

REPORT Nº 8/07
PETITION 1425-04
ADMISSIBILITY
HUGO QUINTANA COELLO *ET AL.*
(JUSTICES OF THE SUPREME COURT)
ECUADOR
February 27, 2007

I. SUMMARY

1. On December 30, 2004, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition lodged by Hugo Quintana Coello and 27 other former members of the Supreme Court of Justice of Ecuador (hereinafter "the petitioners"),¹ which alleges violation by the Republic of Ecuador (hereinafter "the State") of Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws), 23 (right to participate in government), 24 (right to equal protection), 25 (right to judicial protection), all in conjunction with Articles 1(1) and 2 of the American Convention on Human Rights (hereinafter "the American Convention").

2. The petitioners say that on December 8, 2004, they were relieved of their duties as members of the Supreme Court of Justice by the National Congress acting in concert with the Office of the President of the Republic. They assert that they had been legitimately elected to their offices, which were not subject to a limited tenure, and that the dismissal was unconstitutional and arbitrary, in contravention of express mandates contained in the American Convention.

3. The State holds that there is no circumstantial evidence nor consistent presumptions from which to conclude that any violation whatever occurred, nor was it determined that there was any support for or tolerance of acts committed by agents of the State, and therefore the alleged facts fail to establish violations of the rights protected by the American Convention. The State further argues that the petitioners did not make use of the domestic remedies available to them and, accordingly, requests the Commission to declare the petition inadmissible and proceed to its closure in keeping with Article 47 of the American Convention.

4. Having examined the positions of the parties in the light of the admissibility requirements set down at Article 46 of the American Convention, the Inter-American Commission decides to declare the case admissible as regards Articles 8, 9, 25 and 1(1) of said international instrument. Accordingly, the IACHR notifies the parties of the instant report, makes it public, and decides to include it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BY THE COMMISSION

5. The Commission received the petition on December 30, 2004, and registered it as number 1425-04. On March 15, 2005, the Commission transmitted the petition to the State and granted it two months to reply. In a communication received on May 16, 2005, the State requested additional time in which to submit its reply; it was given 30 days. In a communication received on May 31, 2005, Dr. Camilo Mena Mena notified his desistance from the petition lodged. On August 4, 2005, the Commission received a communication from the State informing that it had engaged with the petitioners in talks designed to reach a friendly settlement. In a communication received on August 10, 2005, the petitioners requested the Inter-American Commission to place itself at the disposal of the parties with a view to reaching a friendly settlement. In a communication of August 31, 2005, the Commission placed itself at

1 Ernesto Albán Gómez, Jorge Andrade Lara, Santiago Andrade Ubidia, José Julio Benítez Astudillo, Armando Bermeo Castillo, Eduardo Brito Mieles, Nicolás Castro Patiño, Teodoro Coello Vásquez, Alfredo Contreras Villavicencio, Arturo Donoso Castellón, Galo Galarza Paz, Luis Heredia Moreno, Estuardo Hurtado Larrea, Ángel Lescano Fiallo, Camilo Mena Mena (who later desisted of his petition), Milton Moreno Aguirre, Galo Pico Mantilla, Hernán Quevedo Terán, Jorge Ramírez Álvarez, Carlos Riofrío Corral, Clotario Salinas Montaña, Armando Serrano Puig, José Vicente Troya Jaramillo, Rodrigo Varela Avilez, Jaime Velasco Dávila, Miguel Villacís Gómez and Gonzalo Zambrano Palacios.

the disposal of the parties preparatory to initiating the procedure provided for at Article 48(1)(f) of the American Convention.

6. A hearing on admissibility was held on March 13, 2006, during the 124th regular session of the Inter-American Commission. On March 21, 2006, the State submitted additional information, which was forwarded to the petitioners on March 31, 2006, with a request for observations. The petitioners conveyed their observations in a communication received on May 23, 2006, on which date the petitioners also transmitted the technical opinions of Drs. Judith Salgado and Orlando Alcívar Santos. Both communications were forwarded to the State on July 7, 2006, with a request for observations. On September 29, 2006, the communication of July 7, 2006, was reiterated to the State. As of the drafting of the instant report the State has not presented the observations requested.

III. POSITIONS OF THE PARTIES

A. The petitioners

7. The petitioners hold that the justices of the Supreme Court were appointed in accordance with the sixteenth transitory provision of the reforms to the 1979 Constitution adopted by the National Congress in 1997. According to said provision:

For this time only the National Congress shall appoint all 31 justices of the Supreme Court of Justice from a list composed of at least four and not more than 10 candidates proposed by the following nominating entities from civil society:

1. The former constitutional presidents of the Republic;
2. The Ecuadorian Episcopal Conference;
3. The former Chief Justices of the Supreme Court of Justice;
4. The National Bar Association of Ecuador;
5. The human rights associations;
6. The deans of the university law schools and the members of the National Council of Universities and Polytechnic Colleges (CONUEP);
7. The National Association of Newspaper Directors, the Ecuadorian Association of Television Networks, and the Ecuadorian Broadcasting Association;
8. The judges of the Superior Courts of Justice, District Tax Courts and Administrative Tribunals, and the National Federation of Judicial Employees and Officials;
9. The general unions, campesino organizations, and teachers and educators organized under the UNE and FENAPUPE;
10. The indigenous and Afro-Ecuadorian peoples' organizations of Ecuador;
11. The Consortium of Provincial Councils of Ecuador and the Association of Municipalities of Ecuador; and,
12. The Chambers of Production and Small Industry.

Any other civil society organization or person may submit their nominations to the Constitutional Committee for Judicial Affairs.

The persons or institutions mentioned in this provision shall have eight days, counted from the publication in the Official Gazette [*Registro Oficial*] of these reforms to the Constitution, in which to submit a list of nominees.

All candidates thus nominated must meet the requirements set out in Article 128, reformed, of the Constitution.

A Qualifying Committee shall be created, which shall be composed of three parliamentarians appointed by the Speaker of the National Congress and three representatives of civil society selected by the nominating entities, who shall designate a seventh member, who shall not be a parliamentarian, as chair of the Committee. The Committee shall qualify those nominees who meet the requirements set out in Article 128, reformed, of the Constitution, and who also satisfy the conditions of probity, suitability, experience, and capacity.

To that end, after it receives the list of candidates, the Committee shall arrange for its publication on a single occasion, so as to enable natural and legal persons to present, with documentation and in a confidential manner, objections to any of the qualified candidates. When 10 days following the date of the aforementioned publication have elapsed, the Committee shall submit its report for the consideration of the National Congress, which shall designate the 31 justices of the Supreme Court of Justice in the following manner:

- a) Twenty-four from the candidates put forward by the 12 nominating bodies and qualified by the Committee; and,
- b) Seven from the candidates proposed by any other civil society organization or person, who have been qualified by the Committee according to the same criteria set for the other candidates.

Should any other of the nominating entities or persons failed to submit candidacies within the time limit established in this transitory provision, then the National Congress shall designate the justices, selecting them from the rest of the nominees.

The Justices thus appointed shall take office before the Speaker of the National Congress.

Within three days after publication of these reforms in the Official Gazette, the Supreme Electoral Tribunal shall summon the nominating bodies composed of the National Bar Association of Ecuador; the human rights associations; the deans of the university law schools and the members of the National Council of Universities and Polytechnic Colleges (CONUEP); National Association of Newspaper Directors, the Ecuadorian Association of Television Networks, and the Ecuadorian Broadcasting Association; The judges of the Superior Courts of Justice, District Tax Courts and Administrative Tribunals, and the National Federation of Judicial Employees and Officials; the general unions, campesino organizations, and teachers and educators organized under the UNE and FENAPUPE; the indigenous and Afro-Ecuadorian peoples' organizations of Ecuador; the Consortium of Provincial Councils of Ecuador and the Association of Municipalities of Ecuador; and the Chambers of Production and Small Industry, which shall prepare the lists of nominees for appointment as justices of the Supreme Court of Justice.

The Supreme Electoral Tribunal shall organize, direct and guarantee said nomination process, for which purpose it shall adopt the necessary provisions and transmit the list of nominees to the National Congress.

8. A qualifying committee was created that was composed of three parliamentarians appointed by the Speaker of the Congress and of three representatives of civil society; these three members, in turn, designated a seventh member, who was not a parliamentarian, as chair of the Committee. Said Committee identified the candidates who fulfilled the requirements mentioned in Article 128 of the Constitution then in force, after which the roll of qualified

candidates was published so that anyone who so wished might present objections and, as appropriate, challenge the selected candidates. The Qualifying Committee then transmitted the roll of eligible candidates to the Speaker of the Congress, on the basis of which the National Congress appointed the members of the Supreme Court at their sessions of October 1 and 2, 1997.

9. The petitioners say that the cooptation system for the appointment of new justices from 1997 onward and the indefinite nature of their tenure were enshrined in Article 9 of the reforms to the 1979 Constitution, which provided for the replacement of the text of Article 129 with the following wording:

The members of the Supreme Court of Justice shall not be subject to a limited tenure of office. Their termination shall be on the grounds prescribed by the Constitution and the law.

When a vacancy arises the plenary of the Supreme Court of Justice shall appoint the new justice by a vote in favor of two thirds of its members, with due consideration to the criteria of professionalism and judicial career, and in accordance with the law.

In the appointment of new justices, the choice shall alternate between professionals who have held judgeships, lectured at university, or engaged in the free practice of the law, in that order.

10. The petitioners hold that the reform of Article 129 of the previous Constitution concerning the cooptation system and their indefinite tenure was included in Article 202 of the 1998 Constitution. The cooptation system was used to renew almost one sixth of the Supreme Court of Justice between 1997 and 2004. In conclusion, the petitioners say that the justices were appointed on an indefinite basis in keeping with the Constitution and set procedures.

11. According to the petitioners, on December 8, 2004, a special session of the Ecuadorian Congress was held, convened by the President of the Republic. They say that in the course of that session the Congress adopted parliamentary resolution 25-181, which dismissed all 31 justices of the Supreme Court based on a "summary and arbitrary" proceeding that disregarded Article 202 of the Constitution. Of those justices, four were later appointed to the Supreme Court under its new membership, while former Justice Bermeo Castillo refused the appointment. The resolution decides:

To declare the TERMINATION of the justices of the Supreme Court of Justice and their respective associate judges, who failed to resign from office in January 2003, as provided in transitory provision 25 Constitution in force; and, to APPOINT the below-mentioned jurists to replace them (...) ².

12. On the subject of admissibility, the petitioners invoke the exception at Article 46 (2) (b) of the American Convention inasmuch as they consider that they were prevented from exhausting domestic remedies. They say in that connection that on December 2, 2004, the Constitutional Tribunal adopted a decision in which it ruled that

[I]n order to suspend the effects of a parliamentary resolution, such as [resolution] 25-160, passed by the Hon. National Congress on November 25, 2004, for alleged violation of the Constitution, whether by content or form, the only admissible legal action is an action for unconstitutionality instituted before the Constitutional Tribunal. ³

13. The petitioners argue that an action for unconstitutionality is neither suitable nor effective for challenging the act of termination to the extent that an alleged victim cannot appear on their own behalf since they require the signatures of 1,000 citizens in order to bring the action or the intervention of the Ombudsman. They say that it is also unsuitable because it is not

² Parliamentary resolution 25-181 published in Official Gazette 485 of December 20, 2004.

³ Adopted by the full Tribunal and published in Official Gazette 477 of December 8, 2004.

designed to protect human rights but to challenge provisions that contradict the Constitution. Lastly, they submit that it is not capable of providing redress for human rights violations, but only of terminating the effects of a legal norm. The Constitution does not empower the Constitutional Tribunal to order any reparation measures in actions for unconstitutionality. With respect to an administrative proceeding, they say that, too, is an unsuitable remedy because the decision in the last instance would fall to the Supreme Court of Justice which was not independent or impartial.

14. According to the petitioners, the decision that denied the possibility of filing for a writ of *amparo* violated Article 25 of the American Convention. Furthermore, they argue that the decision was not issued by a competent judge in a procedure previously established by law, and that basic due-process guarantees were not observed. In this connection, they say that the justices were not notified of or charged with any legal violation. They also say that they were not given the opportunity to mount a defense since the motion was presented in a special session at 23:05 and passed at 23:45 later the same day. At the same time they say that the fact that the dismissal procedure was not previously established constitutes a breach of Article 9 of the American Convention.

15. They also allege violation of Article 23 of the American Convention because the justices were unlawfully and abruptly prevented from exercising their right to perform the public services for which they appointed on an indefinite basis in October 1997. Finally, they allege, violation of Article 24 of the Convention on the grounds that the justices were treated in a discriminatory manner based on the government's perception of their political affiliations. Four of the dismissed justices, reportedly sympathetic to the government, were reappointed.

16. According to the petitioners, on April 17, 2005, the National Congress annulled the resolution whereby the *de facto* Supreme Court was appointed because they considered it at odds with the constitutional framework. However, the justices who were dismissed in November 2004 were never reinstated.

B. The State

17. The State argues that on December 8, 2004, the Ecuadorian Congress, in exercise of its constitutional and statutory powers, decided to terminate all the members of the Supreme Court. In so doing, the Congress interpreted transitory provision 25 of the Constitution and determined that the tenure of the members of the Supreme Court had expired in January 2003.⁴ According to the State, as of December 2004 the justices were exercising their duties under an expired mandate because they had been appointed in 1997, before the entry into force of the constitutional provision of 1998 that introduced indefinite tenure for the office.⁵ It further argues that the Congress acted within its authority in adopting resolution R-25-181, and any interpretation of Ecuador's constitutional precepts by that branch of government is not open to review in an international proceeding.

18. The State also asserts that the petitioners failed to comply with Article 46 (1) of the American Convention because they did not attempt any remedy; and that in the instant case it cannot be concluded in abstract and in the absence of any credible evidence that the decisions adopted in the future by a domestic tribunal will be biased and disregard the rules of due process.

4 All officials and representatives of agencies appointed by the National Congress as well as the Comptroller General appointed, since August 10, 1998 for a period of four years, by virtue of the provisions contained in this Constitution, shall remain in office until January 2003.

5 Transitory Provision Fifteen of the Reform of the 1979 Constitution.- In order to enable the immediate application of the principles [of cooptation and indefinite tenure] approved in the referendum of May 25, 1997, let the periods for which the present members of the Supreme Court of Justice were appointed be declared terminated. However, said members shall remain in office until they are replaced in the manner prescribed in the following transitory provision [Sixteen].

19. The State points out that the petitioners had recourse to an action for unconstitutionality and an administrative proceeding. As regards the former, it holds that if the petitioners believed that an unconstitutional and arbitrary dismissal had occurred they could have met the requirements set forth in Article 277 of the Constitution and taken their case to the Constitutional Tribunal. As to an administrative proceeding, the State mentions that such a proceeding may be instituted by natural or legal persons against rules, acts and administrative decisions adopted by the public administration or by legal or semi-public persons that infringe a right or direct interest of the complainant. It can also be invoked against administrative decisions that violate privileges established or recognized by a law when such decisions are adopted as a consequence of a generally applicable provision that violates the law that gives rise to those privileges.

20. Furthermore, the State argues, several of the petitioners appeared before the Administrative Tribunal to request the reliquidation of "judicial bonds" that they received as severance pay. The State argues that the petitioners made use of the remedies available in Ecuador for that purpose, and yet with regard to their termination they did not even attempt to take their case to the courts, despite being at liberty to do so. Accordingly, the State affirms that there is nothing to show the petitioners were denied access to the available remedies, or that they were prevented from exhausting them, or that there has been a violation of Article 25 of the American Convention.

21. With respect to the alleged violations, the State says that the petitioners confuse removal [*remoción*] from office or dismissal [*destitución*] with straightforward termination of duties [*cesamiento de funciones*].⁶ In the case of the first two it is necessary to institute proceedings to verify and determine the commission of the wrongdoing, in the framework of which the official must be afforded full guarantees to exercise their right to a defense. In the instant case, the State says that there was no dismissal of the justices and, therefore, it was inappropriate to speak of the need for a proceeding before a competent, independent and impartial tribunal that allows the exercise of the right of defense, since the justices were not charged with any statutory offence. Nor, therefore, was it necessary to notify them in detail of the proceeding or the charges against them, since there simply were none. Based on the foregoing, the State argues that Articles 8 and 9 of the American Convention have not been violated.

22. The State, furthermore, denies any violation of Articles 23 and 24 of the American Convention inasmuch as all the terminated justices had and have access to public service under conditions of equality. So much so, asserts the State, that, had they wished, they could have stood for appointment to the new Supreme Court. In that connection, the State explains that several of the petitioners stood for reappointment and three of them are current members of the Supreme Court and others at present occupy other public posts. Finally, the State requests that the petition be declared inadmissible and the record closed.

IV. ANALYSIS

A. The Commission's Competence *Ratione Personae*, *Ratione Materiae*, *Ratione Temporis* and *Ratione Loci*

23. The petitioners have standing under Article 44 of the American Convention to lodge petitions with the Commission. The petition names as alleged victims individuals on whose behalf Ecuador undertook to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Ecuador has been a party to the American Convention since December 28, 1977, when it deposited the respective instrument of ratification. The Commission therefore has *ratione personae* competence to examine the petition.⁷

6 The State bases its distinction on the definitions of removal [*remoción*], dismissal [*destitución*] and termination [*cese*] contained in the Diccionario Enciclopédico de Derecho Usual, Diccionario Jurídico Ámbar con Legislación Ecuatoriana, and Enciclopedia Jurídica Omeba.

7 In respect of the following alleged victims: Ernesto Albán Gómez, Jorge Andrade Lara, Santiago Andrade Ubidia, José Julio Benítez Astudillo, Armando Bermeo Castillo, Eduardo Brito Mieles, Nicolás Castro Patiño, Teodoro Coello Vásquez,

24. The Commission is competent *ratione loci* to consider the petition inasmuch as it alleges violations of rights protected by the American Convention which are said to have taken place within the territory of a state party to said treaty.

25. The Commission is also competent *ratione temporis* because the obligation to observe and ensure the rights protected in the American Convention was already binding upon the State at the time the events alleged in the petition occurred.

26. Finally, the Commission has *ratione materiae* competence because the petition alleges violations of human rights protected in the American Convention.

B. Other admissibility requirements

1. Exhaustion of domestic remedies

27. Article 46(1)(a) of the American Convention provides that admission of petitions lodged with the Commission shall be subject to the requirement that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. In its preamble, the American Convention states that the international protection offered by said instrument in the form of a convention reinforces or complements the protection provided by the domestic law of the states. In that sense, the rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights.

28. The rule of prior exhaustion of domestic remedies set down in Article 46 of the American Convention refers to the judicial remedies that are available, suitable and able to provide an effective solution for the alleged violation of human rights. The Inter-American Court has ruled that when, for *de facto* or *de jure* reasons, domestic remedies are not available to petitioners then they are freed from the obligation to exhaust them.⁸ If the domestic remedy is designed in such a way that its exercise is in effect beyond the reach of the alleged victim then there is certainly no obligation to exhaust it in order resolve the legal situation.

29. With respect to the action for unconstitutionality, Article 277 of the Ecuadorian Constitution specifically determines which persons have standing to bring such an action along with the requirements in order to do so. The Inter-American Commission finds excessive the requirements of collecting the signatures of 1,000 citizens or securing a favorable opinion from the Ombudsman. At the time of the events, there were no regulations in place on the proceeding before the Ombudsman, and therefore there was no specific procedure or time limits. In addition, the State has also failed to provide information about the action for unconstitutionality in other individual petitions. Accordingly it has not furnished any information to support its suitability and effectiveness for disposing of the instant matter in the domestic jurisdiction. Furthermore, the IACHR takes as reasonable and uncontested the petitioners' argument regarding the ineffectiveness that any action brought before the Constitutional Tribunal would have had in practice, since said organ had already adopted a decision setting out its position on the inadmissibility of actions against the congressional resolution under which Hugo Quintana Coello and the other justices had been terminated. In sum, the action for unconstitutionality was not a domestic remedy that the petitioners had to exhaust before they could seek the intervention of the Inter-American Commission.

Alfredo Contreras Villavicencio, Arturo Donoso Castellón, Galo Galarza Paz, Luis Heredia Moreno, Estuardo Hurtado Larrea, Ángel Lescano Fiallo, Milton Moreno Aguirre, Galo Pico Mantilla, Hernán Quevedo Terán, Jorge Ramírez Álvarez, Carlos Riofrio Corral, Clotario Salinas Montaña, Armando Serrano Puig, José Vicente Troya Jaramillo, Rodrigo Varea Avilez, Jaime Velasco Dávila, Miguel Villacís Gómez and Gonzalo Zambrano Palacios.

⁸ I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Article 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, par. 17.

30. The Commission has also noted that it is the State's position that the petitioners should have exhausted the administrative remedy available to challenge rules, acts and administrative decisions that violate a right or direct interest of the complainant, or that infringe privileges, provided that they have been adopted as a consequence of a generally applicable provision that violates the law that gives rise to those privileges. The Commission regards as founded the argument concerning the ineffectiveness of the administrative proceeding because the case would have been decided in the last instance by the Supreme Court whose members replaced the alleged victims. Accordingly, the petitioners were also under no obligation to pursue or exhaust the administrative remedy before taking their case to the inter-American system.

31. With respect to the *amparo*, the Commission notes that the resolution issued by the new Constitutional Court prevented the presentation of such recourse:

To establish that in order to suspend the effects of a parliamentary resolution, including number 25-160 () for the alleged violation of the Constitution, as to the forms or the merits, the only action that applies is the action for unconstitutionality which must be brought before the Constitutional Court () and that any recourse of *amparo* that were presented in the national courts with respect to said resolution, must be rejected directly and declared inadmissible by the respective judge, because otherwise they would be deciding a case against the express text of the law, which would in turn generate the corresponding judicial actions.⁹ (emphasis added)

32. The Inter-American Commission considers that the Ecuadorian State did not supply the petitioners with a simple and effective recourse to challenge the congressional resolutions which they believe violate their human rights. The Commission finds that the exception to prior exhaustion of domestic remedies provided in Article 46(2)(a) of the American Convention is applicable in the instant case.

2. Deadline for lodging the petition

33. Given that one of the exceptions contained in Article 46(2) applies in the instant case, the requirement set down in article 46(1)(b) is not applicable in this matter. The petition was lodged in December 2004 after the Constitutional Tribunal adopted a decision on the only recourse available against the Parliamentary resolution that dismissed the petitioners. The Inter-American Commission finds that the petition was lodged within a reasonable time in the terms of Article 32 of its Rules of Procedure.

3. Duplication of proceedings and *res judicata*

34. Article 46(1)(c) of the Convention provides that admission of petitions lodged shall be subject to the requirement that "the subject of the petition or communication is not pending in another international proceeding for settlement." Article 47(d) of the Convention stipulates that the Commission shall not admit a petition if it "is substantially the same as one previously studied by the Commission or by another international organization." In this case, the parties have not advanced arguments on either of these grounds for inadmissibility, nor does the Commission note their existence from the proceedings.

4. Nature of the allegations

35. The IACHR finds that, if proven, the allegations on the proceeding that led to the termination of the members of the Supreme Court could constitute violations of Articles 8 and 25, in connection with Article 1(1) of the American Convention.

⁹ Resolution of the Constitutional Court adopted in the session of December 2, 2004.

36. It is not appropriate at this stage of the proceeding to verify if there has been any violation of the American Convention. For purposes of admissibility, the IACHR must simply determine if the arguments set out in the petition could tend to establish a violation of the American Convention, as required under Article 47(b) thereof, and whether or not the petition is "manifestly groundless" or "obviously out of order," as paragraph (c) of the same Article provides. The standard by which to assess these extremes is different from the one needed to decide the merits of a petition. At this stage the IACHR must perform a *prima facie* evaluation that does not imply any prejudgment or advance opinion on the merits of the petition. By establishing two clearly separate phases -one for admissibility and the other for the merits- the Commission's own Rules of Procedure reflect the distinction between the evaluation the Commission must make to declare a petition admissible, and the evaluation required to determine the responsibility of the State.

37. The petitioners claim that their dismissal violates several provisions contained in the American Convention, including those that guarantee a fair trial, effective judicial protection, and the principle of legality.

38. The allegations, which include the dismissal of the members of the Supreme Court without a hearing and in a proceeding not provided for in that country's Constitution, if proven, would constitute violations of the victims' right to judicial protection in the framework of a proceeding with due legal guarantees as envisaged in Articles 8 and 25 of the American Convention. Furthermore, the Commission must take into consideration the decision of the Inter-American Court in the cases of *Baena* and *Canese* with respect to the application of Article 9 of the American Convention, all in connection with Article 1(1) of the aforesaid international instrument:

It is desirable to analyze whether Article 9 of the Convention is applicable to the administrative punitive action, in addition to it's being evidently applicable in the penal realm. The terms used in such precept seem to refer exclusively to the latter. However, it is appropriate to take into account that administrative sanctions, as well as penal sanctions, constitute an expression of the State's punitive power and that, on occasions, the nature of the former is similar to that of the latter. Both, the former and the latter, imply reduction, deprivation or alteration of the rights of individuals, as a consequence of unlawful conduct. Therefore, in a democratic system it is necessary to intensify precautions in order for such measures to be adopted with absolute respect for the basic rights of individuals, and subject to a careful verification of whether or not there was unlawful conduct. Likewise, and for the sake of legal security, it is indispensable for the punitive rule, whether of a penal or an administrative nature, to exist and to be known or to offer the possibility to be known, before the action or omission that violate it and for which punishment is intended, occurs. The definition of an act as an unlawful act, and the determination of its legal effects must precede the conduct of the subject being regarded as a violator. Otherwise, individuals would not be able to orient their behavior according to a valid and true legal order within which social reproach and its consequences were expressed. These are the foundations of the principles of legality and unfavorable non-retroactivity of a punitive rule.¹⁰

39. The Commission considers that, if it were proven that the magistrates were ceased in application of a cause not provided for in the internal legislation and by an institution that was not competent to do so, there could be a violation of Article 9 of the American Convention. All of the above would be in connection with Articles 1(1) and 2 of the mentioned international instrument.

40. Furthermore, the petitioners charged that the State has violated their rights to participate in government guaranteed in Article 23(1)(c) since they consider that they were unlawfully and abruptly prevented from exercising the functions for which they were appointed on an

10 I/A Court H.R., Case of Baena-Ricardo et al. Judgment of February 2, 2001. Series C No. 72. para. 106; and Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111. paras. 176 y 177.

indefinite basis. In that respect, the IACHR finds that the arguments refer not to access to public service in the terms of the aforementioned provision in the Convention, but to the right to remain therein.¹¹ The Inter-American Commission finds that the arguments put forward by the petitioners do not tend to establish a possible violation of Article 23 of the American Convention.

41. Finally, the petitioners alleged violation of Article 24 of the Convention because they consider that the justices were treated in a discriminatory manner based on the government's perception of their political affiliations. Beyond the mere affirmation of the petitioners, the Commission finds no evidence by which to show in the stage on merits that any discrimination existed.

42. Based on the foregoing, the Inter-American Commission finds that the arguments refer to alleged violations of the rights to a fair trial and judicial protection enshrined in Articles 8, 9 and 25 of the American Convention, in conjunction with the general obligations to observe and ensure rights set down in Articles 1(1) and 2 of the same international instrument. On the other hand, the allegations do not tend to establish possible violations of the rights protected in articles 23 or 24 of the American Convention.

V. CONCLUSIONS

43. The Inter-American Commission concludes that the instant case is admissible and that it is competent to take up the petition lodged by the petitioners in respect of the alleged violation of Articles 8 and 25 of the American Convention, in connection with Article 1 (1) thereof. Conversely, it concludes that the allegations of the petitioners, if proven, would not constitute possible violations of Articles 9, 23, or 24 of the American Convention.

44. Based on the factual and legal arguments given above and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, DECIDES:

1. To declare the petition under review admissible with regard to the rights recognized in Articles 8, 9, and 25 of the American Convention in connection with Article 1(1) of said instrument.

2. To declare inadmissible the arguments concerning Articles 23 and 24 of the American Convention.

3. To invite the parties to consider the possibility of initiating a procedure with a view to reaching a friendly settlement of the case and to place itself at their disposal for that purpose.

4. To notify the State and the petitioners of this decision.

5. To publish this decision and include it in its Annual Report to be presented to the General Assembly of the OAS.

Done and signed by the Inter-American Commission on Human Rights in Washington, D.C., on the 27th day of the month of February, 2007. (Signed) Florentín Meléndez, President; Paolo Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President, Sir Clare K. Roberts, Evelio Fernández Arévalos, Paulo Sérgio Pinheiro, and Freddy Gutiérrez, Commissioners.

11 See, in this respect, I/A Court H.R., Constitutional Court Case. Judgment of January 31, 2001, para. 103.