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**REPORT No. 16/15
PETITION 4596-02**
REPORT ON ADMISSIBILITY

FIDEL CAMILO VALBUENA SILVA AND OTHERS
ECUADOR

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Ecuador. March 24, 2015.



Organization of
American States

**REPORT No. 16/15
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I. SUMMARY

1. On December 6, 2002, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACtHR") received a petition lodged by the organization Acción Ecológica (hereinafter "the petitioner") alleging responsibility of the Republic of Ecuador (hereinafter "the State" or "the Ecuadorian State") for violation of Article 7 (right to personal liberty), Article 8 (right to a fair trial), Article 15 (right of assembly), and Article 22 (freedom of movement and residence) in connection with Article 1.1 (obligation to respect rights) and Article 2 (domestic legal effects) of the American Convention on Human Rights (hereinafter "the American Convention") to the detriment of Fidel Camilo Valbuena Silva, Alejandro Pajón Naranjo, Juan David Ojeda, Carlos Vladimir Rodríguez, Mateo Giacometti, Paola Colleoni, Bettina Stephanie Ritter, Katerina Hrabal, Nicholas Paul Jones, Bruno Cassis, Randolph Daniel Packard, Quentin Goye, Andrea Klimaschewski, and Robert Françoise, (hereinafter "the alleged victims").

2. The petitioner contends that, on March 25, 2002, the alleged victims, all of them environmentalists and foreign nationals¹ who were in Ecuadorian territory as tourists, were arrested and subsequently deported to their countries of origin as a result of their peaceful opposition to an oil pipeline project for carrying heavy crude, on the basis of a discriminatory law and after legal proceedings that did not provide any guarantees of due process of law.

3. As for the State, it argues that the alleged victims were deported for having breached Ecuadorian immigration laws and that the deportation proceedings were conducted observing all the guarantees of the Constitution and the Convention, as a result of which Ecuador had not incurred any international responsibility.

4. Without prejudging the merits of the complaint, after examining the positions of the parties and pursuant to the requirements set out in Articles 46 and 47 of the Convention, the Commission has decided to declare the case admissible for the purpose of examining the alleged violation of the rights set forth in Article 7 (right to personal liberty), Article 8 (right to a fair trial), Article 9 (freedom from ex post facto laws), Article 22 (freedom of movement and residence), and Article 25 (right to judicial protection) in connection with Article 1.1 (obligation to respect rights) and Article 2 (domestic legal effects) of said Treaty. The Commission has also decided to notify the parties of this decision and to publish and include it in its Annual Report to the General Assembly of the OAS.

II. PROCEEDINGS BEFORE THE IACtHR

5. On December 6, 2002, the Commission received the petition and registered it under number 4596-02. After a preliminary review of the case, on April 28, 2004, the IACtHR forwarded the relevant parts of the petition to the State for its observations. On September 30, 2004, the IACtHR received the document of observations made by the State, which was duly forwarded to the petitioner. On June 1, 2005 it received the document of observations from the petitioner, which was forwarded to the State for its observations. On August 3, 2005, the State submitted its observations, which were forwarded to the petitioner. On August 9,

¹ Fidel Valbuena Silva, Alejandro Pajon Naranjo, Juan David Ojeda and Carlos Vladimir Rodríguez, Colombian nationals; Mateo Giacometti and Paola Colleoni, Italian nationals; Bettina Stephanie Ritter and Katerina Hrabal, German nationals; Nicolas Paul Jones, Irish national; Bruno Cassis, Swiss national; Randolph Daniel Packard, U.S. national; Quentin Goye and Robert Françoise, French nationals; and Andrea Klimaschewski, German national.

2005, the petitioner was requested to submit observations it deemed appropriate about this last document from the State, a request that was reiterated by the Commission by a letter of December 15, 2008. On November 23, 2010, the petitioner submitted additional information. On December 7, 2010, the IACtHR reiterated its request to the petitioner for additional information. Finally, on September 15, 2014, the petitioner provided further information, which was duly forwarded to the State.

III. POSITION OF THE PARTIES

A. Position of the petitioner

6. The petitioner pointed out that the alleged victims were foreign nationals of various nationalities (four Colombians, two Italians, three Germans, two French, one American, one Swiss, and one Irish) who were in Ecuadorian territory with a tourist visa when the incidents that led to the present petition took place. It indicated that the young people were ecologists and environmentalists who peacefully opposed the building of an oil pipeline to carry heavy crude, which was being built in the area of Mindo, province of Pichincha, Ecuador.

7. It indicated that, on March 25, 2002, the alleged victims were walking peacefully along the public road that runs between Nono, Tandayapa, and Nanegalito, in the area of Guarumos, province of Pichincha, when they were detained and illegally deprived of their freedom by policemen from the Provincial Immigration Department, without a written warrant issued by a judge having jurisdiction. It added that, 24 hours after the arrests, on March 26, 2002, the Police Commissioner of the province of Pichincha ordered their pre-trial detention and issued "constitutional warrants for incarceration."

8. It contended that, afterwards, these foreign nationals were subjected to fast-track "criminal deportation proceedings" in which they were judged by the Police Commissioner of Pichincha himself, who is an administrative civil servant attached to the Ministry of the Interior of Ecuador, pursuant to Migration Law No. 1899 which was in force at that time. It added that, in these proceedings, they did not receive any prior communication that specified the charges being brought against them, nor did they benefit from a translator, although several of them did not understand the language in which they were being judged. It indicated that they were unable to challenge the deportation order issued by the Resolution of March 27, 2002, because Article 30 of Migration Law No. 1899 established that "the ruling of the Police Commissioner issuing a deportation order against a foreign national would not be eligible for any administrative or judicial appeal and must be carried out by the police in the way, conditions and time-limits established."

9. It argued that, after the detention, 5 of the 14 alleged victims filed a petition for a writ of habeas corpus² claiming that they were being held since March 25, 2002 without being delivered to the orders of the authority having jurisdiction, without having been shown the court warrant for their arrest, and without having been informed of the reasons for their arrest, and therefore they requested their release from jail. This appeal was ruled admissible by the Mayor of the Metropolitan District of Quito on April 2, 2002.

10. As for its allegations of law, the petitioner pointed out that the State violated Article 7.2 of the Convention, because the arrest of the alleged victims was carried out without observing the provisions pointed out in Article 24.6 of the Political Constitution of Ecuador, which requires a written warrant issued by a judge having jurisdiction. It added that said arrest also violated Article 7.3 of the Convention, because Article 5, paragraph VI, of Migration Law No. 1899 was arbitrarily applied to them, which it believes is unconstitutional and incompatible with the Convention, because it enables police officers to arrest foreign nationals at their discretion without a written court warrant.

² The appeal had been filed for the benefit of 11 persons, and 5 of them appear as the alleged victims in the present case: Bettina Ritter, Katherina Hrabal, Robert Françoise, Andrea Klimaschewski, and Nicolas Jones.

11. It indicated that the State also violated Article 8.1 of the Convention because the Police Commissioner who processed the deportation of the alleged victims could not be viewed as an independent, impartial judge or court having jurisdiction. It pointed out that he would not have had jurisdiction because he was not an authority belonging to the structure of the Judiciary and therefore could not exercise jurisdictional powers. Nor would he be independent because he was attached to the Executive Branch of Government and hierarchically subordinate to the Ministry of the Interior, acting at the latter's orders. It added that, at the time of deciding to deport the foreign ecologists, the authority was under pressure from the company awarded the contract to build the oil pipeline, so that he would not have been able to act impartially.

12. It argued that Article 8.2 of the Convention had been violated, because the deportation proceedings did not observe the principle of the presumption of innocence or the minimum guarantees provided therein and because the alleged victims were not provided with a translator nor were they informed previously and in detail about the charges being brought against them, nor were they able to appeal the resolution ordering their deportation. It added that the arrest and detention of the alleged victims was aimed at harassing and intimidating them and that their subsequent judgment and deportation also constitutes a violation of their right to assemble, as guaranteed by Article 15 of the Convention.

13. At the same time, it indicated that subparagraphs 1, 6, and 8 of Article 22 had been violated because, although the victims were in Ecuadorian territory legally with a tourist visa, they were arbitrarily expelled. The petitioner also considered that the State had violated the general obligations contained in Articles 1 and 2 of the Convention for having issued, upheld and applied a domestic regulatory system such as Migration Law No. 1899, which is contrary to its human rights obligations.

B. Position of the State

14. The State indicated that, on March 8, 2002, the Police Commissioner of Pichincha received a complaint from the heavy crude oil pipeline company Oleoducto de Crudos Pesados (OCP) indicating that, since January 2002, a group of ecologists and environmentalists, some of them foreign nationals, had entered the right-of-way belonging to the company and installed field tents and kitchens and caused damage to the building of the oil pipeline in the area.

15. In that context, it indicated that, on March 25, 2002, in an immigration control operation, the Head Immigration Control Office of the National Immigration Department arrested 14 foreign nationals holding tourist visas for having breached Article 9, section XIII, of the Migration Law,³ because they were walking without authorization on the right-of-way belonging to the heavy crude oil pipeline company Oleoducto de Crudos Pesados (OCP) and because, when they were arrested, they indicated that they were taking care of the site so the ecology would not continue to be destroyed and that was why they were obstructing the activities of the company Oleoducto de Crudos Pesados in the area. Likewise, damage to the oil pipeline's building activities had been observed, specifically to the sandbag embankments, which could be attributed to the 14 foreign nationals.

16. At the same time, the State pointed out that, on March 26, 2002, the Police Commissioner of Pichincha filed criminal deportation proceedings against the 14 foreign nationals and ordered their pre-trial detention, in application of Article 167 of the Criminal Proceedings Code, which governs this measure, and issued the respective "constitutional warrants for incarceration."

³ Law 1899 of December 27, 1971, Migration Law.

"Article 9.-Unless otherwise provided for in other legal provisions, foreign nationals subject to territorial jurisdiction who are included in the following cases shall not be eligible to obtain a visa and must be turned down when requesting entry into the country: (...)

XIII. Those who advise, teach or practice breaking the law, overthrowing the government by violence, ignoring the right to property, and opposing any organized government or the republican and democratic system and who belong or once belonged to nihilist organizations."

17. It argued that, on March 26, 2002, the criminal deportation hearing was held before the Police Commissioner of Pichincha, which was held with a court-appointed public defender and with defense attorneys, observing all rules of due process of law. As a result, on March 27, 2002, the Police Commissioner immediately ordered the deportation of the 14 foreign nationals for having breached Article 9, section XIII, of the Migration Law in accordance with Article 19, section II, of the same law.⁴

18. The State asserted that, after this judgment, the petitioners filed a petition for a writ of habeas corpus before the Mayor of the Metropolitan District of Quito, which was favorably ruled upon on April 1, 2002 and their release was ordered.

19. The State deems that the petition is inadmissible because the facts do not tend to establish a violation of the rights guaranteed by the Convention, as it was clearly concluded from the facts that the alleged victims had breached Ecuadorian immigration laws and were therefore deported after fair criminal deportation proceedings were carried out with all the procedural guarantees provided for in the Constitution and the Convention.

20. Furthermore, the State indicated that the alleged violation that was reported regarding the right to personal liberty had been resolved in the domestic jurisdiction, when the authority having jurisdiction verified the irregularities in the arrest of the victims and ruled for the victims in their petition for a writ of habeas corpus filed by some of them, ordering that they be released, and therefore it considers that the IACHR does not have jurisdiction to examine the petition. Finally, the State considers that the IACHR is not competent to review the decisions issued by domestic courts simply because the alleged victims do not agree with the ruling as the Commission cannot act as a fourth instance.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

21. The petitioner is entitled, in principle, by Article 44 of the American Convention to lodge petitions before the Commission. The petition identifies as the alleged victim individuals for whom the State undertook to ensure the rights enshrined in the American Convention. As for the State, the Commission notes that Ecuador is a State party to the American Convention since December 28, 1977, date on which it deposited its ratification instrument. As a result, the Commission has jurisdiction *ratione personae* to examine the petition.

22. The Commission also has jurisdiction *ratione loci* to hear the petition, because it alleges violations of rights protected by the American Convention that had taken place in the territory of Ecuador, a State Party to this treaty. The Commission has jurisdiction *ratione temporis* because the obligation to respect and guarantee the rights protected in the American Convention were already in force for the State at the time the incidents alleged in the petition took place. Finally, the Commission has jurisdiction *ratione materiae*, because the petition reported possible violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

23. Article 46.1 a) of the American Convention provides that, for a petition to be declared admissible by the Commission, remedies under domestic law must have been filed and exhausted in line with

⁴ Article 19, section II, of the above-mentioned law stipulates that “the Minister of the Interior, via the Migration Service of the National Civilian Police Force, shall proceed to deport any foreign national subject to territorial jurisdiction who remains in the country included in the following cases: (...) II. Unless otherwise provided for in other legal provisions, whoever has been admitted temporarily or definitively and his/her stay included any of the incidents constituting causes for exclusion of the present laws.”

generally recognized principles of international law. Furthermore, Article 46.2 of the Convention provides that the requirement of prior exhaustion of remedies under domestic law shall not be applicable when (i) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (ii) 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 (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

24. In the instant case, the State did not argue that remedies under domestic law had not been exhausted, but rather indicated that, with respect to the deportation of the alleged victims, they had access to justice and that judicial remedies had been unfavorable to them. In addition, it added that the remedy of habeas corpus was adequate and effective as the alleged victims who filed for the writ were released because their petition had been granted.

25. On the other hand, it appears in the case file that, at the time of the alleged incidents, there was no procedure or remedy available to the alleged victims to challenge the deportation decision issued by the Police Commissioner on March 27, 2002, because Article 30 of Migration Law No. 1899 established that "the ruling of the Police Commissioner issuing a deportation order against a foreign national would not be eligible for any administrative or judicial appeal and must be carried out by the police in the way, conditions and time-limits established."

26. The Commission also observes that 5 of the 14 persons identified as the alleged victims had filed a petition for a writ of habeas corpus with respect to their detention, which was favorably ruled on April 1, 2002 by the Mayor of the Metropolitan District of Quito, subsequent to the deportation order, which had been issued on March 27, 2002 ordering the immediate deportation of the alleged victims. In that respect, the substantive elements of this remedy shall be reviewed in the stage of the merits.

27. As the complaint that is the subject of the petition has its origin in the alleged violations of human rights that took place during the processing of the deportation, such as arbitrary detentions and breaches of due process of law, among them the absence of an independent and impartial judge or court having jurisdiction, the absence of a translator, the absence of any prior detailed communication about the charges being brought, and the impossibility to appeal the deportation order, and as Article 30 of Migration Law No. 1899 prevented filing any remedy, the Commission considers that the exception contained in Article 46.2 a) of the Convention is applicable in this case, as there was no procedure or remedy in domestic law that was available to the alleged victims that would have made it possible for them to challenge any aspect referring to the proceedings or decision of their deportation.

28. Invoking exceptions to the rule of prior exhaustion of domestic remedies provided for in Article 46.2 of the Convention is closely linked to the determination of potential violations of certain rights enshrined therein, such as the fair trial guarantees of access to justice. However, because of its very nature and purpose, Article 46.2 is a norm whose content is independent from the substantive rules of the Convention. Therefore, it must be determined in advance and separately from the analysis of the merits of the case whether or not exceptions to the prior exhaustion of domestic remedies requirement are applicable to the case in question, since it relies on a standard of evaluation different from the one used to determine a possible violation of Articles 8 and 25 of the Convention. It is important to clarify that the causes and the effects preventing exhaustion of domestic remedies will be analyzed in the report adopted by the Commission on the merits of the dispute, in order to ascertain whether or not they constitute violations of the Convention.

2. Timeliness of the petition

29. Article 46.1 b) of the Convention establishes that, for the petition to be declared admissible by the Commission, it is necessary that it 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 that exhausted remedies under domestic law. In the petition being reviewed, the IAC^{HR} has established that the exceptions to the exhaustion of remedies under domestic law are applicable in accordance with Article 46.2 a) of the American Convention given that there was no adequate remedy in domestic law that was available to the alleged victims that would

have made it possible for them to challenge any aspect referring to the proceedings or decision of their deportation.

30. Regarding this, Article 32 of the Commission's Rules of Procedures establishes 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 must consider the date on which the alleged violation of rights took place and the circumstances of each case.

31. The deportation order of the alleged victims was issued by the Police Commissioner of Pichincha on March 27, 2002 and the petition was received on December 6, 2002, around 8 months since the alleged violations of the rights of the alleged victims took place. Therefore, in view of the context and characteristics of the present petition, the Commission finds that the petition was lodged within a reasonable period of time and that the admissibility requirement pertaining to timeliness has been met.

3. Duplication of proceedings and international *res judicata*

32. There is no evidence in the case file that the subject of the petition is pending in another international proceeding for settlement, nor that it is substantially the same as one previously studied by this or any other international organization. Therefore, the requirements set forth in Articles 46.1.c and 47.1.d of the Convention must be deemed as fulfilled.

4. Colorable claim

33. For purposes of admissibility, the Commission must decide whether the alleged facts might constitute a violation of rights pursuant to the provisions of Article 47.b of the American Convention, or if the petition is "manifestly groundless" or "obviously out of order", pursuant to Article 47.c. The criteria for evaluating those requirements differ from the ones used to rule on the merits of a petition; the Commission must conduct a *prima facie* evaluation to determine whether the petition establishes the grounds for the possible potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation of rights. Such determination constitutes a preliminary analysis, but does not prejudge the merits of the case⁵.

34. Neither the American Convention nor the IACR's Rules of Procedure require the petitioner to identify the specific rights allegedly violated by the State in the matter submitted to the Commission, although petitioners may do so. Rather, it falls to the Commission, based on the system's jurisprudence, to determine in its admissibility reports what provision of the relevant inter-American instruments applies and could establish a violation in the facts are proven sufficiently.

35. In the instant case, the Commission considers that the allegations filed by the petitioner with respect to illegal and arbitrary detention of the alleged victims and the alleged warrant of arrest issued against them by an authority who did not have jurisdiction to do so could tend to establish violations of Article 7 (personal liberty) of the American Convention. The Commission takes into account that, after filing a petition for a writ of habeas corpus with the mayor, 5 of the 14 alleged victims obtained an order for their release. Nevertheless, the allegations highlight legal issues regarding the competence of the authorities to carry out the detention under the alleged circumstances and other elements that call for a review of its compatibility with the terms of the American Convention in the stage of the merits.

36. Likewise, the allegations filed by the petitioner according to which the alleged victims had been expelled from Ecuadorian territory although they had valid tourist visas, after proceedings in which several breaches of due process of law were supposedly committed, among them the absence of an

⁵ See IACR, Report No. 21/04, Petition 12.190, Admissibility, José Luís Tapia González and others, Chile, February 24, 2004, par. 33.

independent and impartial judge or court having jurisdiction, the absence of a translator, the absence of prior detailed communication of the charges being brought, as well as the application of a domestic legal norm (Article 30 of the Migration Law of Ecuador) that established the impossibility of filing an appeal, either administrative or judicial, with respect to the deportation of foreign nationals deemed to be in an irregular situation,⁶ could tend to establish violations of Article 8 (right to a fair trial), Article 22 (freedom of movement and residence)⁷ and Article 25 (right to judicial protection) of the American Convention in connection with Article 1.1 (obligation to respect rights) and Article 2 (domestic legal effects) of the same instrument. At the same time, in the stage of the merits, the Commission shall consider whether it is relevant to review the legal framework applied to the present victims in the light of Article 9 (freedom from ex post facto laws) of the American Convention.

37. Regarding the alleged violation of Article 15 (right of assembly), the Commission considers that it does have enough elements to establish a possible violation of the American Convention imputable to the State, and therefore it considers this point of law of the petition inadmissible according to the terms of Article 47 b) of the American Convention.

V. CONCLUSIONS

1. The Commission concludes that it has jurisdiction to examine the petitions filed by the petitioner on the alleged violation of Article 7 (right to personal liberty), Article 8 (right to a fair trial), Article 9 (freedom from ex post facto laws), Article 22 (freedom of movement and residence), and Article 25 (right to judicial protection), in connection with Article 1.1 (obligation to respect rights) and Article 2 (domestic legal effects) of the Convention and that they are admissible in accordance with the requirements set forth in Articles 46 and 47 of the American Convention. In addition, it concludes that the petition in connection with Article 15 (right of assembly) is inadmissible.

2. Based on the foregoing points of fact and law, and without prejudice to the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition admissible with respect to Article 7 (right to personal liberty), Article 8 (right to a fair trial), Article 9 (freedom from ex post facto laws), Article 22 (freedom of movement and residence), and Article 25 (judicial protection) in connection with Article 1.1 (obligation to respect rights) and Article 2 (domestic legal effects) of the American Convention.

2. To declare the petition inadmissible in connection with Article 15 (right of assembly) of the American Convention.

3. To notify the Ecuadorian State and petitioners of this decision.

4. To proceed to the analysis of the merits of the case;

5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

⁶See IACHR, Report No. 52/05, Petition 191-03, Admissibility, Nelson Iván Serrano Sáenz, Ecuador, October 24, 2005, par. 53.

⁷ See IACHR, Report No. 49/99, Case 11.610, Merits, Loren Laroye Riebe Star, Jorge Barón Gutlein and Rodolfo Izal Elorza, Mexico, April 13, 1999.

Done and signed in the city of Washington, D.C., on the 24th day of the month of March, 2015. (Signed): Rose-Marie Belle Antoine, President; James L. Cavallaro, First Vice President; José de Jesús Orozco Henríquez, Second Vice President; Felipe González, Rosa María Ortiz, Tracy Robinson and Paulo Vannuchi, Commissioners.