

REPORT No. 141/10
PETITION 247-07
ADMISSIBILITY
LUIS EDUARDO GUACHALÁ CHIMBÓ
ECUADOR
November 1, 2010

I. SUMMARY

1. On March 1, 2007, the Inter-American Commission on Human Rights (hereinafter “the Commission,” “the IACHR,” or “the Inter-American Commission”) received a petition presented by the Human Rights Clinic of the Pontifical Catholic University of Ecuador (PUCE), the Regional Foundation for Assistance in Human Rights (INREDH), and the Ecumenical Commission on Human Rights (CEDHU) (hereinafter “the petitioners”), which alleges that the Republic of Ecuador (hereinafter “Ecuador” or “the State”) bears responsibility for the alleged disappearance of Mr. Luis Eduardo Guachalá Chimbó (hereinafter “Mr. Guachalá Chimbó” or “the alleged victim”) while he was an inpatient at a public hospital in the city of Quito, and for the lack of judicial clarification of the facts.

2. The petitioners argue that the State is responsible for the violation of the rights to life, humane treatment, personal liberty, and judicial protection established, respectively, in Articles 4, 5, 7, and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), in relation to the obligations to respect rights and adopt measures under domestic law established in Articles 1.1 and 2 of that treaty. In that connection, they argue that the disappearance of Mr. Guachalá Chimbó, who was at the public Julio Endara Hospital, constitutes a failure by the State to take the necessary measures to protect his life and ensure his humane treatment as a patient. They argue that none of the legal measures instituted has proven effective and that no serious investigation as to his whereabouts has been conducted. They also maintain that the right to humane treatment of Mr. Guachalá Chimbó’s mother, Zoila Rosario Chimbó Jarro, has been violated, in that she has suffered the consequences of his disappearance and the subsequent denial of justice.

3. The State, for its part, argues that a person’s admission to a mental health institution cannot be equated to confinement in a detention center and therefore the State would not bear the same obligations. It also argues that domestic remedies have not been exhausted because the petitioners should have instituted actions under civil jurisdiction for damages and for the presumption of death and pursued a constitutional action for noncompliance. The State also alleged that the complaint had not be presented within the proper timeframe.

4. Without prejudging the merits of the complaint, after studying the positions of the parties, and in compliance with the requirements set forth in Articles 46 and 47 of the American Convention, the Commission finds the case admissible for purposes examining the alleged violation of the rights enshrined in Articles 4, 5, 7, 8, and 25, in keeping with Articles 1.1 and 2, of that convention. In addition, according to the principle *iura novit curia*, the Commission finds the petition admissible with respect to the alleged violation of the right to recognition as a person before the law enshrined in Article 3 of the American Convention, in keeping with Article 1.1 of the American Convention, and of Article 1 of the Inter-American Convention on Forced Disappearance of Persons. The Commission has decided to convey this decision to the parties, to publish it, and to include it in the Commission’s Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

5. The Inter-American Commission registered the petition under number P-247-07 and transmitted the relevant sections thereof to the State on April 17, 2008, granting it a period of two months to present information, in keeping with Article 30.3 of the Rules of Procedure of the IACHR. The State, by note of May 27, 2008, requested an extension of that deadline, which was granted by the IACHR on June 3, 2008. Subsequently, on October 17, 2008, the State's reply was received.

6. During the processing of the complaint, communications were received from the petitioners on September 17, 2009, and March 18, 2010; these were transmitted to the State, respectively, on September 21, 2009, and April 5, 2010, for its observations.

7. For its part, the State presented communications on November 10, 2009, and May 21, 2010.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

8. The petitioners state that on January 10, 2004, Ms. Zoila Chimbó took her son, Mr. Luis Eduardo Guachalá Chimbó, to the Julio Endara public psychiatric hospital in the city of Quito (hereinafter also "the hospital"), where he was admitted after exhibiting physical and verbal aggressiveness, impulsive and argumentative behavior, insomnia, muteness, hallucinatory behavior, and convulsions. At the time of his admission, Mr. Guachalá Chimbó was 24 years old.

9. Two days later, on January 12, Ms. Zoila Chimbó returned to the hospital to visit her son; but he was not in the bed assigned to him or in any of the other places in the hospital where she was told he could be. Finally, the doctor assigned to his case allegedly told his mother that visiting him at that time was not advisable in that it could provoke anxiety attacks because he was recently admitted. On January 13, 15, and 16, Ms. Zoila Chimbó allegedly held telephone conversations with the doctor in charge of her son's treatment, and on all three occasions the doctor allegedly assured her that Mr. Guachalá Chimbó was doing well.

10. On January 18, Ms. Zoila Chimbó returned to the hospital to visit her son and the doctor on duty allegedly told her that he had disappeared the previous day, January 17, 2004, at approximately 3:30 p.m.. The petitioners state that on that day another patient approached Ms. Zoila Chimbó and told her that her son had suffered a heart attack during Mass.

11. The petitioners allege that Mr. Luis Eduardo Guachalá Chimbó disappeared, that the Julio Endara Hospital has not issued information as to his whereabouts, and that only on January 19 did the hospital staff report the disappearance of the patient Guachalá Chimbó to the National Police. They state that Mr. Guachalá Chimbó did not leave the hospital of his own accord but, rather, was a victim of malpractice or other mistreatment and that the alleged facts have been concealed.

12. The petitioners state that on January 21, 2004, the mother of the alleged victim submitted a complaint of forced disappearance to the Judicial Police of Pichincha, which was later set aside by the inspector's office in charge of the investigation, on August 29, 2005. In addition, on November 22, 2004, a writ of habeas corpus was pursued with the mayor of the Metropolitan Municipality of Quito; no reply was received from that official. Therefore, on April 19, 2005, considering the lack of response from the Mayor's Office, the denial of habeas corpus was appealed to the Constitutional Tribunal; on July 6, 2006, the Tribunal ruled that an investigation for the purpose of locating a disappeared person cannot be closed until the case has been resolved.

13. The petitioners state that, despite this decision by the Constitutional Tribunal, the inspector's office in charge of the investigation has issued no findings, the investigation has not progressed,

and, finally, the State has not provided a satisfactory explanation of the whereabouts of Mr. Luis Eduardo Guachalá Chimbó.

14. The petitioners argue that, since he was admitted to a public hospital, the Julio Endara Hospital, which reports directly to the Ministry of Public Health, the State has the role of protector of persons admitted thereto; therefore, it had the essential duty of protecting the alleged victim's life and right to humane treatment. They argue that the State failed to provide this protection when it allowed the disappearance of Mr. Guachalá Chimbó, who, as a patient in a public hospital, was under its immediate custody.

15. The petitioners also allege that the judicial remedies pursued, the criminal complaint, and the writ of habeas corpus have proved fruitless, having produced no concrete results or information as to the fate of the alleged victim. They argue therefore that the decision of the Constitutional Tribunal had no effect and that the domestic law provides no means of enforcing constitutional actions.

16. They further argue that Ms. Zoila Rosario Chimbó Jarro, mother of the alleged victim, must also be considered a victim in this case, having experienced great psychological pain over her son's disappearance. They say it has caused her extreme anguish and suffering, both because she does not know what happened to him and because she feels helpless in the face of the failure by the authorities to provide assistance and cooperation.

B. Position of the State

17. The State maintains that the admission of a person to a mental health institution cannot be equated to confinement in a detention center and, therefore, the State would not bear the same obligations as it would as the protector of persons deprived of liberty in penitentiaries.

18. It objects that the petitioners are attempting to have the Inter-American Commission act as a court of review or fourth instance with respect to the criminal proceeding that was heard under national jurisdiction. It argues that the IACHR lacks competence to determine the existence of a crime and, moreover, to undertake any sort of trial.

19. The State further argues that in this case the domestic remedies have not been exhausted. It states that the petitioners should have instituted a civil suit for damages, as a means of securing reparations for an aspect of the damage caused to the alleged victim.

20. The State also maintains that if the heart of the matter is to discover and locate a person, civil law also provides for a "proceeding for presumption of death," which would be the appropriate means of compensation for the situation reported. By way of supporting that argument it states that one of the measures that should be carried out in this proceeding is to summon the disappeared person in three publications, in the official gazette and in such newspapers as the judge considers appropriate for that purpose.

21. In its subsequent communications, the State argued that the new Constitution, which entered into force on October 19, 2009, provides new mechanisms for ensuring observance of constitutional guarantees, such as the action for noncompliance provided under the present Constitution, which would have been effective in enforcing the Constitutional Tribunal's favorable ruling.

22. Moreover, the State argues that the petition was not presented in a timely manner, in that, since the ruling of the Constitutional Tribunal dates back to September 6, 2006, and the petition was dated February 22, 2007, and received by the IACHR on March 13, 2007, eight months clearly elapsed between the final judicial decision and the receipt of the petition by the Commission.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

23. The petitioners are empowered, in principle, by Article 44 of the American Convention to lodge petitions with the IACHR. The petition names as alleged victims natural persons in respect of whom the Ecuadorian State undertook to respect and guarantee the rights enshrined in the American Convention. As for the State, the Commission indicates that Ecuador has been a state party to the American Convention since December 28, 1977, on which date it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to consider the petition. In addition, the Commission is competent *ratione loci* to consider the petition, since it alleges violations of rights protected in the American Convention that are said to have taken place within the territory of the Republic of Ecuador, a state party to that treaty.

24. The Commission is competent *ratione temporis* because the obligation to respect and guarantee the rights protected in the American Convention was already in force for the State on the date on which the events described in the petition allegedly took place. The Commission notes that the Inter-American Convention on Forced Disappearance of Persons (hereinafter “the Convention on Forced Disappearance”) entered into force for Ecuador on July 27, 2006. Therefore the Commission is competent *ratione temporis* with respect to the obligation set forth in Article I.b thereof, by virtue of the continuing lack of clarification as to the crime of forced disappearance.

25. Finally, the Commission is competent *ratione materiae* because the petition alleges possible violations of human rights protected by the American Convention.

B. Exhaustion of domestic remedies

26. Article 46.1.a of the American Convention provides that in order for a petition concerning alleged violations of the Convention to be admissible, the remedies available under domestic law must have been exhausted in accordance with generally recognized principles of international law. Article 46.2 of the Convention provides that this requirement does not apply when:

1. The State’s domestic law does not afford due process of law for the protection of the right or rights allegedly violated;
2. The alleged victim has not had access to, or has been prevented from exhausting, the remedies under domestic law; or
3. There has been an unwarranted delay in rendering a judgment under those remedies.

27. As established by the Inter-American Court, whenever a State argues that a petitioner has failed to exhaust domestic remedies, the State bears the burden of proof that the remedies not exhausted are effective in compensating for the alleged violation, i.e., that the function of those remedies under the system of domestic law is effective in protecting the legal right allegedly violated¹.

28. The petitioners indicate that on January 21, 2004, Ms. Zoila R. Chimbó J., mother of the alleged victim, submitted a complaint to the Judicial Police of Pichincha. A preliminary investigation was thus opened, but it was later set aside by the inspector’s office in charge, on August 29, 2005.

29. In addition, on November 22, 2004, a writ of habeas corpus was pursued with the Mayor of the Municipality of Quito. Subsequently, on December 16, 2004, a petition to expedite court action was submitted in connection with the earlier motion, but no answer to it was received. Later, the petitioners allegedly visited the Habeas Corpus Unit of the Municipality of Quito several times, determined to resolve this question; they allege, however, that the reply given was that the case had been set aside and no ruling would be issued.

30. In view of the lack of results under the habeas corpus motion, the petitioners appealed to the Constitutional Tribunal on April 19, 2005. Because the country had no Constitutional Tribunal for several

¹ Article 31.3 of the Rules of Procedure of the IACHR. See also Inter-American Court of Human Rights, *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 64.

months, this body began to hear the appeal on April 11, 2006, and issued a favorable ruling on July 6, 2006. The petitioners state that, although the Constitutional Tribunal established that in cases of forced disappearance the investigations and actions could not be closed until a case was resolved, to date the Commission has received no indication of progress in the investigation.

31. The Commission observes that the Constitutional Tribunal, in its decision of July 6, 2006, found that habeas corpus was the only action at the level of constitutional law that could be pursued for emergency protection of the right to life, liberty, and humane treatment. Therefore, it is appropriate in cases of disappeared persons when there are indications that the State could be responsible². The Constitutional Tribunal also stated that it was unacceptable that a person should remain disappeared for over two years without coordinated and effective action by the competent authorities to learn his whereabouts. The Tribunal therefore found it unconstitutional for the Mayor's Office to deny the writ of habeas corpus, it being the State's obligation to determine clearly and precisely what happened to the disappeared person³.

32. The Commission finds in this case that the petitioners availed themselves of the legal means available under domestic law: the constitutional habeas corpus motion and the crime report. Both actions, nevertheless, were set aside. The Commission notes that, even though the Constitutional Tribunal found it unconstitutional that the constitutional habeas corpus motion submitted to the Mayor's Office of Quito had been set aside, according to information provided to the Commission, no other measures were taken after that decision. Consequently, the petitioners did not have access to a suitable remedy, for the reasons set forth in Article 46.2, sections (a) and (b), of the American Convention.

33. The State argues that the petitioners should have exhausted other judicial actions, such as a civil suit for damages, an action for presumption of death, and the constitutional action for noncompliance. The latter, established by the present Constitution of the Republic of Ecuador, would, in the State's view, be effective in securing execution of the ruling issued by the Constitutional Tribunal in the matter of habeas corpus.

34. In that regard, the petitioners argue that the action for presumption of death is not effective in this case. That action requires that at least two years have elapsed since the most recent news of the disappeared person; its purpose is to safeguard successor rights; and in that action the family members must persuade the judge that it is impossible to locate the disappeared person and, thus, that the person should be declared dead. As for the supposed effectiveness of the action for damages, the petitioners argue that the State has not indicated how that proceeding would be suitable and effective in locating a disappeared person; and that the action would be intended solely to address certain consequences of the violations reported, not to correct the violations.

35. As for the alleged need to exhaust the constitutional action for noncompliance, the petitioners argue that this action was not available on the date of issue of the habeas corpus decision, since the Constitution had not yet entered into force. The petitioners, therefore, could not have pursued it. Moreover, the constitutional measures set forth in the 1988 Constitution (in force at the time of the reported events) and its enacting legislation established a regime of immediate execution of decisions on constitutional actions.

36. As for the other remedies which the State argued were effective--the civil suit for damages, the action for presumption of death, and the constitutional action for noncompliance--the Commission finds them ineffective in correcting the situation reported. The former two, of a civil nature, as the petitioners have stated, clearly are not designed to determine the fate of a person deemed to have disappeared; they

² Initial petition received March 13, 2007. Annex 10: Decision No. 0076-2005-HC, issued by the Third Chamber of the Constitutional Tribunal on July 6, 2006.

³ Initial petition received March 13, 2007. Annex 10: Decision No. 0076-2005-HC, issued by the Third Chamber of the Constitutional Tribunal on July 6, 2006.

basically involve questions of property and, therefore, are not effective in this case⁴. As for the constitutional action for noncompliance, it is clear that this action, having been created in the Constitution that came into force in October 2009, was established over five and a half years after the reported events began.

37. The Commission therefore concludes that in this case the exceptions to the exhaustion of domestic remedies rule, contained in Articles 46.2, sections(a) and (b) of the American Convention, do apply.

C. Deadline for presentation of the petition

38. The American Convention provides that, in order for a petition to be admitted by the Commission, it must have been presented within six months from the date on which the allegedly injured party was notified of the final decision. In this case, the IACHR has applied the exceptions to the exhaustion of domestic remedies rule under Article 46.2, (a) and (b), of the Convention. Article 32 of the Rules of Procedure of the Commission provides that, when such exceptions apply, the petition must have been presented within what the Commission deems a reasonable period of time. For that purpose the Commission must consider the date on which the alleged violation of rights occurred and the particular circumstances of the case.

39. In this case, the petition was received on March 1, 2007. The events described in the complaint began in early January 2004 and, as they involve an alleged disappearance, their effects extend to the present. In view of the nature of this case, therefore, and of the fact that the remedies available under domestic law to correct the situation reported have proven neither appropriate nor effective, the Commission deems the petition to have been presented within a reasonable period of time.

D. Duplication of procedures and international *res judicata*

40. The case file shows no evidence that the subject of the petition is pending in another international proceeding for settlement or that it duplicates one previously studied by the Commission or by another international organization. The Commission finds therefore that the requirements set forth in Articles 46.1.c and 47.d of the Convention have been met.

E. Nature of the allegations

41. For purposes of admissibility, the Commission must decide whether the petition describes events that could constitute a violation of rights as stipulated in Article 47.b of the American Convention; or, conversely, is "manifestly groundless" or "out of order" according to section (c) of that article. The standard for assessing those requirements is different from the one used to rule on the merits of a petition. The Commission must make a *prima facie* assessment as to whether the petition includes the basis for the possible or potential violation of a right guaranteed by the Convention; it need not establish that rights were indeed violated. This determination constitutes a summary examination that does not prejudice or rule upon the merits⁵.

42. In view of the arguments of fact and of law presented by the parties, and of the nature of the matter placed before it, the IACHR finds that the events alleged by the petitioners could constitute possible violations of the rights protected in Articles 4, 5, 7, 8, and 25 of the American Convention, to the detriment of Mr. Luis E. Guachalá Chimbó, in keeping with Articles 1.1 and 2 of that convention, as well as of Articles 5, 8, and 25 of the American Convention, to the detriment of his mother, Ms. Zoila Rosario Guachalá Jarro.

⁴ IACHR, Report No. 136/09, P-321-05, Admissibility, María Inés Chinchilla Sandoval, Guatemala, November 13, 2009, para. 47.

⁵ See, among other precedents: IACHR, Report No. 12/10, Case 12,106, Admissibility, Enrique Hermann Pfister Frías and Lucrecia Pfister Frías, Argentina, March 16, 2010, para. 46; IACHR, Report No. 10/10, Petition No. 214-08, Admissibility, Koempai *et al.*, Suriname, March 16, 2010, para. 43.

43. In addition, considering the facts alleged in this petition, and in application of the principle *iura novit curia*, it falls to the Commission to determine whether the State bears responsibility for the alleged violation of Article 3 of the American Convention, in connection with Article 1.1; and of Article I of the Inter-American Convention on Forced Disappearance of Persons, given the continuing lack of clarification as to the crime of forced disappearance.

V. CONCLUSIONS

44. On the basis of the considerations of fact and of law set forth herein, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS HAS DECIDED:

1. To declare this petition admissible in relation to Articles 2, 3, 4, 5, 7, 8, and 25 of the Convention, in keeping with Article 1.1 thereof, and in relation to Article I of the Inter-American Convention on Forced Disappearance of Persons.

2. To apprise both the Ecuadorian State and the petitioner of this decision.

3. To proceed with the examination of the merits.

4. To publish this decision and to include it in the Commission's Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 1st 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.