for the hearing was transmitted with only three hours advance notice that it would be held. They also argue that the arguments they presented were disregarded, and that the substance of the case was not decided on. They therefore consider that the remedy was inadequate and was a mere formality.

11. After the denial, the petitioners presented an appeal to the Constitutional Court on January 14, 2007, which was denied on February 15, 2007, on the grounds that *“the complainant is lawfully and properly detained, and since the case is being heard by the Second Criminal Court of Pichincha, and since there is a summons to trial, the habeas corpus petition is not in order because the “detención en firme” of the complainant was ordered prior to the ruling of the Constitutional Court to which she refers in her complaint”*.

12. They also allege that ever since Mrs. Puertocarrero was detained, the State has violated and infringed upon her rights recognized under Articles 7.5, 7.6, 8.2 and 25 of the American Convention on Human Rights, as a result of the allegedly wrong proceedings of the courts in the matter of the filing and ruling on the *habeas corpus* petition, and because she had been kept in pre-trial detention for a disproportionate amount of time, when the law on which her detention was based had been declared unconstitutional.

13. Lastly, they claim that with the response from the Constitutional Court, domestic remedies in the State of Ecuador were exhausted. They also conclude that the State violated Articles 7, 8 and 25 of the American Convention on Human Rights.

B. Position of the State

14. The State maintains that Mrs. Puertocarrero had been apprehended on October 14, 2004, having been found inside a hairdressing salon handing over a package containing drugs, in exchange for 20 dollars; the detainee said that she did not know what the contents were.

15. It also indicates that the Fourth Criminal Court of Pichincha took up the case on October 18, 2004; on January 25, 2005, the Public Prosecutor filed charges against Mrs. Puertocarrero; the preliminary hearing was held on August 29, 2005; and on August 30, 2005, the Fourth Criminal Judge of Pichincha issued a summons to trial. Subsequently, on September 15, 2005, the case was sent to a higher court because of the petitions that had been filed; after examining the case, the Third Specialized Criminal Bench of the Superior Court of Justice of Quito decided on January 26, 2006 to return the case to the trial court, where, after a new drawing of lots, it was assigned on May 9, 2006 to the Second Criminal Court of Pichincha which would henceforth hear the case.

16. Subsequently, on September 25, 2007, the sentencing hearing was held, following which, on January 2, 2008, the Second Criminal Court of Pichincha sentenced Mrs. Puertocarrero to four years of imprisonment and a fine of 80 times the minimum wage. The case was sent for consultation to the Third Specialized Criminal Bench of the Superior Court of Justice of Quito on January 21, 2008, in accordance with the law in force. This court increased Mrs. Puertocarrero’s sentence to eight years of imprisonment.

17. The State initially maintained that domestic remedies had not been exhausted, inasmuch as the trial had not yet ended and once the sentence had been handed down by the Second Court of Pichincha and the consultation with the Superior Court of Justice completed, the remedies of cassation, nullity and revision needed to be exhausted. It also alleged that it is the ruling of the Superior Court of Justice that has legal effect and not the ruling of the Constitutional Court; therefore, the aforementioned remedies could be lodged in order to quash the said decision.

18. The State also states that the petitioners are attempting to induce the IACHR to serve as a court of review or a fourth instance for the criminal case that was tried in the domestic courts, and that [the IACHR] is not competent to determine the existence of a crime, much less to undertake any form of sentencing.

19. The State indicates that by Decision 002-2006-TC of September 26, 2006, the Constitutional Court ruled that “*detención en firme*” was unconstitutional, and that that decision does not have retroactive effects; rather, it affects only those legal situations that arose after the declaration of unconstitutionality, since that precept protects the principle of legal certainty—which is of interest to society—in addition to the principle of “*pro reo*”, which is based on the interest of the individual.

20. The State recognizes that the case of Mrs. Puertocarrero presented a unique situation with respect to application of the principle of “*pro reo*”; this principle holds that the criminal statute most favorable to the defendant will always be applied. In this case, since “*detención en firme*” had been declared unconstitutional, the detainee ought to have been set free immediately; this did not occur because the Constitutional Court’s ruling expressly stated that it was not retroactive.

21. Lastly, with regard to the petition for *habeas corpus*, the State acknowledged that it was in a process of institutional restructuring and the National Constituent Assembly was meeting to draft a new Constitution. As part of this process, the Office of the Attorney General informed the Assembly that domestic law was being harmonized with inter-American human rights law, and maintained that the constitutional guarantee of *habeas corpus* should be in accordance with international standards, and should be ruled on by a court or judicial authority and not by a Mayor.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. ANALYSIS OF ADMISSIBILITY

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

22. The petitioners are authorized by Article 44 of the American Convention to file petitions before the Commission. The petition names as the alleged victim an individual person in respect of whom the State of Ecuador has pledged to respect and guarantee the rights set forth in the American Convention. For the State’s part, 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. The Commission is therefore competent *ratione personae* to examine the petition. The Commission is competent *ratione loci* to consider the petition, since it alleges violations of rights protected under the American Convention that are said to have occurred in the territory of Ecuador, a State Party to said Convention.

23. The Commission is competent *ratione temporis* since the obligation to respect and ensure the rights protected in the American Convention was in force for the State as of the date on which the events alleged in the petition took place. The Commission is competent *ratione materiae* because the petition adduces possible violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

24. Article 46.1.a of the American Convention requires that, in order for a petition on alleged violation of the American Convention to be admissible, the remedies available under domestic law must first be exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to enable the national authorities to learn of the alleged violation of a protected right and, if appropriate, to have the opportunity to resolve it before it is taken up by an international body.

25. In the present case, the petitioners claim that they have exhausted domestic remedies, inasmuch as they presented a petition for *habeas corpus* to the Mayor, who denied it; that decision was in turn appealed to the Constitutional Court, which rejected it on February 15, 2007. Since the Constitutional Court is the final instance with competence to hear the specific violations alleged, they consider that domestic remedies have thus been effectively exhausted. They reiterate that they do not seek a ruling on the alleged victim's innocence or guilt, but rather a decision on the possible violations to the specific provisions of the American Convention they have alleged.

26. For its part, the State maintains that there was no effective exhaustion of domestic remedies, because it considers that the case against Mrs. Puertocarrero had not yet ended, inasmuch as once the Superior Court of Justice (in consultation) had ruled on the case, it was possible to file petitions for cassation, nullity and revision. It also alleges that the ruling on the unconstitutionality of the "*detención en firme*" is not retroactive in nature, and thus could not be applied in the case of this detainee since there was already a summons to trial.

27. It is up to the Commission, therefore, to clarify which domestic resources had to be exhausted in the present case. The Inter-American Court has noted that only those remedies that are adequate to remedying the violations allegedly committed need to be exhausted. That the remedies should be adequate means that:

The function of these remedies in a domestic law system is to be capable of protecting the legal situation that has been infringed. All domestic legal systems have many remedies but not all are applicable in all circumstances. If, in a specific case, the remedy is not adequate, it is obvious that it does not have to be exhausted. Thus states the principle that a statute is designed to produce an effect, and may not be interpreted as meaning that it would not produce any effect or that its outcome would be manifestly absurd or unreasonable¹.

28. As has been determined in other earlier cases regarding Ecuador, a petition for *habeas corpus* had to be filed with the Mayor or President of the Council². Here, both the Commission³ and the

¹ I/A Court H.R., *Case of Velásquez Rodríguez*. Judgment of July 29, 1988. Series C No. 4, para. 63.

² Article 19, number 17, subparagraph j) of the Ecuadorian Constitution of 1979.

³ IACHR, Report No. 139/10, P-139-10, Admissibility, Luis Giraldo Ordóñez Peralta, Ecuador, November 1, 2010, para. 29; IACHR, Report N° 66/01, *Dayra María Levoyer Jiménez*, Ecuador, June 14, 2001, paras. 78-81.

Inter-American Court have found that the presentation of a petition for *habeas corpus* to an administrative authority is not an adequate remedy under the standards of the American Convention⁴.

29. In the instant case, the Commission observes that the petition refers specifically to facts related to the alleged violations stemming from the illegal detention of Mrs. Daría Olinda Puertocarrero; to excessive use --for three years and ten months-- of pre-trial detention, and to the lack of effective judicial remedies available for acts such as those alleged. Moreover, the petitioners have been clear in stating that they are not challenging the criminal trial as such, nor requesting the IACHR to rule on the guilt or innocence of the alleged victim regarding the acts attributed to her.

30. Thus, consistent with its precedents on this matter, the Commission considers that at the time of the events, the petition for constitutional *habeas corpus* was not an effective remedy and as such, it was not necessary to exhaust it. Despite this, however, the petitioners did exhaust the remedy, since Ecuadorian law in force at the time of the events did not provide any other effective remedies for challenging the alleged violation of the victim's right to personal liberty. The State acknowledges that the petitioners exhausted the *habeas corpus* and appeal remedies in the manner they indicated, but alleges instead that the petitioners ought to have exhausted the extraordinary remedies available under domestic law to contest the sentence handed down in the criminal case against Mrs. Puertocarrero; however, the Commission observes that that was not the subject of the petition; those remedies are not required to be exhausted in order to comply with the requirements set forth by Art. 46(1)(a).

31. The Commission therefore finds that the domestic remedies to reverse the alleged violations were effectively exhausted by the decision of the Constitutional Court of February 15, 2007, which denied the writ of *habeas corpus* that was originally filed with the municipality and that was specifically directed at restoring to Mrs. Puertocarrero her right of personal liberty while the criminal case continued.

2. Time for presentation of the petition

32. Article 46.b of the American Convention provides that in order for a petition to be admissible, it must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment of the domestic courts. Article 32 of the Commission's Rules of Procedure provides that in those cases to which exceptions to the requirement of prior exhaustion of domestic remedies apply, the petition shall be presented within a reasonable period of time, as determined by the Commission.

33. In the present case, Mrs. Daría O. Puertocarrero H. was detained on July 16, 2004; the decision that ratifies the denial of the *habeas corpus* was taken on February 15, 2007; and the petition was received in the IACHR on July 16, 2007. As indicated above, the Commission considers that domestic remedies were exhausted with the decision of the Constitutional Court of February 15, 2007 on the *habeas corpus*, thus since that final decision was reached five months before the date the petition P-910-07 was received in the IACHR, it was lodged within the period required by the Convention.

⁴ I/A Court H.R., *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 128.

3. Duplication of international procedures

34. The case file contains no information that the present matter is pending in another international proceeding for settlement, or that it has previously been decided by the Inter-American Commission. The IACHR therefore concludes that the exceptions provided for in Articles 46.1.c and 47.d of the American Convention do not apply to this case.

4. Characterization of the facts alleged

35. For purposes of admissibility, the Commission must decide only whether the facts alleged might be characterized as a violation of rights, as provided in Article 47 (b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order" as stated in subparagraph (c) of the same article. The criterion for weighing those requirements differs from that required for a ruling on the merits of a petition. The Commission must undertake a *prima facie* assessment to determine whether the petition gives grounds for the violation, possible or potential, of a right guaranteed by the American Convention, but not to establish the existence of a violation of rights. This determination is an initial analysis that does not imply prejudging the merits of the matter⁵.

36. Neither the American Convention nor the IACHR Rules of Procedure require the petitioners to identify in the case filed with the Commission the specific rights alleged to have been violated by the State, although the petitioners may do so. It is up to the Commission to determine in its admissibility reports, based on the jurisprudence of the system, which provision of the pertinent inter-American instruments is applicable and might have been violated if the alleged facts or events are sufficiently proven.

37. Complaints are made in the present case regarding: the alleged continued illegal detention of the alleged victim on the basis of a concept in a legal statute that had been declared unconstitutional; the supposed lack of effectiveness of the judicial remedies available to remedy the alleged violations stemming from that detention –since the *habeas corpus* petition was filed with the Mayor (an administrative authority) who was not a judicial authority)–; the alleged disproportionate and excessive length of the pre-trial detention –for approximately three years and ten months–; and the possible violations of the right to a presumption of innocence and the right to be tried within a reasonable period of time.

38. Furthermore, taking into consideration the facts brought before the Commission by the parties with respect to the continued detention of the alleged victim after the ruling of unconstitutionality of the provisions on which the detention was grounded, and the potential distress caused over a prolonged period of time, the Commission considers that those matters should be analyzed in the merit stage of the instant case, in order to assess the possible breach of articles 5 and 9 of the American Convention.

⁵ See, *inter alia*: IACHR, Report No. 173/11, Petition 897-04, Alejandro Daniel Esteve and sons, Brazil, November 2, 2011, para. 43; IACHR, Report No. 3/11, P-491-98, Admissibility, Néstor Rolando López et al., January 5, 2011, para. 37; IACHR, Report No. 12/10, Case 12.106, Admissibility, Enrique Hermann Pfister Frías and Lucrecia Pfister Frías, Argentina, March 16, 2010, para. 46; IACHR, Report No. 10/10, Petition No. 214-08, Admissibility, Koempai et al., Suriname, March 16, 2010, para. 43.

39. Based on the arguments of fact and of law presented by the parties, the nature of the matter brought to its attention, and other precedents of similar nature, the IACHR finds that the facts alleged by the petitioners could be characterized as possible violations of the rights protected under Articles 5, 7, 8, 9 and 25 of the American Convention in accordance with Articles 1(1) and 2 thereof.

V. CONCLUSIONS

40. The Commission concludes that it has competence to examine the claims presented by the petitioner on the alleged violation of Articles 5, 7, 8, 9 and 25 in accordance with Articles 1(1) and 2 of the American Convention, pursuant to the requirements set forth in Articles 46 and 47 thereof.

41. Based on the arguments of fact and of law set out above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To rule the present petition admissible regarding Articles 5, 7, 8, 9 and 25 in relation to Articles 1(1) and 2 of the American Convention.
2. To notify the Ecuadorian State and the petitioner of this decision.
3. To continue with the analysis of the merits of the question.
4. To publish this decision and include it in its annual report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 4th day of November 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Dinah Shelton, Rose-Marie Antoine, Commissioners.