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REPORT No. 199/19
PETITION 286-09
REPORT ON ADMISSIBILITY

OSCAR RAÚL CORDOVEZ NOVOA
ECUADOR

Approved by the Commission on December 6, 2019 in San Salvador, El Salvador.

Cite as: IACHR, Report No. 199/19, Petition 286-09. Admissibility. Oscar Raúl Cordovez Novoa. Ecuador. December 6, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Oscar Raúl Cordovez Novoa and Jorge Sosa Meza
Alleged victim:	Oscar Raúl Cordovez Novoa
Respondent State:	Ecuador
Rights invoked:	Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention on Human Rights ¹ in conjunction with its Article 1.1 (obligation to respect rights) of the same instrument

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	March 16, 2009
Additional information received at the stage of initial review:	July 19, 2013
Notification of the petition to the State:	February 13, 2015
State's first response:	June 10, 2015
Additional observations from the petitioner:	February 8 and 16, 2016; May 8, 2017
Additional observations from the State:	June 14, 2016; September 5, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of instrument made on December 28, 1977)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the American in conjunction with Article 1.1 (obligation to respect rights) of the same instrument
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of Section VI
Timeliness of the petition:	Yes, in the terms of Section VI

V. FACTS ALLEGED

1. The petition alleges that the State is responsible for violating the human rights of the alleged victim in the context of criminal and civil proceedings brought against him. In relation to the criminal proceedings, the petitioners allege that in 2002 an investigation against the alleged victim and other individuals was initiated for unlawful misappropriation committed by them against the Pacifictel S.A. company, while the alleged victim occupied the position of its executive president. The allegations are that in

¹ Hereinafter "the Convention" or "the American Convention".

² The observations submitted by each party were duly transmitted to the opposing party.

June 2007 the alleged victim was sentenced to two years imprisonment in violation of the principle of the presumption of innocence, and based on insufficient evidence, by a court of second instance after a first instance acquittal. They maintained that during the cassation appeal filed by the private claimant, and contrary to the opinion issued by the Prosecutor's Office that the material existence of the offense had not been proven, the court of second instance illegally reevaluated the evidence and altered the judgment of first instance to the detriment of the alleged victim. An appeal for reconsideration was filed against the conviction and was declared inadmissible in October 2008. In July 2009, the statute of limitations was held to apply.

2. Regarding the civil proceedings, they indicate that despite the statute of limitation's application to the penalty, the Pacifictel S.A. company filed a claim for damages against the alleged victim, and the judicial authorities mistakenly allowed the suit to proceed. In this regard, they argue that in October 2010 a judgment was issued in favor of the alleged victim, which was challenged by the plaintiff company. In June 2013, when all the plaintiffs' appeals had been dismissed and proceedings should have been archived, the court of first instance submitted a consultation to the higher court, which constituted a new appeal to an organ that had already decided on the issues. According to the petitioner, in breach of the *ne bis in idem* principle, the court decided to annul all proceedings since December 3, 2009. Several appeals were lodged against this decision and rejected as being inadmissible. According to the latest information provided by the petitioners, due to the annulment decision and the dismissal of the filed appeals, to date the civil proceedings against him are still ongoing at the evidence stage without a first instance decision.

3. According to the alleged victim, the irregularities and illegalities committed by the judicial authorities in conducting these proceedings against him are due to the interference of the Executive Power in the trials. In this regard, he argues that Pacifictel S.A.'s counsel, Mr. Alexis Mera, who filed the criminal complaint against him, was later named Legal Secretary of the Presidency of the Republic and promoted proceedings with the aim of punishing him, including the adoption of reprisal measures - such as removal from office - against prosecutors and judges who refused to charge or convict the alleged victim for the offense of misappropriation. He adds that due to the long duration of proceedings against him, his income has been considerably reduced, the psychological integrity of his family has been undermined and his right to a decent life affected.

4. Regarding the criminal proceedings, the State maintains that the court of second instance was not bound by the opinion of the Prosecutor's Office and duly observed due process guarantees when deciding the cassation appeal and in its conviction of the alleged victim for the offense charged. It adds that the alleged victim was not deprived of his liberty, as he never presented himself to the authorities to serve his sentence, and in 2009 the statute of limitations expired. On the other hand, regarding the civil suit, it alleges that this was not the subject of the original petition filed before the IACHR and must be excluded from the IACHR's analysis. In addition, it indicates that it was filed in 2007 after the alleged victim had been convicted in criminal proceedings and his liability to pay compensation and damages was assessed. Therefore, it argues that the action was timely and legally filed before the criminal action became time barred, as the application of the time bar did not affect the trial for damages. It also points out, in agreement with the petitioner, that after the declaration of nullity and the rejection of various appeals filed by the alleged victim, in May 2016, the proceedings were remanded to the court of first instance and, therefore, they are still pending before the domestic courts without a final decision and no finding on civil damages has been reached. As such, the State argues that domestic remedies have not been exhausted.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

5. Regarding the criminal proceedings, Mr. Cordovez Novoa alleges that: i) after his conviction at second instance, he filed an appeal for review because it was the only remedy available to him; ii) thereby the State was given the opportunity to annul and compensate the violations alleged in the petition; iii) this appeal was decided on October 9, 2008; and iv) the petition was filed in March 2009 within the time period set out in Article 46.1.b of the American Convention. The State for its part argues, as it did in Admissibility

Report No. 108/13,³ that in order to determine the exhaustion of domestic remedies the IACHR must only take into account the ordinary remedies exhausted, and disregard motions for reconsideration. In this sense, it indicates that the assessment of remedies without precise time limits, such as a motion for reconsideration, generates uncertainty and renders the six-month rule inoperative. It adds that, given that the cassation appeal decision was issued in June 2007, and the petition was filed in March 2009, it does not fulfill the timeliness requirement.

6. The Commission has previously established that, as a general rule, the only remedies to be exhausted are those whose functions, within the legal system, are suitable for providing the necessary protection to remedy a violation of a specific legal right. In principle, these are ordinary and not extraordinary remedies.⁴ However, in the instant case, the alleged victim maintains that, because he was convicted at second instance, there was no possibility of filing an ordinary appeal to have his conviction reviewed and therefore the motion for reconsideration was filed. The State has not disputed this argument and has not indicated the existence of other ordinary remedies that the alleged victim could have filed. In addition, the IACHR considers that the decision in Admissibility Report No. 108/13 is not applicable to the present case.⁵ Based on the foregoing, the IACHR considers the filing of the motion for reconsideration to be reasonable and observes that little more than one year elapsed between the date of the resolution of this motion and the cassation appeal. In light of the above, and taking into account that the ordinary appeal decision was served on the alleged victim in October 2008, and the petition was filed in March 2009, the IACHR considers that in this regard the petition fulfills the requirements of Articles 46.1.a and 46.1.b of the Convention.

7. Regarding the civil proceedings, both parties have indicated that they were remitted to the evidence stage and remain so to date. The State argues that the matters relating to these proceedings were not included in the submissions of the original petition and that therefore they should be disregarded because they are not supervening events. However, should the IACHR decide to assess them, the State argues that domestic remedies have not been exhausted in relation to the civil proceedings and that this aspect of the petition fails to satisfy the requirements of Article 46.1.a of the Convention. The IACHR observes that neither the Convention nor the Regulations prevent the IACHR from ruling on the admissibility of allegation brought after the original petition and before the admissibility ruling. The Commission has previously established that the analysis of the requirements set forth in Articles 46 and 47 of the Convention must be made in the light of the situation at the moment when decides on the admissibility or inadmissibility of the claim.⁶ In light of the foregoing, the Commission considers that the exception provided for in Article 46.2.c of the Convention applies to this aspect of the petition since the civil claim was originally filed in 2007 and it is still pending. The IACHR also considers that the matter has been raised in accordance with Article 32.2 of the Rules of Procedure of the IACHR.

VII. ANALYSIS OF COLORABLE CLAIM

8. The petitioners maintain that the State is responsible for violating the alleged victim's human rights⁷ and that it does not ask the IACHR to review the body of evidence or assess domestic judgments, but rather to analyze the irregularities committed by the administration of justice. In turn, the State argues that the alleged facts do not characterize violations of human rights because: i) the opinion of the prosecutor's office issued in the context of the cassation appeal can not be considered binding for a judicial decision, and that the judicial proceedings, including the conviction in the second instance, complied with the standards established in the Convention; ii) the rejection of the appeal for review was made in accordance with the law and does not constitute a violation of judicial protection; and iii) it is evident that the petitioner

³ IACHR, Report No. 108/13, Petition 4636-02. Inadmissibility. Juan Echeverría Manzo and Mauricio Espinoza González. Chile. November 5, 2013.

⁴ IACHR, Report No. 161/17, Petition 29-07. Admissibility. Andy Williams Garcés Suárez and Family. Peru. November 30, 2017, para. 12.

⁵ In this regard, in Report 108/13, when analyzing the labor situation of Juan Echeverría Manzo and Mauricio Espinoza González, the Commission disregarded the remedies filed before administrative authorities after the exhaustion of ordinary judicial remedies. That precedent is substantially different from the criminal proceedings addressed in this Petition and in this case the extraordinary remedy has been filed before judicial authorities.

⁶ IACHR, Report No. 35/16, Petition 4480-02. Admissibility. Carlos Manuel Veraza Urtusuástegui. Mexico. July 29, 2016, para. 33.

⁷ See the rights invoked in section I of the present Report.

merely states that the conviction was wrong or unfair in itself and it is not for the IACHR to act as a court of appeal to examine alleged errors of law or fact that may have been committed. national courts that have acted within the limits of their jurisdiction.

9. The Commission considers that the allegations in relation to the irregularities in the proceedings, the alleged impossibility of obtaining a comprehensive review of the conviction and the alleged excessive duration of the trials, if proven, could constitute violations of Articles 8 (judicial guarantees) and 25 (judicial protection) of the American Convention in accordance with article 1.1. (obligation to respect the rights) of the same instrument. In addition, during the merits stage, the IACHR will evaluate and legally classify the alleged damages caused by these alleged violations in relation to the alleged victim and his next of kin.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8 and 25 of the American Convention in conjunction with Article 1.1 of the same instrument; and

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 6th day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas, and Flávia Piovesan, Commissioners.