

REPORT N° 71/02
ADMISSIBILITY
PETITION 12.360
SANTANDER TRISTÁN DONOSO
PANAMA
October 24, 2002

I. SUMMARY

1. The *Centro de Asistencia Legal Popular* (CEALP) and the Center for Justice and International Law (CEJIL) (hereinafter "the petitioners") submitted a petition on July 5, 2000, to the Inter-American Commission on Human Rights (hereinafter the "Commission" or the "IACHR") against the Republic of Panama (hereinafter "the State" or "Panama") in which they allege the violation of the following rights recognized in the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") to the detriment of Mr. Santander Tristán Donoso (hereinafter "Tristán Donoso"): the right to privacy (Article 11(2)); the right to freedom of expression and thought (Article 13); the right to a fair trial (Article 8); and the right to judicial protection (Article 25), all in connection with the generic duties of the State to respect and ensure the rights enshrined in the Convention (Article 1(1)) and to adopt measures necessary to making effective the rights and freedoms set forth in the Convention (Article 2).

2. The petitioners alleged that the interference in and the taping of a phone conversation between attorney Santander Tristán Donoso and his client, and the subsequent publication of its content by the Attorney General of the Nation, Mr. José Antonio Sossa Rodríguez (hereinafter the "Attorney General") constitute improper interference with his private life and his confidentiality and liberty in the exercise of the profession of attorney. In a press conference, Mr. Tristán Donoso publicly denounced these facts, and presented a complaint against the Attorney General. The Supreme Court of Justice (hereinafter the "Supreme Court") affirmed the dismissal with prejudice of the charges against the Attorney General, and the investigations performed have not found the persons responsible for having ordered or carried out the aforementioned acts.

3. The petitioners also allege that in response to the press conference, the Attorney General presented a complaint against Mr. Tristán Donoso for the criminal offenses of slander and libel, the trial for which limits his freedom of expression. They add that Mr. Tristán Donoso asked that those crimes be declared unconstitutional, through a constitutional challenge before the Supreme Court, which was rejected, which makes it possible for the proceeding to continue its course. Accordingly, they consider that Panama has not adopted all the measures needed to bring its legislation and national practices into line with the Convention, since the proceeding instituted against Tristán Donoso and the real possibility of a sanction of imprisonment for the crime of slander and libel is a disproportionate means of curtailing the freedom of expression, on imposing a disproportionate risk on all those who, in exercising their freedom of expression, criticize or point out a possible abuse of authority by public officials, information which is extremely important for society in general.

4. The State requested that the arguments of the petitioners related to the alleged violations of the rights to privacy, freedom of expression, a fair trial, and judicial protection be declared inadmissible. With respect to the right to privacy, it alleged that the petition has no basis whatsoever, and that it is based solely on personal considerations, thus they did not obtain the result they hoped for. It adds that in the course of the investigation, it was determined that no phone conversation had been wiretapped, and that the evidence had been properly handled and weighed by the judicial authorities. Furthermore, in relation to the alleged violation of the freedom of expression, it considers that domestic remedies have not been exhausted, since it understands that the criminal trial for slander and libel, which at present is continuing in the plenary phase, must be exhausted. With respect to the challenge of the constitutionality of the Criminal Code provisions, the State argued that the Supreme Court declared it inadmissible since the same question had been decided previously.

5. On analyzing the instant case, the IACHR concluded that it is competent to take cognizance of it, and declared that the petition meets the admissibility requirements with respect to the rights to privacy (Article 11(2)), a fair trial (Article 8), freedom of expression (Article 13), and

judicial protection (Article 25), all in relation to the generic duties of the State to respect and ensure the rights enshrined in the American Convention (Article 1(1)) and to adopt the measures needed to give effect to the rights and freedoms provided for in the Convention (Article 2). The IACHR decided to notify the parties of this decision, publish it, and include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

6. The petition was received at the IACHR on July 4, 2000 and was sent to the State, with a request for information, on January 26, 2000; the State was given 90 days to respond. The State requested a 30-day extension on April 17, 2001 which was granted on May 1, 2001. The State responded on May 30, 2001 and sent additional information on June 21 and 27, 2001. On July 20, 2001 the petitioners submitted their observations, and on August 8, 2001 they sent additional information, and requested a hearing before the IACHR, which was turned down on August 29, 2001. On September 26, 2001, the State sent its observations. On November 9, 2001 the petitioners sent in their observations, and on December 13, 2001 the State submitted its response. On January 31, 2002 the petitioners sent the IACHR their observations. On March 10, 2002 the State indicated that additional comments related to the instant case were pending. On July 3, 2002 the petitioners submitted additional information. On July 9, a communication was received from the petitioners, and on August 9, 2002 the State submitted its observations.

III. THE PARTIES' POSITIONS

A. The petitioners

a. With respect to the interference, taping, and publication of a phone conversation between Mr. Tristán Donoso and his client, and the subsequent criminal investigation into the Attorney General

7. The petitioners allege arbitrary violation of the right to privacy and the lack of protection for the exercise of the legal profession (Article 11(2)), due to the unlawful interference in the phone conversations on July 8, 1996 between attorney Tristán Donoso and his client, Mr. Adel Sayed, who was being investigated in a money-laundering case. The content of this conversation was later released publicly by the Attorney General at least twice in July 1996. The release of the cassette has been acknowledged by the Attorney General, but he stated that it did not mean having "made public the contents of the tape."¹

8. The petitioners also allege that the State has violated Articles 8 and 25 of the Convention in its handling of the complaint lodged by Mr. Tristán Donoso against the Attorney General for various criminal offenses. In response to the request by the *Procuraduría de la Administración*, the Supreme Court dismissed the case, to the benefit of the Attorney General. On October 22, 1999 Mr. Tristán Donoso appealed this decision, which ignored several items of evidence that show the violation of which he was the victim, and because they did not follow other lines of investigation to determine responsibilities. On December 3, 1999 the Supreme Court affirmed the dismissal with prejudice of the case against the Attorney General, and the complainant was so notified on January 4, 2000; and the judgment became final the next day, January 5, 2000. The petitioners consider that with that decision, domestic remedies were exhausted, and they presume that the wiretaps were done by the State, since it has the means needed to take such actions.

b. With respect to the trial for slander and libel initiated by the Attorney General against Mr. Tristán Donoso because of the press conference he called to denounce the taping and publication of his telephone conversation with his client

9. The petitioners allege that the State has violated Article 13 of the Convention by the filing of a complaint for slander and libel by the Attorney General against Mr. Tristán Donoso for having called a press conference on March 26, 1999 in which he reported the interference in and taping of his telephone conversations, as described above. The petitioners consider that the

1 See: Sworn statement by Attorney General José Antonio Sossa, May 24, 1999 before the *Procuraduría de la Administración*, para. 12.

proceedings in this criminal trial constitute violations of the freedom of expression, and that both the laws that criminalize such conduct, and the possibility of preventive detention during the trial or a conviction, constitute a burden disproportionate to the legitimate exercise of the freedom of expression. They also consider that Mr. Tristán Donoso has been harassed, as he has been denied authorization to travel abroad even though it is not possible to issue such a prohibition for the offense of which he is accused.² The petitioners also indicate that on October 25, 2001 the Attorney General filed a claim for compensation for damages and losses for the sum of 1,100,000 balboas for damages and material losses arising from the slander and libel.

10. The petitioners allege that Mr. Tristán Donoso has exhausted two constitutional challenges of the laws that regulate these offenses. The second of these challenges, which refers to the instant case, was filed on April 28, 2000 against the *desacato* laws provided for in Articles 172, 173, 173-A, 174, and 175 of the Criminal Code, on grounds of unconstitutionality. This challenge was dismissed by the Supreme Court, on May 24, 2000 as the purpose of the action had already been decided by the Court in a judgment of October 28, 1998 which established that those provisions of the Criminal Code are not unconstitutional. The petitioners allege that this remedy represented the sole opportunity to fight the provisions of a "*desacato* law," which is incompatible with the Convention, and that, for this reason, Panama has not adopted all the measures needed to bring its legislation and practices into line with the Convention.

11. Without prejudice to the argument set forth above, with respect to the requirement of exhaustion of domestic remedies for violations of the right to freedom of expression, the petitioners also allege that the exception provided for at Article 46(2)(a) of the Convention applies, for the following reasons: (a) There is no effective remedy in the legislation to protect the right to freedom of expression when the opinions refer to public officials, and it is not possible to challenge the constitutionality of the slander and libel laws, since the Supreme Court itself has declared them to be constitutional; (b) The slander and libel provisions in the Criminal Code are contrary to the Convention, as they criminalize the exercise of the freedom of expression as they entail the threat of prison or fines for those who insult or offend a public official, and, even though by being subsequent to the expression they do not impede the petitioner from expressing himself, "they are equivalent, nonetheless, to censorship, which may possibly deter him from making criticisms of that sort in the future." The fear of criminal sanctions necessarily discourages citizens from expressing their opinions on problems of public interest; (c) There is a reiterated practice of public officials abusing such trials. They add that Mr. Tristán Donoso has been suffering the anguish of the continuation of this trial, its possible outcomes, and the possibility of facing a prison sentence, for over three years.

B. The State

a. With respect to the interference, taping, and publication of a telephone conversation between Mr. Tristán Donoso with his client and the subsequent criminal investigation against the Attorney General

12. The State requests the IACHR to declare the petition related to the wiretapping, taping, and publication of a telephone conversation between Mr. Tristán Donoso and his client inadmissible, for lack of any objective foundation, as it is based merely on personal considerations made in connection with the complaint he lodged, which did not have the outcome he had hoped for.³ The State alleges that these facts were the subject of an administrative investigation by the *Procuraduría General de la Administración*, and that the proceeding regarding acts which had been sought to be attributed to the Attorney General concluded with a dismissal with prejudice handed down December 3, 1999 by the Supreme Court. This judgment was reported by edict on January 4, 2000 which noted "that as of 3:00 p.m. on the next day, January 5, no appeal whatsoever had been taken, accordingly the judgment can be considered legally to be a firm judicial decision."

² Article 2127, agreeing with Article 2128 of the Judicial Code indicate that personal precautionary measures imposing a prohibition on travel abroad without judicial authorization, and the duty to appear before a public authority periodically, shall also be applicable when two circumstances are both present: the accused takes flight or there is a danger he or she will try to do so, and the offense carries a minimum sentence of two years of imprisonment (underscored by petitioners).

³ Communication from the State received at the IACHR October 2, 2001 which referred to a report by the Office of the Attorney General and the Supreme Court of Justice.

13. The State alleges that in this ruling, the Supreme Court made it clear that the wiretapping and taping of the conversations were not ordered or carried out by the Public Ministry, or by the Attorney General. In this regard, the judgment of the Supreme Court of December 3, 1999 notes that "those who proceeded to tape the telephone conversation, for reasons unknown, were members of the Sayed family, and not of the Public Ministry, or specifically, the Attorney General of the Nation, as alleged by attorney Santander Tristán."⁴ The State also alleges that the various items of evidence presented in this proceeding were properly weighed.

b. With respect to the trial for slander and libel initiated by the Attorney General against Mr. Tristán Donoso because of the press conference called to report the taping and publication of his telephone conversation with his client

14. Second, with respect to the criminal complaint filed by the Attorney General against Mr. Tristán Donoso for the offenses of slander and libel, the State alleges that on June 27, 2000 a dismissal without prejudice was handed down on his behalf on the grounds that the offense against his honor was not shown in its objective aspect. This decision was appealed by the Office of the Fourth Circuit Prosecutor, and the Superior Tribunal of Justice for the First Judicial District decided to open the criminal case against Mr. Tristán Donoso as the alleged perpetrator of offenses against honor. That resolution relies on the falsity of the accusation made against the Attorney General, who taped his conversation, which makes it possible to prove the punishable act set forth in the criminal complaint. At present, according to the State, this process is pending a decision, and is to continue with the proceedings of the plenary phase. The Panamanian State calls on the IACHR to declare this part of the petition inadmissible, since domestic remedies have not been exhausted, and as the corresponding objections are pending. The State also considers that there are no objective causes to exempt the petitioner from having to meet this requirement.

15. It should be noted that in respect of the constitutional challenges filed by Tristán Donoso, the State alleges that on May 24, 2000 the Supreme Court decided not to admit the constitutional challenge as there was already a decision of October 28, 1998, in which it was established that the laws that were the basis of the accusation against Tristán Donoso are not unconstitutional. This decision was reported on June 5, 2000, and it was not challenged.

IV. ANALYSIS OF ADMISSIBILITY

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

16. The Commission is competent to take cognizance of the instant case. First, the Commission is competent *ratione materiae*, because the petition alleges violations of human rights protected in Articles 1, 2, 8, 11, 13, and 25 of the Convention. Second, the Commission is competent *ratione personae* in view of its active and passive standing to examine the petition lodging a complaint against Panama, as the petitioners are authorized by Article 44 of the Convention to submit complaints to the IACHR, and the petition indicates as the alleged victim an individual. Third, the IACHR is competent *ratione temporis*, for as of the date on the which the acts are alleged to have taken place, the obligation to respect and ensure the rights protected in the Convention was already in force, as it was since on June 22, 1978 the date Panama deposited the instrument of ratification. Finally, the Commission is competent *ratione loci* insofar as the petition alleges violations, in Panama, of rights protected in the Convention.

B. Other admissibility requirements of a petition

a. Exhaustion of domestic remedies

17. Article 46(1)(a) of the Convention requires "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." The IACHR reiterates that this requirement has the purpose of allowing the State to resolve the issues raised within its own legal framework before having to be brought before an international body. In the following paragraphs, the IACHR will analyze whether this

⁴ See: Ruling of December 3, 1999 folio 17.

requirement has been met with respect to the violations alleged by the petitioners in the judicial proceedings involving Mr. Tristán Donoso:

18. With respect to the arguments on the violations of Mr. Tristán Donoso's right to not be subject to arbitrary and abusive interference with his private life (Article 11) and the rights to due process (Article 8) and judicial protection (Article 25), the petitioners allege that Mr. Tristán Donoso exhausted domestic remedies, and specifically that he pursued the appropriate remedy, which was decided by the Supreme Court of Justice on December 3, 1999. The State agreed with the petitioners that this process concluded with the dismissal with prejudice of the charges against the Attorney General, on the date indicated. The IACHR concludes that this remedy was exhausted in keeping with Article 46(1)(a) of the Convention.

19. With respect to the alleged violation of the right to freedom of expression (Article 13), the IACHR notes that the parties have different positions on the exhaustion of domestic remedies. On the one hand, the State argues that domestic remedies have not been exhausted, since the criminal proceedings for slander and libel initiated by the Attorney General against Mr. Tristán Donoso had not yet concluded. The State adduced that this criminal proceeding, which it considers a "remedy," had not been exhausted, and that "the corresponding appeals are pending." It further considered that there are no objective causes exempting the petitioner from this requirement, since the criminal proceeding was still under way. The IACHR notes that despite these assertions, the State did not indicate any circumstance to justify the adequacy or effectiveness of such a "remedy." Not did it point to the existence of any other domestic remedy adequate to address the alleged violation of Article 13 of the Convention, although it affirms, as do the petitioners, that Mr. Tristán Donoso exhausted two constitutional challenges, which were rejected in due course by the Supreme Court.

20. The petitioners have set forth two arguments which in the view of the IACHR are different: First, they understand that it is illogical and legally anomalous to require that a person exhaust the domestic remedies within a proceeding to which that person objects *ab initio* and entirely. In this sense, the petitioners consider that the slander and libel trial brought by public officials represents in its entirety a violation of the freedom of expression of Panamanian citizens derived from a law contrary to the Convention, as is the case of *desacato* laws. Accordingly, they consider that the victim need not exhaust a remedy against a proceeding which by its nature is illegal, and which is unfolding in the context of a generalized violation of the right to freedom of expression. Moreover, they add that the constitutional challenge filed by the victim against the "*desacato* laws" was the only real opportunity to fight the provisions of a *desacato* law, and that remedy was not admitted by the Supreme Court of Justice on May 24, 2000. Accordingly, this remedy has been exhausted in keeping with Article 46(1)(a) of the American Convention. The petitioners' second argument is considerably different: They understand that they must apply the exceptions provided for in Article 46(2)(a) of the Convention, and they ask that the petitioners be exempted from the requirement to exhaust domestic remedies, which, in practice, cannot attain their objectives, for the reasons set forth above.⁵

21. The Inter-American Court has indicated that when a State alleges failure to exhaust domestic remedies, it has the burden to specify the domestic remedies that must be exhausted, and to show that they are adequate and effective.⁶ With respect to the distribution of the burden of proof, the IACHR reiterates that if the State that alleges failure to exhaust proves the existence of specific domestic remedies that should have been pursued, it will be up to the petitioner to show that said remedies were or were not exhausted, or that one of the exceptions provided for in Article 46(2) of the Convention applies.

⁵ See para. 11.

⁶ IACHR, Report No 02/01, Case 11.280, *Juan Carlos Bayarri*, Argentina, January 19, 2001. Para. 30. The Inter-American Court of Human Rights has said repeatedly that "the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective." See *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987 Series C No 1, para. 88; *Fairén Garbi and Solís Corrales Case*, Preliminary Objections, Judgment of June 26, 1987 Series C No 2, para. 8; *Godínez Cruz Case*, Preliminary Objections, Judgment of June 26, 1987 Series C No 3, para. 90; *Gangaram Panday Case*, Preliminary Objections, Judgment of December 4, 1991 Series C No 12, para. 38; *Neira Alegría et al. Case*, Preliminary Objections, Judgment of December 11, 1991 Series C No 13, para. 30; *Castillo Páez Case*, Preliminary Objections, Judgment of January 30, 1996 Series C No 24, para. 40; *Loayza Tamayo Case*, Preliminary Objections, Judgment of January 31, 1996, Series C No 25, para. 40; 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, August 10, 1990 Series A No 11, para. 41.

22. The IACHR considers that in the instant case the State has not alleged the reasons why the criminal proceeding under way against Mr. Tristán Donoso for the criminal offenses of slander and libel is the *adequate* and *effective* remedy for addressing the alleged violation of Article 13 of the Convention. The petitioners have argued that they exhausted the constitutional challenge of the provisions at Articles 172 and 175 of the Criminal Code, and the State indicates only that it was rejected by the Supreme Court. In this case, the adequate remedy is the constitutional challenge, and, accordingly, the petitioners have met the requirement of prior exhaustion of domestic remedies.

b. Time period for lodging a petition

23. Article 46(1)(b) of the Convention requires that a petition 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.” Following is the analysis of whether this requirement has been met for the domestic remedies that involve Mr. Tristán Donoso:

24. First, with respect to the alleged violation of the right to privacy, the petitioners allege that the criminal action brought by Mr. Tristán Donoso against the Attorney General culminated in the dismissal with prejudice, which was reported to them on January 4, 2000. The State agreed with the petitioners, indicating that this ruling was reported by edict of January 4, 2000 whose notice period ended January 5, without any appeal whatsoever, thus it can be considered *res judicata*. The petition was filed on July 5, 2002; therefore, the IACHR concludes that with respect to this part of the petition, the requirement that a complaint be lodged within six months, provided for at Article 46(1)(b) of the Convention, has been met.

25. Second, with respect to the alleged violation of the right to freedom of expression, the IACHR notes that the rejection of the constitutional challenge by the Supreme Court was reported on June 5, 2000. The petition was lodged with the IACHR on July 5, 2000; accordingly, the IACHR concludes that the petition was submitted within the time period provided for in Article 46(1)(b) of the Convention.

c. Duplication of proceedings and *res judicata*

26. Article 46(1)(c) establishes as an admissibility requirement that the subject matter of the petition or communication not be pending before any other international proceeding for settlement. In addition, Article 47(d) of the Convention establishes that a petition will be declared inadmissible when it is substantially the same as a prior petition already examined by the Commission or another international body. In the instant case, the parties have not alleged or proven that the subject matter submitted to the Commission for its consideration is pending before another international proceeding for settlement, or that it reproduces a petition already examined by another international body, or that it reproduces a petition already examined by the Commission. Accordingly, the Commission concludes that these requirements have been met.

d. Characterization of the facts alleged

27. Article 47(b) of the Convention provides that the Commission shall declare inadmissible any petition that does not set forth facts that tend to establish a violation of the rights guaranteed by the Convention. In the instant case, the petitioners alleged that the following provisions were violated:

- i. Article 11, due to the interference in and taping of a telephone conversation between Mr. Tristán Donoso, in his capacity as attorney, and his client Mr. Adel Sayed, and the later publication of its content by the Attorney General;
- ii. Article 13, since the Attorney General lodged a complaint against Mr. Tristán Donoso for the criminal offenses of slander and libel, in response to the press conference held to report the facts mentioned in the previous paragraph, which entails a threat to and intimidation of the exercise of the freedom of expression;
- iii. Articles 8(1) and 25, insofar as the decision handed down by the competent judicial authority in the criminal proceeding initiated by Mr. Tristán Donoso against the Attorney

General for interference in, taping, and publication of a telephone conversation between him and his client, *inter alia*, did not take into account or weigh relevant evidence, nor has criminal liability been established for the perpetrators of those acts;

iv. Article 2, considering the criminal code provisions on *desacato*, which have been applied in the proceeding initiated into the complaint lodged by the Attorney General for the criminal offenses of slander and libel against Mr. Tristán Donoso.

28. After analyzing the parties' positions, the IACHR considers that the facts alleged tend to establish violations of the Convention. Accordingly, the Commission concludes that the petition meets the requirement of Article 47(b) of the Convention.

V. CONCLUSIONS

29. Upon analyzing the instant case, the IACHR concluded that it is competent to take cognizance of it, and it declared that the petition meets the admissibility requirements with respect to the rights to privacy (Article 11(2)), a fair trial (Article 8), freedom of expression (Article 13), and judicial protection (Article 25), all in connection with the generic duties of the State to respect and ensure the rights enshrined in the American Convention (Article 1(1)), and to adopt the measures necessary to give effect to the rights and freedoms provided for in the Convention (Article 2).

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this petition admissible with respect to the petitioners' arguments regarding alleged violations of Articles 1, 2, 8, 11, 13, and 25 of the American Convention.
2. To notify the parties of this decision.
3. To continue analyzing the merits.
4. To publish this decision and include it in its Annual Report 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., October 24th, 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, and Susana Villarán, Commissioners.