



INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT 90/00*
CASE 12.124
DANIEL DAVID TIBI
ECUADOR
October 5, 2000

I. SUMMARY

1. On July 15, 1998, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a complaint in which it was alleged that the Republic of Ecuador (hereinafter "the State" or "Ecuador") had violated the rights of Mr. Daniel David Tibi, a French national residing in Ecuador and a dealer in precious stones and art objects, which rights are protected in the American Convention on Human Rights (hereinafter "the American Convention"). The Petitioner is represented before the Commission by Attorney Arthur Vercken, also a French national. He alleges violation of Articles 5 (humane treatment); 7 (personal liberty); 8 (fair trial); 10 (compensation); 11 (privacy); 21 (property); and 25 (judicial protection), all in relation to Article 1(1) of the American Convention.

2. The Petitioner alleges that, on September 27, 1995, he was arrested by the police in Quito while driving his car in a city street. The Petitioner alleges that he was taken, unjustly, by airplane, to the city of Guayaquil, some 600 km. from Quito, where he was placed in a cell and illegally held for 28 months. The Petitioner claims that he is entirely innocent of the charges made against him and that he was subjected to torture on seven occasions, beating, burning, and suffocation aimed at obtaining a confession that he had participated in a drug trafficking incident.

3. The Commission concludes, in this report, that the case meets the requirements set forth in Articles 46 and 47 of the American Convention. The Commission therefore decides to declare the case admissible, to notify the parties of its decision, and to continue to analyze, on the merits, the allegations of violations of Articles 5, 7, 8, 10, 11, 21, and 25 of the American Convention. At the same time, it places itself at the disposal of the parties for initiation of a friendly settlement process and decides to publish this report.

II. PROCESSING BEFORE THE COMMISSION

4. On July 15, 1998, the complaint on this matter was received by the Commission. On May 7, 1999, notes were sent to the State and the Petitioner and the case was opened. On August 12, 1999, the State replied to the request for information; on September 27, it transmitted additional information. On October 8, 1999, the information was sent to the Petitioner. On April 7, 2000, the Petitioner transmitted further information; on June 20, this was sent to the State. As of this date, October 5, 2000, the State has not submitted its observations.

III. THE POSITIONS OF THE PARTIES

A. Position of the Petitioner

5. On September 27, 1995, the Petitioner was arrested in Quito by two police officers who identified themselves as Interpol agents, and said that they worked in immigration control. Approximately two hours following his arrest, the Petitioner was informed as a mere formality that he would see a trial judge in Guayaquil, with the return trip scheduled for that same day at night. The trip was made by plane.

6. On arriving in Guayaquil, he was handcuffed on leaving the plane and was transferred to the model headquarters of Interpol, where he was placed in a cell until the following day when he was removed from the cell and taken before the prosecutor, without a judge being present. In the prosecutor's office, he was shown an album of photographs of persons implicated in the operation against the drug trafficker called "Camarón," and, in particular, the picture of someone the Petitioner had met on two occasions to negotiate the exportation of leather bags, a transaction that never occurred. After recognizing the individual, the Petitioner explained why that person visited his home. The individual, Eduardo Edison García, made a statement along the same lines as the one made by the Petitioner, but, according to the Petitioner, the last part of the statement was falsified by the police to frame him. Interpol accused the Petitioner of having sold 50 grams of cocaine hydrochlorate to Eduardo García. In December 1995, Eduardo García denied the police report, but this statement was not included in the file. In March 1996, Eduardo García made another statement that the Petitioner was innocent. That statement was placed in the file.

7. In July 1996, the Petitioner filed an action for enforcement of his right to liberty before the President of the Superior Court. This measure was rejected by the Court, since the President of the Court found evidence in the action that suggested an infringement of the law and also liability of the Petitioner, which suffice under Article 177 of Ecuador's Criminal Procedure Code to hold a person in custody.

8. Five months after his arrest, the Petitioner was offered his freedom in exchange for a new statement in which he was to admit his involvement in the "Camarón" case. The Petitioner received death threats in attempts to force him to change his statement. He was handcuffed and taken to a room where he received blows about the body and face. His lower limbs were burned with cigarettes and red hot metal bars. Ten days later, the blows and burns were repeated, this time resulting in his ribs being broken. On other occasions, he was dealt blows with baseball bats, and his head was submerged in a barrel of water. He never received medical attention to treat his wounds. Finally, the torture sessions were suspended through the intervention of the Embassy of France. In total, the Petitioner counted seven sessions. Despite the physical pressure, the Petitioner never admitted participation in the offenses of which he was accused.

9. On September 3, 1997, the request for dismissal was accepted, but the Petitioner was not immediately freed since the Public Prosecution Service had to send its verdict "for consultation" to the Superior Court, in accordance with Articles 398 to 403 of Act 134 of the Ecuadorian Code of Criminal Procedure.^[1] Under normal circumstances, this consultation should be done within 15 days, but, in this case, it required more than the established period. Faced with this delay, the Petitioner filed an action for *amparo* on October 2, 1997, which was dismissed without any explanation whatever, as the Petitioner alleged. Nonetheless, in January 1998, the judges decided to sign the consultation by finding, as stated in the decision, that the accusations against the Petitioner were completely unrelated to the criminal activity reviewed in the action. They also decided to transmit an

order of release. On January 21, 1998, the Petitioner was finally released. Following his release, he returned to France and retains a lawyer in Ecuador, Dr. Colón Delgado Cedeño, who is responsible for continuing to handle the proceedings for the Petitioner's matter.

10. The Petitioner attaches the following documents as evidence of his allegations of torture:

- a. Press articles from France and Ecuador;
- b. French medical reports that determine the physical state of the Petitioner, caused by injuries suffered in prison.

11. The Petitioner also alleges that when he was held in the penitentiary, he had to pay 20,000 sucres (US\$ 90) to a prison guard to be able to obtain a cell. According to the Petitioner, this was a common practice in order to sleep "safely." Until he agreed to that payment, he remained in the corridors of the pavilion, sleeping on a bench.

12. The Petitioner also alleges that he was robbed of his belongings (his car, along with money and valuable items inside the car) which he still claims.^[2] The value of the assets for which the Petitioner is suing amounts to FRF 1,000,000.

B. Position of the State

13. The State alleges that the Petitioner did not exhaust the remedies of the domestic jurisdiction, and that, consequently, the Commission should declare his petition inadmissible. It alleges that the courts are still to decide the action. It admits the existence of procedural irregularities in the proceedings in the trial court, but it alleges that those irregularities have been remedied, since the Petitioner could invoke remedies available to him to recuse the judges. Pursuant to that provision, he filed a complaint with the Complaints and Claims Commission of the Supreme Court of Justice, since the judge hearing the action had not replied to the Petitioner's appeal for dismissal. This judge was admonished by the Supreme Court for delaying the proceedings for this type of trial. The use of such a measure by the Petitioner, alleges the State, made it possible for trial to be conducted under appropriate conditions.

14. The State also alleges that the process was not concluded and that the decision of the tribunals, whether favorable or not, would be a suitable way to resolve the situation of the Petitioner. It also alleges that it prove the existence of effective domestic remedies to resolve the legal situation of the Petitioner. These measures are the appeal to quash a decision of a lower court, which the Petitioner might file against the judgment issued by the corresponding criminal court. That measure is effective if the Supreme Court of Justice had made errors of law, in annulling the judgment and issuing a new according to law. The State also alleges that another available remedy is that of review, which may be filed at any time after the judgment is executed if it was a conviction.

15. As to returning the belongings taken from the Petitioner at the time of the arrest, the State alleges that the law requires that they be requested and that they were never claimed after the Petitioner was released.

IV. ANALYSIS OF ADMISSIBILITY

A. *Ratione materiae, ratione personae, ratione loci, and ratione temporis* competence of the Commission

16. The Commission has *ratione materiae*, *ratione personae pasiva*, *ratione loci*, and *ratione temporis* competence to hear this case, because the complaints of violations of Articles 5, 7, 8, 10, 11, 21, and 25 of the Convention against the Petitioner, a French citizen, are attributed to the Ecuadorian State, a State Party to the Treaty, and were allegedly committed on Ecuadorian territory after ratification of the Convention.^[3] Regarding *ratione personae* competence, the Petitioner retained Attorney Arthur Vercken, who was authorized to file complaints with the Commission pursuant to Article 44.

17. The Commission has *prima facie* competence to consider this case, since it concerns a claim alleging human rights violations protected by the American Convention. The Petitioner has *locus standi* to appear and present complaints on the failure to comply with provisions established in the Convention by the Ecuadorian police and prison guards, which means consequent international liability of the Republic of Ecuador. The Commission is therefore competent to examine the claim of the petitioner.

B. Other requirements for admissibility of the petition

a. Exhaustion of domestic remedies

18. The Petitioner stated that the charges against him were dismissed, and consequently he had no other domestic remedies to exhaust.

19. The State's claim that the other remedies to exhaust refer to the drug trafficking case against the Petitioner that was provisionally dismissed on September 3, 1997. However, this case has been under consideration since 1995, on which account the Commission concludes that there is unjustified delay in applying the exception set forth in Article 46(2)(c). The Commission observes that the State does not specify what remedies have already been exhausted, nor the body hearing the action.

20. The Commission observes that after the dismissal of the first action for (*amparo*) infringement of fundamental rights and freedoms filed by the Petitioner on July 1, 1996, the Petitioner proceeded to present a second action for *amparo* on October 2, 1997, since he was arrested despite the dismissal. In the appeal, the Petitioner informed the judicial authorities of Ecuador that "since his detention, as stated in the action, all his due process rights, both personal and constitutional, have been violated, which have resulted as a consequence of the unlawful detention, judgment in a forum without jurisdiction, and imprisonment, despite his innocence, for more than two years".^[4] The Ecuadorian judicial authorities did not respond at all to this appeal.

21. In Advisory Opinion N° 8, requested by the Commission, the Inter-American Court of Human Rights stated that *habeas corpus* meets the objective of respect for the life and humane treatment of the individual, of preventing the disappearance of persons or preventing the individual from being held in unknown locations, and protects against torture and other forms of cruel, inhumane or degrading treatment.

22. Specifically, the Court underscored the difference between *habeas corpus* and an action for *amparo*:

If the two remedies are examined together, it is possible to conclude that "amparo" comprises a whole series of remedies and that *habeas corpus* is but one of its components. An examination of the essential aspects of both guarantees, as embodied in the Convention and, in their different forms, in the legal systems of the States Parties, indicates that in some instances *habeas corpus* functions as an independent remedy. Here its primary purpose is to

protect the personal freedom of those who are being detained or who have been threatened with detention. In other circumstances, however, habeas corpus is viewed either as the "amparo of freedom" or as an integral part of "amparo."^[5]

23. In *Suarez Rosero*, a case also brought against Ecuador, the Court stated that the right of *habeas corpus* is fully protected under Ecuadorian law:

.... a detained person must be guaranteed the right of habeas corpus at all times, even when he is being held in exceptional circumstances of *incommunicado* detention established by law. That guarantee is doubly entrenched in the law in Ecuador. Article 28^[6] of the Political Constitution provides that [a]ny person who believes that he is being unlawfully deprived of his liberty may seek the remedy of *habeas corpus*. He may exercise this right himself or through another person without the need for written mandate ... The Code of Criminal Procedure of that State establishes in Article 458 that [a]ny person who is charged with infringing the precepts contained in [that] Code and is kept in detention may apply to be released to a higher Court than the one that has ordered the deprivation of his liberty. [...]
The application shall be made in writing.
[...]
Immediately upon receipt of the application, the Judge who is to hear it shall order the detained person to be brought before him and shall hear his statements, which shall be included in a record which shall be signed by the Judge, the Secretary and the applicant, or, should the applicant be unable to sign, by a witness on his behalf. Thereupon, the Judge shall seek to obtain all the information he deems necessary for the purpose of arriving to a conclusion and ensuring the lawfulness of his decision and shall, within forty-eight hours, decide what he deems to be lawful.^[7]

This Court shares the Commission's view that the right enshrined in Article 7(6) of the American Convention is not exercised with the mere formal existence of the remedies it governs. Those remedies must be effective, since their purpose, in the terms of Article 7(6), is to obtain without delay a decision "*on the lawfulness of [his] arrest or detention,*" and, should they be unlawful, to obtain, also without delay, an "*order [for] his release*". The Court has also held that

[i]n order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhuman or degrading punishment or treatment (*Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 35).^[8]

24. In regard to violation of Article 7, the Commission considers the actions for *amparo* presented by the Petitioner to be sufficient to exhaust domestic remedies.

Furthermore, the Commission considers those same actions for *amparo* capable of resolving the questions of violations against the rights of liberty and physical and mental integrity.^[9] Thus the Commission concludes that the Petitioner did exhaust domestic remedies in regard to Article 5 of the Convention, as he filed for *amparo* twice and had both requests denied (once in court and the other simply ignored with no explanation given). These action for *amparo* did not lead to the Petitioner being freed or to the Ecuadorian authorities carrying out an investigation of the Petitioner's complaint that his human and constitutional rights had been violated while he was being detained. Said actions proved ineffective and could be called a "formality devoid of meaning".

25. In *Velásquez Rodríguez* the Court stated that:

The mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence of exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion.

...It is a different matter, however, when it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to those remedies becomes a senseless formality. The exceptions of Article 46(2) would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfill their objective in that case.^[10]

Moreover, in regard to the Petitioner's property confiscated upon his detention, the State does not indicate what procedures should have been followed to secure its return. Instead, the State maintains that after his release, the Petitioner never made a claim for his property. However, the Criminal Court of Guayaquil in its decision of 23 September 1998 found that, "The case of Daniel Tibi having been dismissed, his property, as figuring in the Guayas Anti-Narcotics Investigation Report and to be confirmed by the Sixth Superior Court of Guayaquil, shall be returned to him."^[11] The Commission notes that as of the date of writing (5 October 2000), the matter has not been resolved. Twenty-four months having passed since the Superior Court decision, the Commission concludes that this is a case of unjustified delay. Thus, in regard to the right to property as recognized in Article 21 of the American Convention, the Commission considers that domestic remedies have been exhausted.

b. Period for lodging a petition

26. Article 46(1)(b) of the Convention stipulates that a petition must be lodged within six months of the date on which the party alleging violation was notified of the final judgment exhausting domestic remedies. In this case the Petitioner lodged his communication with the Commission 5 months and 3 weeks after he was released upon the execution of the 14 January 1998 Superior Court order confirming dismissal. Given that the petition was lodged within six months of the petitioner first having the opportunity to do so, the Commission considers that it was presented within a reasonable time period in accordance with Article 46(1)(b).

c. Duplication of proceeding and subject

27. The Commission understands that the subject of the petition is not pending in any other international proceeding for settlement, and that the petition is not substantially

the same as any already examined by this or another international organization. Thus the requirements laid out in Articles 46(1)(c) and 47(d) have been met.

d. Characteristics of the alleged facts

28. The Commission finds that in principle the facts presented by the Petitioner, if proven true, could constitute a violation of rights protected by the American Convention. Thus the requirements of Article 47(b) of the Convention have been satisfied.

V. CONCLUSION

29. Based on the findings of fact and law herein explained, the Commission concludes that the present case satisfies the requirements for admissibility contained in Articles 46 and 47 of the American Convention.

30. Given the above conclusion,

THE INTER-AMERICAN HUMAN RIGHTS COMMISSION,

DECIDES TO:

1. Declare the present case admissible with respect to Articles 5, 7, 8, 10, 11, 21 and 25 of the American Convention.
2. Transmit this report to the Petitioner and to the State.
3. Continue with an in-depth study of the case.
4. Make this report public 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 Washington D.C., on this the 5th day of October, 2000. (Signed): Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Commissioners: Marta Altolaguirre, Robert K. Goldman, and Peter Laurie.

[Table of Contents | Previous | Next]

* In keeping with Article 19 of the Regulations of the Commission, Dr. Julio Prado Vallejo, a national of Ecuador, did not participate in the discussion of this case.

[1] Art. 398 – The criminal court judges are required to take up for consultation to the respective Superior Court, the decisions to dismiss (...) Art. 399. Whenever the judge in the same proceedings issues a decision to dismiss in favor of one or more of the accused (...) a copy of the proceedings will be transmitted to the Superior Court to resolve the consultation and the original will go to the Criminal Court which will continue the case. Art 401 – The Superior Court will decide the consultation on the merits of what has been presented within 15 days from the receipt of the proceedings and its resolution will be carried out.

[2] The Petitioner presented a detailed two page list of the goods that he is claiming. This list was compiled at the time of Mr. Tibi's detention and is signed by him and the police lieutenant, Mr. Edison Tobar.

[3] Ecuador ratified the American Convention on December 28, 1977.

[4] Writ of amparo presented by the Petitioner to the President of the Superior Court of Guayaquil on October 2, 1997.

[5] Inter-American Court of Human Rights. *Habeas Corpus in Emergency Situations* (Arts. 27.2, 25.1 and 7.6

American Convention on Human Rights). Advisory Opinion 8/87 of January 30, 1987, paragraph 34. The Commission would like to point out that Article 93 of the Constitution refers to *habeas corpus* as a safeguard on the legality of a detention which is presented to the mayor of the jurisdiction where the person is being held. Article 95 refers to *amparo*, an action which would "require measures to stop, prevent or immediately remedy the consequences of an illegitimate act or omission on the part of a public authority that violates or could violate any right protected by the Constitution or by an international treaty or convention currently in force..." *Amparo* is more inclusive as it safeguards the right to personal liberty and all other rights protected by the Constitution of Ecuador and the American Convention.

[6] This refers to Article 28 of the old Constitution of Ecuador. It is Article 93 of the present Constitution.

[7] Inter-American Court of Human Rights, Suárez Rosero case, Judgment of November 12, 197, paragraph 59.

[8] *Ibid*, paragraph 63.

[9] Inter-American Court of Human Rights. *Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*. Advisory Opinion 8/87 of January 30, 1987, paragraph 35.

[10] Inter-American Court of Human Rights. Velásquez Rodríguez case, 29 July 1988, paragraphs 67-68.

[11] Decision of the Superior Court of Guayaquil, 23 September 1998.