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REPORT No. 34/21
PETITION 1270-10
REPORT ON ADMISSIBILITY

MARCO EUGENIO BRAVO SARMIENTO
ECUADOR

Approved electronically by the Commission on March 1, 2021.

Cite as: IACHR, Report No. 34/21, Petition 1270-10. Admissibility. Marco Eugenio Bravo Sarmiento. Ecuador. March 1, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Marco Eugenio Bravo Sarmiento, César Baquerizo Bustos and Rubén Morán Sarmiento
Alleged victim:	Marco Eugenio Bravo Sarmiento
Respondent State:	Ecuador
Rights invoked:	Articles 8 (fair trial), 24 (equality before the law) and 25 (judicial protection) of the American Convention on Human Rights ¹ , article 6 (right to work) and 7 (just, equitable and satisfactory conditions of work) of the Additional Protocol to the American Convention on Human Rights ² ; and other international instruments ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	September 8, 2010
Additional information received at the stage of initial review:	September 23, 2010
Notification of the petition to the State:	January 9, 2017
State's first response:	April 7, 2017
Additional observations from the petitioner:	August 11, 2017
Additional observations from the State:	January 26, 2018

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 the instrument of ratification 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 (fair trial), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention in connection to article 1 of the same instrument
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, March 3, 2010
Timeliness of the petition:	Yes, in the terms of section VI

¹ Hereinafter "the American Convention".

² Hereinafter the "Protocol of San Salvador" or the "Protocol".

³ Article 8, 10, 22 and 23 of the Universal Declaration of Human Rights.

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. Mr. Marco Eugenio Bravo Sarmiento (hereinafter, “the alleged victim”) alleges the responsibility of the Ecuadorian State in relation to the failure to comply with the judgment issued on August 12, 2007 by the then Supreme Court of Justice by virtue of which he was reinstated to his job at the Ecuadorian Institute of Social Security (hereinafter, el “IESS”) of Guayaquil and the payment of remunerations. He also claims that the State infringed his right to defense and due process, as well as to the principle of right to work and the social orientation of right to work as a result of judgment No. 012-09-SEP-CC issued on July 31, 2009 by the Constitutional Court and the decision of the Second Labor and Social Chamber of the National Court of Justice on January 12, 2010.

2. The petitioner claims that Mr. Bravo Sarmiento was untimely fired from his job at the Regional IESS Guayaquil, due to an approval to terminate his employment relationship granted by the Labor Inspectorate of Guayas on September 27, 1993. He alleges that the request for approval was filed on July 28, 1993 by his employer as a result of the information shown in the IESS Internal Audit report on the remodeling and re-equipment processes of the “Teodoro Maldonado Carbo” Hospital in the city of Guayaquil, in which administrative responsibilities were established, a presumption of civil and criminal liability against the alleged victim and more than thirty workers for alleged faults and non-compliance of legal and regulatory norms, and was accused of being involved in the offenses mentioned in the 3rd and 5th numerals of article 171 of the Labor Law⁵.

3. The petitioner describes that on December 9, 1993 Mr. Bravo Sarmiento filed una a labor action before the Fourth Labor Court of Guayas requesting the illegality of the approval, the reinstatement to his post and the payment of indemnities set forth in article 13 of the First Single Collective Work Contract at a national level, in force at the time of his dismissal⁶. The petitioner specifies that the court issued its judgment on September 27, 1996 declaring the claim admissible and ordering the IESS to pay compensation to the alleged victim for the illegal dismissal, the bonus determined in article 185 of the corresponding Law, as well as the remunerations and social benefits applicable during the time his dismissal until the reinstatement in his workplace. In this regard, the petitioner emphasizes that Mr. Bravo Sarmiento filed an appeal claiming the omission to set professional fees of his defense attorneys, which was resolved by the First Labor Chamber of the then Superior Court of Guayaquil by judgment of April 13, 1999. In said text, the petitioner describes the Chamber specified the untimely dismissal and the right of the plaintiff to compensation for such concept, but rejected as improper, the intended reinstatement to his job and the payment of unreceived wages during the period of separation since the Court considered that it was only possible to exercise the right established in article 13 of the First Collective Work Contract when one of the requirements set forth therein had been met. In this regard, the petitioner informs that both the alleged victim and the IESS filed appeals for cassation which were rejected by judgment of February 15, 2001 thereby affirming the decision of the Superior Court of Guayaquil⁷.

⁵ Accordingly, the petitioners highlight that, following a complaint filed by the Regional Director of IESS, the 13th Criminal Court of Guayas began criminal trial No. 33-1993 in 1993 against the main directors of the institution, for alleged embezzlement in the remodeling and re-equipment of the aforementioned Hospital. They argue that this proceeding was extended to the alleged victim and more than 20 colleagues by means of “trial orders” on February 6, 1995 as a result of the request of precautionary measures and arrest warrants from the IESS for all those allegedly involved, including the alleged victim. They claim that this resulted in a prosecution for more than 6 years, until the Third Criminal Chamber of the then Superior Court of Guayaquil confirmed on January 30, 2001 the definitive dismissal of the case, which was notified on May 14, 2001.

⁶ On this matter they detail that Article 13 of the aforementioned instrument reads: “*if in the executed judicial decision, a termination of a labor relationship were to be considered illegal or if a favorable provisional or definitive dismissal writ or sentence was received from Courts of the Republic, that were executed, the dismissed worker, is to be reinstated to his previous workplace or to another of similar category to the one held at the time of his separation, whereupon the Institute shall pay the worker the remunerations and benefits to which he or she was entitled during the time of separation*”.

⁷ The petitioners indicate that, by order of May 16, 2001, the Fourth Labor Judge of Guayas ordered the payments of compensation solely and exclusively on account of untimely dismissal in relation to the provisions set forth in Article 8 and 11 of the First Collective Contract and for the dismissal and bonification of Articles 185 and 188 of the Labor Law. They hold that in spite of their disagreement, the payment was received by the alleged victim.

4. The petitioner specifies that subsequently, based on the aforementioned second instance judgment from April 13, 1999, and pursuant to stipulations of article 13 del First Collective Work Contract⁸, the alleged victim filed a second labor claim on May 3, 2002 requesting payment of remunerations and bonifications as well as the reinstatement to his workplace⁹. The petitioner argues that the First Social and Labor Chamber of the then Supreme Court of Justice issued a decision on January 12, 2007 on the appeal for cassation filed on November 17, 2004 by the alleged victim. In this regard, the petitioner reports that the then Supreme Court of Justice accepted his claim for the reinstatement to his post or to another of similar category and the payment of remunerations and benefits during the time of severance considering that “[...] conditions [set forth in article 13 of the First Collective Contract] were met (...)”.

5. The petitioner details that, throughout the execution of the judgment, the IESS sponsor received the notification of the reception of the proceeding and the cassation executorial of February 23, 2007 and then on March 7, 2007 received from the Fourth Provisional Labor Judge of Guayas, a certified copy of the judgment. Nonetheless, the petitioner argues that although the IESS sponsor as well as other officials from the same institution accepted the decision and conducted several actions over the 6 following months to comply to what was ordered¹⁰, in a surprising manner, the judicial sponsor of the provincial directorate of IESS of Guayas and the Guayas IESS Director made different requests and filed numerous anti-judicial actions, even in the process of seizure and judicial auction¹¹, requesting the nullity of the judgment of the then Supreme Court of Justice with the sole purpose of creating incidents to waste time¹².

6. Along these lines, the petitioner argues that on December 12, 2008, the IESS filed an extraordinary action for protection before the Constitutional Court requesting the nullity of the judgment of January 12, 2007 due to “severe procedural flaws” in the process as the IESS and its representatives had not been notified of the cassation proceeding in the judicial mailbox of the city of Quito. On this matter, the petitioner informs that on July 31, 2009, the Constitutional Court issued decision No. 012-09-SEP-CC in which it accepted the extraordinary remedy and, in its text, declared the nullity of all proceedings conducted within the second trial by Marco Bravo Sarmiento against the IESS “as of the act dictated on January 25, 2005” which admits the remedy and ordered to notify¹³. In particular, the petitioner specifies that the Chamber of the Constitutional Court considered that the lack of notification prevented the defendant from exercising his right to defense, thus breaching the right to a fair trial. The petitioner describes that before this decision from the Constitutional Court, the alleged victim filed on January 19, 2009 a action for noncompliance with the judgment which was declared inadmissible on September 15, 2009 upon considering the lack of competence of the Constitutional Court.

⁸ On this point they claim that at the time of the first trial the situation regarding the illegality of the approval was uncertain, there was no favorable sentence yet enforced and there was still no definitive dismissal of the criminal proceeding which is why there was no material evidence.

⁹ Likewise, they describe having exhausted the administrative action for the IESS to consider what was stated by its former General Director in Official communication No. 01100-1764 of April 7, 1994 in which he recommended reinstating Mr. Bravo Sarmiento to his position.

¹⁰ Among some of the actions, the petitioner describes the issuance of a favorable report issued by the IESS General Prosecutor on compliance with judgment, who also issued an official letter requesting budget certification and budgetary authorizations on November 20, 2008 as well as the publication of an order on July 17, 2007 issued by IESS General Director for the payment of remunerations and reinstatement. Nonetheless, the petitioner points out that the IESS challenged the liquidation of assets assumed by the judge by means of an order of May 10, 2007 in execution process, proposing another value which is then accepted by the Judge.

¹¹ The petitioner describes that at the same time, the Fourth Provisional Labor Judge of Guayas issued an attachment order on November 17, 2007, on a property owned by IESS and the seizure act on November 15, 2007. The petitioner adds that on December 1, 2008, said court set a date for the public auction despite the fact that “for the umpteenth time and with no legal grounds, the IESS objects the competence of this court to hear the enforcement proceeding of this case and insists on its claim”.

¹² The IESS filed a competence claim before the Second Labor Court of Oral Procedure of the Guayas Province in December 2007 against the Fourth Provisional Labor Judge; nullity petitions of the executed judgment both before the then Superior Court of Guayaquil, and before the then President of the Supreme Court of Justice; and a claim of nullity for an executed judgment before the Fourth Provisional Labor Judge of Guayas against the secretariat of the First Chamber of the then Superior Court of Guayaquil, of the secretariat of the First Labor Chamber of the Supreme Court of Justice and against the alleged victim .

¹³ The petitioner informs that with sentence of the Constitutional Court, the Eighth Labor Judge of Guayas overruled on August 31, 2009, the execution phase of the sentence and therefore the auction of the property owned by the IESS, and returned the consigned assets by the auctioneer.

7. The petitioner specifies that after judgment No. 012-09-SEP-CC, the casefile was forwarded to the First Labor, Childhood and Adolescence Chamber of the Provincial Court of Guayas whom without notifying the IESS for it to address the judicial mailbox in Quito, forwarded the proceeding over to the National Court of Justice. The petitioner argues on that occasion, the Second Labor Chamber, without expressly complying to the judgment of the Constitutional Court and without any legal grounds or motivation, re-qualified the cassation remedy filed by the worker, through a writ on January 12, 2010, rejecting it with total disregard of the fact that it had been declared admissible. The petitioner claims that this writ denied the legitimate right to defense of the alleged victim and consequently the principle of labor law and the social orientation of the right to work, as well as the right to effective judicial protection since the referred ordinance lacks grounds and motivation in the rejection of admissibility and neglects to explain the errors in the analysis of the text of the writ issued on January 25, 2005. On the other hand, the petitioner considers that the Constitutional Court violated the rights of the alleged victim since it invoked a cause which does not constitute legal basis to annul an already enforced and executed final instance decision and ignored that the cassation proceeding is an extraordinary instance which does not produce proof and is merely a legal tool. In this regard, the petitioner adds that it was also processed contrary to law and in violation of the principle of equality, effective judicial protection and contradictory proceedings since the alleged victim was not allowed to reply to what was said by the IESS sponsor in a public hearing held on May 6, 2009 that the Constitutional Court had convened.

8. Finally, the petitioner holds that all judicial instances are exhausted being the last judicial action, the request to revoke and annul the resolution of January 12, 2010 and everything acted by the Second Labor and Social Chamber of the National Court of Justice, which was denied by means of ordinance of March 1, 2010 and notified in Quito on March 3, 2010. On this matter, the petitioner argues that, at the time of filing the petition, it had not been notified in Guayaquil, place where the proceeding originated.

9. The State, on the other hand, holds that the petitioner refers in the petition to two labor proceedings related to his dismissal from the Ecuadorian Social Security Institute, which were processed and substantiated with the same purpose, yet conducted at different times. Thus, the State specifies that considering that in the first labor claim, the national instances granted him what he requested including a severance payment, the second labor claim was dismissed. In this regard, the State maintains that Mr. Bravo Sarmiento has not raised facts which characterize violations of the American Convention, inasmuch as the judgments handed down by domestic judges and courts have been resolved correctly based in national law. The State argues that by filing the present petition, the alleged victim intends to use the Commission as a fourth instance due to his disagreement with what has been resolved in the domestic sphere.

10. As for the timeliness of the petition, the State argues that the conventional six-month deadline should be counted as of 2001 since that is the date on which the first labor lawsuit concluded before the Guayas Labor Court, and therefore considers that the petition is untimely. The State details that even if the second labor claim were to be considered, the petition would still fail to meet the requirement set forth since it was filed 8 months after the notifications of the appeal for cassation as the last and only instance available in ordinary proceedings that concluded the controversy and was resolved on January 25, 2010 and notified on that same date on the mailboxes mentioned by the petitioner.

11. The State recalls that the petitioner improperly requested to revoke this last decision, a situation that was resolved on February 9, 2010 and notified two days later; and then requested the nullity of all proceedings in this instance which was resolved by the National Court of Justice itself on March 1 and notified on March 3, 2010. The State points out that should the wrongly filed remedies be considered appropriate and effective, it must be considered that the State has proven that on March 3, 2010 Mr. Bravo Sarmiento was notified and knew of the termination of such appeal, since he himself requested it with the purpose that notifications be sent to the judicial mailbox of his representative and by letter of January 22, 2010 to the National Court of Justice, in the judicial mailbox of the Palace of Justice in Quito.

12. The State alleges that although the alleged victim claims a violation to the right to work, this is not justiciable before the Inter-American System for the protection of human rights. Likewise, in relation to international treaties and conventions such as the treaties of the International Labor Organization (hereinafter,

the “ILO”), the State emphasizes that the IACHR has established its lack of competence to declare a State responsible for the violation of the ILO conventions. The State argues that the criminal trial against Mr. Bravo as well as the trial for competence which concluded in 2008 and the nullity proceeding concluded in 2009, both filed by the IESS, must be excluded from the proceeding, since there are many actions within domestic jurisdiction, linked to Sr. Bravo which hold no relation to the present matter.

13. Furthermore, the States considers the time taken by the IACHR for the initial review of this petition as unreasonable, since seven years elapsed between the filing of the petition to the initial notification to the State. The State holds that this kind of situations generate an evident violation of article 8 of the IACHR in that on the one hand it limits the right to defense by the State and on the other hand it generates uncertainty for the petitioner.

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

14. Regarding the exhaustion of domestic remedies, the petitioner argues that he has exhausted domestic jurisdiction remedies. In particular, the petitioner specifies that, as a first proceeding, on December 9, 1993 the alleged victim filed a labor claim before the Fourth Labor Court of Guayas, which was resolved by the Court by the judgment issued on September 27, 1996 declaring the claim admissible. To this point, the petitioner stresses that an appeal was filed and latter resolved by the First Labor Chamber of the then Superior Court of Guayaquil through judgment issued on April 13, 1999 in which the Chamber stipulated the untimely dismissal and the right of the plaintiff to compensation for such concept, yet rejected as improper the claim for reinstatement to his position and the payment of unearned wages during the period of separation, since it was only possible to exercise the right established in article 13 of the First Collective Work Contract when one of the requirements set forth therein were fulfilled. In this sense, informs that both the alleged victim and the IESS filed cassation remedies and both were rejected by judgment of February 15, 2001.

15. Regarding a second proceeding, the petitioner alleges the alleged victim filed a labor claim on May 3, 2002 requesting the payment of remunerations and bonuses, as well as the reinstatement to his work based on article 13 of the First Collective Work Contract and the judgment of April 13, 1999. Said proceeding concluded with the judgment dated January 12, 2007 issued by the First Social and Labor Chamber of the then Supreme Court of Justice on the cassation appeal filed on November 17, 2004 by the alleged victim.

16. Likewise, concerning the extraordinary action for protection filed by the IESS before the Constitutional Court and the judgment No. 012-09-SEP-CC issued on July 31, 2009, the alleged victim filed on February 19, 2009 an action for failure to comply with the judgment which was declared inadmissible on September 15, 2009 for considering the lack of competence of the Constitutional Court. Finally, in regard to the order of January 12 issued by the National Court of Justice that re-qualified the cassation remedy filed by the worker, filed a request to revoke and annul the resolution of January 12, 2010 and every action taken by the Second Labor and Social Chamber of the National Court of Justice, which was denied by means of ordinance of March 1, 2010 and notified in Quito on March 3, 2010. On this matter, the State does not question the exhaustion of domestic remedies nor did it refer to other suitable remedies to redress the alleged violations.

17. Based on the information available in the casefile, the IACHR considers that domestic remedies were definitely exhausted with the decision by the National Court of Justice of March 1, 2010, notified to the alleged victim on March 3 of the same year. On this point, the Commission considers that the fact that the requests filed after the judgment issued on January 12, 2010 were considered and admitted by the court leads to think that their filing was not manifestly unreasonable nor impetuous.

18. On the other hand, the Commission observes that the petition, sent by postal mail, is dated August 25, 2010 and was received at the IACHR on September 8, 2010. The Commission also notes that the notification of the decision by the National Court of Justice was made on March 3, 2010. In this regard, according to the common practice by the IACHR on the matter, presuming the days that elapsed while the petition was in

the mail, the Commission considers that the petition was filed in a timely manner, thus satisfying the requirement set forth in article 46.1.b of the American Convention¹⁴.

19. The Commission takes note of the State's claim on what it describes or labels as untimeliness in the communication of the petition. The IACHR notes in this regard that neither the American Convention nor the Commission's Rules for Procedure establish a time limit for the transmission of a petition to the State from the time it is received and that the times set forth in the Rules for Procedure and in the Convention for other stages of the proceeding are not applicable by analogy¹⁵.

VII. ANALYSIS OF COLORABLE CLAIM

20. The Commission observes that the present petition includes allegations regarding the unjustified dismissal, the failure to comply with the judgment issued on January 12, 2007 by the then Supreme Court of Justice, and different violations of the guarantees of due process and effective judicial protection, particularly within the scope of the action for protection filed by the IESS before the Constitutional Court which resulted in sentence No. 012-09-SEP-CC from July 31, 2009; and of the proceeding conducted by the Second Labor Chamber of the National Court of Justice, inasmuch as it is alleged that it again decided on the admissibility of the cassation remedy with no motivation whatsoever. As for the violations to fair trial and effective judicial protection, the Commission takes note that, within the action for protection, the petitioner also claims the violation of the right to defense at a public hearing held on May 6, 2009 and the lack of legal grounds to annul the sentence of the Supreme Court of Justice from January 12, 2007 within the proceeding conducted by the National Court of Justice.

21. In view of these considerations, and after examining the factual and legal elements set forth by the parties, the IACHR considers that the petitioner's claims are not manifestly unfounded and require a study on the merits, since the alleged facts, if corroborated, may characterize violations of rights established in articles 8 (fair trial), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention in connection to article 1 of the same instrument.

22. As for the claim on the alleged violation of article 24 of the American Convention, the Commission observes that the petitioner has failed to provide enough grounds or allegations which allow to consider *prima facie* its possible violation.

23. Concerning the alleged violations of articles 6 and 7 of the Protocol of San Salvador, the IACHR notes that the competence contemplated in article 19(6) of such treaty to rule on violations in the context of individual petitions is limited to articles 8 and 13. With respect to the other articles and treaties, article 29 of the American Convention provides that the Commission may consider them for the purpose of interpreting and applying the American Convention and other relevant instruments.

24. Finally, in regard to allegations from the State concerning the fourth instance formula, the Commission reiterates that, for purposes of admissibility, it must decide whether the alleged facts may characterize a violation of rights, as article 47(b) of the American Convention so stipulates, or whether the petition is 'manifestly unfounded' or its 'total inadmissibility is evident', according to subsection (c) of such article. The criterion to assess these requirements differs from the one used to decide on the merits of a petition. Likewise, within the scope of its mandate it is competent as to declare a petition admissible if it refers to domestic proceedings which may violate rights guaranteed by the American Convention. This means that, according to the conventional norms cited above, pursuant to article 34 of its Rules for Procedure, the admissibility analysis centers in the verification of such requirements, which refer to the existence of elements.

¹⁴ In this sense, see: IACHR, Report No. 173/17. Petition 1111-08. Admissibility Marcela Brenda Iglesias, Nora Ester Ribaldo and Eduardo Rubén Iglesias. Argentina. December 29, 2017, para. 8; IACHR. Report No. 115/12 Giovanna Janett Vidal Vargas, Chile, Admissibility, November 13, 2012, para. 42. IACHR, Report No. 60/14, Petition 1415-04. Admissibility. Alejandro Nissen Pessolani. Paraguay. July 24, 2014, para. 45.

¹⁵ IACHR, Report No. 55/16, Petition 4949-02. Admissibility. Guillermo Antonio Álvarez. Argentina. December 6, 2016, para. 24.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 25 and 26 of the American Convention in connection to its Articles 1.1; and;

2. To find the instant petition inadmissible in relation to Articles 24 of the American Convention; and

3. To notify the parties of this decision; to proceed 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 1st day of the month of March, 2021. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice-President; Flávia Piovesan, Second Vice-President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.