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REPORT No. 56/16
PETITION 666-03
REPORT ON ADMISSIBILITY

LUIS ALBERTO LEIVA
ARGENTINA

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ADMISSIBILITY REPORT
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DECEMBER 6, 2016

I. SUMMARY

1. On August 28, 2003, the Inter-American Commission on Human Rights (hereinafter, “the Inter-American Commission,” “the Commission” or “the IACHR”, received a petition lodged by the Center for Legal and Social Studies (CELS) –who later withdrew from legal representation–, and the Center for Justice and International Law (CEJIL) (hereinafter, “the petitioners”) against Argentina (hereinafter “Argentina” or “the State”). The petition was filed on behalf of Luis Alberto Leiva (hereinafter, “the alleged victim” or “Mr. Leiva”).

2. The petitioners argue that the rights of the alleged victim to be judged by an impartial tribunal, to have a judgement reviewed by a higher court and to have his appeals processed within a reasonable time were violated in the proceedings filed to remove him from his office as a Federal Judge. In turn, the State argues that the case must be filed, because the petition was referred to the State out of time, and that Mr. Leiva was lawfully removed, in conformity with the mechanisms provided by the law, and allowed to seek a judgement review.

3. Without prejudging the merits of the complaint, after examining the position of the parties and pursuant to the requirements established in Articles 31 to 34 of the IACHR’s Rules of Procedure (hereinafter, “the Rules”) and in articles 46 and 47 of the American Convention on Human Rights (hereinafter, “the American Convention” or “the Convention”), the Commission decides to declare the petition admissible in order to assess the allegations regarding the alleged violation of the rights set forth in Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention in agreement with Articles 1.1 and 2 of the same treaty. The Commission moreover decides to notify the parties of its decision, to publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE IACHR

4. The IACHR received the petition on August 28, 2003 and in its first assessment, the Commission requested additional information on January 4, 2006; the request was answered on January 18, 2006. The petitioners also sent additional information on December 10, 2009. On February 2, 2010 the IACHR sent the State the pertinent parts of the complaint and additional information received during the first assessment, and a request for observations to be answered within two months, in accordance with Article 30.3 of the Commission’s Rules then in force. On October 4, 2011 the State’s reply was received; it was transmitted to the petitioner on December 28, 2011.

5. The petitioners sent additional observations on May 11, 2012 after requesting a postponement when CELS withdrew from the alleged victim’s representation and CEJIL was left as the only petitioner. In turn, the State sent additional observations on February 25, 2013. These observations were duly sent to the other party.

6. On November 7, 2016 the Commission sent the petitioner a warning on the possible filing of the petition pursuant to provisions in Article 42 of its Rules of Procedure. On the same day, the petitioner sent a reply saying that the grounds of the petition persist, and requesting that the IACHR continue working on the processing of their petition.

III. POSITION OF THE PARTIES

A. Position of the petitioners

7. The petitioners affirm that Mr. Leiva used to work as a judge in Federal Court No. 1 of the City of Mendoza. They say that his rights were violated in the proceedings whereby he was dismissed from said office, as these were presided by a tribunal that was not impartial and that allegedly violated the rights to due process. In addition, they inform that the law applied to this case does not allow for a full review of the judgement and that there were unnecessary delays in the processing of the appeals filed.

8. The petitioners find that most of the charges against the alleged victim are a consequence of his participation as a judge in the case “Bank of Mendoza II” –a politically sensitive case in which he investigated the irregular management of the bank which led to asset-stripping and the eventual closure. They say that in this case, there was a dispute about who was competent to hear the case, since both the judge from Mendoza and the judge from Buenos Aires considered themselves competent. The petitioners say that this was solved by the National Supreme Court of Justice of Argentina (hereinafter, “CSJN” or “the Court”) who declared the judge from Buenos Aires competent. In this decision, Moliné O’Connor, Justice of the Court (hereinafter, “Minister Moliné”), considered that the alleged victim was guilty of wrongdoing, on the grounds that he had wrongfully claimed competence over the case.

9. They say that after Mr. Leiva became involved in the case, complaints were suddenly filed against him; 22 complaints in all. On November 22, 2001 Mr. Leiva was notified of the proceedings brought against him, and the names of the members of the Jury for the Prosecution (hereinafter, “the Jury”), which would conduct the removal procedure and was presided by Minister Moliné.

10. According to the petitioners, the Jury was not impartial due to Minister Moliné’s participation, because it was after a decision in which he had participated that Mr. Leiva was accused of wrongdoing. In addition to this, they say that when Minister Moliné was cross-examined by the Chamber of Deputies about his underperformance of duties in the case “Bank of Mendoza II,” he said negative comments in public about Mr. Leiva. In this regard, they say that when Minister Moliné was prosecuted, his defense strategy consisted in accusing Mr. Leiva of underperformance of duties, under the logic that someone’s good performance of duties in the case “Bank of Mendoza II” necessarily meant the underperformance of others. They say that these are the reasons causing a conflict of interest in that Minister Moliné presided over the Jury that carried out the removal procedure against the alleged victim.

11. They say that on November 22, 2001 the alleged victim was notified of the proceedings brought against him along with the names of the members of the Jury, and that on December 3, 2001 he filed an objection to Minister Moliné that was rejected on December 13, 2001. They say that on March 19, 2002 Minister Moliné disqualified himself in the oral and public hearing, but this was unanimously rejected. They argue that immediately after this, Mr. Leiva objected to the judge again and this was also rejected by the other members of the Jury. They say that on April 5, 2002 Mr. Leiva filed another objection to Minister Moliné and that it was finally accepted.

12. On May 9, 2002, the Jury decided to remove Mr. Leiva from his office as a Federal Judge after finding him guilty of underperformance of duties in only one of the 22 charges against him –the other charges were unanimously dismissed. In this regard, they say that he was found guilty of the accusation regarding the case “*Policía de Mendoza s/ preventivo*,” for not disqualifying himself immediately from a case in which he was an alleged victim of the fact reported therein.

13. The petitioners allege that, even though Minister Moliné took no part in the Jury’s decision of removing the alleged victim from office, his removal from the case was late, as it took place during the final stages of the trial and only the closing allegations were pending. As a result, they allege that Minister Moliné’s performance throughout the whole procedure damaged the Jury’s impartiality.

14. The petitioners argue that both Article 115 of the Argentine Constitution and Article 27 of the law of removal of judges, law no. 24937, are contrary to international law, in that they forbid appeals against the decisions of the Jury.

15. Despite that legal impediment, the petitioners filed two extraordinary appeals: a federal extraordinary appeal and a complaint appeal against the refusal of the federal extraordinary appeal. They say that the former had been rejected before a complaint was filed before the IACHR on June 11, 2002, and that the latter was processed later on May 19, 2009 and rejected. The petitioners affirm that there was violation of the term of reasonable time, because the complaint appeal was decided upon only seven years after it was lodged, although the case posed no need for delays.

16. The petitioners argue that not only is it impossible to file ordinary appeals against the Jury's decision, but also that extraordinary appeals accepted by the jurisprudence, though not by the law, are subjected to a too strict review criteria. In this regard, they say that according to the jurisprudence of the Supreme Court in the case "Nicosia," a decision of the Jury will be reviewed only when there is 'precise, unequivocal and conclusive' evidence of the breach of procedural norms.

17. In view of this, the petitioners argue that, to the detriment of the alleged victim, the State violated the rights enshrined in Articles 8 and 25 of the American Convention in agreement with Articles 1.1 and 2 of this same treaty.

B. Position of the State

18. The Argentine State argues that the petition was referred to the State out of time, and requests that it be filed. It says that the petition was lodged on August 28, 2003 and that the State took note of it only six years and a half later. In addition, the State requests that the petition be declared inadmissible, since it finds that the Jury was impartial, that the alleged victim was able to appeal the judgement and that there was no violation of the reasonable term. The State, therefore, affirms that Mr. Leiva was removed from office in conformity with the mechanisms provided by the law and in protection of all of his rights.

19. Regarding the arguments in the petition, the State alleges that in this case the right to due process was protected, since all provisions in the Prosecution law, Law no. 24937, were abided by, and says that the Jury was presided over by a Minister of the Supreme Court, as set forth by the law in its 22nd Article.

20. The State reminds the Commission that an impeachment aims not to punish a person but to remove them from office for the safeguard of public interests, and that it is not a judicial procedure but a political one.

21. Concerning the ability to have the case reviewed, the State believes that although it was historically understood that the prosecution procedure was a non-actionable political issue, over the years this situation changed along with the jurisprudence of the CSJN. This change became manifest in the case "Nicosia". This judgement set down the criterion that a decision by a Jury for the Prosecution can be subjected to review when the interested party is able to prove a violation to due process. The State sees that due to the specificity of the concept of impeachment, only obvious violations of basic aspects of the right to legal representation could be heard before a court, as long as this can be proved by the petitioner, who must also prove that the redress of the damage can lead to reverse the judgement.

22. The State says that the petitioner was able to file appeals, in accordance with the statements by the alleged victim, and that the Court overruled the appeal of complaint.

23. The State stresses that the CSJN, working with impartiality and made up of justices, did not straightforwardly dismiss the violations alleged by the petitioner, but believed that it had to assess them. The Court rejected the appeal of complaint after the unanimous vote of its members, as they found that Mr. Leiva's charges were final charges, that he was able to use procedural mechanisms to defend himself before an impartial court, and that the judgement was made by the corresponding body. The Court concluded that there

was no 'clear, unequivocal and conclusive' proof of the breach, and that, consequently, there were no federal issues that required its intervention.

24. As a result, the State alleges that it cannot be said that the proceedings were arbitrary, as they were carried out by the legal and legitimate body to do this, and the judgement was later reviewed by a court.

25. It says that the rights and guarantees set forth in Article 8 of the Convention were observed in this case, since the alleged victim was able to access useful judicial remedies in the domestic venue, in conformity with the right to due process, to find if there had been a human rights violation and to do as necessary to reverse it. In addition, the mechanisms in the domestic venue, in conformity with international rules, have been duly applied, giving adequate solutions to Mr. Leiva. The State argues that what the petitioners seek is to resort to the IACHR as a fourth instance, and that this is contrary to the international legal framework. It believes that no violations of rights protected by the Convention have been reported.

26. To conclude, the State states that the petition must be filed as it was referred to the State out of time, and requests it be declared inadmissible on the grounds that there was no violation of the right to due process and that the alleged victim was able to appeal the judgement that removed him from office.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

27. Under Article 23 of the IACHR's Rules and Article 44 of the American Convention, the petitioners are entitled to lodge complaints with the Commission. In the petition, the alleged victim is an individual person whose rights are protected under the American Convention, which the State of Argentina is bound to abide by. As to the State, the Commission declares that it is a State Party to the Convention since September 5, 1984 when it deposited its instrument of ratification of said treaty. As a result, the Commission is competent *ratione personae* to examine the petition. The Commission is also competent *ratione loci* to assess the petition, in so far as it alleges violations that seemingly occurred within the territory of Argentina.

28. The Commission is competent *ratione temporis*, since by the time the facts alleged are said to have taken place, the State was already bound to respect and ensure the rights protected by the Convention. Finally, the Commission is competent *ratione materiae* regarding the alleged violations of human rights protected by the Convention.

29. The Inter-American Commission takes note of the State's claim about the failure to refer the petition within the stipulated period. In this regard, the IACHR says that after receipt there is no deadline for the referral of petitions to the State, under the American Convention and the Commission's Rules. Deadlines established by the Rules and the Convention for other stages in the processing do not apply by analogy¹.

B. Admissibility requirements

1. Exhaustion of domestic remedies

30. Under Articles 31.1 of the Rules and 46.1.a) of the American Convention, for a petition to be admissible, domestic remedies must have been pursued and exhausted, in accordance with generally recognized principles of international law. This requirement is aimed at enabling national authorities to take cognizance of the alleged violation of a protected right and, if applicable, reverse the situation before it is heard by an international body.

¹ Accord I/A Court H. R., *Case of Mémoli v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 22, 2013. Series C No. 265, paras. 30-33.

31. The petitioner alleges that the Argentine law does not allow the filing of appeals against a removal judgement. Despite this, and seeing that under the jurisprudence judgements can be exceptionally reviewed, the petitioner filed two extraordinary appeals and sees that domestic remedies have been exhausted. In turn, the State does not challenge the exhaustion of domestic remedies and argues that a higher court reviewed the Jury's judgement.

32. The IACHR sees that the alleged violations mentioned by the petitioners are the violation of the rights to due process and to a comprehensive judgement review by a court. The aim of the prior exhaustion of domestic remedies is allowing national authorities to take note of the alleged violation of a protected right and, if applicable, reverse the situation before it is heard by an international body. Consequently, the Commission finds that several State courts had the opportunity to hear the allegations filed by the alleged victim, regarding both the request for a comprehensive review of the condemning judgement as well as the other alleged violations of due process.

33. As a result, the Commission concludes that in this case, domestic remedies have been pursued and exhausted in conformity with Articles 46.1 (a) of the American Convention and 31.1 of the Rules.

2. Timeliness of the petition

34. Under Articles 46.1 (b) of the American Convention and 32.1 of the Rules, for a petition to be declared admissible by the Commission, it must be lodged within a period of six months from the date on which the alleged victim was notified of the final judgment. The petition was lodged with the IACHR on August 28, 2003 and the domestic remedies exhausted on May 19, 2009 when the Supreme Court decided to reject the appeal of complaint –at that time, the petition was under assessment for admissibility. In accordance with the doctrine of the IACHR, the analysis concerning the requirements set forth in Articles 46.1 (b) of the Convention and 32.1 of the Rules, shall be done in light of the situation existing at the moment when it decides on the admissibility or inadmissibility of the petition². In view of this, the Commission finds that the requirement has been met.

3. Duplication of proceedings and International *res judicata*

35. From the case file, there is nothing to indicate that the subject matter of the petition is pending in another international proceeding for settlement or that it duplicates a petition already examined by this or another international body. Therefore, inadmissibility requirements set forth in Articles 46.1 (c) and 47 (d) of the Convention and Articles 33.1 (a) and 33.1 (b) of the Rules do not apply.

4. Colorable claim

36. The Commission must decide if the facts alleged tend to establish a violation of protected rights, under Articles 47 (b) of the American Convention and 34 (a) of the Rules of Procedure, or if the petition is 'manifestly groundless' or 'obviously out of order,' under Articles 47 (c) of the American Convention and 34 (b) of the Rules. The assessment criteria for admissibility differs from that used for the assessment of the merits of the petition, since the Commission only undertakes a *prima facie* assessment to determine whether the petitioners have established the apparent or possible violation of a right protected by the American Convention on Human Rights. It is a general analysis not involving a prejudgment of, or issuance of a preliminary opinion on the merits of the matter.

37. Moreover, the corresponding legal instruments do not require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its

² IACHR, Report No. 15/15, Petition 374-05. Members of the Trade Union of Workers of the National Federation of Coffee Growers of Colombia. Colombia. March 24, 2015, para. 41. Accord I/A Court H.R., *Case of Wong Ho Wing v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2015. Series C No. 297. paras. 25-28.

admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

38. The petitioners argue that Mr. Leiva's rights to an impartial court, appeal of judgement and timely processing of remedies were violated in the removal procedure followed against him. In turn, the State holds that the removal procedure did not violate any of the alleged victim's rights, as it was done in conformity with the law, and the decision made by the Jury was subjected to judicial review.

39. In view of the elements of fact and law filed by the petitioners, along with the nature of the matter brought to its attention, the IACHR believes that, if proved, the facts alleged may tend to establish a possible violation of human rights protected by Articles 8 and 25 of the American Convention in agreement with Articles 1.1 and 2 of said treaty.

V. CONCLUSIONS

40. Based on the above elements of fact and law, the Inter-American Commission concludes that this petition meets the admissibility requirements set forth in Articles 31 to 34 of the Rules and Articles 46 and 47 of the American Convention, and without prejudgment of the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible with regard to Articles 8 and 25 of the American Convention in accordance with Articles 1.1 and 2 of said treaty.
2. To notify the parties of this decision;
3. To proceed to the analysis of the merits of the matter; and
4. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Panama, on the 6th day of the month of December, 2016. (Signed): James L. Cavallaro, President; Francisco José Eguiguren, First Vice President; Margarete May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, Esmeralda E. Arosemena Bernal de Troitiño and Enrique Gil Botero, Commissioners.