REPORT N° 5/04
PETITION 720/00
ADMISSIBILITY
EDUARDO KIMEL
ARGENTINA
February 24, 2004

I. SUMMARY

1. On December 6, 2000, 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) and the Center for Justice and International Law (CEJIL) (hereinafter "the petitioners") against the Republic of Argentina (hereinafter "the State", "the Government", or "Argentina"). The petition concerns the suspended sentence of one year in prison and damages of 20,000 pesos imposed on the journalist and writer Eduardo Kimel (hereinafter "the victim"), author of the book *La Masacre de San Patricio* (The San Patricio Massacre). The sentence was imposed in a criminal action for libel brought by a former judge criticized in the book for his part in the investigation of a massacre committed at the time of the military dictatorship.

2. The petitioners claim that the State is responsible for having violated the rights to judicial guarantees and freedom of expression, in conjunction with the general obligations to respect and ensure rights, as well as to bring domestic law into conformity, enshrined in Articles 8, 13, 1(1) and 2, respectively, of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention").

3. At the time of the preparation of the present report, the State had presented no argument regarding the admissibility of this petition.

4. In the instant report, the Commission concludes, without prejudging the merits of the matter, that the petition is admissible in accordance with Articles 46 and 47 of the Convention, and that it will continue with its analysis of the alleged violations of Articles 8, 13, 1(1) and 2 of that instrument. The Commission also decides to notify the parties of its decision, and publish it and include it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BY THE COMMISSION

5. Having conducted the appropriate review of the petition, the IACHR decided to join it with petition 12.128 ("*Verbitsky et al*. "), which it was already processing, owing to the similarity of the alleged facts. In a communication of February 2, 2001, the Commission informed the petitioners that processing had commenced, and it sent the pertinent portions of the petition to the State as additional information related to petition 12.128, which was the subject of a friendly settlement procedure. In that communication, the Government was given 30 days to submit such observations as it deemed appropriate regarding the new information (petition on behalf of Mr. Kimel) and to provide an account of progress in the friendly settlement procedure underway in connection with petition 12.128.

6. On April 17, 2001 the petitioners presented a communication to the Commission in which they formally expressed their consent to the inclusion of this case in the friendly settlement procedure already in progress. However, without prejudice to the foregoing, they requested that the Commission give consideration in its examination to the specific aspects of the petition concerning the position of Eduardo Kimel under both criminal and civil law.

7. On July 30, 2001 the State sent a communication to the IACHR in the framework of the friendly settlement procedure in connection with petition 12.128, and forwarded a copy of a draft bill presented by the Executive Branch to the Congress to reform the provisions on the crimes of libel and slander contained in Argentina's Civil and Criminal Codes, in order to make them compatible with the object and purpose of the American Convention. That communication was transmitted to the petitioners on August 16, 2001, and they were given one month to submit observations.

8. On September 27, 2001 the petitioners sent a note to the Executive Secretariat in which they refer to the draft bill presented by the Executive Branch to the Congress with a view to reforming the provisions on the crimes of libel and slander contained in Argentina's Civil and Criminal Codes. The pertinent portions of that communication were brought to the attention of the State on October 12, 2001, and it was given one month to present the information it deemed pertinent in that regard.

9. At the request of the petitioners, the Commission called the parties to a working meeting that was held on November 15, 2001 in the framework of the 113th session of the IACHR. In the course of that meeting, the parties discussed the need for the State to define its position with respect to the possibility of disposing of the Kimel case in a friendly settlement procedure. The issue of the draft bill was also addressed at a meeting held during the working visit conducted by the country rapporteur in July 2002.

10. In a communication of August 15, 2002 the petitioners requested that the Commission ask the State to provide up-to-date information on the processing of the draft parliamentary bill to reform the Civil and Criminal Codes.

11. The Commission called the parties to another working meeting held on October 18, 2002, in the framework of the 116th session of the IACHR. On this occasion the State provided information on the processing of the draft bill and said that, owing to the particular nature of the petition concerning Mr. Kimel, it would not be feasible to resolve it completely in the friendly settlement procedure initiated in respect of the so-called "Verbitsky case."

12. On November 27, 2002 the Commission received a communication from the petitioners requesting that the petition lodged on behalf of Mr. Kimel be declared admissible, inasmuch as the deadlines provided for at Article 30 of the IACHR's Rules of Procedure for the State to submit its observations or objections regarding the admissibility of the petition in question had expired. The IACHR transmitted the relevant parts of that brief to the State in a note of February 5, 2003.

13. The Commission called the parties to another working meeting held on February 28, 2003 in the course of the 117th session of the IACHR. The object of the meeting was to review the status of the negotiations in the friendly settlement procedure on

petition 12.128, and to determine the way forward in the processing of that case and of the petition concerning the situation of Mr. Kimel.

14. On March 17, 2003 the State requested an extension of 30 days to present its reply to the last submission made by the petitioners, which it eventually transmitted on April 16, 2003, in the framework of the processing of petition 12.128 ("Verbitsky *et al.*"). (On May 27, 2003 the petitioners informed the Commission that, based on the lack of progress in processing the law bill, the talks aimed at reaching a friendly settlement in connection with petition 12.128 had been suspended altogether).

15. By means of a communication of November 26, 2003 the Commission formally separated the petition concerning Mr. Kimel from the processing of petition 12.128 ("Verbitsky *et al.*"), and informed the parties that it would continue to process the former petition as case number P720/2000. In that same communication, the Commission informed the parties that it was concluding the friendly settlement procedure in light of its lack of results, and granted them one month to present any additional observations on the admissibility both of petition 720/2000 and of petition 12.128. The petitioners replied, reiterating their request that the case be declared admissible. The Government, for its part, did not reply.

III POSITIONS OF THE PARTIES

A. Position of the petitioners

16. According to the complaint, in its ruling of September 25, 1995 the Eighth National Court of First Instance for Criminal and Correctional Matters in and for Buenos Aires found in Case 2564 of that court's docket that the journalist Eduardo Gabriel Kimel was guilty of the crime of defamation in accordance with Article 110 of the Criminal Code and imposed on him a sentence of one year in prison (suspended) as well as 20,000 pesos in damages for defamation.[1]

17. According to the petition, the criminal proceeding against Kimel was initiated based on a criminal complaint brought on October 28, 1991 by Guillermo Federico Rivarola, whose name is mentioned in a publication authored by the alleged victim titled *La Masacre de San Patricio*. The book, published in 1989, tells of the murder of five clerics of the Palotine order in the District of Belgrano, Buenos Aires, killings that occurred on July 4, 1976 during the military dictatorship. The book criticizes the actions of the authorities entrusted with the investigation of the crimes, among them the then-judge Guillermo Federico Rivarola, in the following terms:

> Judge Rivarola carried out all the applicable procedures: he collected the police reports containing the preliminary information; he requested and was provided with the reports of the coroner and the ballistics expert. He summoned a sizeable number of people who were able to provide information to further the enquiry. However, an examination of the judicial records poses an initial question: Was there any real intention to turn up clues that might lead to the murderers? Under the dictatorship judges were normally acquiescent to, when not complicit in, the repression of the dictatorial regime. In the Palotines' case, Judge

1 The norm in question provides: Anyone who injures another person's honor or reputation shall be fined between 1,500 and 90,000 pesos or imprisoned from one month to one year.

> Rivarola complied with most of the formal requirements of the investigation. However, it is evident that a series of decisive elements that could have shed light on the assassination were not taken into account. Evidence that the order to carry out the crime had come from within the military power structure paralyzed the enquiry, bringing it to a standstill.[2]

18. The petitioners allege that the judgment at first instance was reversed on November 19, 1996 by the Sixth Court of the National Chamber of Appeals for Criminal and Correctional Matters, which acquitted Eduardo Kimel with the argument that the statements in dispute were value judgments that could not be considered tantamount to the false imputation of a publicly actionable crime made against a given person. The Chamber of Appeals reached the conclusion that Mr. Kimel exercised his legitimate right to propagate information in a non-abusive manner without the intention of injuring the honor of Dr. Rivarola; and it drew attention to the fact that "persons in public office are open to the criticism of the press on the performance of their functions."

19. According to the petitioners, on December 22, 1998, the Supreme Court of Argentina, upholding an extraordinary appeal for review filed by the complainant,[3] reversed the acquittal ruling issued by the Chamber of Appeals and ordered that the proceeding be returned to first instance for a new ruling to be passed in keeping with its judgment. In particular, the Supreme Court considered that, "the arguments put forward by the judges who signed the acquittal determining that the characterization of defamation had not been shown are unfounded [...] because only from an incomplete and disjointed reading of the incriminating text could it be said -as the court *a quo* does- that the criminal accusation is not addressed to the complainant."

20. The petitioners affirm that the Chamber of Appeals delivered a new judgment on March 17, 1999, which upheld the suspended sentence of one year in prison and the damages of 20,000 pesos imposed on Eduardo Kimel, and amended the legal classification of the act charged to the crime of defamation in accordance with Article 109 of the Criminal Code.[4]

21. The petition states that the alleged victim filed an extraordinary appeal for review of the new judgment of the Chamber of Appeals, followed by a *recurso de queja* (appeal against improper refusal to allow an appeal), which was rejected *in limine* by the Supreme Court on September 14, 2000, with which the sentence became final.

22. The petitioners allege that the State has violated the right to freedom of expression contained in Article 13 of the Convention because the imposition of a prison sentence for the crime of defamation dissuades criticism of state officials and therefore impedes public access to important information about the performance of their authorities. In the opinion of the petitioners, the criminal punishment of a journalist has an intimidating effect that encourages self-censorship.

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2 Eduardo Kimel, La Masacre de San Patricio, Ediciones LOHLÉ-LUMEN, 1995, p.125.

3 In accordance with Article 14 of Law 48, the extraordinary federal remedy is an appeal that can be presented before the Supreme Court of Justice of the Nation once the proceedings before the provincial jurisdiction have been completed.

4 The rule in question provides that defamation or false imputation of a publicly actionable crime shall be punished with one to three years' imprisonment.

23. The petitioners further argue that Argentina has violated the right to a fair trial of Mr. Eduardo Kimel because the courts that tried him lacked the element of impartiality required by the American Convention, as was patently clear from the corporate reaction to a criticism of a member of the judiciary.

24. Finally, the petitioners indicate that the State has breached its obligations under Article 2 of the American Convention, inasmuch as in this particular case it applied Articles 109 and 110 of the Argentine Criminal Code, which, like the now-abolished *desacato* laws in Argentina, punish statements or expressions that criticize public officials in the exercise of their duties.

B. The State

25. The State for its part informed the Commission that a bill has been under preparation since July 6, 2001 with a view to reforming the provisions contained in the Criminal Code and the Civil Code on libel and slander against public officials in the exercise of their duties. However, according to information supplied on a variety of occasions, including at the working meetings, the bill has been left on hold, without any firm progress made.

26. In its presentation of April 16, 2003, the State, in reference to the request of the petitioners that the petition lodged on behalf of Mr. Kimel be declared admissible because the deadline under Article 30 of the IACHR Rules of Procedure for the State to present its observations or objections regarding the admissibility of the petition in question had expired, said that the initial communication of the Commission of February 2, 2001 did not specify to which of the different petitions joined under petition 12.128 the complainants were referring, so as to have enabled the State to convey its observations. Furthermore, it argued that there was no silence on its part toward Mr. Kimel's petition, since that petition was an integral part of petition 12.128, which was the subject of a friendly settlement procedure that, strictly speaking, is devoid of any procedural deadlines.

27. In that communication, the State further indicated that it had received no official pronouncement providing definitive confirmation of the separation of the petition concerning Mr. Kimel from the friendly settlement procedure under way in the so-called "*Verbitsky case*." Accordingly, it considered that the arguments regarding its purported failure to reply should be rejected.

28. After the separation of petition 720/2000 concerning the situation of Mr. Kimel was made official, the State issued no pronouncement on the claims of the petitioners or on the admissibility of the petition.

IV. ANALYSIS

A. The Commission's competence *ratione personae, ratione materiae, ratione temporis* and *ratione loci*

29. The petitioners are entitled, in principle, under Article 44 of the American Convention to lodge petitions with the Commission. The petition names as an alleged victim an individual in respect of whom the State undertook to respect and ensure the rights enshrined in the American Convention. As to the State, the Commission notes that Argentina has been a state party to the Convention since September 5, 1984, the

date on which it deposited its instrument of ratification. Therefore, the Commission has *ratione personae* competence to examine the petition.

30. The Commission has *ratione loci* competence to hear the petition, since it alleges violations of rights protected by the American Convention occurring within the territory of a state party thereto. The IACHR has *ratione temporis* competence inasmuch as the duty to respect and ensure the rights protected in the American Convention was in force for the State at the time the violations alleged in the petition are said to have occurred. Finally the Commission has *ratione materiae* competence because the petition alleges violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

31. Article 46(1)(a) of the American Convention provides that admission of a petition shall be subject to the requirement "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law".[5] Both the Inter-American Court of Human Rights (hereinafter "the Court") and the Commission have reiterated that "(…) under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means.[6] Furthermore, the Court has held that in order for the objection that domestic remedies have not been exhausted to be valid, it should be raised in a timely manner, that is, during the initial stages of the proceeding before the Commission, lest it be presumed that the interested State has tacitly waived its use.[7]

32. In the instant case, the petitioners have shown that on September 14, 2000 the Supreme Court of Argentina rejected the appeal (*recurso de queja*) interposed by Mr. Kimel's counsel against the conviction returned on March 17, 1999 by the National Chamber of Appeals for Criminal and Correctional Matters in and for the Federal Capital. At that point, remedies under domestic law were exhausted.

33. In addition, while the State reserved its right to object to the admissibility of the petition in its communication of April 16, 2003, to date, it has yet to refute in any way the arguments of the petitioners that domestic remedies have been exhausted.

34. Accordingly, the Commission considers that the suitable remedies as regards the alleged violations were appropriately exhausted.

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5 *See* I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, (Ser. A) No.11(1990), para.17.

6 *See* I/A Court H.R., Decision in the Matter of *Viviana Gallardo et al.*, November 13, 1981, Ser. A N° G 101/81, paragraph 26.

7 *See*, for example, I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case*, Preliminary Objections, Judgment of February 1, 2000, (Ser. C) No. 66, paras. 53 and 54.

2. Deadline for lodging the petition

35. Article 46(1)(b) of the Convention states 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. This rule guarantees legal certainty and stability once a decision has been adopted.

36. In the instant case, the Commission notes that the decision of the Supreme Court of Argentina on the appeal (*recurso de queja*) filed by Mr. Kimel's counsel against the conviction handed down by the National Chamber of Appeals for Criminal and Correctional Matters in and for the Federal Capital was communicated to the alleged victim on September 19, 2000. Therefore, the petition received by the Executive Secretariat of the IACHR on December 6, 2000, was lodged in a timely manner and the requirement contained in Article 46(1)(b) of the American Convention has been met.

3. Duplication of proceedings and *res judicata*

37. There is nothing in the record to suggest that the petition is pending before another international proceeding for settlement or that it is substantially the same as one previously studied 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 met.

4. Nature of the alleged violations

38. The Commission considers that, if proven, the petitioners' allegations regarding the alleged violations of the victim's rights to a fair trial and freedom of thought and expression, could constitute violations of the rights enshrined in Articles 8 and 13 of the Convention, in conjunction with Articles 1(1) and 2 of said instrument. Furthermore, there is nothing to indicate that the petition is manifestly groundless or out of order. The Commission, therefore, considers that the requirements established in Article 47(b) and (c) of the American Convention have been met.

39. Further, although the petitioners have not alleged it expressly, in accordance with the principle of *iura novit curia*, which obliges international mechanisms to apply all pertinent legal norms even when not invoked by the parties,[8] the Commission will, to the extent applicable, evaluate the facts alleged in the light of Article 25 of the American Convention, which establishes the right to judicial protection.

V. CONCLUSION

40. The Commission concludes that it is competent to hear this case and that the petition is admissible under the provisions of Articles 46 and 47 of the American Convention.

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8 PCIJ, Lotus Case, Judgment of September 7, 1927, Ser. A Nº 10, p. 31.

41. Based on the foregoing arguments of fact and of law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible with respect to the alleged violations of Articles 8 and 13, in conjunction with Articles 1(1) and 2 of the American Convention on Human Rights.

2. To notify the State and the petitioners of this decision.

3. To proceed with its analysis of the merits of the case.

4. To publish this decision and include it in the Annual Report of the IACHR to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 24th day of February, 2004. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice President; Susana Villarán, Second Vice President; Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez and Florentín Meléndez Commission Members