REPORT No. 108/13[1]
PETITION 4636-02
INADMISSIBILITY
JUAN ECHEVERRÍA MANZO AND MAURICIO ESPINOZA GONZÁLEZ
CHILE
November 5, 2013

I. SUMMARY

1. On December 17, 2002, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received[2] a petition presented by Francisco Cox Vial (hereinafter "the petitioner") alleging the international responsibility of the Republic of Chile (hereinafter "the State" or "Chile") for the retroactive enforcement of the Law on Administrative Probity (No. 19.653; hereinafter the "Probity Law"), the effect of which was the dismissal of Juan Echeverría Manzo and Mauricio Espinoza González (hereinafter "the alleged victims") from their positions as officers of the Chilean Investigations Police (hereinafter "PICH") .

2. The petitioner contends that the criminal and administrative proceedings brought against the alleged victims entailed possible violations of the rights to a fair trial, to the principle of legality, to private property, and to judicial protection enshrined in Articles 8, 9, 21, and 25 of the American Convention on Human Rights (hereinafter "the American Convention"), together with the obligation of respecting and ensuring those rights as set down in Article 1.1. The State claims that the filing is inadmissible because it is untimely, because domestic remedies have not been exhausted, because it does not tend to establish violations of the American Convention, and because, as it contends, the IACHR is not a court of appeal.

3. Without prejudging the merits of the case, after analyzing the positions of the parties and the requirements set forth in Articles 46 and 47 of the American Convention, the Commission decided that the claim is inadmissible under Article 47.a of the American Convention, in conjunction with Article 46.1.b thereof, in that the established deadlines were not observed. It also decided to notify the parties of this decision, to publish it, and to include it in its Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

4. The petition was registered as No. 4636-00 and was conveyed to the State for its comments on October 12, 2003. On January 16, 2005, October 5, 2005, and May 9, 2006, the petitioner submitted additional information. On June 5, 2006, the IACHR repeated its request for the State to present information. On June 23, 2006, the State requested that the IACHR provide it with a copy of the petition's case file, which was sent to the State on April 26, 2007. On November 21, 2006, the petitioner submitted additional information.

[1] In compliance with the terms of Article 17.2 of the Commission's Rules of Procedure, Commissioner Felipe González, a Chilean national, did not participate in discussing or deciding this petition.

[2] The petition was received by fax on December 17, 2002, and stamped as received on December 18, 2002.

5. On June 6, 2007, the State indicated that it had not received the relevant parts of the petition until May 25, 2007, and it requested an extension of the deadline for returning its comments; that request was granted by the IACHR on June 11, 2007.

6. On August 15, 2007, the State presented its response, which was forwarded to the petitioner. On March 11, 2008, the petitioner informed the IACHR that he had received no updates on the processing of the petition since the extension was granted to the State. On May 15, 2008, he was sent acknowledgement of the receipt of that communication. On September 1, 2009, the IACHR repeated its request for the petitioner to present information and, on September 2, 2009, the petitioner replied that the address used was incorrect and so he had not received the State's reply, but that regardless of that, he would not be commenting on the State's submission, since "that would only further delay the adoption of a decision." On September 24, 2013, the State's reply was again sent to the petitioner, and the petitioner's 2009 communication was forwarded to the state, for information purposes.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

7. The petitioner states that PICH officers Juan Echeverría Manzo and Mauricio Espinoza González were arrested on October 17, 1999, and November 27, 1999, respectively, for driving while under the influence of alcohol.

8. Regarding Mr. Espinoza, he indicates that on June 15, 2000, the Criminal Court of Limache convicted him for drunk driving and imposed a sentence of 61 days minor-level imprisonment in its minimum degree, with the additional penalty of suspension from public duties, and that he served that sentence. He states that by means of PICH Resolution No. 5, dated March 6, 2001, it was decided that he would serve the penalty of 61 days of suspension from employment from March 12 to May 11, 2001.

9. He claims that in parallel to the criminal trial, an administrative inquiry was opened to examine the reasons and circumstances of the facts for which the arrest took place. On June 18, 2001, that inquiry confirmed that a penalty of four days' confinement to barracks would be imposed. He further claims that notice was given of the alleged victim's irrevocable dismissal from service, effective on September 11, 2001, pursuant to Supreme Decree No. 212 of July 23, 2001, issued by the Ministry of Defense's Undersecretariat of Investigations.

10. The petitioner explains that this measure was grounded on the conviction of June 15, 2000, and on the Organic Constitutional Law of the General Bases for the Administration of the State (No. 18.575; hereinafter the "Organic Administration Law"), as amended by the Probity Law, which establishes the reasons for disqualification from public positions and the grounds for dismissal. He notes that Article 56.c of this law provides that persons convicted of crimes or misdemeanors may not enter public service.

11. He further notes that Article 66 provides that:

> Affected public servants shall report supervening disqualifications to their hierarchical superiors within ten days of the appearance of any of the grounds indicated in Article 56. Simultaneously they shall present their resignations from their positions or posts, except when the disqualification arises from the subsequent designation of a superior, in which case the subaltern shall be assigned to an office in which there is no hierarchical relationship. Failure to comply with this provision shall be punishable by the disciplinary sanction of dismissal.

12. He notes that this law was published in the Official Journal on December 14, 1999, which was after the date of the commission of the offense for which the criminal sanction was imposed.

13. Regarding Juan Echeverría Manzo, the petitioner reports that on April 17, 2000, that alleged victim was convicted and the same penalty was imposed. He further states that on May 16, 2000, Mr. Echeverría was notified by the administrative inquiry that he was subject to four days' confinement to barracks. He contends that these sentences were also served.

14. He states that on August 3, 2001, Mr. Echeverría was notified of the personnel chief's deed No. 2685, ordering his irrevocable separation from the agency, which was enforced on September 13, 2001, by means of Supreme Decree No. 217 of July 27, 2001, issued by the Ministry of Defense's Undersecretariat of Investigations.

15. The alleged victims filed constitutional protective remedies, holding that the prohibition on the retroactive enforcement of laws had been breached, thereby violating the alleged victims' constitutional rights to due process, and contending that the measure ordering their irrevocable dismissal had not arisen from administrative proceedings. It was claimed that the alleged victims were denied the right of defense, that the hearing was one-sided, and that their right to property had been violated.

16. On October 26, 2001, the Santiago Court of Appeal dismissed Mr. Espinoza's protective remedy filing; an appeal was lodged with the Supreme Court on November 2, 2001, which was dismissed on December 4, 2001, finding that the PICH had acted within its authority. The Supreme Court also ruled that the right of property did not apply to jobs, and so the remedy was not admissible with respect to the right of employment.

17. The protective remedy filed by Mr. Echeverría was dismissed on October 17, 2001, and the appeal was dismissed on October 25, 2001, when the appeal court found that "the disqualification in this case is grounded on the conviction for a crime or misdemeanor, and not on the offense itself."

18. In November 2001, the petitioner filed administrative remedies on behalf of the alleged victims with the office of the Comptroller General of the Republic (hereinafter "the Comptroller's Office"), challenging the Court of Appeal's contention that the police authority had acted legally. Those remedies petitioned the Comptroller to annul the Supreme Decrees ordering the alleged victims' dismissals on the grounds that they were unconstitutional and illegal in that they retroactively enforced the Probity Law.

19. The Comptroller's Office replied that it was unable to rule on the matter because there was a protective remedy still pending. On June 17, 2002, once the protective remedies had been dismissed, the Legal Division of the Comptroller's Office stated that to determine whether it was now competent to rule on the filing, it would have to examine the sentences whereby the remedies were

dismissed. In Mr. Echeverría's case, the Comptroller's Office decided that "the judgment of the Santiago Court of Appeal […] was based on its finding that the authority's decision to terminate the appellants' services was in accordance with the law," for which reason it again declined to rule on the matter.

20. In Mr. Espinoza's case, the Comptroller's Office decided that "since this latter judgment was not grounded on substantive issues related to the dismissal of Mr. Espinoza González, it now falls to this Comptroller's Office to rule on his claim." The petitioner claims, however, that the Comptroller's Office did not address the alleged retroactive enforcement of the law, but merely the inapplicability of the benefit of conditional suspension of the sentences that had been handed down against the alleged victims.

21. The petitioner contends that domestic remedies were exhausted with the protective remedies and the administrative filings that were presented, and that, although these were the ideal remedies, they were not effective in that they were dismissed on merely formal grounds.

22. The petitioner holds that the alleged victims were punished with their irrevocable dismissal from the police force – the severest sanction available to administrative venues – without respecting the guarantees established in Article 8 of the American Convention, in that a "mechanical and capricious enforcement [was made] of the Probity Law, altering the consequences of a conviction for a simple crime." He holds that the authorities cannot "issue administrative sanctions without granting the punished parties the guarantees of due process"[3] and that the alleged victims "faced no administrative proceedings prior to the punishment of dismissal."[4]

23. In addition, he claims that the State violated the freedom from the *ex post facto* enforcement of punitive laws enshrined in Article 9 of the American Convention and the right to an effective judicial remedy, established in Article 25 thereof.

II. Position of the State

24. The State claims that the petition is inadmissible because it is untimely and because the domestic remedies have not been exhausted. It further contends that it contains no violations of the American Convention and that the IACHR cannot serve as a fourth instance.

25. Chile notes that Mr. Espinoza was arrested on November 27, 1999, and that on November 29, an administrative inquiry was opened against him. In addition, he faced criminal prosecution for driving under the influence of alcohol, which concluded with his conviction on June 15, 2000, whereby he was sentenced to 61 days minor-level imprisonment in its minimum degree and, additionally, to the penalty of suspension from public duties for the duration thereof.

26. Chile also contends that the inquiry into Mr. Echeverría concluded with the conviction of April 4, 2000, issued by the Second Criminal Court of Melipilla, with the same penalty. It notes that upon being notified of the judgment, Mr. Echeverría informed the PICH authorities, which informed him on May 16, 2000, that he was subject to four days' confinement to barracks as a disciplinary measure.

[3] To support his arguments, the petitioner cites: I/A Court H. R., *Case of Baena*, Judgment of February 2, 2001.

[4] To support his arguments, the petitioner cites: I/A Court H. R., *Case of Baena*, Judgment of February 2, 2001.

27. It states that on August 29, 2000, the Comptroller's Office issued its ruling No. 33.122, establishing that Article 56 of the Organic Law of the Administration contained a basic provision that was binding on all the services subject to its terms and that must prevail over all other provisions in force at the time of its enactment that might provide for less strict disqualifications, such as Article 86 of the 1980 Decree with the Force of Law No. 1, the PICH Personnel Statute (hereinafter "D.F.L. No. 1/80"); consequently, it holds that the aforesaid legal provision had lost its legal effectiveness.

28. Chile indicates that the aforesaid Article 86 provides that:

> No public servant convicted by an enforceable judgment for committing a crime warranting a prison term, in the performance of his duties or by making use of his position, may continue on active service, even if pardoned.[5]

29. Chile states that in ruling No. 23.882, the Comptroller's Office stated that the disqualification from service in the public administration was on account of the existence of a conviction against the person in question, which disqualified that person from entering the service of the police and, in general, of the public administration. In addition, it states that as supervening grounds, the person is prohibited from remaining in the administration if, at the time judgment was handed down, he held the position of a public employee, regardless of whether the sentence had been served or not.

30. Chile reports that the PICH proceeded with the dismissals of all those officers who, as of December 14, 1999, had been convicted for crimes or misdemeanors and had not presented their resignations within ten days following execution of the resolution regardless of effective compliance with the penalty, pursuant to Article 91.d of D.F.L. No. 1/80. Those dismissals had been ordered by the President of the Republic, by means of a Supreme Decree, since they were presidential appointments. In addition, Chile notes that on November 22, 1999, the Constitutional Court ruled the Probity Law to be constitutional.

31. Mr. Espinoza's inquiry concluded on June 18, 2001, with the disciplinary punishment of four days' confinement to barracks, and he was notified of that decision on July 25, 2001.

32. It states that as a consequence of the criminal judgment handed down against Mr. Espinoza, on June 29, 2001, the PICH ordered his irrevocable dismissal pursuant to Law No. 18.576, as amended by the Probity Law. He was notified of this on July 11, 2001. The Supreme Decree ordering the dismissal was issued on July 16, 2001, and he was notified of this on July 25, 2001.

33. Mr. Espinoza lodged a protective remedy against the PICH's decision with the Valparaíso Court of Appeals, but that court ruled itself incompetent and referred the matter to the Santiago Court of Appeals; in turn, this second court dismissed the filing on October 26, 2001, finding that there had been no illegal or arbitrary action on the part of the police authorities. That judgment was upheld by the Supreme Court on December 4, 2001. The alleged victim made a submission to the Comptroller's Office, which refrained from issuing judgment because it was unable to intervene in matters under litigation.

34. Regarding Mr. Echeverría, Chile states that by means of deed No. 801/44 of July 12, 2001, the General Directorate of the PICH ordered his irrevocable dismissal, for which it requested the

[5] The record indicates that this provision only covers disqualification for crimes punishable by prison terms, and not more serious crimes.

Minister of Defense to issue the corresponding administrative order. On August 3, 2001, he was notified of his dismissal. The Supreme Decree ordering the dismissal was based on his criminal conviction and on the Probity Law. On August 22, 2001, the Comptroller's Office took cognizance of that decree and the measure was enforced on September 13, 2001.

35. Chile reports that Mr. Echeverría lodged a protective remedy with the Court of Appeals, which was dismissed on October 17, 2001; he filed no appeal against that decision, and so the ruling became final on November 6, 2001. It notes that in response to an administrative remedy lodged with it, the Comptroller's Office stated, on June 17, 2002, that it was refraining from issuing a ruling because the case had been settled by the Court of Appeal.

36. Chile holds that the right of freedom from *ex post facto* laws was not violated in that the grounds for the disqualification was the conviction for the crime or misdemeanor and not the criminal act that gave rise to that conviction. It adds that following the entry into force of the Probity Law, a conviction for a crime or misdemeanor, be it publicly actionable or not, was enough for entering or remaining in the PICH.

37. It holds that there was no violation of Article 8 of the American Convention as alleged, since under Chilean law, administrative decisions can be challenged pursuant to Article 10 of the Organic Administration Law. It further contends that there was no violation of Article 25, given that the alleged victims made use of such effective resources as the protective remedy and their other filings with the Comptroller's Office. It holds that the failure to receive a favorable result cannot justify disregarding the judicial remedies that were used.

38. In addition, Chile claims that the alleged victims did not make use of claim remedies or hierarchical remedies to challenge the administrative decisions. It also contends that neither did they make use of the invalidation remedy provided for in Chilean law since May 2003, and so they neither filed nor exhausted all the domestic remedies. It holds that the exceptions to the exhaustion requirement do not apply to this petition, since there were no barriers to their access, since there was no delay in their resolution, and since the provisions of Chilean domestic law are adequate.

39. Chile maintains that there was no violation of the American Convention since the alleged victims should have acted in accordance with the "dignity of their positions and with the disciplinary regulations," and so they cannot pursue international action to avoid being punished by a provision that is in line with domestic law. It holds that the petition is groundless to allege the State's responsibility because it entails no rights violations; rather, it entails a due correlation between the basic rights and duties of people, particularly public officials.

40. It further contends that the petition seeks an additional instance to rectify the alleged victims' dismissal, which was done in accordance with due process, did not violate the prohibition of retroactive enforcement, and provided ample time for them to make use of the relevant administrative remedies.

41. Chile also notes that the IACHR's communication to the State is dated April 26, 2007, and that the final ruling was given by the Comptroller's Office on June 17, 2002, and therefore the petition is untimely. It holds that even had the deadline began to run on December 12, 2003 (the date on which the State failed to receive the IACHR's fax communication), the requirement would still not have been met.

IV. ANALYSIS

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

42. The petitioner is entitled to lodge petitions with the Commission under the terms of Article 44 of the American Convention. The petition names, as its alleged victims, individuals with respect to whom the State has assumed the commitment of respecting and ensuring the rights enshrined in the American Convention. In addition, Chile has been a state party to the Convention since August 21, 1990, when it deposited its corresponding instrument of ratification. The Commission therefore has competence *ratione personae* to examine the petition.

43. The Commission is competent *ratione loci* to examine the petition, since it contains allegations of violations of rights protected by the American Convention that took place within the territory of a state party to that treaty. The IACHR is competent *ratione temporis*, since the obligation of respecting and ensuring the rights protected by the American Convention was in force for the State on the date that the alleged violations occurred. Finally, the Commission has competence *ratione materiae* since the petition describes violations of human rights that are protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

44. 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. 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 the 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.

45. According to the Commission's Rules of Procedure, and as the Inter-American Court has established, whenever a State claims that a petitioner has not exhausted the relevant domestic remedies, it is required to identify the remedies that have not been exhausted and to demonstrate that they are "suitable" for remedying the alleged violation and that their function within the domestic legal system is applicable to protecting the violated juridical situation.[6]

46. Thus, the State claims that the alleged victims did not make use of claim remedies or hierarchical remedies to challenge the administrative decisions. It also holds that they did not make use of the invalidation remedy, and so not all the domestic remedies were invoked or exhausted. In contrast, the petitioner contends that the domestic remedies were exhausted with the protective and administrative remedies.

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

47. The Commission notes that the matter of this petition is the penalty of dismissal imposed on the alleged victims through the alleged retroactive enforcement of the Probity Law. Specifically, the petition claims that the Supreme Decrees of the Ministry of Defense were arbitrary and affected the alleged victims' fundamental rights to a fair trial, to the principle of legality, to judicial protection, to equality before the law, and to private property.

48. The Commission notes that after those decrees were issued, the alleged victims filed protective remedies against them, believing that the prohibition on the retroactive enforcement of punitive laws had been breached. On October 26, 2001, the Santiago Court of Appeal dismissed Mr. Espinoza's protective remedy; he appealed that decision on November 2, 2001, and the appeal was, in turn, rejected on December 4, 2001. The protective remedy filed by Mr. Echeverría was dismissed on October 17, 2001, and the appeal, in turn, was dismissed on October 25, 2001.[7] Consequently, in light of the characteristics of this petition, the Commission finds that the remedies offered by domestic law were exhausted, for Mr. Espinoza, with the judgments of the Supreme Court of December 4, 2001, and, for Mr. Echeverría, with the dismissal handed down by the Supreme Court.

49. As for the claim, hierarchical, and invalidation remedies to which the State refers, the Commission again states that it is not necessary to exhaust all the resources available in national law, but only those that are suitable for effectively remedying the alleged harm.[8] The Commission notes that the petitioners chose to file protective remedies to challenge the Supreme Decrees in question and the alleged human rights violations.

50. Irrespective of this, the Commission also notes that after filing those judicial resources, the alleged victims filed administrative remedies against the same Supreme Decrees with the Comptroller's Office. The Comptroller's Office responded on June 17, 2002. With respect to Mr. Espinoza, it only ruled on the inapplicability of the conditional suspension of sentence that he had received. In Mr. Echeverría's case, the Comptroller's Office refrained from issuing an opinion since "the judgment of the Santiago Court of Appeal […] was based on its finding that the authority's decision to terminate the appellants' services was in accordance with the law."

51. The Commission notes that the administrative resources filed after the judicial decisions are not jurisdictional remedies in the terms of the American Convention and that they are not suitable for protecting the alleged human rights violations set out in this petition, in that they are not effective in the sense used by the established precedents of the inter-American system.[9]

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[7] Decision published at http://corte.poderjudicial.cl.

[8] I/A Court H. R., *Case of Velásquez Rodríguez v. Honduras*, Judgment of July 26, 1987, Series C No. 1, para. 64; *Case of Fairén Garbi and Solís Corrales v. Honduras*, Judgment of June 26, 1987, Series C No. 2, para. 88; and *Case of Godínez Cruz v. Honduras*, Judgment of June 26, 1987, Series C No. 3, para. 88.

[9] See: IACHR, Ejido "Ojo de Agua" v. Mexico, Petition 11.701, Report No. 73/99, OEA/Ser.L/V/II.106 doc. 3 rev. in 316 (1999), para. 16; and Report No. 36/05 (Inadmissibility), Petition 12.170, Fernando A. Colmenares Castillo, Mexico, March 9, 2005, paras. 38-39.

2. Timeliness of the petition

52. The American Convention requires that for the Commission to admit a petition, it must be lodged within a period of six months from the date on which the alleged victim of a rights violation was notified of the final judgment.

53. The State claims that the petition is untimely because the communication whereby it finally received the petition was dated April 26, 2007, and the decision of the Comptroller's Office was adopted on June 17, 2002, and so the six-month deadline was not observed.

54. In performing its analysis, the IACHR uses the date on which the petition was lodged with it and the notification date of the final decision in the exhausted domestic judicial remedy. The Commission notes that the petition was presented to it on December 17, 2002, and the Supreme Court dismissed Mr. Espinoza's appeal on December 4, 2001, while Mr. Echeverría's appeal was dismissed on October 25, 2001. Hence, the petition does not meet the six-month deadline set by Article 46.1.b of the American Convention and is consequently inadmissible.

55. The Commission refrains from examining the other admissibility requirements set out in the American Convention because they have been rendered moot.[10]

V. CONCLUSIONS

56. Based on the foregoing considerations of fact and law, the Commission believes that the petition is inadmissible under Article 47.a of the American Convention, due to the failure to lodge the petition in a timely fashion. Consequently,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the petition under review inadmissible, pursuant to Article 47.a of the American Convention.

2. To give notice of this decision to the State and to the petitioner.

3. To publish this decision and to include it in its Annual Report, to be presented to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 5th day of November 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Dinah Shelton, Rodrigo Escobar Gil and Rose-Marie Belle Antoine, Commissioners.

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