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REPORT No. 84/19
PETITION 1134-09
REPORT ON ADMISSIBILITY

LUIS HUMBERTO ABARCA GALEAS
ECUADOR

Electronically approved by the Commission on May 31, 2019.

Cite as: IACHR, Report No. 84/19. P-1134-09. Admissibility. Luis Humberto Abarca Galeas. Ecuador. May 31, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Luis Humberto Abarca Galeas
Alleged victim:	Luis Humberto Abarca Galeas
Respondent State:	Ecuador
Rights invoked:	Articles 11 (privacy), 25 (judicial protection) and 26 (economic, social and cultural rights), in connection with Article 2 (domestic legal effects), of the American Convention on Human Rights ¹

II. PROCEDURE BEFORE THE IACHR²

Filing of the petition:	September 15, 2009
Additional information received at the stage of initial review:	October 26, 2010, February 17, September 5 and November 26, 2012
Notification of the petition to the State:	May 20, 2015
State's first response:	June 4, 2015
Additional observations from the petitioner:	May 27, 2016 and February 14 and May 29 2018
Additional observations from the State:	November 16, 2017

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 ratification instrument on December 28, 1977)

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 8 (fair trial), 23 (participation in government), 25 (judicial protection) and 26 (economic, social and cultural rights), regarding Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects), of the American Convention
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 Section VI

V. ALLEGED FACTS

1. Luis Humberto Abarca Galeas (hereinafter "the petitioner") indicates that he was appointed justice of the Supreme Court of Justice after a competitive merit-based examination process. He claims that his post was a life-term appointment and that he took office on November 30, 2005.

2. He submits that, by a referendum, Ecuadorian citizens approved the creation of a National Constituent Assembly ("the Assembly") to draft a new constitution. On November 29, 2007, the Assembly issued Constituent Resolution No. 1, establishing that justices of the Supreme Court would remain in office

¹ Hereinafter "Convention" or "American Convention."

² The observations submitted by each party were duly transmitted to the opposing party.

until the Assembly rules the contrary.³ Under its article 2, “none of the decisions by the Constituent Assembly shall be subject to review or appeal by any of the established branches of government.” On January 24, 2008, the Assembly issued Constituent Resolution No. 2, imposing a ceiling on public officials’ salaries, including those of justices of the Supreme Court. Article 9 of this resolution established that no “complaint, appeal, writ of amparo, petition, claim, or any other legal or administrative remedy” would be admissible against decisions by the Assembly.

3. He asserts that the Assembly changed the nature of his appointment as a justice and reduced his salary by fifty percent. He claims that his current salary is insufficient to meet the requirements of his office, causing him serious moral damage. He also alleges unlawfulness by the Assembly in that it was entrusted with drafting a new constitution and not with passing laws or removing or appointing officials. He believes that given the ban on the filing of remedies against decisions by the Assembly, he was deprived of his right to effective judicial protection, enshrined in Article 25 of the Convention.

4. He also submits that during the Transition System, he was appointed to the *National Court for the Transition*, where he was head of the Second Criminal Chamber. As such, he heard the appeal lodged by Jorge Hugo Reyes Torres against his conviction for a drug-trafficking-related crime. On June 11, 2009, the criminal chamber found the appeal inadmissible; however, it also overturned the sentence ex officio on considering that the said judgment was contrary to the presumption of innocence.⁴ Thus, it acquitted Mr. Reyes Torres.⁵ He moreover indicates that a codefendant (not a party in the appeal), Adrian Goetschel Ludeña, requested this chamber to lift the injunctions ordered against him. On January 6, 2009, considering that a definitive discontinuance of the proceedings had occurred in favor of the latter, he lifted the injunctions and ordered the police to dismiss the arrest warrant.

5. The petitioner claims that on June 19, 2009, the Judiciary Council filed an investigation against him and his Chamber colleagues for annulling ex officio a lower court’s decision and acquitting Mr. Reyes Torres. On April 22, 2010, the Council removed the three members from the Chamber.⁶ The petitioner believes that the Council was not competent to rule on his case because the Chamber was a transition body and the National Court for the Transition was the competent body to hear disciplinary complaints against its judges.⁷

6. Furthermore, he indicates that on June 16, 2009, the Attorney General’s Office requested the Criminal Chamber of the National Court of Justice to schedule a hearing to arraign for malfeasance the three

³ The petitioner claims that by Constituent Resolution No. 1, the Assembly decided to terminate several state officials and appoint other people to those offices temporarily, including the temporary Attorney General’s Office—all these were subject to termination anytime.

⁴ According to the Chamber, the appellate court had sentenced the defendant without incriminating evidence and based its decision on illegal evidence, like phone call logs obtained after an examination of the defendant’s mobile phone that was undertaken without a legal warrant or the legally required formalities to submit evidence. ⁵ He indicates that the Inspector General’s Office lodged an extraordinary remedy of constitutional protection proceedings regarding the judgment of acquittal that the petitioner and his colleagues from the Chamber passed on June 11, 2009. On February 6, 2013, the Constitutional Court admitted the remedy. The petitioner believes that this decision was contrary to the principle of due process because neither he nor his colleagues were summoned as the accused party or defendants; therefore, they were unable to exercise their right of defense.

⁵ He indicates that the Inspector General’s Office lodged an extraordinary remedy of constitutional protection proceedings regarding the judgment of acquittal that the petitioner and his colleagues from the Chamber passed on June 11, 2009. On February 6, 2013, the Constitutional Court admitted the remedy. The petitioner believes that this decision was contrary to the principle of due process because neither he nor his colleagues were summoned as the accused party or defendants; therefore, they were unable to exercise their right of defense.

⁶ The investigation was filed by the Ministry of Justice and Human Rights. The Council found the Chamber’s acts illegal as (1) it was not allowed to dismiss the appeal and overturn a judgment ex officio at the same time; (2) it reexamined the evidence although its powers were limited to examining whether the lower court’s decision was contrary to the law or not; (3) it amended the judgment by only considering the evidence which, it believed, had been illegally obtained, and not taking into account that the lower court had also used other evidence; and (4) the grounds of its decision were wrongful and incoherent; among other reasons.

⁷ The petitioner submits that the Council was a temporary body, unable to undertake the functions attributed by the new constitutional order to the established Judiciary Council. He asserts that on December 10, 2009, the National Court of Transition announced to the Council that it, the Court, was the competent body to hear disciplinary proceedings against judges of the Court. The Council continued hearing the case although it was expected to answer to the Court by waiving or retaining jurisdiction and, in the latter case, to send the case file to the Constitutional Court to settle the conflict.

members of the Chamber that ruled on the appeal by and acquitted Mr. Reyes Torres. The three judges filed constitutional protection proceedings.⁸ On July 3, 2009, the court dismissed the petition. The complainants lodged an appeal, which the Second Criminal Chamber of the Provincial Court of Pichincha denied on September 10, 2009. On September 26, 2011, the defendants were acquitted, a decision appealed by the Attorney General's Office on September 30, 2011.

7. The Attorney General's Office filed another lawsuit against the petitioner on the grounds of malfeasance in connection with the decision to lift the injunctions issued against Mr. Goetschel Ludeña. On January 28, 2014, the Trial Court established that there was no incriminating evidence. The Attorney General's Office lodged an appeal, but this was rejected.⁹

8. As to the malfeasance proceedings against the three judges of the Chamber, on August 21, 2014, the National Court of Justice admitted the appeal (supra para. 6), revoked the acquittal, and summoned the three judges. On January 6, 2015, the Trial Court found that the three judges had ruled against the law, sentencing them to a three-month period of deprivation of liberty. The judges presented appeals for annulment and complaints as well as requested the court to declare the lapse of the statute of limitations on the criminal proceedings. On June 18, 2015, the Court of Appeals declared the case against the two other defendants barred. However, it declined the petitioner's request on the grounds that the lapse of the statute of limitations was suspended because another criminal action against him was pending.¹⁰ Although the petitioner appealed the denial, the decision was upheld on September 24, 2015.

9. The petitioner argued that given that the two decisions appealed by the Attorney General's Office were issued within the same proceedings, the court should have regarded the claims as a continuing offense. He claims that by filing two cases for malfeasance, the authorities infringed the rule of double jeopardy. He moreover submits that the Code of Criminal Procedure rules the suspension of the statute of limitations when a new offense has been committed. However, the judgment giving rise to the second malfeasance proceedings was prior to the decision leading to the first proceedings. He added that the case against him remains pending despite the lapse of the statute of limitations and the fact that the matter of the case is moot because of the Constitutional Court's resolution of February 6, 2013.

10. Additionally, the petitioner claims that the President of the National Court for the Transition decided that a staff co-judge should replace him in office until the Constitutional Court adjudicated on a conflict of jurisdiction. The petitioner reported that he had not received his salary or the obligatory insurance benefit since April 27, 2010, while he was also barred from privately practicing as an attorney-at-law. This situation had affected his standard of living to the extent of driving him into poverty. He submitted that the Constitutional Court "failed to pass a straightforward judgment" on the claim about jurisdiction and that he and his colleagues were deprived of judicial protection and removed from office.

11. He contends that he tried to recover his post by entering a competitive merits-based examination process but was excluded on October 3, 2011. He alleges that the decision to exclude him was unreasonable, as it was based on his refusal to answer some of the questions of the psychological test; yet participants had been instructed not to answer questions regarding aspects not relevant to their present life.

12. The petitioner claims that he was subjected to unjust disciplinary and criminal proceedings for fulfilling his duty to protect the rights to a fair trial and property of Mr. Reyes Torres and Mr. Goetschel

⁸ Among others, they alleged that the Attorney General's actions interfered with the judiciary and were a form of retaliation.

⁹ On April 6, 2017, the Chamber Specializing in Traffic, Criminal Police, Military, and Criminal Matters of the National Court of Justice rejected the Attorney General's appeal. The petitioner alleges that the Attorney General's Office violated his rights to a fair trial and judicial protection in that it challenged the judgment of acquittal passed in his favor and forced the Trial Court to admit the appeal even though by the time he passed the decision leading to his prosecution, no remedies were admissible against judgments by criminal courts, except for appeals for annulment.

¹⁰ The contempt proceedings regarding the decision to lift the precautionary measures imposed on Mr. Goetschel Ludeña. This, based on article 108 of the Criminal Code of Procedure, ruling as follows: "Both the statute of limitations on the action and the sentence shall be suspended when the defendant has committed another offense that deserves the same or a more severe punishment, before the statute of limitations is due."

Ludeña, under the national and international rules. He submits that he has been harassed by a “corrupt political mafia” that usufructs from the goods seized in cases related to drug-trafficking activities and persecutes judges who pass judgments contrary to their interests.¹¹ He submits that Ecuadorian authorities have refused to investigate the possible wrongful use of the goods seized from Mr. Reyes Torres.

13. The petitioner claims that the Judiciary Council has created a situation where no judge dares to rule against its decisions for fear of being removed. Therefore, it is impossible for him to lodge a remedy against the Council’s decisions. He also alleges that the filing of remedies in the administrative jurisdiction would be ineffective, for these are not admissible regarding constitutional or human rights violations but regarding judgments with legal defects. He affirms that no remedy is admissible against decisions by the Constituent Assembly or abuses by the Attorney General’s Office. Accordingly, he deems that the exception to the rule of prior exhaustion of domestic remedies established in Article 46, paragraph 2 of the Convention applies to his case.

Arguments by the State

14. The State indicates that all the proceedings filed against the petitioner were held pursuant to the law and the right of defense. According to it, given the petitioner’s failure to exhaust domestic remedies duly, his petition should be declared inadmissible. Moreover, it believes that he has infringed the subsidiarity principle that governs the Inter-American System, in that he lodged his first petition in 2009 and continued bringing complaints to the Commission while proceedings were still being held at the national level. It argues that under the principle of subsidiarity, international bodies will be competent to intervene once domestic remedies have been exhausted. It alleges procedural error by the petitioner because he sought to “build a case” before the Inter-American System with disregard for its subsidiary nature.

15. It contends that the alleged lack of remedies in the national legal framework regarding purported abuses by the Attorney General’s Office is false, for the petitioner could have reported any abuse by the said Office, to the Judiciary Council, the competent body to initiate the applicable administrative proceedings. Likewise, it alleges that the Attorney General could have been subjected to impeachment by the National Assembly and criminally prosecuted had the claims been proven. As to the Judiciary Council’s decision to dismiss the petitioner, the State argues that he could have presented a full jurisdiction or subjective remedy to have his rights protected, or an extracontractual civil liability claim to claim damages.

16. Regarding the criminal proceedings, it indicates that one of these was settled with a verdict of innocence in favor of the petitioner and that the other remains in the court of appeals. It contends that if the court returns an unfavorable verdict to the petitioner, he could still lodge an appeal for annulment, an appeal for review, an appeal of complaint as well as the extraordinary remedy of a constitutional appeal for legal protection. As for Constituent Resolution No. 1, it denies the alleged ban on remedies or complaints submitted by judges of the Supreme Court of Justice. Also, it submits that Constituent Resolution No. 2 concerns the ceiling on public officials’ salaries, an issue unrelated to the petitioner’s claims.

17. Furthermore, it believes that the petition should be declared inadmissible based on Article 47, paragraphs b and c of the American Convention because it does not specify the acts attributed to the State that may have violated the petitioner’s human rights. It alleges that his claims and arguments are general, unprecise and do not tend to establish violations of the rights protected by the Convention. It submits that the petitioner has abused the right of petition, considering international customary law, for he has pressured the Commission by filing successive complaints when Article 33 of the IACHR Rules of Procedure establishes that the Commission will not consider a petition if its subject matter duplicates a petition pending. The State

¹¹ The petitioner specifically accuses the National Attorney General who filed the proceedings against him, of systematically interfering with the judiciary’s independence by lodging criminal complaints against judges whose resolutions were contrary to his, the Attorney General’s, interest. He claims that this official was appointed on a political and temporary basis by the Constituent Assembly, which, exceeding its powers, terminated several state officials (including the Attorney General) and appointed new temporary employees to said vacancies (which could be terminated anytime).

considers that the petitioner's claims are confusing in that they are aimed at defending Mr. Reyes Torres and the petitioner's acts as a judge but do not explain in what sense the petitioner's rights were violated.

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

18. The Commission observes that, before the State was notified of the instant petition, the petitioner had lodged five written documents to the Commission, which he called petitions or complaints. The State has argued that successively filing such communications infringes Article 33 of the Commission's Rules. The IACHR considers that the documents lodged by the petitioner, regardless of what he called them, are not new petitions that duplicate previous ones; that, on the contrary, these documents either elaborate on facts or are petitions concerning new or other facts related to the initial petition. Therefore, the Commission does not find Article 33 of its Rules applicable to this petition.

19. Regarding the State's claim on the petitioner's violation of the principle of subsidiarity by filing petitions before proceedings were settled at the domestic level, the Commission has consistently established that the situation to be considered to determine the exhaustion of domestic remedies, is that existing when such decision is made, because the time when the petition was filed and the time of the decision on admissibility are different.

20. With respect to the petitioner's arguments about the effects of Constituent Resolutions No. 1 and No. 2 on his work situation, the Commission observes the claim that the resolutions themselves denied the admissibility of remedies, and that the State has not mentioned what remedies could have been presented against decisions by the Constituent Assembly. Therefore, the IACHR believes that the exception to the requirement of prior exhaustion of domestic remedies established in Article 46, paragraph 2.a of the Convention applies to this petition. It observes that Constituent Resolution No. 1 was promulgated on November 29, 2007, and Resolution No. 2 on January 24, 2008 and that the IACHR received the petitioner's first communication on this on February 17, 2012. Therefore, and given that the petitioner has not mentioned the reasons that he could not lodge his petition within a reasonable time, the Commission decides that this part of the petition does not meet the requirement of timeliness under Article 32 of its Rules of Procedure.

21. As to the purported violations within the disciplinary proceedings held against the petitioner and the Judiciary Council's decision, the Commission observes that the petitioner controverts the competence of the Council, for he alleges that the Constitutional Court "failed to pass a straightforward judgment" on the matter and indicates that the available administrative remedies may be inadequate to have his rights protected because their application is limited to legal errors. He also refers to an alleged problem of structural independence because the decision on any legal remedy he may file, depends on judges reportedly under the Judiciary Council's disciplinary control; thus, these judges will refrain from ruling in his favor for fear of being removed from office. The Commission deems that, concerning this claim, the exhaustion of domestic remedies is closely connected with the alleged violations of the American Convention. Accordingly, the exhaustion of these remedies will be analyzed together with the merits of the case. As a result, the Commission will join this part of the requirement of exhaustion of domestic remedies with the merits of the case.¹²

22. Regarding the alleged violations of the petitioner's rights as a result of the purported delay by the Constitutional Court in settling the conflict of jurisdiction between the National Court for the Transition and the Judiciary Council, the Commission observes that the State has not mentioned the remedies that the petitioner could have exhausted to have this situation addressed. Consequently, it declares the exception to the requirement of exhaustion of domestic remedies established in Article 46, paragraph 2.a of the American Convention applicable. Given that this was an ongoing situation when the petitioner reported it to the Commission, the IACHR finds that this claim was lodged within a reasonable time under Article 32 of its Rules.

¹² IACHR, Report No. 121/06 (Admissibility), Petition 554-04, John Doe *et al.*, Canada, October 27, 2006, paras. 62 and 63.

23. As to the petitioner's being excluded from the competitive merits-based examination process on October 3, 2011, the Commission observes that he does not indicate whether he has lodged remedies at the national level, nor suggest the unavailability or ineffectiveness of these. Therefore, it deems that this part of the petition is inadmissible as it does not meet the requirement set forth in Article 46, paragraph 1.a of the Convention.

24. Regarding the alleged violations of the petitioner's rights within the criminal proceedings against him for lifting the injunctions imposed on Mr. Goetschel Ludeña, the Commission notes that the outcome was the petitioner's being found innocent and that the petitioner has not lodged complaints against the officials that, according to him, violated his rights, nor presented remedies to claim damages. Neither has he indicated situations that prevent him from doing so, apart from his certainty about the lack of due process in Ecuador. Therefore, the Commission considers that this claim is inadmissible, for it does not meet the requirement established in Article 46, paragraph 1.a of the American Convention.

25. Concerning the alleged violations of the petitioner's rights in relation to the Constitutional Court's decision of February 6, 2013, the Commission believes that this is a final judgment; thus, this part of the complaint meets the requirements established Article 46, paragraph 1.a of the Convention. Given that the IACHR received the petition on September 15, 2009, and that the matter at issue concerns a subsequent event, the Commission finds that this claim fulfills the requirements set out in Article 46, paragraph 1.b of the Convention and is admissible.

26. As for the purported violations of the petitioner's rights within the criminal proceedings lodged against him in light of his decision to acquit Mr. Reyes Torres, the Commission observes that the request for arraignment dates from September 16, 2009 and that, according to the latest information submitted by the State, on November 16, 2017, these proceedings have been in the court of appeals since October 19, 2015 (after many remedies presented by both parties were settled). Therefore, and without prejudging the merits, the Commission believes that the exception to the requirement of exhaustion of domestic remedies set out in Article 46, paragraph 2.c of the American Convention applies to this part of the complaint. As the petition was presented on September 15, 2009, the Commission believes that this meets the timeliness requirement according to Article 32 of its Rules and is admissible.

27. Regarding the petitioner's claims about the Constituent Assembly's illegal appointment of the Attorney General who lodged proceedings against him and was politically-biased in favor of the said body, the Commission deems that, given the lack of remedies admissible against decisions by the Constituent Assembly, the exception to the requirement of prior exhaustion of domestic remedies established in Article 46, paragraph 2.a of the Convention applies to this part of the petition. As the complaint was presented when the proceedings referred to were pending, the Commission considers that this was lodged within a reasonable time according to Article 32 of the IACHR Rules of Procedure; therefore, this is admissible.

28. As to the purported "corrupt political mafia" that takes advantage of goods seized from drug traffickers and the purported illegal use by state agents of the goods seized from Mr. Reyes Torres, the Commission observes that the petitioner has not indicated that he has submitted official complaints before national authorities. Accordingly, the Commission believes that this part of the petition is inadmissible, for it does not fulfill the requirements established in Article 46, paragraph 1.a of the Convention.

VII. ANALYSIS OF COLORABLE CLAIM

29. The Commission believes that, if proven, the facts alleged by the petitioner regarding (1) the disciplinary proceedings against him being lodged by an official not competent to do so and the lack of effective remedies against decisions by the Judiciary Council that are contrary to human rights; (2) the fact that an administrative decision by the president of the National Court and the unwarranted delay by the Constitutional Court in settling a conflict of jurisdiction deprived him of his rights to access work and social security for over two years; (3) the violation of his right to defense given that he was not called to participate in the proceedings in which a decision he made as a judge was annulled; (4) the fact that the criminal proceedings against him were lodged by an investigative official that lacked independence and was illegally

appointed, and that there were no remedies to challenge this situation at the national level; and (5) the fact that authorities have violated the due process of law within the criminal proceedings filed against him for partaking in the decision to acquit Mr. Reyes Torres, these could establish violations of Articles 8 (fair trial), 23 (participation in government), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention, regarding its Articles 1, paragraph 1 (obligation to respect rights) and 2 (domestic legal effects).

30. The Commission will not perform an analysis of colorable claim in respect of claims in the petition that do not meet the requirements of Article 46 of the American Convention according to its considerations in Section VI of this report.

31. With respect to the alleged violation of Article 11 (privacy) of the American Convention, the Commission observes that, as for the parts of this petition that fulfill the requirements of Article 46 of the Convention under Section VI of this report, the petitioner has not submitted claims or enough evidence for a prima facie consideration of the said possible violation.

VIII. DECISION

1. To find the instant petition admissible regarding Articles 8, 23, 25 and 26 of the American Convention, in relation to its Articles 1.1 and 2;

2. To analyze, in the report on the merits, the requirements of prior exhaustion of domestic remedies and timeliness of the petition, regarding the disciplinary proceedings initiated by the Judiciary Council against the petitioner; and

3. To find the instant petition inadmissible in connection with the effects of Constituent Resolutions No. 1 and No. 2 on the petitioner's work situation; the petitioner's exclusion from the competitive merits-based examination process of October 3, 2011; the criminal case brought against the petitioner because of his decision to lift the precautionary measures imposed on Mr. Goetschel Ludeña; and state agents' purported illegal use of goods seized in procedures connected with drug trafficking.

4. To notify the parties of this decision; to continue with the analysis on the merits, and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 31st day of the month of May, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva and Flávia Piovesan, Commissioners.