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REPORT No. 77/14
PETITION 140-05
REPORT ON ADMISSIBILITY

INÉS YADIRA CUBERO GONZÁLEZ
HONDURAS

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I. SUMMARY

1. On February 14, 2005, the Inter-American Commission on Human Rights (hereinafter “Commission” or “IACHR”) received a petition lodged by Mrs. Inés Yadira Cubero González (hereinafter “the petitioner” or “the alleged victim”), serving as her own counsel, in which she claimed that the Republic of Honduras (hereinafter “the State” or “the Honduran State”) bore international responsibility for violations of the rights to a fair trial and judicial protection, among other rights, in the context of a supposedly arbitrary and unlawful disciplinary proceeding whereby she was dismissed from her position as Regular Trial Judge of the Second Criminal Court, supposedly for having expressed specific opinions to the media.

2. The petitioner alleges that her dismissal was formally based on the relations she maintained with the press while she was performing judicial functions, although the real reason for her expulsion from the judiciary was her refusal to cover up certain irregularities being committed within the institution. In this regard, she complains that she was the target of diverse acts of persecution and interference in the independence of her functions and that her dismissal was decided through a flawed process fraught with various irregularities, in which the final decision, adopted by the judiciary itself, was not subject to appeal. She considers all of this is in violation of her rights to a fair trial, honor and reputation, freedom of expression, equal protection, and judicial protection, established respectively in Articles 8, 11, 13, 24, and 25 of the American Convention on Human Rights (hereinafter “Convention” or “American Convention”), in conjunction with Articles 1.1 y 2 thereof. Likewise, she contends that she exhausted judicial remedies with the final decision issued by the Judicial Career Council (*Consejo de la Carrera Judicial*) of the judiciary.

3. The State, for its part, requests that the petition be declared inadmissible because of a failure to exhaust domestic remedies, given that Mrs. Inés Cubero did not have recourse to the constitutional remedy of amparo. Likewise, it argues that, while in a democratic society it is appropriate for the decisions of judges and magistrates to have repercussions in the media and for judges and magistrates to interact with the press, it is also true that these justice operators must act in accordance with the ethical guidelines applicable to their posts. In this connection, it indicates that the exercise of freedom of expression by judges and magistrates must therefore conform to the limits imposed by said ethical guidelines.

4. Without prejudging the merits of the case, after examining the positions of the parties and in keeping with the requirements set out in Articles 46 and 47 of the American Convention, the Commission decides to find the case admissible for purposes of examining the alleged violation of Articles 8, 9, 13, 23, and 25 of the American Convention, in conjunction with Articles 1.1 and 2 of said treaty. The Commission decides to declare inadmissible Articles 11 and 24 invoked by the petitioner. Consequently, the Commission decides to notify the parties, to continue the analysis of the merits of the aforementioned alleged violations, to publish the present admissibility report, and to include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE IACHR

5. On February 14, 2005, the Commission received the petition and registered it as number 140-05. On December 11, 2007, the IACHR transmitted the pertinent parts of the petition to the State, giving it a period of two months to submit any observations it deemed pertinent. On February 8, 2008, the State’s answer to the petition was received and, on April 24, 2008, it was transmitted to the petitioner. On April 6, 2010, the petitioner was requested once again to present her observations to the State’s brief

6. On November 12, 2010, the petitioner's observations were received and, on December 20, 2010, they were forwarded to the State. The State sent its final observations in a communication dated November 23, 2011. Those observations were transmitted to the petitioner on April 7, 2011.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

7. The petitioner points out that on August 6, 1998, she began to work for the judiciary as an Assistant in the Registry of Real Estate and Commercial Property and, after several successive promotions, was appointed Regular Trial Judge of the Second Criminal Court, on September 7, 2000. She underscores that during the period when she was performing judicial duties her decisions "were upheld by courts of appeal [second instance] and applauded by society at large." She explains that some of her proceedings "were highlighted by the various media because of their importance and social impact," for example, her imposition of the first life sentence in the country.

8. In this connection, she states that on February 18, 2002, an interview was published on the front page of a nationally circulated daily newspaper in which she expressed, among other personal matters, that "it was [her] dream to become President of the Supreme Court of Justice." In the aftermath of these statements and those related to the imposition of the first life sentence, on April 11, 2002, a court inspector appeared in her office to take a statement from her, as a result of a complaint filed by a former judicial official—a subordinate to the petitioner—who had previously been sanctioned because of defamatory acts against the petitioner herself and who was currently the subject of an arrest warrant for various crimes against public administration. The complaint was essentially accusing her of seeking fame and of promoting herself. On April 15, 2002, the inspector who took the statement issued a report that concluded, among other things, that Mrs. Inés Cubero did indeed try to promote herself through her declarations to the press and that this was incompatible with the image a judge should project.

9. She indicates that in a meeting on June 5, 2002, a senior judicial official requested "solidarity with those charged," in reference to those judges and judicial officials who at that time had been accused of diverse irregularities and were being portrayed in a negative light in the media, to which the petitioner answered that she "could not express solidarity in criminal cases and that each person is responsible for his or her actions." She points out that this incident, along with the other supposed feelings of resentment on the part of her colleagues and the fact that on June 19, 2002, she met with one of the journalists who were most critical of the judiciary at that time, resulted in her being reprimanded that very day by the Head of Personnel of the Supreme Court of Justice and by a magistrate named Rolando Bouloy, for her lack of solidarity with the institution and her ties with the aforementioned journalist. In the face of these statements, Mrs. Inés Cubero allegedly reiterated her position that she could not show solidarity with her colleagues' fraudulent or irregular actions. According to the petitioner, minutes were kept of the meeting in which it was falsely stated that she showed a lack of respect to Magistrate Bouloy.

10. She adds that in July 2002, she ruled on a complaint in favor of the Public Prosecutor's Office against Corruption of San Pedro Sula. In her ruling, she asked for judicial authorization to make telephone calls to a list of judges, magistrates, prosecutors, police officers, and lawyers who were presumably implicated in acts of corruption and she ordered that the investigation be kept secret for 15 days. She claims that following these decisions she was pressured by senior judicial officials who tried to get access to the investigation file.

11. On August 29, 2002, the Judicial Career Department of the Supreme Court of Justice convened the petitioner to a hearing to answer to charges as part of the disciplinary proceeding instituted against her as a result of the complaint lodged by her former subordinate. She contends that in the course of this hearing the evidence she submitted in her defense was neither presented nor considered. Finally, she was dismissed from her post through Dismissal Agreement No. 1190 of September 9, 2002, adopted by the Supreme Court of Justice, as it was considered that the petitioner encouraged and sought publicity concerning

herself and her proceedings. In view of this decision, on September 25, 2002, the petitioner filed an appeal (*recurso de impugnación*) with the Judicial Career Council (document No. 606).

12. The petitioner points out that on October 12, 2002, with the appeal still pending, an interview was published in the daily papers in which the President of the Judicial Career Council (and the Vice President of the Supreme Court of Justice) said that no judge should promote his or her image through the press.

13. On April 1, 2003, the petitioner complained to the National Human Rights Commissioner (CONADEH) about a delay of more than five months in settling the appeal and other alleged irregularities committed in her dismissal process. In subsequent months, CONADEH representatives made various inquiries with the Judicial Career Council requesting information on Mrs. Inés Cubero's case, which under the Judicial Career Law should have been decided five days after the end of the evidentiary phase, on April 30, 2003. The petitioner indicates that, according to the report issued by CONADEH, as of June 18, 2004, this institution had allegedly still not received any answer on a possible final decision in the appeal filed by Mrs. Inés Cubero; however, in the days that followed, it learned that said decision had indeed been adopted, supposedly on May 4, 2004. In this regard, CONADEH concluded in its report: "*It is clear from our investigations that the Judicial Career Council was late in issuing its final ruling*" (*Closure Report on the Restitution of Violated Rights*, September 13, 2004, p. 2).

14. Mrs. Inés Cubero argues further that the ruling of the Judicial Career Council is groundless as it merely transcribes the dismissal order issued by the Supreme Court of Justice and that said decision may not be appealed pursuant to Article 31 of the Regulations of the Judicial Career Council, which expressly states that decisions adopted by the Judicial Career Council are not subject to any appeal. Thus, according to the petitioner, domestic remedies have been exhausted.

B. Position of the State

15. First of all, the State questions the fact that the petitioner is conducting a "self-evaluation" of her performance as a criminal judge based on the media's dissemination of her decisions. It considers questionable, for example, that she should mention among her most outstanding actions her imposition of the first life sentence in the history of Honduras.

16. The State is of the view that, while it is normal for judges and magistrates to take decisions that in some way have an impact on public debate, this does not mean that the good performance of a judge should be measured by the number of guilty verdicts issued or the number of years of prison imposed in their sentences, or even by the fact that their actions as judges are motivated by "society's applause," as the petitioner supposedly tries to do in her opinion. In this connection, the State points out that, pursuant to the Honduran Code of Ethics for Judicial Officials and Personnel, judges and magistrates must exercise their functions with integrity, refraining from issuing public or private opinions on matters they are considering, in an attempt to justify their actions or to question decisions issued by hierarchical superiors reversing their own. These provisions are consistent with Article 111 of the Court Organization and Powers Act, which stipulates that "[j]udges and magistrates must refrain entirely from expressing and even insinuating their views regarding matters that they are called upon by law to rule on."

17. It emphasizes that the exercise of freedom of expression by judges and magistrates must take place, therefore, within the parameters set by said rules and guidelines on professional ethics and that judges and magistrates must avoid conduct or attitudes that may be understood as an unjustified or disproportionate search for social recognition. None of this, in the State's opinion, was done by the petitioner in her tenure as a criminal judge.

18. With regard to compliance with the admissibility requirements, the State contends that the petitioner did not exhaust domestic remedies because she failed to file the constitutional action of amparo. It claims that although Article 31 of the Regulations of the Judicial Career Council establishes that the decisions of the Judicial Career Council are not subject to any appeal, that did not preclude the petitioner from filing the

aforementioned action, which had constitutional status. In this respect, it indicates that Article 64 of the Constitution establishes that laws and other lesser provisions that diminish, restrict, or circumvent the fundamental guarantees established by the Constitution itself shall not be applicable; and that, under Article 183, an amparo action may be brought by anyone who considers that such guarantees have been violated.

19. Consequently, the State argues that a regulatory provision, such as Article 31 of the Regulations of the Judicial Career Council, could not, although it so establishes, diminish, restrict, or circumvent the right of any citizen to file for amparo. In support of this argument, the State notes that it has indeed admitted said remedy in similar cases and cites as a specific example a ruling issued by the Supreme Court of Justice on January 24, 2007, overturning a decision issued by the Judicial Career Council against a judicial official who had been dismissed.

20. Along these lines, the State concludes that none of the exceptions established in Article 46.2 of the American Convention would be applicable, inasmuch as the domestic legislation affords due process of law for protection of the rights the petitioner deems to have been violated; access to the remedy of amparo was not denied, the failure to present it being a personal decision made by the petitioner herself; and there was no unwarranted delay in the decision on judicial remedies given that Mrs. Inés Cubero did not file the aforementioned appeal against the ruling of the Judicial Career Council.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence of the Commission *ratione materiae*, *ratione personae*, *ratione temporis*, and *ratione loci*

21. Pursuant to Article 44 of the American Convention, the petitioner is entitled, in principle, to file petitions with the IACHR. The petition identifies as the alleged victim an individual in respect of whom the Honduran State committed to respect and protect the rights enshrined in the American Convention and in other international instruments. Honduras has been a State Party to the American Convention since September 8, 1977, the date on which it deposited its instrument of ratification. The Commission is therefore competent *ratione personae* to examine the petition. Likewise, the Commission is competent *ratione loci* to hear the petition inasmuch as it alleges violations of rights protected by the American Convention that are alleged to have occurred within Honduran territory.

22. The Commission is competent *ratione temporis* since the obligation to respect and guarantee the rights protected by the American Convention were already in force for the State on the date when the acts alleged in the petition took place. Similarly, the Commission is competent *ratione materiae* inasmuch as the petition refers to 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 requires prior exhaustion of the remedies available in the domestic jurisdiction in keeping with generally recognized principles of international law, as a requirement for admitting claims alleging violations of rights established in the American Convention. The prior exhaustion requirement applies when the national system offers adequate and effective remedies to redress the alleged violation. Article 46.2 of the Convention, for its part, establishes three instances in which the exhaustion of domestic remedies rule does not apply: (a) when the domestic legislation of the State does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) when the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; and (c) when there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. These instances do not only refer to the formal existence of such remedies, but also to such remedies being adequate and effective.

24. In the present case, the State argues that the petition should be found inadmissible because of the failure to exhaust domestic remedies, inasmuch as the petitioner did not file an action for amparo, which is a higher-ranking constitutional guarantee than the regulations governing the judicial career. Amparo would therefore be an available and appropriate remedy in the domestic jurisdiction for achieving protection of the rights the petitioner claims have been violated. The petitioner, for her part, maintains that the decision of the Judicial Career Council exhausted remedies in the domestic jurisdiction since, in keeping with the Regulations of the Judicial Career Council, said decision is not subject to appeal, and that amparo is an extraordinary remedy that she would not have to file.

25. The Inter-American Commission notes that the petitioner filed an appeal with the Judicial Career Council on September 25, 2002, and that said appeal was decided on May 4, 2004. The Commission also notes that Article 31 of the Regulations of the Judicial Career Council, referred to by the petitioner in support of her claim, establishes: "Final resolutions issued by the Council must be clear, precise, and consistent with the claim and with the other claims that stem in due course from the litigation [...] No appeals, whether ordinary or extraordinary, may be made against the final rulings of the Council."

26. In this regard, the Commission considers that when the text of a specific law (*lex specialis*) expressly establishes that recourse to domestic remedies is out of order in a specific situation in which a violation of human rights is alleged, it is not reasonable to require the petitioner, contrary to the express text of said law, to file an appeal, whether ordinary or extraordinary. Specifically as concerns to the filing of a constitutional action of amparo against a decision of the Judicial Career Council of Honduras, the IACHR has held that "an *amparo* filing would have not been admissible according to Article 31 of the *Reglamento del Consejo de la Carrera Judicial* (Regulation of the Judicial Career Council) [...] [c]onsequently [...], the filing of a judicial remedy would have been hindered in terms of Article 46 of the Convention."¹ Likewise, it said that "according to Article 31 thereof, it is not possible to request a judicial review of the disciplinary proceeding for Judicial Branch officials. In that way, not only an *amparo* cannot be filed but any other type of remedy."²

27. In view of these considerations, the Inter-American Commission concludes that in this case the State's legislation expressly established the absence of available judicial remedies capable of challenging the decision that the petitioner alleges violated her rights. Thus, grounds exist for the exception set out in Article 46.2.a of the American Convention.

2. Timeliness of the petition

28. Article 46.1.b of the American Convention establishes that for a petition to be admissible, it must be lodged within a period of six months from the date on which the petitioning party was notified of the final judgment at the national level. However, under Article 32.2 of the Rules of Procedure of the IACHR, in those cases in which the exceptions to the exhaustion of domestic remedies requirement are applicable, the petition must be lodged within a reasonable period of time, in the Commission's view. To this end, the Commission must consider the date on which the alleged violation of the rights occurred and the circumstances of each case.

29. In the petition under consideration, the IACHR has deemed it in order to apply the exception to the exhaustion of domestic remedies established in Article 46.2.a of the American Convention. Considering that the dismissal of the alleged victim was confirmed by the Judicial Career Council on May 4, 2004, and the petition was filed with the IACHR on February 14, 2005, said petition was lodged within a reasonable period of time and therefore meets the requirement established in Article 46.1.b of the Convention.

¹ IACHR, Report No. 70/11, Petition 975-10, Admissibility, Adán Guillermo López Lone *et al.*, Honduras, March 31, 2011, par. 30.

² IACHR, Report No. 70/11, Petition 975-10, Admissibility, Adán Guillermo López Lone *et al.*, Honduras, March 31, 2011, pars. 30 and 31.

2. Duplication of international proceedings and *res judicata*

30. The file does not indicate that the subject matter of this petition is pending in another international proceeding for settlement or that it duplicates a petition previously examined by this or any other international body. Therefore, the requirements of Article 46.1.c and 47.d of the Convention are deemed to have been met.

3. Characterization of the alleged facts

31. For purposes of admissibility, the Commission must decide whether the alleged facts tend to establish a violation of rights, as stipulated in Article 47.b of the American Convention, or whether the petition is “manifestly groundless” or “obviously out of order,” as described in Article 47.c. The criterion for evaluating these requirements is different from the one used to decide on the merits of a petition; the Commission must conduct a *prima facie* evaluation, not to establish the existence of a rights violation but to ascertain whether the petition establishes grounds for the possible or potential violation of a right guaranteed by the Convention. This determination involves a preliminary analysis that does not imply a prejudgment on the substance of the matter.³

32. The Inter-American Commission’s Rules of Procedure do not require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the IACHR, based on the inter-American system’s jurisprudence, to determine in its admissibility report which provisions of the relevant instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

33. In the present case, the petitioner considers that her punishment for granting the interview published on February 18, 2002, was a pretext for persecuting and discriminating against her because she did not adapt to the dynamics of a judicial system that, in her view, administers justice in a “tortuous and unlawful” fashion, and that, in summary, she was the target of a disciplinary proceeding in which the evidence submitted was not considered, which was unduly protracted, which was not impartial, and whose ruling was not duly well founded. Likewise, she considers that the very fact that a disciplinary proceeding was instituted against her for having expressed specific opinions to the media violated her right to freedom of expression. The State, for its part, considers that it is important for members of the judiciary to act according to ethical criteria in their relations with the media and in the public statements they make.

34. In view of the elements of fact and law presented by the parties and the nature of the matter put before it, the IACHR considers that the acts denounced by Mrs. Inés Cubero could constitute violations of the rights protected in Articles 8 (a fair trial), 13 (freedom of expression), and 25 (judicial protection) of the American Convention, in conjunction with Articles 1.1 (obligation to respect rights) and 2 (duty to adopt measures under domestic law) of said instrument. Similarly, it will examine as appropriate in the merits stage the possible violation of Articles 9 (freedom from ex post facto laws) and 23 (participation in government) of the American Convention.

35. It also concludes that the claims regarding the alleged violation of Articles 11 (right to honor and dignity) and 24 (equal protection) of the American Convention are to be deemed inadmissible, given that no elements are apparent to make a *prima facie* determination of their possible violation.

³ See in general: IACHR, Report No. 12/10, Case 12.106, Admissibility, Enrique Hermann Pfister Frías and Lucrecia Pfister Frías, Argentina, March 16, 2010, par.46; IACHR, Report No. 10/10, Petition No. 214-08, Admissibility, Koempai *et al.*, Suriname, March 16, 2010, par. 43.

V. CONCLUSIONS

36. Based on the foregoing considerations of fact and law and without prejudging the merits of the case, the Inter-American Commission concludes that the petition meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention and consequently

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To find the petition admissible in relation to the alleged violations of the rights established in Articles 8, 9, 13, 23, and 25 of the American Convention, in conjunction with Articles 1.1 and 2 of said instrument, with regard to Mrs. Sra. Inés Yadira Cubero.

2. To find the present petition inadmissible in relation to Articles 11 and 24 of the American Convention.

3. To notify the parties of this decision.

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

Approved by the Inter-American Commission on Human Rights in the city of Mexico on the 15th day of the month of August, 2014. (Signed): Tracy Robinson, President; Rose-Marie Belle Antoine, First Vice-President; Felipe González, Second Vice President; José de Jesús Orozco Henríquez, Rosa María Ortiz, Paulo Vannuchi and James L. Cavallaro, Commissioners.