

**REPORT No. 139/10**  
PETITION 11.510  
ADMISSIBILITY  
LUIS GIRALDO ORDÓÑEZ PERALTA  
ECUADOR  
November 1, 2010

**I. SUMMARY**

1. On November 4, 1994, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition lodged by the Ecumenical Commission for Human Rights - CEDHU (hereinafter “the petitioners”) alleging the responsibility of the Republic of Ecuador (hereinafter “the State, “the Ecuadorian State,” or “Ecuador”) for the illegal deprivation of physical liberty and other violations of the right to personal liberty, and the right to a fair trial and judicial protection and the lack of compensation to the detriment of Luis Giraldo Ordóñez Peralta, since March 26, 1993 in the city of Quito.

2. The petitioners allege that the State was responsible for the violation of the articles 7, 8, and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) in connection with its Article 1.1. For its part, the State alleged that the trial phase of the case began on November 14, 1994; the State has not made any additional observations.

3. After analyzing the parties’ positions and compliance with the requirements established in Articles 46 and 47 of the American Convention, the Commission decided to declare the petition admissible in order to examine the alleged violation of Articles 7, 8, and 25 in connection with Articles 1.1 and 2 of the American Convention. It also decided to notify the parties of the report, and to publish it in its annual report.

**II. PROCESSING BY THE COMMISSION**

5. On November 8, 1994, the IACHR received the petition, which registered it with number 11.510. After it made a preliminary analysis, it sent a copy of the pertinent parts to the State for its comments on July 17, 1995. On February 21, 1996, the State submitted its response, which was forwarded to the petitioners for their comments. On May 8, 1996, the petitioners sent their observations, which were transmitted to the State.

6. On February 9, 1999, the IACHR placed itself at the disposal of the parties to seek a friendly settlement. On October 24, 2008, the petitioners responded to the IACHR that it had not been possible to reach a friendly settlement, “so the case could be archived if the Commission considered that appropriate.” On April 16, 2009, in order to clarify whether the petitioners were seeking an end to the friendly settlement process or the archiving of the petition, the IACHR asked them if the grounds for the petition no longer exist, in which case it could be archived. On June 12, 2009, the petitioners requested the continuation of the petition’s processing; this was communicated to the State for its observations on June 19, 2009, giving it one month to respond. On July 16, 2010, the State asked the IACHR for a copy of the case file, which was sent to the State on July 21, 2010. As of the date of approval of this report, the State has not responded.

**III. POSITIONS OF THE PARTIES**

**A. Position of the petitioners**

7. The petitioners state that Luis Giraldo Ordóñez Peralta was arrested in March 1993, accused of drug trafficking, and the case was referred to the Tenth Criminal Court in Pichincha after the police report was completed. They allege that during the investigation Luis Ordóñez was not granted the assistance of a public defense counsel.

8. They allege that on February 7, 1994, days after the prosecutor issued a report without accusing Luis Ordóñez, the Tenth Court handed down a provisional dismissal in his favor, 330 days after his arrest. They indicate that in accordance with the terms of the 1990 Law on Narcotic and Psychotropic Substances (hereinafter the "Narcotics Law") it was not possible to release a person granted dismissal until the sentence was reviewed by the Superior Court. They state that the case was therefore taken up by the Fifth Chamber of Quito's Superior Court.

9. They allege that the Provincial Prosecutor in the Superior Court filed charges on June 2, 1994, and the Fifth Chamber of Quito's Superior Court revoked the provisional dismissal order and declared the plenary trial stage open on November 14, 1994. They indicate that the First Criminal Court of Pichincha heard the case and acquitted the defendant on February 1, 1995, a sentence upheld by the Fifth Chamber of the Superior Court on April 17, 1995. They say that Luis Giraldo Ordóñez Peralta was deprived of liberty for more than 24 months and was released in April 1995.

10. The petitioners state that the Procedural Code in force at the time stipulated that the summary phase could not last more than 90 days and in this case 11 months elapsed (from the arrest on March 26, 1993, to the dismissal on February 7, 1994). They allege that the review of the dismissal ruling was not supposed to take more than 15 days and in this case it took nine months. The review of the acquittal took two months and 16 days.

11. They argue that the fact that Luis Ordóñez was not released despite the provisional dismissal ruling of February 1994 violates the principle of presumption of innocence. They allege that Luis Ordóñez remained in custody for the subsequent phases of the proceeding. They argue that this violation occurred a second time when the criminal court confirmed Luis Ordóñez's innocence, acquitted him, and did not release him until the sentence was confirmed by the Superior Court. Therefore, since these reviews delayed the process, the case was not resolved in a reasonable period, observing the presumption of innocence and the immediate release of the accused after the dismissal of the case; they consider that the State has violated Articles 7 and 8 of the American Convention.

12. Furthermore, they argue that the failure to release Luis Ordóñez after the preliminary dismissal and the acquittal is a violation of Article 25 of the American Convention, given that the State did not guarantee access to a remedy that would give the victim immediate liberty.

13. They allege that Ecuadorian law does not have any remedy for claiming indemnification for violation of the rights of a person who has been arrested illegally and has been acquitted.

14. In view of the foregoing, the petitioners argue that the Ecuadorian State has violated Articles 7, 8, and 25 of the American Convention.

## **B. Position of the State**

15. The State informed that proceedings No. 81-94 against Luis Giraldo Ordóñez reached the Fifth Chamber of the Superior Court on April 4, 1994, and that on April 11, 1994 it requested the opinion of the Prosecutor, who on June 6, 1994 returned the case file -with his recommendation-, to issue a judgment.

16. It indicate that on November 14, 1994, the Fifth Chamber of the Superior Court revoked the provisional dismissal ruling in favor of Luis Giraldo Ordóñez Peralta, and declared the plenary trial phase of the case open.

17. The State has not submitted any other information or arguments concerning the petition.

## **IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY**

### **A. Competence**

18. The petitioners are eligible in principle under Article 44 of the American Convention to submit petitions before the Commission. The petition indicates that the alleged victim is person, for whom the Ecuadorian State has undertaken to respect and guarantee the rights established in the American Convention. As for the State, the Commission notes that Ecuador has been a State Party to the American Convention since December 8, 1977, the date on which it deposited its instrument of ratification. The Commission therefore has *ratione personae* competence to examine the petition, because it alleges violations of rights protected by the American Convention that allegedly occurred in the territory of Ecuador, a state party to that treaty.

19. The Commission has *ratione temporis* competence because the obligation to respect and guarantee the rights protected in the American Convention was in force for the State when the facts alleged in the petition were said to have occurred. Finally, the Commission has *ratione materiae* competence because the petition alleges violations of rights protected by the American Convention.

### **B. Requirements for admissibility**

#### **1. Exhaustion of domestic remedies**

20. Article 46.1.a) of the American Convention stipulates as a requirement for admission of a petition alleging violations of the Convention that remedies under domestic law have been exhausted in accordance with generally recognized principles of international law.

21. In this case the State has not submitted any observations on the petition except for reporting that the proceeding against Luis Ordóñez began the plenary trial phase on November 14, 1994. The petitioners argue that Luis Ordóñez lacked any remedy for challenging the violations of his rights and obtaining indemnification under domestic law as an acquitted person who was kept in custody for more than 24 months, and that the State did not guarantee access to a remedy that would give the alleged victim immediate release after the provisional dismissal and the acquittal. The IACHR understands that the petitioners allege application of the exception provided in Article 46.2.b) of the American Convention.

22. According to Article 31.3 of the Inter-American Commission's Rules of Procedure, when the petitioners allege that exception, it is up to the State to demonstrate that domestic remedies are adequate to address the alleged violation. However, as of the date of this report's approval, the State has not made any observation concerning exhaustion of domestic remedies, so it has tacitly renounced its right to challenge that exception.

23. It is therefore appropriate to consider which domestic remedies must be exhausted in the present case. The Inter-American Court has said that it is only necessary to exhaust remedies adequate for addressing the alleged violations. Adequacy of the remedies means that:

Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.<sup>1</sup>

24. The Commission notes that this petition refers specifically to the facts involving alleged violations of the right to personal liberty and due process of Luis Giraldo Ordóñez Peralta, including the alleged lack of legal counsel during the investigations, the violation of the presumption of innocence, the prolonged preventive detention, the lack of effective domestic remedies for challenging continued custody after the preliminary dismissal ruling and the acquittal, and for requesting compensation.

25. The Commission understands that Article 121 of the Narcotics Law, under which Luis Ordóñez was tried, mandates review of the order to end preventive detention by the Superior Court:

Mandatory review. An order to end preventive detention or to suspend or annul measures for arrest, retention, or confiscation shall not be executed unless it is upheld by the Superior Court, based on a required and favorable report of the applicable prosecuting ministry, which shall issue its opinion within 24 hours after receiving the case.

26. Article 122 of that law states:

[...] whether a verdict is guilty or innocent; it must be reviewed by the Superior Court. Until that is done, the defendant shall not be released [...].

27. The Commission notes that at the time of the facts cited in the petition there were two remedies in force in Ecuador to challenge deprivation of liberty: (i) habeas corpus under the Constitution, and (ii) *amparo* [protection] of liberty or habeas corpus under the law.

28. With respect to the remedy of *amparo* of liberty or habeas corpus under the law, established in the Penal Procedure Code<sup>2</sup> (*lex generalis*), the Commission considers that this was not an adequate remedy for obtaining the immediate release of Luis Ordóñez after revocation of the preventive detention order, because the legal basis for the deprivation of his liberty was Articles 121 and 122 of the Narcotics Law (*lex specialis*).

29. The remedy of habeas corpus under the Constitution must be filed with the Mayor or Council Chair.<sup>3</sup> In this regard, both the Commission<sup>4</sup> and the Inter-American Court have established that filing a writ of habeas corpus with an administrative authority is not an adequate remedy under the standards of the American Convention.<sup>5</sup>

30. In light of this, the Commission considers that at the time of the facts the remedy of habeas corpus under the Constitution did not constitute an adequate remedy, so its exhaustion could not be required. The Commission therefore considers that there was no effective remedy for challenging the Narcotics Law's requirement for mandatory review.

31. The Commission also understands that at the time of the facts alleged in the petition there was no domestic remedy under Ecuadorian law to claim the indemnification allegedly due to Luis

<sup>1</sup> I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*. Judgment of July 29, 1988. Series C No. 4, para. 64.

<sup>2</sup> Established in Article 458 of Ecuador's Penal Procedure Code of 1983.

<sup>3</sup> Article 19.17.j of the Ecuadorian Constitution of 1979.

<sup>4</sup> IACHR, Report N° 66/01 *Dayra María Levoyer Jiménez* of June 14, 2001, paras. 78-81.

<sup>5</sup> I/A Court H.R., *Chaparro-Álvarez and Lapo-Íñiguez. v. Ecuador Case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 128.

Ordóñez for the alleged prolonged preventive detention, which ended in acquittal.<sup>6</sup> Given the nature of this case, the Commission deems that the exception specified in Article 46.2.b) of the American Convention is applicable with respect to the petitioners' allegations of Luis Ordóñez's right to compensation.

32. The invocation of exceptions to the rule of exhaustion of domestic remedies prescribed in Article 46.2 of the Convention is intimately linked to the finding of possible violations of certain rights established in that instrument, such as the guarantees to a fair trial. However, by its nature and purpose Article 46.2 is an autonomous provision *vis à vis* the substantive clauses of the Convention. Therefore, the determination of whether the exceptions to the rule for exhaustion of domestic remedies apply in this case must be made previously and independently from the analysis of the merits of the case, because it requires a different standard of appraisal than that used to determine the possible violation of Articles 8 and 25 of the Convention. It should be noted that the causes and effects that prevented the exhaustion of domestic remedies will be analyzed in the Commission's report on the merits of the case, to determine whether they constitute violations of the American Convention.

## **2. Deadline for presentation of the petition**

33. The American Convention stipulates that 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. On this matter, Article 32 of the Commission's Rules of Procedure provides that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission.

34. As the Commission has already established, the exception to the requirement for prior exhaustion of domestic remedies, in Article 46.2.b) of the American Convention, applies in this case. To decide whether the petition was presented within a reasonable period of time, as stipulated in Article 32 of the Commission's Rules of Procedure, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

35. In this petition, Luis Ordóñez was arrested on March 26, 1993, and the petition to the IACHR was dated November 4, 1994, and filed while Luis Ordóñez was in preventive detention. In view of the characteristics of this case, the Commission considers that the petition was lodged within a reasonable period of time and the deadline for the presentation of petitions has been met.

## **3. Duplication of proceedings and *res judicata***

36. There is no indication in the file that the subject of the petition is pending in another international proceeding for settlement or that the petition is substantially the same as one previously examined by the Commission or by another international organization. Therefore, the requirements established in Articles 46.1.c) and 47.d) of the Convention have been satisfied.

## **4. Nature of the allegations**

37. Based on elements of fact and law presented by the parties and the nature of the matter submitted to it, the Commission finds that in this case the petitioners' allegations on the alleged violation of the right to personal liberty, a fair trial, and judicial protection tend to establish possible violations of the rights protected by the American Convention in Articles 7, 8, and 25, to the detriment of Luis Giraldo Ordóñez Peralta, all in connection with the Convention's Article 1.1.

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<sup>6</sup> At the time the facts alleged in the petition occurred, Ecuador's current Penal Procedure Code was not yet in force. It entered into force on July 13, 2001, and provides for the right to indemnification in Article 419: "Cases of preventive incarceration or provisional confinement. When the accused is acquitted or the case is dismissed, he or she shall be compensated for the days in custody, as provided in the preceding articles." R.O. 360-S, 13-I-2000.

38. In addition, taking into account that petitioners' allegations that legislation in force during Luis Ordóñez's detention imposed time limits for preventive detention but denied that protection to persons such as him who were accused under the Law on Narcotic and Psychotropic Substances, the IACHR considers, in application of the *iura novit curia* principle, that the alleged facts tend to characterize violations of Article 7 of the American Convention, in connection with its articles 1.1 and 2.<sup>7</sup> Since there is no evidence that the petition is manifestly groundless or obviously out of order, the Commission considers that the requirements established in Article 47.b) and c) of the American Convention have been met.

## V. CONCLUSIONS

39. The Commission concludes that it is competent to examine the petitioners' complaints of the alleged violation of Articles 7, 8, and 25 in connection with Articles 1.1 and 2 of the American Convention and that these are admissible under the requirements set forth in Articles 46 and 47 of the American Convention.

40. By virtue of the foregoing arguments of fact and law,

### THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

#### DECIDES:

1. To declare the present petition admissible as regards Articles 7, 8, and 25 in connection with Articles 1.1 and 2 of the American Convention
2. To notify the Ecuadorian State and the petitioners of this decision.
3. To continue with analysis of the merits of the case.
4. To publish this decision and include it in the Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 1<sup>st</sup> day of the month of November 2010.  
(Signed): Felipe González, President; María Silvia Guillén, José de Jesús Orozco Henríquez, and Rodrigo Escobar Gil, members of the Commission.

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<sup>7</sup> See I/A Court H.R., *Suárez Rosero v. Ecuador Case*. Judgment of November 12, 1997. Series C No. 35, paragraph 98.