

OAS/Ser.L/V/II
Doc. 187
April 30, 2022
Original: Spanish

REPORT No. 184/22
PETITION 536-12
REPORT ON INADMISSIBILITY

JAVIER HURTADO ARIAS
COLOMBIA

Electronically approved by the Commission on April 30, 2022

Cite as: IACHR, Report No. 184/22. Petition 536-12. Inadmissibility. Javier Hurtado Arias.
Colombia. April 30, 2022.

I. INFORMATION ABOUT THE PETITION

| | |
|-------------------------|--|
| Petitioner: | Javier Hurtado Arias |
| Alleged victim: | Javier Hurtado Arias |
| State denounced: | Colombia ¹ |
| Rights invoked: | Articles 8 (fair trial) and 25 (judicial protection) of the American Convention on Human Rights ² |

II. PROCEEDINGS BEFORE THE IACHR³

| | |
|--|--|
| Filing of the petition: | March 30, 2012 |
| Additional information received at the stage of initial review: | April 23, 2012, June 16, 2017, and June 4, 2017. |
| Notification of the petition to the State: | December 28, 2017 |
| State's first response: | August 8, 2018 |
| Additional observations from the petitioner: | December 19, 2018 and May 23, 2019. |

III. COMPETENCY

| | |
|--|--|
| 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 of ratification on July 31, 1973). |

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

| | |
|--|--|
| Duplication of proceedings and international <i>res judicata</i>: | No |
| Rights declared admissible: | None |
| Exhaustion of domestic remedies or applicability of an exception to the rule: | Yes, under the terms of section VI |
| Timeliness of the petition: | Yes, under the terms of the section VI |

V. FACTS ALLEGED

1. Mr. Javier Hurtado Arias, in his capacity as petitioner and alleged victim, claims that the Superior Council of the Judiciary suspended him from practicing law for two years, using illegally obtained tape recordings as the primary evidence to support its decision. Subsequently, the courts allegedly failed to protect his right to due process.

M.R.H.'s complaint against the alleged victim

¹ Pursuant to Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Carlos Bernal Pulido, a Colombian national, did not participate in the debate or decision in this case.

² Hereinafter referred to as "the American Convention" or "the Convention".

³ The observations of each party were duly conveyed to the opposing party.

2. The petitioner explains that on November 19, 2008, in his capacity as attorney, he filed a petition to divide the marital property of M.R.H and S.M.R.⁴ However, for reasons beyond his control—a judicial strike and other events—those proceedings took longer than usual. As a result, in 2009 M.R.H. could not remarry, and consequently began to threaten the petitioner, blaming him for the delay and demanding the petitioner return the money M.R.H. had paid him for his services.

3. In order to stop being pressured, the petitioner returned a large sum of money to M.R.H.; however, M.R.H. was not satisfied with the amount refunded, and thus continued threatening the petitioner in order to obtain the full amount demanded. In view of this, the petitioner reports that he went to the Immediate Reaction Unit of the Prosecutor's Office to report the incident. The employee who helped him, however, told the petitioner that he could not process the request given the lack of evidence, and merely advised the petitioner to take measures to protect himself.

4. Although he was unable to have his complaint processed, the petitioner led M.R.H. to believe that he had reported him, which led M.R.H. to leave the country. Nevertheless, the petitioner indicates that in response, M.R.H.'s attorney filed a disciplinary complaint against him. M.R.H.'s attorney alleged that the petitioner, in his capacity as counsel, had suggested to M.R.H that he offer a sum of money to the court employee in charge of his divorce settlement proceedings to expedite the resolution of the case. The petitioner states that M.R.H.'s attorney provided tape recordings with her complaint in which the petitioner is allegedly heard talking to M.R.H., advising M.R.H. to give the court employee a sum of money to expedite the proceedings. In this regard, the petitioner holds that, although he had acknowledged it was his voice in said recordings, they showed the conversation that took place in a one-sided manner.

Disciplinary proceedings and sanction

5. The petitioner indicates that due to the aforementioned complaint against him, on June 21, 2010, the Armenia Regional Council of the Judiciary barred him from practicing law for two years for violation of the proper and lawful administration of justice, as stipulated in Article 33(6) of the Attorney Disciplinary Code.⁵ The Council considered there was sufficient evidence to prove that the petitioner had recommended to M.R.H. that he give money to a court employee to expedite the process of settling his divorce. In this regard, the petitioner notes that, although the Council recognized in its decision that the tape recordings had been obtained without his consent, it affirmed that said evidence was not illegal, given that the case law of the *Consejo de Estado* [the highest court with jurisdiction over administrative matters] provides that the right to privacy may not be used as an excuse to elude punishment for unlawful conduct.

6. The petitioner appealed this decision, stating he had never participated in the acts attributed to him and calling into question the use of the tape recordings as grounds for sanctioning him, as well as the lack of a chain of custody to protect the integrity of the evidence. He points out that nevertheless on October 6, 2010, the Disciplinary Division of the Superior Council of the Judiciary confirmed the first-instance decision, arguing that the case law of the Criminal Cassation Division of the Supreme Court had already determined that the recording of private conversations by the victim of a crime is legitimate when through these recordings evidence can preliminarily be established for the purpose of reporting a criminal act. In this sense, the Disciplinary Division deemed that M.R.H. was unaware that he was committing an unlawful act when providing money to a judicial officer, and had therefore recorded the conversations to prove he had been induced to engage in such conduct. Finally, the petitioner explains that the aforementioned Disciplinary Division indicated that the chain of custody does not apply in disciplinary proceedings and dismissed the arguments presented in the appeal.

The tutela proceedings

⁴ Since these are persons outside the legal scope of this report, the Commission will keep their identities confidential.

⁵ Article 33. The following constitute offenses against the proper and lawful administration of justice and the aims of the State: (...) 6. To avail oneself of gifts, unlawful payments, unjustified or unusual attention, or any other ambiguous action that may be interpreted as a means to secure the favor or good will of officials, their collaborators, or judicial officers.

7. The petitioner filed a *tutela* action [writ for protection of fundamental rights] against this decision, alleging the violation of his right to due process for using evidence that is barred against him. Thus, on May 9, 2011, the Division of Associate Judges of the Regional Council of the Judiciary granted the writ for protection and nullified the decisions that had found him responsible for a disciplinary violation, deeming that: (i) the tape recording could not be admitted as evidence since it had been obtained "*surreptitiously by Mr. M.R.H. without an order from a competent authority, the authorization of the attorney, or of the other parties involved, thus violating the right to privacy regarding confidentiality of personal communications (...)*;" (ii) the case law used was not applicable to the specific case; (iii) there was a factual defect due to the one-sided assessment of the evidentiary material and the omission of evidence other than the recording; and (iv) the principle *in dubio pro disciplinado* should have been applied given the lack of certainty regarding whether disciplinary action can be taken against the defendant for these acts.

8. The petitioner points out that nevertheless the Quindío Regional Council of the Judiciary challenged this decision, and on July 19, 2011 the Superior Council of the Judiciary overturned it, declaring the disciplinary sanction against him enforceable. In its decision, the Superior Council deemed that the decision imposing the sanction was adopted "*in accordance with the principles of due circumspection and existing procedure in the matter submitted to its consideration, there is no evidence that the decisions show a flagrant, gross, or manifest violation of the regulations applicable to the matter; nor do the decisions adopted show any defect of arbitrariness.*" Likewise, in relation to the tape recording, the Superior Council of the Judiciary highlighted that the Disciplinary Division of the Superior Council of the Judiciary considered that M.R.H. "*was a victim (...) an argument made in a reasoned and reasonable manner (...) weighing the situation of the legal professional in question against the rights of the victim (...)*," so that the case law of the Criminal Cassation Division of the Supreme Court had been correctly used.

Arguments of the petitioner and alleged victim

9. Based on these factual considerations, Mr. Javier Hurtado Arias alleges that during the disciplinary proceedings there was never a true procedural debate, since M.R.H. was never present at the hearings, which prevented the Mr. Hurtado's attorney from questioning him. Furthermore, the tape recordings used to sanction him were acquired in violation of his right to privacy, since he had not given his authorization to record his voice. Despite the fact that these recordings should have been excluded from the proceedings, they were used as the primary evidence to sanction him.

10. He argues that although he acknowledged in the hearing some segments of the recording, the authority in charge of the proceedings never investigated whether there was the possibility of a montage or use of such evidence out of context, nor did it establish a chain of custody to protect such recordings. Consequently, he claims that his right to the presumption of innocence was also violated, inasmuch as it did not meet the standard of proof to show he had committed the disciplinary offense attributed to him.

11. Finally, he states that the high courts had reiterated that the use of tape recordings of private conversations as evidence in criminal or disciplinary proceedings has no probative value if they do not meet the following requirements: (i) they are authorized by the person against whom they are to be used; (ii) they have been ordered in advance by a competent judicial authority; (iii) there is no possibility of obtaining incriminating evidence in any other way; and (iv) if that possibility exists, the evidence to be obtained is of minor importance. In the petitioner's opinion, these parameters were not respected in the decision in his case.

Arguments of the State

12. The State, for its part, has countered that the petition is inadmissible, inasmuch as the facts being alleged do not constitute a violation of human rights. It affirms that the disciplinary proceedings against the alleged victim were conducted in keeping with the guarantees of due process and that during the hearings to provide evidence and provisionally specify charges, the Quindío Regional Council of the Judiciary conducted the following proceedings: (i) took Mr. Hurgado [*sic*] Arias' spontaneous declaration, in which he presented his considerations on the facts of the complaint against him; (ii) assessed as evidence the recording of the conversations between M.R.H. and an employee of the Court, whom M.R.H. allegedly bribed to expedite the

process; (iii) transcribed the recordings provided; and (iv) took different statements. The State also maintains that during these proceedings, Mr. Hurtado Arias acknowledged it was his voice in the recording provided by his client, although he noted that this evidence only contained those parts that favored the person accusing him.

13. Once the evidence had been analyzed, charges were brought against Mr. Hurtado Arias for willful violation of the proper and lawful administration of justice, regulated under Article 33(6) of the Attorney Disciplinary Code.⁶ The State further indicates that copies were forwarded to the *Fiscalía General de la Nación* [Office of the Attorney General] so it could decide whether or not to conduct a criminal investigation into the alleged victim's conduct, and to the *Procuraduría General de la Nación* [Office of the Administrative Prosecutor General] to decide whether or not to open a disciplinary investigation against the court employee who had received the money.

14. Thereafter, on June 21, 2010, the Armenia Regional Council of the Judiciary found that Mr. Hurtado Arias had committed a disciplinary violation by infringing the proper and lawful administration of justice and barred him from practicing law for two years. Regarding the appeal filed by the alleged victim challenging the evidence, the State notes that on October 6, 2010 the Disciplinary Division of the Superior Council of the Judiciary upheld the penalty on the basis of the following analysis regarding the use of the disputed recordings:

"It is understood, then, that the evidence, which might at first be considered to have been secured illegally, for having been attained in violation of the right to privacy (...), was not in fact, insofar as when a recording is made by the victim, or with the victim's consent, the violated rights must be weighed, since the rights of the victim that were undermined by the actions of the interlocutor also come into play. It is clear that in this situation the State must protect the weaker party in the relationship because if the evidence put forth is deemed illegal, the aims of justice of the social rule of law would not be achieved."

15. In this connection, the State notes that even though the authorities did not rule in Mr. Hurtado Arias' favor, the process was conducted in keeping with due judicial guarantees, with duly reasoned decisions having been issued following an effective examination of the entire body of evidence. The State also indicates that the judicial authorities that heard the case in the first and second instances pored over all the available evidence to determine whether or not the alleged victim had committed a disciplinary violation. In addition, they conducted a detailed analysis of the evidence submitted by the parties and rendered an opinion on its validity and lawfulness, dispelling any doubts about its authenticity, in light of the regulations in force.

16. Colombia asserts that the *tutela* action was also handled effectively and diligently, noting that on September 15, 2011, the petitioner was informed that his case had not been selected for review by the Constitutional Court, which would confirm that the second instance court's decision dismissing his claims had been properly substantiated. The State also notes that while a Constitutional Court judge had, on September 30, 2011, filed a motion of insistence that the alleged victim's case be selected for review, such motion was denied on October 13, 2011, thus concluding the judicial processing of the action. In this regard, the State affirms that the petitioner has not provided any arguments to support the claim that the handling of his *tutela* action was improper.

17. Lastly, the State reports that in the wake of the investigations conducted by the *Fiscalía General de la Nación* on July 24, 2015, the Fourth Criminal Circuit Court of Armenia convicted the alleged victim of bribery, handing down a primary sentence of 48 months' imprisonment plus a fine of 66 monthly minimum wages and disqualification from holding public office for a period of 80 months. In this respect, the State specifies that the judicial authorities suspended the aforementioned sentence for a period of two years following the signing of a *diligencia de compromiso* [joint dismissal agreement] and deposit of a bond. The State

⁶Ibid.

likewise notes that the criminal proceeding was conducted independently and did not evaluate the factual, legal, and evidentiary arguments that served as the basis for the disciplinary punishment of Mr. Hurtado Arias.

18. The State indicates that the alleged victim appealed this decision, reiterating his objections regarding the validity and appropriateness of the evidence being used, alleging that: (i) M.R. was not compelling or credible as he was a suspect witness; (ii) the recordings were not able to prove that the alleged victim had given instructions to deliver money; and (iii) statements by some judicial officers made outside the context of the trial were taken into account. Nevertheless, on September 2, 2015, the Criminal Division of the Superior Court of Armenia dismissed these arguments and upheld Mr. Hurtado Arias' conviction after deciding there were statements made by him, which, together with the rest of the evidence presented, made it possible to find him criminally liable for the alleged acts.

19. Based on these considerations, the State argues that it is clear that the criminal case brought against Mr. Hurtado Arias for the crime of bribery was in keeping with the rights to a defense and to due process, as well as all the guarantees protected under the Convention. Consequently, the State requests that the petition be declared inadmissible based on Article 47(b) of the American Convention, since it considers that the petitioner's aim is to have the Commission act as an appellate court, which runs counter to its complementary nature.

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

20. First, the Commission emphasizes that the main purpose of the instant petition is to challenge the disciplinary sanction imposed on the alleged victim. Consequently, the analysis of exhaustion of domestic remedies must be limited solely to this point. Therefore, the aforementioned criminal proceedings reported on by the State are not part of the present report.

21. The alleged victim does not specify his position with respect to the exhaustion of domestic remedies, only indicating that he availed himself of a *tutela* action to challenge the disciplinary sanction against him. For its part, the State does not raise any objection on this point, limiting itself to reporting that on October 13, 2011, the Constitutional Court rejected the motion of insistence filed by one of the judges to have the alleged victim's case be reviewed. As a result, bearing in mind the absence of a reply from Colombia on this point, the Commission concludes that, based on the information in the case file, this petition meets the requirement of exhaustion of domestic remedies pursuant to Article 46(1)(a) of the American Convention.

22. Additionally, the Commission recalls that in previous reports it has deemed that motions of insistence filed with the Constitutional Court of Colombia can be taken into account when analyzing the timeliness of a petition.⁷ On this basis, and in view of the fact that on October 13, 2011, the Constitutional Court dismissed the aforementioned motion and that this petition was received by the Commission on March 30, 2012, the present petition meets the requirements of Article 46(1)(b) of the Convention.

VII. ANALYSIS OF THE CHARACTERIZATION OF THE ALLEGED FACTS

23. The Commission observes that the Colombian authorities heard the case and resolved it in accordance with the guidelines set forth in the country's domestic law. In the opinion of the IACHR, no elements have been provided that demonstrate that the legal standards for evaluating the evidence used in the case are illegal, arbitrary, or unreasonable; on the contrary, the rulings issued show that the decisions were reached after weighing the arguments, with evidence apart from the disputed recordings even having been evaluated.

24. In this respect, the Commission reiterates that the petitioner's mere disagreement with the domestic courts' interpretation of the relevant legal norms is not sufficient to establish violations of the

⁷ IACHR, Report 80-12, Petition 1527-11, Admissibility. Nelson Emilio Ospina Mora. Colombia. March 29, 2021, paras. 11-15; Report 430-12, Petition 1846-12, Admissibility. Oscar Leonidas Wilchez Carreño. Colombia. December 19, 2021, paras. 11-14; and Report 75-18, Petition 422-07, Admissibility. José Humberto Gómez Herrera et al. Colombia. June 21, 2018, paras. 10-14.

Convention. Interpretation of the law, relevant proceedings, and the evaluation of evidence are, *inter alia*, exercises of domestic jurisdiction that cannot be replaced by the IACHR.⁸ In this vein, it falls to the Commission to ensure compliance with the obligations undertaken by the States party to the American Convention, but the Commission cannot act as a court of appeal to examine alleged errors of law or fact that may have been made by domestic courts that have acted within the limits of their jurisdiction.⁹

25. Therefore, the Commission considers that the instant case does not constitute, *prima facie*, a violation of rights to the detriment of the American Convention, for which reason it should be declared inadmissible for failure to meet the requirements of Article 47 of the American Convention.

VIII. DECISION

1. To declare this petition inadmissible.

2. To notify the parties of this decision; 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 30 days of the month of April, 2022. (Signed:) Julissa Mantilla Falcón, President; Margarette May Macaulay, Second Vice President; Esmeralda E. Arosemena Bernal de Troitiño, and Joel Hernández, Commissioners.

⁸ IACHR, Report No. 83/05 (Inadmissibility), Petition 644/00, Carlos Alberto López Urquía, Honduras, October 24, 2005, para. 72.

⁹ IACHR, Report No. 70/08, (Admissibility), Petition 12.242, Pediatric Clinic of the Region of Los Lagos, Brazil, October 16, 2008, para. 47.