EPORT No. 42/13
PETITION 595-05
ADMISSIBILITY
CARLOS JULIO AGUINAGA AILLON (MEMBER OF THE SUPREME ELECTORAL TRIBUNAL)
ECUADOR
July 11, 2013

I. SUMMARY

1. On May 26, 2005, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition lodged by Carlos Julio Aguinaga Aillón (hereinafter "the petitioner"), which alleges the violation by the Republic of Ecuador (hereinafter "the State" or "the Ecuadorian State") of articles 8 (right to a fair trial), 9 (freedom from ex post facto laws), 11 (right to privacy), 23 (right to participate in government), 24 (right to equal protection), and 25 (right to judicial protection), in connection with Article 1.1 of the American Convention on Human Rights (hereinafter "the American Convention"), and Articles 1, 3, 4, and 7 of the Inter-American Democratic Charter, and Articles 16 and 43 of the Charter of the Organization of American States because of the facts related to removal from his position as a member of Ecuador's Supreme Electoral Tribunal.

2. The petitioner states that he was legitimately re-elected as a member of the Supreme Electoral Tribunal of Ecuador on January 9, 2003, for a four-year term, but in resolution R-25-160 of November 25, 2004, the Congress arbitrarily terminated his service, violating several Constitutional provisions and his rights recognized in the American Convention.

3. For its part, the State alleges that the Congress made that decision legally in the exercise of its competence to designate the members of the Supreme Electoral Tribunal, as stipulated in the Constitution. It says that the petitioner has not exhausted remedies at the domestic level, and that the Commission cannot act as a court of appeal to review the substance of decisions of the Congress, by virtue of the formula of the "fourth instance."

4. After analyzing the parties' positions and compliance with the requirements established in Articles 46 and 47 of the Convention, the Commission decided to declare the case admissible for purposes of examining the alleged violation of Articles 8, 9, and 25 in connection with Article 1.1 of that treaty, and inadmissible for purposes of examining the alleged violation of its Articles 11, 23, and 24. It also decided to notify the parties of the decision and publish it in the Annual Report to the General Assembly of the OAS.

II. PROCESSING BY THE COMMISSION

5. The Commission received the petition on May 26, 2005, and assigned it number 595-05. After a preliminary examination, the IACHR transmitted the pertinent parts of the petition to the State on June 20, 2005, giving it two months to submit its observations. On July 31, 2008, and September 26, 2008, the State requested that it be sent the petition's appendixes, which were requested from the petitioner on October 6, 2008. The State presented its observations on the petition on February 18, 2009. The petitioner presented the petition with all its appendixes on November 5, 2009, which were forwarded to the State on November 20, 2009, so that it could submit its response in two months. In a communication

on March 1, 2012, the Commission reiterated that request for information, and to this date has not received a reply from the Ecuadorian State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

6. The petitioner stated that a resolution of December 2, 1998, appointed him as a member of Ecuador's Supreme Electoral Tribunal for the period 1998-2003, and that subsequently, on January 9, 2003, the Congress reappointed him to that electoral body for the 2003-2007 term. He said that his election and re-election had both been conducted in accordance with the Ecuadorian legal framework then in force, particularly in keeping with the provisions of the amended text of Article 137 of the Constitution of 1979 and Article 209 of the Constitution of 1998.

7. He added that pursuant to the criterion in force at the time of his initial appointment as a member of the Supreme Electoral Tribunal the results of the elections of May 31, 1998, were taken into account. He added that for his second term for the period 2003-2007, it was clear that the Congress had considered and found acceptable his service as a member in the 1998-2003 period and compliance with the Constitutional requirements. He said that on that basis he had been re-elected as a member on January 9, 2003, along with four other magistrates.

8. He said that more than one year after his re-election, on November 25, 2004, the Congress had issued resolution R-25-160 ordering the "immediate termination" of all the members of the Constitutional Court and the Supreme Electoral Tribunal, and stating that their appointment was illegal because it was not done in accordance with Article 209 of the Constitution of 1998. He said that this resolution, which was published on December 20, 2004, read as follows:

> 2. To declare vacant the positions of the members and alternate members of the Supreme Electoral Tribunal, because they were appointed without regard to the provisions of Article 209 of the Constitution with respect to the form of their appointment; and to proceed to their appointment in accordance with that constitutional norm, based on the election results of October 20, 2002.
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> The designees shall be sworn in by the President and/or any of the vice presidents of the Congress and shall remain in their positions until legally replaced in January 2007.

9. The petitioner alleged that by issuing that resolution R-25-160, the Congress acted arbitrarily, placing political interests above the law, completely ignoring the legal institutions and the rule of law, and violated basic principles of legal security, constitutional supremacy, due process, legality, the right to defense, the obligation to justify its decisions, the right to hold public office, equality before the law, and the guarantee of judicial protection, all of which are recognized in the Constitution of Ecuador; and the rights recognized in Articles 8, 9, 23, 24, and 25 of the American Convention, in connection with its Article 1.1 referring to the obligation to guarantee and respect the rights contained therein. He also said that the State had violated Articles 1, 3, 4, and 7 of the Inter-American Democratic Charter, which refer respectively to the right to democracy of the peoples of the Americas, respect for human rights, basic freedoms, and the transparency of government activities, as well as Articles 16 and 43 of the OAS Charter.

10. The petitioner said that if something had been considered illegal in the process followed for his appointment and re-election, the Congress lacked the jurisdictional authority to declare it illegal and the only legal channel for doing so would have been through a lawsuit challenging the constitutionality of his appointment, which would have been decided ultimately by the corresponding courts. He stated that the only other valid option for the Congress under Ecuadorian law for removing a member of the Supreme Electoral Tribunal before the end of his term would have been impeachment, but he had never been charged with any irregularity nor were there any other grounds for that action. The petitioner said that the declaration of "vacancy" used to fire him is not a form of termination that is regulated by Ecuadorian law and it was therefore illegal.

11. With respect to the exhaustion of domestic remedies, the petitioner said that he had been denied access to domestic remedies and that at the time of the facts members of the Supreme Court and the Constitutional Court had been dismissed, so there were no tribunals administering justice independently and impartially. He specifically mentioned that he had been prevented from filing an *amparo* lawsuit for protection of his constitutional rights by a resolution of December 2, 2004, specifying the new composition of the Constitutional Court.

12. The petitioner argued that the purpose of said resolution was to preclude the affected members from filing *amparo* lawsuits. He said that the unconstitutionality lawsuit suggested in the resolution of December 2, 2004, was not an appropriate or effective remedy for challenging the act that removed him from his position, because a person cannot do it as an individual; it is necessary to have 1,000 signatures or the intervention of the Public Defender; furthermore, he stated that it was not an action for immediate protection of human rights, and that it was not capable of remedying the violation, noting that when he was terminated, the Congress had also terminated the members of the Constitutional Court, so there was no impartial or independent authority to which he could resort. He added that administrative litigation was not an appropriate or effective remedy either, because in the end it would be decided by a Supreme Court that was not independent or impartial, and because this process does not challenge political or government acts.

B. Position of the State

13. The State said that resolution R-25-160 is an administrative act regulated by and emanating from a competent authority, because Article 130.1 of the Constitution of 1998 established that the Congress is responsible for naming the members of the Supreme Electoral Tribunal, excusing them, and designating their replacements.

14. With respect to the petition's admissibility, the State said that the petitioner had not exhausted domestic remedies, because he could have filed administrative litigation to challenge the congressional resolution that terminated his services, since such an action can be filed by anyone to challenge an act that is contrary to his rights or direct interests.

15. It said that the petitioner could also have filed an *amparo* suit for protection of his constitutional rights, regulated by Ecuador's Constitutional Control Law; or in any case could have met the legal requirements for filing a case challenging constitutionality, if he had felt that his removal was unconstitutional or arbitrary.

16. Finally, the State said that the petitioner could file a lawsuit for protection under Article 88 of the current Constitution and the Rules of Procedure for the exercise of the jurisdiction of the

Constitutional Court for the transition period, published in Official Register 446 of November 13, 2008. It said that all these remedies were at the petitioner's disposal, and he cannot excuse his own negligence by arguing his future fear about the courts' impartiality.

17. In the State's view, the petitioner was attempting to have the IACHR act as a "fourth instance" to review the substance of a domestic administrative decision simply because he was dissatisfied with the results of a proper administrative act.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

18. In principle the petitioner is empowered by Article 44 of the American Convention to submit petitions to the Commission. The petition indicates as alleged victim an individual person with respect to whom the Ecuadorian State committed to respect and guarantee the rights enshrined in the American Convention. Regarding the State, the Commission points out that Ecuador has been a State Party to the American Convention since December 28, 1977, the date on which it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

19. The Commission is also competent *ratione loci* to hear the petition in that it alleges violations of rights protected in the American Convention that occurred within the territory of Ecuador, a State Party to the Convention. The Commission is competent *ratione temporis* in that the obligation to respect and guarantee the rights protected in the American Convention were already in effect for the State on the date the events alleged in the petition occurred. Finally, the Commission is competent *ratione materiae* because the petition reports possible violations of human rights protected by the American Convention.

20. With respect to the allegations of violation of the Inter-American Democratic Charter and the OAS Charter, the Commission notes that for the States parties to the American Convention that treaty is in principle the concrete source of their obligations to respect and protect human rights. However, in the light of Article 29.d of that international instrument, it does not exclude or limit the effect that the American Declaration and other international acts of the same nature may have on the OAS member states. In that regard, the Commission can take into account the terms incorporated by the States in the OAS Charter and the Inter-American Democratic Charter insofar as they are pertinent for interpreting the Convention and defining possible violations of human rights guaranteed by that instrument.

B. Admissibility requirements

1. Exhaustion of domestic remedies

21. Article 46.1.a of the American Convention requires the prior recourse to and exhaustion of domestic remedies in accordance with generally recognized principles of international law as a requirement for the admission of a complaint lodged with the Commission. Article 46.2 of the Convention provides that the prior exhaustion of domestic remedies requirement is not applicable when:

a. the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have been allegedly violated;

b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

22. In this case, the State alleges that domestic remedies have not been exhausted as stipulated in Article 46.1.a of the Convention, and that the petitioner could have defended his rights with appeals for *amparo* (protection), constitutionality challenges, administrative litigation, and after 2008, lawsuits for protection. For his part, the petitioner requests application of the exception for exhaustion of domestic remedies because he lacked an adequate and effective remedy to restore him to his position and respect his rights.

23. Considering the parties' positions, the IACHR must determine which domestic remedies must be exhausted in cases like this one, in the light of the jurisprudence of the inter-American system. In this regard, the Inter-American Court has established that when domestic remedies are not available either as a matter of law or as a matter of fact, petitioners are exempt from the obligation to exhaust them. If a domestic remedy is virtually inaccessible for the alleged victim, there is certainly no obligation to exhaust it to remedy the legal situation.[1]

24. On this matter, the Commission notes that in information that is public knowledge and cited in other cases, the resolution of the Constitutional Court on December 2, 2004, stated:

> To rule that to suspend the effects of a parliamentary resolution, such as No. 25-160, adopted by the National Congress on November 25, 2004, for an alleged violation of the Constitution, in substance or in form, the only action admissible is an unconstitutionality suit, which must be placed before the Constitutional Court, in line with the resolution of the Supreme Court of Justice adopted on June 27, 2001, and published in Official Register No. 378 on July 27 of that year; and that any amparo remedy lodged with the country's courts in connection with the aforesaid resolution must be rejected outright and ruled inadmissible by the judges, since to do otherwise would to be admit proceedings against express law, which would lead to the corresponding judicial actions. [2]

25. The Commission notes with respect to the *amparo* remedy that, as affirmed by the petitioner and not refuted by the State, said resolution, issued by the new members of the Constitutional Court established after the Congress had deposed the former magistrates of that organ, expressly ruled out *amparo* actions against resolution 25-160 that had fired the petitioner and the other members of the Supreme Electoral Tribunal, so the IACHR notes that in accordance with said resolution the *amparo* remedy was not available to challenge the dismissal decision.

26. As for the unconstitutionality suit, which the resolution of December 2, 2004, said was available to challenge the terminations, the Commission notes in the first place that, as it has observed on previous occasions, the text of that resolution says it is based on the Supreme Court's resolution of

[1] See I-A Court. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a, and 46.2.b of the American Convention on Human Rights). Advisory Opinion OC-11/90, August 10, 1990. Series A No. 11, para. 17.

[2] Approved by the plenary session and published in Official Register N° 477 of December 8, 2004. See IACHR, *Case 12.600 Hugo Quintana Coello et al (Supreme Court of Justice) Ecuador (Merits),* March 31, 2011, para. 46.

June 27, 2001, which said that *amparo* action was not admissible when brought with respect to "organic and ordinary laws, decree laws, decrees, ordinances, statutes, regulations, and generally binding (erga omnes) resolutions," i.e., a series of acts of a general and abstract nature.[3] By contrast, the Commission notes that resolution 25-160 that removed the members of the Supreme Electoral Tribunal affected the rights and specific interests of the alleged victim with concrete damage that by its nature could not be challenged through an unconstitutionality suit, which as has been explained, was conceived in principle to analyze the constitutionality of general and abstract normative acts.

27. In the second place, the Commission observes that the unconstitutionality suit is not a remedy of rapid and simple access for the alleged victim because Article 277 of Ecuador's 1998 constitution, in force at that time of the facts, lists the specific subjects authorized to file such suits and the requirements for doing so,[4] and according to the regulation governing the remedy, it cannot be used directly by an individual who must first get signatures of 1,000 citizens or a favorable ruling by the Public Defender. The IACHR also notes that on the date when the facts occurred the regulations had not been approved for access to the Public Defender, so there was no procedure or specific deadlines.[5]

28. In the third place, the IACHR observes the doubtful efficacy of any action filed with the Constitutional Court, because that organ had already approved a resolution ruling out lawsuits against the Congressional resolution that had removed the alleged victim. Moreover, the same Constitutional Court had been formed after the termination of the former members of the Constitutional Court by the same resolution that removed Mr. Aguinaga and the other members of the Supreme Electoral Tribunal.

29. Therefore, and in view of the lack of information from the State regarding the suitability and efficacy of the unconstitutionality remedy in cases like this one, the Commission considers that for the purpose of analyzing compliance with the requirement in Article 46 of the Convention the alleged victim is not required to exhaust that remedy.

30. The Commission notes that the State said that the petitioner should exhaust the administrative litigation remedy, which is applicable to regulations, acts, and administrative resolutions that violate a right or immediate interest of the petitioner, or that violate private rights, provided the offending regulation, measure or decision was approved as a consequence of a general provision that

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[3] IACHR, *Case 12.600 Hugo Quintana Coello et al (Supreme Court of Justice) Ecuador (Merits),* March 31, 2011, paras. 47 and 136.

[4] "Art. 277.- Unconstitutionality suits may be filed by:

1. The President of the Republic, in cases specified in section 1 of Art. 276.

2. The National Congress, by decision of a majority of its members, in the cases specified in sections 1 and 2 of the same article.

3. The Supreme Court of Justice, by resolution of the full court, in the cases specified in sections 1 and 2 of the same article.

4. The provincial or municipal councils, in the cases specified in section 2 of the same article.

5. One thousand citizens who have political rights, or any person upon favorable recommendation by the Public Defender, in the cases specified in sections 1 and 2 of the same article.

The President of the Republic shall request the decision prescribed in sections 4 and 5 of the same article. (…)"

[5] See also IACHR, Report No. 8/07, Petition 1425-04, Admissibility, Hugo Quintana Coello et al, Ecuador, February 27, 2007, para. 29.

infringes the law that is the basis of those rights. On this point, the IACHR considers that none of the hypotheses posited by the State fit the situation posed by the petitioner, since the act by which Congress removed the justices from the bench of the Constitutional Court –allegedly in violation of the Ecuadorian Constitution- cannot be equated with an administrative decision.[6] Therefore, the Commission finds that administrative litigation would not be a suitable or effective remedy that the petitioner would have to pursue to comply with the requirement established in Article 46 of the Convention.

31. Finally, with respect to the so-called action for protection, the Commission notes that the State has not provided information that would show that it is a suitable and effective remedy for challenging the dismissal resolution, and it is a remedy that was established following the entry into force of the Constitution of 2008, and therefore was not available at the time of the facts alleged in the petition, which occurred on November 25, 2004. The IACHR therefore considers that the petitioner cannot be required to pursue it.

32. In view of the foregoing, the Commission considers, for purposes of analyzing the requirement for exhaustion of domestic remedies, that the petitioner did not have a simple and effective recourse by which to challenge the congressional resolution that he believed violated his human rights. Therefore, the IACHR considers that the exceptions to the requirement for exhaustion of domestic remedies allowed in Article 46.2.a of the American Convention apply to the instant case.

33. Invocation of exceptions to the rule for exhaustion of domestic remedies allowed in Article 46.2 of the Convention is closely linked to the determination of possible violations of certain rights contained therein, such as guarantees of access to justice. However, Article 46.2, by its nature and purpose, is an autonomous norm *vis á vis* the Convention's substantive norms. Therefore, the determination as to whether the exceptions to the exhaustion of domestic remedies rule are applicable to the case in question should be made prior to and separate from the analysis of the merits of the case, in that it depends on a standard of assessment different from that used to determine the possible violation of Articles 8 and 25 of the Convention. 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 submitting the petition

34. Article 46.1.b of the American Convention establishes that in order for a petition to be admitted by the Commission it must be submitted within a period of six months from the date when the alleged injured party was notified of the final decision. Article 32 of the Commission's Rules of Procedure stipulates 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. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

35. In the case under study, the Commission has concluded that the exception to the requirement for exhaustion of domestic remedies is applicable, so the IACHR must decide whether the petition was presented within a reasonable period of time in view of the specific circumstances. The Commission notes that the resolution that dismissed the petitioner was adopted on November 25, 2004,

[6] See in this regard Report No. 5/07, Petition 161-05, Admissibility, Miguel Camba Campos et al, Ecuador, February 27, 2007, para. 24.

and the petition was lodged on May 26, 2005, under the specific circumstances that the petitioner could not have exhausted additional remedies to challenge his removal from the post. Therefore, in view of the context and characteristics of the instant case, the Commission believes that the petition was submitted within a reasonable period of time, and this requirement for admissibility has been met.

3. Duplication of proceedings and *res judicata*

36. The petition's file contains no information that could lead to a determination that the instant matter is pending in another international proceeding or has been previously decided by the Commission or any other international organ. Therefore, the requirements of Articles 46.1.c and 47.d of the Convention have been satisfied.

4. Characterization of the alleged facts

37. When determining admissibility, the Commission must decide whether the petition presents facts that could tend to characterize a violation, as provided in Article 47.b of the American Convention, and whether the petition is "manifestly groundless or obviously out of order," according to paragraph c) of the same article. In this stage of the proceeding the Commission must perform a *prima facie* evaluation to examine whether the complaint provides the grounds for an apparent or potential violation of a right guaranteed by the Convention and not to establish the existence of a violation. Such examination does not imply prejudgment or an advance opinion regarding the merits of the case.[7]

38. Bearing in mind the importance of the stability of judges for ensuring the independence and impartiality of the judicial branch in a democratic society,[8] in this case the Commission considers that the allegations in the petition that Mr. Aguinaga was removed from his position as member of the Supreme Electoral Tribunal by an allegedly arbitrary decision adopted in a proceeding that was not authorized by law, without specific reasons and without having been given adequate guarantees, such as the right to be heard and defend himself, and the alleged lack of an effective remedy to challenge the dismissal decision could tend to characterize a violation of the rights established in Articles 8, 9, and 25 of the American Convention. The Commission therefore decides to declare said articles admissible in order to analyze their possible violation in the merits stage of this case.

39. Finally, the Commission considers that the petitioner has not presented arguments that tend to characterize a violation of the right to privacy, the right to participate in government, and the right to equal protection established respectively in Articles 11, 23, and 24 of the American Convention.

V. CONCLUSIONS

40. The Commission concludes that it is competent to examine the complaints submitted by the petitioner regarding the alleged violation of Articles 8, 9, and 25, in connection with Article 1 of the Convention, and that these are admissible in accordance with the requirements stipulated in Articles 46 and 47 of the American Convention. On the other hand, it concludes that the facts alleged by the petitioner, if true, would not constitute possible violations of Articles 11, 23, or 24 of the American Convention.

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[7] See IACHR, Report N° 21/04, Petition 12.190, José Luís Tapia González at al, (Chile), February 24, 2004, para. 33.

[8] I-A Court, *Case of the Constitutional Court.* Judgment of January 31, 2001. Series C No. 71.

41. Based on the factual and legal arguments presented above and without thereby implying prejudgment on the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible with respect to Articles 8, 9, and 25 in connection with Article 1 of the American Convention.

2. To declare inadmissible the allegations referring to Articles 11, 23, and 24 of the American Convention.

3. To inform the Ecuadorian State and the petitioner of this decision.

4. To continue with analysis of the merits of the case.

5. To publish this decision and include it in the Annual Report to be submitted to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 11 day of July 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rosa María Ortiz, Second Vice-President; Felipe González, Dinah Shelton, Rodrigo Escobar Gil, Rose-Marie Antoine, Commissioners.