

OEA/Ser.L/V/II.
Doc. 8
27 January 2017
Original: Spanish

REPORT No. 7/17
PETITION 1049-11
REPORT ON ADMISSIBILITY

JOSÉ ANTONIO CANTORAL BENAVIDES AND FAMILY
BOLIVIA

Approved by the Commission on January 27, 2017.

Cite as: IACHR, Report No. 7/17. Admissibility. José Antonio Cantoral Benavides and family.
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 JANUARY 27, 2017

I. INFORMATION ABOUT THE PETITION

Petitioning party:	Luis Alberto Cantoral Benavides
Alleged victim:	José Antonio Cantoral Benvidez and family ²
State denounced:	Bolivia
Rights invoked:	Articles 5 (Right to Personal Integrity), 7 (Right to Personal Liberty), 8 (Right to A Fair Trial), 11 (Right to Privacy), 13 (Freedom of Thought and Expression), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection) of the American Convention on Human Rights ³ ; and Articles 1, 6 and 9 of the Inter-American Convention to Prevent and Punish Torture ⁴

II. PROCEDURE BEFORE THE IACHR⁵

Date on which the petition was received:	August 4, 2011
Date on which the petition was transmitted to the State:	August 8, 2011
Date of the State's first response:	August 22, 2011
Additional observations from the petitioning party:	August 8, September 26 and November 6, 2011; September 9, 2012; November 11, 2013, and June 16, 2015
Additional observations from the State:	June 21, 2012; January 9 and March 19, 2013; and April 29, 2014
Precautionary measure granted:	MC 291-11, granted on August 8, 2011 and lifted on August 16, 2012

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 instrument on July 19, 1979)

¹ Commissioner Francisco José Eguiguren Praeli, a Peruvian national, considered that, based on Article 17(3) of the Rules of Procedure of the IACHR, he should abstain from participating in the deliberation and decision on this matter.

² Malkia Tudela Canaviri and Luis Fernando Cantoral Benavides, the alleged victim's wife and his brother.

³ Hereinafter the "Convention" or the "American Convention".

⁴ Hereinafter the "Convention against Torture".

⁵ The observations presented by each party were duly transmitted to the opposing party.

IV. ANALYSIS OF 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 5 (Right to Personal Integrity), 7 (Right to Personal Liberty), 8 (Right to A Fair Trial), 11 (Right to Privacy), 13 (Freedom of Thought and Expression), 22 (Freedom of Movement and Residence), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection) of the Convention, in agreement with Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof; and Articles 1, 6 and 9 of the Convention against Torture
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes; exception in Art. 46.2 (c) of the ACHR applies
Timeliness of the petition:	Yes, in agreement with section VI

V. ALLEGED FACTS

1. The petitioner declares that José Antonio Cantoral Benvides, a Peruvian national, was living in Bolivia as a refugee since 1994 due to the serious human rights violations in Peru occurred during the government of Alberto Fujimori.⁶ He says that on August 1, 2011, the alleged victim was performing his duties as a teacher at an academy when police officers entered his workplace saying that they had to search for alleged drugs. As no illegal drugs were found, the police reported the finding of leaflets connected with the social conflict known as “*gasolinazo*” that took place in Bolivia in December 2010, and of a book on Marxism. Therefore, the alleged victim and other three persons (also from Peru) were arrested on the grounds that they belonged to a group of subversives with terrorist goals. The petitioner alleges that the leaflets were from 2010 and were found pasted up on walls near the University of El Alto, close to the alleged victim’s workplace, and that the book on Marxism was part of the university curriculum. The petitioner adds that the alleged victim was subjected to attacks and torture during his detention, and that this was reported to the judge who heard the case, and confirmed by the physicians who later examined the alleged victim.

Alleged expulsion attempt and disavowal of his refugee status

2. The petitioner declares that on August 3, 2011, at the request of the Bolivian Ministry of Government, the National Committee for Refugees (hereinafter the “CONARE”) held a special session without the presence of the alleged victim or his lawyer and issued Resolution No. 812 ruling the immediate expulsion of the alleged victim on urgent national security grounds. The petitioner also says that such resolution not only is groundless and violates the alleged victim’s right to due process but also states that it cannot be challenged. Given the imminent expulsion, the petitioner requested a precautionary measure, which the IACHR granted on August 8, 2011 to State to refrain from expelling the alleged victim from Bolivia and ensure his life and personal integrity.

3. He declares that although the CONARE’s decision explicitly overrules any type of review, the alleged victim filed an appeal on August 16, 2011. On November 1, 2011, the CONARE decided to cancel the expulsion.

⁶ The petitioner refers to *Case Cantoral Benavides v. Peru*, settled by the Inter-American Court on August 18, 2000, where the victim is the petitioner and alleged victim’s brother in this petition. (I/A Court. *Case Cantoral Benavides v. Peru*. Merits. Sentence of August 18, 2000. Series C No. 69).

Criminal proceedings for alleged acts of terror

4. The petitioner declares that on August 1, 2011, after the alleged victim's arrest, the Ministry of Government referred to the latter as a member of the Peruvian group Sendero Luminoso, at a press conference, by publicly accusing him of acts of terror and criminal association. Later, on August 5, 2011, the Fifth Criminal Examining Judge of the city of El Alto (hereinafter the "Examining Judge") decided to confirm the expulsion issued by the CONARE, instead of ruling on the alleged victim's judicial situation regarding the criminal proceedings filed against him –i.e. releasing the alleged victim or ordering his preventive detention–; again, this violated the right to due process. The petitioner also says that the Examining Judge wrongfully ordered that said detention continue under the supervision of the Ministry of Government. As a result, on August 8, 2011, the petitioner filed an interlocutory appeal that was not timely processed. He also declares that three Chambers of the Court of La Paz Department cancelled the assignment of the case file for over three months due to alleged formality issues, which did not allow that the remedy was processed promptly. He declares that such unwarranted delay did not allow the victim to file a motion to release, since according to the binding jurisprudence of the Constitutional Court, a motion to release applies only after an interlocutory appeal has been filed and processed.

5. While the alleged victim was waiting for the appeal to be processed, on August 26, 2011, the Examining Judge ordered his home detention and custody by security guards. Moreover, on November 1, 2011, the CONARE decided to overrule the expulsion; thus, on November 22, 2011, given the lack of grounds for his detention, the alleged victim lifted the interlocutory appeal and filed to the Examining Judge a request for immediate release on November 8 and 24, 2011. On December 5, 2011, the Examining Judge decided to annul the alleged victim's detention and custody.

6. On February 24, 2012, the Public Prosecutor's Office brought charges against the alleged victim for acts of terror and criminal association, and on April 23, 2014, the Examining Judge rejected the charges due to formal shortcomings. Finally, on April 24, 2014, the Public Prosecutor decided to discontinue the criminal proceedings due to the lack of criminal grounds and of sufficient evidence for a formal accusation.

7. The petitioner declares that the annulment of expulsion does not overrule the irreparable damages caused to the alleged victim, since the public accusations calling him a dangerous offender harmed the alleged victim's name and honor, the effects of torture caused him and his family psychological stress, and the criminal charges affected his economy negatively and caused him loss of income. Moreover, the petitioner says that the State acted in a xenophobic way toward aliens, and that this is aggravated by the refugee status of the alleged victim as well as by the stigma caused after he was called a terrorist.

Complaints of alleged torture

8. The petitioner declares that the alleged victim was subjected to torture by police officers during his detention. To this aim, he submits health certificates showing that on August 1, 2011, the alleged victim had "five excoriations [on the neck] with a diffuse hyperemic halo of 1cm diameter that is painful to the touch [...] several hyperemic ecchymosis [on the right thoracic part], [...] blood clots [on left nostril] [and] linear hyperemic ecchymosis of 4cm long and 1cm distance between parallel lines (it resembles traces of handcuffs)" on the wrists. He argues that the alleged victim reported the attacks against him to the CONARE through the appeal for review filed on August 16, 2011, and to the Examining Judge via a written document on September 7, 2011. He says that the State did not open an investigation until April 24, 2014, and that so far there has been no progress. In addition, he says that Bolivia does not have a specific legislation to fight torture and victims are therefore in a state of defenselessness and perpetrators, in impunity.

9. In turn, the State holds that the petition is inadmissible inasmuch as domestic remedies have not been exhausted. It says that in the context of the criminal proceedings against him, the alleged victim filed an interlocutory appeal and then voluntarily lifted it and that, as a result, said ordinary remedy was not exhausted. Moreover, it declares that the motion to release –which it says is an effective extraordinary remedy under the constitutional law– was not filed either. In addition, the State says that on April 24, 2014,

the Public Prosecutor's Office decided to discontinue the criminal proceedings against the alleged victim, after which he was absolved.

10. Concerning the alleged acts of torture, the State affirms that the alleged victim did not file any official reports or criminal charges. However, on April 24, 2014, in compliance with his functions and competencies, the Fifth Criminal Examining Judge decided to open an investigation on alleged acts of torture that is still open.

11. Finally, regarding the CONARE's resolution to expel the alleged victim, the State argues that said decision was annulled after a review by said body. In this regard, it declares that the alleged victim's rights were not violated, and that the facts do not establish a violation of rights.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

12. Concerning the abovementioned decision by the CONARE and based on the information submitted by each party, the Commission sees that the alleged victim filed an appeal for review on August 16, 2011, that was processed on November 1, 2011, after which domestic remedies were exhausted in conformity with Article 46.1 (a) of the Convention and Article 31.1 of the IACHR Rules of Procedure.

13. As to the criminal proceedings for acts of terror and criminal association, the petitioner declares that due to the resolution of August 5, 2011, that confirmed the alleged victim's expulsion and placed him under the custody of the Ministry of Government, the alleged victim filed an interlocutory appeal on August 8, 2011. However, the judicial authorities did not process in a timely manner; thus, the alleged victim could not file a motion to release. The petitioner says that subsequently, given the new resolution by CONARE that annulled his expulsion, the alleged victim lifted the interlocutory appeal to request his immediate release. In turn, the State says that the alleged victim did not exhaust the domestic remedies available, as he voluntarily lifted the interlocutory appeal and did not file a motion to release.

14. Under its jurisprudence, the IACHR establishes that an exception to the requirement of prior exhaustion of domestic remedies applies whenever there is a factual or legal obstacle for the alleged victim to exhaust domestic remedies. Based on the petition, the Commission notes that it was impossible to file a motion to release in favor of the alleged victim because the Court of La Paz Department did not rule on the interlocutory appeal, since Bolivia's constitutional jurisprudence establishes that, given its extraordinary nature, the motion to release applies only if the competent jurisdictional authority, on processing the appeal, did not restore the violated right. In this regard, the Commission concludes that the exception to the rule of prior exhaustion of domestic remedies in Article 46.2 (b) of the Convention does apply.

15. Concerning the alleged acts of torture, the Commission believes that the State heard them at least three times: (a) when precautionary measures MC 291-11 were granted on August 8, 2011; (b) via the review appeal filed to the CONARE on August 16, 2011; and (c) through the police report filed by the alleged victim to the Examining Judge on September 7, 2011. According to the information available, the authorities did not open the corresponding investigation until April 24, 2014, and no results have been reported so far. Therefore, the IACHR concludes that the exception to the rule of prior exhaustion of domestic remedies, set forth in Article 46.2 (c) of the Convention, does apply in this respect.

16. On the other hand, the Commission received the petition on August 4, 2011, the alleged facts reported in the petition began on August 1, 2011, and some of its consequences persist. As a result, in view of the context and the characteristics of this matter, the Commission considers that the petition is timely and that the admissibility requirement of timeliness has been met.

VII. COLORABLE CLAIM

17. In view of the elements of fact and law presented by the parties and given the nature of this matter, the Commission believes that the alleged acts of torture, arbitrary detention, violations in the criminal trial allegedly filed based on leaflets and a Marxist book found at the alleged victim's workplace, the public

accusations of terrorism against him based on his nationality, and the likely violation of his freedom of movement could all tend to establish a violation of Articles 5 (Right to Personal Integrity), 7 (Right to Personal Liberty), 8 (Right to A Fair Trial), 11 (Right to Privacy), 13 (Freedom of Thought and Expression), 22 (Freedom of Movement and Residence), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection) of the Convention, in agreement with Articles 1.1 to the detriment of the alleged victim and his family; and a violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 8, 11, 13, 22, 24 and 25 of the American Convention, in accordance with Articles 1.1 and 2 of the same treaty; and in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture;

2. To notify the parties of this decision;

3. To continue with the analysis on the merits; and

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

Done and signed in the city of San Francisco, California, on the 27 day of the month of February, 2017.
(Signed): James L. Cavallaro, President; Margarete May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, Esmeralda E. Arosemena Bernal de Troitiño and Enrique Gil Botero, Commissioners.