

REPORT N° 50/07
PETITION 232-05
ADMISSIBILITY
CARLOS BARAONA BRAY
CHILE
July 24, 2007

I. SUMMARY

1. On March 4, 2005, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR"), received a petition filed by the Public Interest and Human Rights Clinic at the Diego Portales University (hereinafter "the petitioner") against the State of Chile (hereinafter "the State" or "the Chilean State") relating to the criminal prosecution and sentence imposed on Mr. Carlos Baraona Bray for making statements indicating that a State official was allegedly involved in the commission of illegal acts. The petition stated that the facts reported constitute violations of rights guaranteed under Articles 1(1), 13, and 24 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), to the detriment of Mr. Carlos Baraona Bray.

2. The State alleged that the petition is inadmissible because it was submitted after the six months deadline stipulated in Article 46(1)(b) of the American Convention. It also indicated that the petition is manifestly groundless and that the petitioner is actually looking for an opinion from the Commission as an appeals court in order to review a decision adopted by competent Chilean courts under the guarantee of due process.

3. After analyzing the petition and pursuant to the provisions of Articles 46 and 47 of the American Convention as well as Articles 30, 37, and related articles of its Rules of Procedure, the IACHR declared the petition to be admissible with respect to the alleged violation of the right enshrined in Article 13 in conjunction with the general obligations established under Articles 1(1) and 2 of the American Convention. Furthermore, the IACHR declared the petition inadmissible regarding Article 24 of the same treaty. The Inter-American Commission also decided to notify the parties of this decision and to include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BEFORE THE COMMISSION

4. The Commission received the petition on March 4, 2005, and assigned it the number 232-05. On September 15, 2005, the petition was forwarded to the State, allowing a period of two months for the State to submit its observations. On February 3, 2006, the State sent its response, which was sent to the petitioner on August 4, 2006.

5. On April 5 and August 21, 2006, the Commission received *amici curiae* briefs from the Association for Civil Rights and from the organizations *Media Law Resource Center*, *Canadian Media Lawyers Association*, and *Canadian Journalists For Free Expression*. On October 13, 2006, the Commission sent these briefs to the State and allowed it one month to submit its observations.

III. POSITIONS OF THE PARTIES

A. Petitioner

6. The petitioner alleges that in early 2003 the Chilean media reported a series of accusations about the illegal cutting of the alerce in the southern part of the country. In particular, one of these accusations referred to alleged unlawful actions by members of the National Forest Corporation (CONAF) and senior government officials involving the illegal exploitation of the alerce.¹ In addition, based on these accusations, on May 12, 2004, a Parliamentary Committee was formed in the Chamber of Deputies in order to investigate the facts.

7. The petitioner maintains that on May 12, 2004, Mr. Carlos Baraona Bray publicly stated that then Senator Sergio Pérez Verdugo pressured Tenth Region authorities to allow the unlawful occupation of properties, the unlawful clearing of ownership titles, and the unlawful felling of alerce. These statements were disseminated nationally in the print media and through newscasts on local television and radio channels.²

8. The petitioner states that in May 2004 Mr. Sergio Pérez filed a criminal complaint against the alleged victim for two crimes of defamation (*calumnia* and *injurias*) through the media. The petitioner adds that on June 22, 2004, the Puerto Montt Court of Guarantees handed down a decision absolving Mr. Baraona Bray of the crime of *calumnia* and convicting him of the crime of *injurias* under Articles 417, 418, and 422 of the Chilean Penal Code as they relate to Article 29 of Law 19.733, the Law on Freedoms of Opinion and Information and the Practice of Journalism.

9. The petitioner states that the conviction imposed a prison term of three hundred days and a fine of 20 monthly tax units (about one thousand, two hundred US dollars), added to the additional punishment of suspension from public positions or duties for the duration of the prison term and payment of court costs.³ The decision also ordered conditional suspension of the prison term with the accused being subject for a period of one year to administrative control and assistance from the corresponding section of the Chilean Gendarmería.⁴

10. The petitioner states that the Criminal Public Defender's Service, representing the alleged victim, filed an appeal before the Supreme Court to have the decision nullified. The Supreme Court denied the appeal in a decision reported on September 9, 2004. The petitioner states that that decision cannot be appealed and domestic remedies have thus been exhausted.

11. The petitioner asserts that the statements made by Mr. Baraona Bray referred to matters of public interest and national importance, in that they relate to the conduct of senior government officials and involve the commission of alleged unlawful acts. The petition states that this issue had been widely discussed in the Chilean press and that the purpose of Mr. Baraona Bray's statements was to inform public opinion.

12. The petitioner indicates that since this is a matter of public interest, the use of criminal charges to punish the statements made by the alleged victim violates international standards on freedom of expression.⁵ The petitioner also maintains that in the specific case

¹ Petition sent to the IACHR on March 4, 2005, annex containing press clippings.

² Petition sent to the IACHR on March 4, 2005, page 2 and Decision of the Court of Guarantee of Puerto Montt, Tax ID 0410008047-3, pages 2-5.

³ Decision of the Court of Guarantee of Puerto Montt, Tax ID No. 0410008047-3, page 6.

⁴ *Idem*, resolution point number 4.

⁵ Petition sent to the IACHR on March 4, 2005, pages 5-15.

the Chilean courts should have applied the provisions of Principle 10 of the Declaration of Principles on Freedom of Expression of the IACHR.⁶

13. The petitioner alleges that the criminal punishment against Mr. Carlos Baraona Bray has the effect of imposing self-censorship on a subject that was widely discussed by Chilean society and the subject of investigations by the judicial and legislative branches. The petitioner adds that since the conviction of the alleged victim, there have been no more public accusations involving politicians or public figures in the unlawful cutting of the alerce tree. In addition, the petitioner maintains that while Mr. Baraona Bray benefited from the conditional suspension of his prison sentence, the decision "left an official record that a potentially injurious statement was made against Mr. Páez, [...] in addition to leaving a stain on Mr. Baraona's résumé by establishing that he was convicted of a crime."⁷

14. The petitioner states that the decision of June 22, 2004, issued by the Puerto Montt Court of Guarantee stated that "greater seriousness was required of Mr. Baraona Bray in his assertions in that he was a person considered credible by the community and was uninformed on the subject," that "the damage that his statements could inflict on the honor of the affected individual was greater." and that "the statements of the defendant cannot be considered to be enveloped in the seriousness and gravity required for his right to report to take precedence over the honor of the complainant."⁸ The petitioner states that these considerations impose on the alleged victim the burden of a duty to verify information beyond that applicable to someone else without the same level of credibility.

15. In this regard, the following abstract from the decision of the Puerto Montt Court of Guarantee is to be noted:

Based on all that has been indicated heretofore, it can be concluded that Mr. Baraona Bray accused Mr. Sergio Páez Verdugo of a lack of morality consisting of pressure exerted on public officials for the settlement of property titles and the illegal felling of alerce trees due to electoral promises, without having background that would indicate this, but on the contrary, he knew or should have known that Senator Sergio Páez was not named in the file of the Los Muermos Court as favoring those who illegally cut alerce on the referenced property. On the contrary, if there was any type of pressure it was on behalf of the owner who wanted to stop the illegal felling of alerce. That being the case, it appears disproportionate to this court to sacrifice someone's right to honor to another's freedom of expression when the assertions do not have the support claimed, as they are mere conjectures or rumors that are not presented as such but rather as the truth.⁹

16. The petitioner indicates that in the same decision the Puerto Montt Court maintained that since Mr. Baraona Bray was an attorney and complainant in a judicial case regarding the alleged unlawful cutting of alerce, he should be required to demonstrate "greater seriousness" in his assertions. In this respect, the petitioner alleges that this reasoning imposes on Mr. Baraona Bray a greater degree of diligence as compared to the

⁶ That principle establishes that "Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news."

⁷ Petition sent to the IACHR on March 4, 2005, page 12.

⁸ Decision of the Court of Guarantee of Puerto Montt, Tax ID No. 0410008047-3, page 36.

⁹ Decision of the Court of Guarantee of Puerto Montt, Tax ID No. 0410008047-3, pages 40-41.

ordinary citizen and that in doing so the State violated the right enshrined in Article 24 of the American Convention.¹⁰

B. The State

17. The State asserts that the petition was forwarded to it on September 14, 2005, beyond the deadline of six months from the date when the alleged injured party was notified of the final decision as provided under Article 46(1)(b) of the American Convention.¹¹ It asserts that the petitioner's brief does not provide any violation of the Convention and that the mere imposition of a criminal sanction through proper prosecution of the author of the crime of defamation does not constitute *per se* a violation of rights as alleged by the petitioner.¹²

18. The State alleges that the petition is manifestly groundless, lacking a sufficient basis to make Chile internationally responsible. The State asserts that although Mr. Baraona Bray was able to express himself freely, his statements injured the reputation of a Senator of the Republic, and he should assume the subsequent imposition of liabilities. It states that in the instant case, the sanction imposed on the alleged victim meets all the assumptions established under Article 13 of the American Convention. It states that the fact that someone is subsequently penalized after being found guilty of making slanderous or defamatory statements does not diminish his right to express himself freely.

19. Regarding the freedom from *ex post facto* laws alleged by the petitioner, the State indicates that the petitioner's allegations are unfounded and meaningless, and refrains from commenting on their possible characterization.

20. The State maintains that the petition seeks to have an additional instance to amend the unfavorable judgment handed down by Chile's Supreme Court. It emphasizes that "the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved."¹³

21. Finally, the State asks the Commission to declare the petition inadmissible based on the assertions made above, in accordance with the relevant provisions of its Rules of Procedure and the American Convention.

IV. ANALYSIS OF ADMISSIBILITY AND COMPETENCE

A. Competence *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci*

22. In accordance with Article 44 of the American Convention and Article 23 of the IACHR Rules of Procedure, the petitioner is authorized to file petitions with the Commission regarding alleged violations of rights established under the Convention. The State of Chile is a party to the American Convention and thus responsible in the international arena for violations of that Convention.

¹⁰ Petition sent to the IACHR on March 4, 2005, page 15

¹¹ State's response sent to the IACHR on February 13, 2006, page 1.

¹² *Idem*, page 9.

¹³ IACHR, Abella et al. Case (Argentina), N° 11.137. Report 55/97, November 18, 1997, para. 141, cited by the State in its response sent to the IACHR on February 13, 2006, page 12.

23. The alleged victim is an individual whose rights are protected and guaranteed under the American Convention. Based on all the foregoing, the Inter-American Commission has the competence *ratione personae* to analyze the petition.

24. The IACHR has the competence *ratione materiae* because the petition refers to charges involving the violation of rights protected by the American Convention. In addition, the Commission has the competence *ratione temporis* because the obligation to respect and guarantee the rights protected in the Convention were in effect for the State on the date on which the events alleged in the petition occurred, given that Chile ratified the American Convention on August 21, 1990.

25. Finally, the Commission has the competence *ratione loci* to hear the petition because it alleges violations of rights protected under the American Convention that occurred within the territory of Chile, a State Party to that convention.

B. Requirements for admissibility of the petition

1. Exhaustion of domestic remedies

26. Article 46(1)(a) of the American Convention provides that in order for a petition filed with the Inter-American Commission in accordance with Article 44 of the Convention to be admissible, the domestic remedies must have been pursued and exhausted, in accordance with generally accepted principles of international law.

27. According to the information provided by the parties in this case, on September 9, 2004, the Supreme Court notified the alleged victim of the denial of his appeal for nullification. According to Chile's legal system, that decision cannot be appealed. In addition, both parties indicate in the briefs they sent to the IACHR that the decision is final.¹⁴ Based on the foregoing, the Inter-American Commission concludes that the remedies provided by Chilean law have been exhausted and consequently finds that the petition meets the requirement under Article 46(1)(a) of the Convention.

2. Deadline for submitting the petition

28. Article 46(1)(b) of the American Convention establishes that one of the requirements for admission of a petition is that 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."

29. The State argues that the petition is inadmissible because it was notified by the Executive Secretariat of the IACHR on September 15, 2005, in its view after the deadline established in Articles 46(1)(b) and 47(a) of the Convention and 32(1) of the Commission's Rules of Procedure.

30. The IACHR rejects Chile's argument since the six month time period established in Article 46(1)(b) of the Convention runs from the date when the party whose rights have allegedly been violated was notified of the final decision to the date when the petition is submitted to the IACHR and not the date when the petition is forwarded to the State concerned.

¹⁴ Petition sent to the IACHR on March 4, 2005, page 3 and response from the State sent to the IACHR on February 13, 2006, pages 6 and 13.

31. As indicated earlier,¹⁵ on September 9, 2004, the Supreme Court of Chile notified the alleged victim of the decision denying his appeal for nullification, a decision that is not subject to review. In accordance with the provisions of Article 46(1)(b) of the Convention, the deadline for submitting a petition to the IACHR was March 9, 2005. The petition in this case was received by the IACHR on March 4, 2005.

32. Thus, the IACHR concludes that the petition satisfies the requirement established in Article 46(1)(b) of the American Convention.

3. Duplication of proceedings and *res judicata*

33. The petition file contains no information that might lead to a determination that the petition submitted is pending another international proceeding. Nor is there anything that would indicate that this petition duplicates a petition previously examined by the IACHR. Thus, this body concludes that the requirements under Articles 46(1)(c) y 47(d) of the American Convention have been met.

4. Characterization of the facts

34. In the instant case, the State alleged that the petition is inadmissible because the facts described therein do not characterize violations of rights protected by the Convention. Thus, it asked the IACHR to reject the petition pursuant to Article 47(b) and (c) of the American Convention.

35. It is not the Commission's task at this stage of the proceeding to decide whether or not the alleged violations of the alleged victim's rights to freedom of thought and expression and to equal protection of the law actually occurred. For purposes of admissibility, the IACHR must decide at this stage only whether the petition presents facts that, if proven, could characterize violations of the American Convention, as stipulated in Article 47(b) thereof, and whether the petition is "manifestly groundless" or "obviously out of order" in accordance with paragraph c of the same article.

36. The criterion for assessing these points is different from that required to issue an opinion on the merits of the petition. The IACHR must make a *prima facie* assessment and determine whether the petition provides the basis for the apparent or potential violation of a right guaranteed by the American Convention, not establish the existence of that violation.¹⁶ At this stage of the proceeding, it must perform a summary analysis that does not imply any prejudgment or preliminary opinion on the merits.

37. The Inter-American Commission has established that it is not competent to review decisions issued by domestic courts acting within the sphere of their competence and applying due judicial guarantees. The IACHR cannot act as an appeals court to review supposed errors of law and of fact that domestic courts may have made when acting within the limits of their competence. Nonetheless, within the limits of its mandate to guarantee the observance of the rights enshrined in the Convention, the Inter-American Commission is in fact competent to declare a petition admissible and find on the basis thereof when it refers to

¹⁵ See paragraph 27 of this report.

¹⁶ See IACHR, Report N° 128/01, Case 12.367, Herrera and Vargas ("La Nación"), Costa Rica, December 3, 2001, paragraph 50. See IACHR, Report N° 4/04, Petition 12.324, Rubén Luis Godoy, Argentina, February 24, 2004, paragraph 43.

a domestic court decision issued without due process or whether it violates any other right guaranteed by the American Convention.¹⁷

38. It is the opinion of the Commission that the arguments made regarding the alleged violation of the right to freedom of expression could characterize a possible violation of the right protected under Article 13 of the American Convention as they relate to Article 1(1) thereof. In order to be resolved, such arguments require an analysis of the merits of the case.

39. With respect to the complaint regarding the alleged violation of the right protected under Article 24 of the American Convention, it is the opinion of the Commission that the petitioner has not provided sufficient grounds and therefore this portion of the petition is inadmissible. Notwithstanding, these arguments could be considered by the Commission in the analysis of the merits of the alleged violation of the right protected under Article 13 of the Convention.

40. Finally, although the petitioner did not make this allegation, in accordance with the principle of *iura novit curia*, the Commission also declares this petition admissible with respect to Article 2 of the American Convention, in that the use of criminal charges to sanction the dissemination of information of public interest could characterize a violation of the duty to adopt provisions under domestic law.

V. CONCLUSION

41. The IACHR concludes that it is competent to hear this petition and that it satisfies the requirements for admissibility in accordance with Articles 46 and 47 of the American Convention and Articles 30, 37 and related articles of its Rules of Procedure.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible with respect to the alleged violations of the right enshrined in Article 13 as it relates to Articles 1(1) and 2 of the American Convention on Human Rights and to declare inadmissible the complaint regarding article 24 of same.
2. To submit this report to the State and to the petitioner.
3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 24th day of the month of July, 2007. (Signed): Florentín Meléndez, President; Paolo G. Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Evelio Fernández Arévalos, Sir Clare K. Roberts, and Freddy Gutiérrez, Commissioners.

¹⁷ See IACHR, Report N° 1/03, Case 12.221, Jorge Omar Gutiérrez, Argentina, February 20, 2003, paragraph 46, citing Report N° 39/96, Case 11.673, Marzioni, Argentina, October 15, 1996, paragraphs 50-