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**REPORT No. 286/21**  
**PETITION 1267-11**  
REPORT ON ADMISSIBILITY

ALAN ALBERTO FLORES CABRERA AND TEODORO RONAL  
ORREGO VERDUN  
PARAGUAY

Electronically approved by the Commission on October 26, 2021.

**Cite as:** IACHR, Report No. 286/21. Petition 1267-11. Admissibility. Alan Alberto Flores Cabrera and Teodoro Ronal Orrego Verdun. Paraguay. October 26, 2021.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Alan Alberto Flores Cabrera, Maria Jose Flores, Teodoro Ronal Orrego Verdun
<b>Alleged victim:</b>	Alan Alberto Flores Cabrera and Teodoro Ronal Orrego Verdun <sup>1</sup>
<b>Respondent State:</b>	Paraguay
<b>Rights invoked:</b>	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 16 (freedom of association), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights <sup>2</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>3</sup>**

<b>Filing of the petition:</b>	September 19, 2011 and September 23, 2011 (petitions accumulated)
<b>Additional information received during initial review:</b>	October 5, 2011; October 11, 2011; October 12, 2011; November 23, 2011; November 25, 2011; and November 29, 2011
<b>Notification of the petition:</b>	August 23, 2018
<b>State's first response</b>	April 11, 2019
<b>Precautionary Measures</b>	MC-368-11 (Denied)

**III. COMPETENCE**

<b><i>Ratione personae:</i></b>	Yes
<b><i>Ratione loci:</i></b>	Yes
<b><i>Ratione temporis:</i></b>	Yes
<b><i>Ratione materiae:</i></b>	Yes, American Convention (instrument of ratification deposited on August 24, 1989) and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (instrument of ratification deposited on June 3, 1997)

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

<b>Duplication of procedures and international <i>res judicata</i>:</b>	No, in the terms of Section VI
<b>Rights declared admissible:</b>	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 9 (freedom from ex post facto laws), 16 (freedom of association), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention, in relation to article 1.1 (obligation to respect rights) thereof; and article 8.1.a) of the Protocol of San Salvador
<b>Exhaustion or exception to the exhaustion of local remedies:</b>	Yes, on June 1, 2011
<b>Timeliness of the petition:</b>	Yes

<sup>1</sup> At the request of the petitioner, through a decision notified on February 12, 2012, the IACHR decided to accumulate petitions P-1267-11 (Alan Alberto Flores) and P-1301-11 (Ronal Orrego) into a single casefile, numbered as P-1267-11.

<sup>2</sup> Hereinafter, "the American Convention" or "the Convention".

<sup>3</sup> The observations of each party were duly transmitted to the other party.

## V. ALLEGED FACTS

1. The petitioner alleges the violation of human rights of the alleged victims on account of their criminal prosecution and conviction for the offense of breach of trust, all of which they characterize as political persecution orchestrated by the governmental authorities in retaliation for their activities as union leaders, unleashed in the midst of a 48-hour strike that they were organizing.

2. Messrs. Flores and Orrego, in the two petitions that the IACHR decided to accumulate in these proceedings, state that they were respectively the President and the Finance Secretary of the *Central Unitaria de Trabajadores* union (CUT). In that capacity, they participated in a business transaction between said union and the National Bank of Workers (NBW), which consisted of the granting of large loans for the acquisition of 4,350 funerary niches in the *Parque Cementerio Las Acacias*, which were to be sold to union affiliates. The transaction, which was initially approved by the competent Paraguayan authorities, including the Technical Planning Secretariat of the Presidency of the Republic, eventually resulted in non-payment of the millions in funds loaned to the CUT Union. This non-payment contributed significantly to the subsequent collapse of the NBW due to financial unsustainability, leading to its bankruptcy and liquidation. As a consequence of the closure of the NBW, criminal proceedings were opened against those who were claimed to be responsible for the bank's failure, which was attributed by the authorities to the granting of fraudulent loans for unviable projects. These included the directors of the CUT in connection to the loan for the purchase of the funeral niches.

3. The judicial authorities processed the numerous criminal investigations jointly within the case labeled "Edgar Cattaldi et al. on Fraud and Other Fraudulent Acts". The case file amounted to several thousand pages, given the complexity of the facts investigated and the number of people prosecuted, including several NBW officials. The prosecution of Messrs. Flores and Orrego began on June 22, 2000, date at which the criminal proceedings had been ongoing for more than three years, and were at the plenary procedural stage, but they were formally brought back to the investigation stage for the purposes of their inclusion in the prosecution.

4. After the lengthy development of this criminal procedure, Messrs. Flores and Orrego and twenty other people were convicted by the Criminal Trial and Sentencing Court No. 7 of the Capital, by means of a judgment of October 8, 2001. They were found guilty as accomplices to the crime of breach of trust, which allegedly caused financial damage to NBW; and they were sentenced to seven years in prison.

5. Following appeals and annulment motions filed by the petitioners, the conviction was confirmed by the Criminal Appeal Court-First Chamber, through Agreement and Judgment No. 37 of June 4, 2009. Following appeals for *cassation*, the conviction was confirmed by Agreement and Judgment No. 694 of December 29, 2010 of the Supreme Court of Justice-Criminal Chamber. The petitioners note that the conviction became final after the resolution of their appeals for clarification filed on June 1, 2011<sup>4</sup>.

6. On June 21, 2009 Messrs. Flores and Orrego filed a motion for unconstitutionality before the Constitutional Chamber of the Supreme Court of Justice against the Agreement and Judgment No. 37 of the Criminal Appeal Court-First Chamber, but as of the date that the petition was filed before the IACHR this motion was still under consideration for admission.

7. The petitioners allege that the following human rights were violated during these criminal proceedings:

(a) The right to personal liberty: inasmuch as they were irregularly subjected to pretrial detention that lasted for two years. On October 8, 2001, one year after the beginning of their prosecution, they were sentenced to seven years of imprisonment by the Criminal Trial and Sentencing Judge Hugo López. Said judge had not requested the pretrial detention of the convicted persons, and the petitioners filed an appeal against the convicting judgment, which was granted, for which reason said judgment was not final. However, while the

<sup>4</sup> As the petitioners have repeatedly indicated, the IACHR has already heard an independent petition related to this same criminal proceeding, in the course of an inter-American procedure to which case number 12,281 was assigned after its admission through Report No. 106/11, petitioners being Messrs. Reinaldo Barreto Medina and Florencio Florentín.

appeal was being considered, Interim Judge Luis Reyes, at the request of the prosecutor, ordered the pretrial detention of the alleged victims, who claim that this judge lacked jurisdiction to do so. On this basis, they argue that their deprivation of liberty infringed the requirement of legality. The petitioners challenged the pretrial detention order through an appeal, but while it was being decided, they were kept deprived of liberty for two years.

Mr. Flores initially spent nine months in the Tacumbú Penitentiary, and later in the Specialized Police Operation Force (FOPE) where he allegedly underwent detention conditions that were incompatible with his dignity. Subsequently, it was decided to replace Mr. Flores's pretrial detention measure with that of house arrest under surveillance, for fifteen months. On December 31, 2003, through Interlocutory Order No. 358, the Court of Appeal revoked the house arrest and ordered that he be set free, a condition in which he remained at the time the petition was filed. It is specified in the petition that Mr. Alan Alberto Flores left Paraguayan territory and sought political asylum in Argentina on June 6, 2011, which was granted by the latter State.

Mr. Orrego, for his part, voluntarily presented himself on September 1, 2003 to the Tacumbú National Penitentiary, where he was detained until April 2004, and subsequently the measure of controlled house arrest was imposed on him until November 2005, leaving him deprived of his liberty in pretrial detention for two years and three months, a situation that ended when the Court of Appeal revoked his house arrest and ordered that he be set free by order of October 24, 2005, enforced one month later.

By a communication dated November 23, 2011, the petitioner reported that Mr. Orrego had been held in the Tacumbú National Penitentiary since November 21, 2011, where overpopulation, overcrowding, and inhuman prison conditions put his life and physical integrity at risk. The petitioners note that pretrial detention for the crime of breach of trust could not last more than six months, since the minimum sentence for such a criminal offense was six months, and article 252 of the Code of Criminal Procedure imposes that limit on its duration.

After his sentence became final, Mr. Orrego remained in Paraguay where he served the sentence imposed and was granted conditional release on May 28, 2014, whereafter the sentence imposed was declared extinct on account of full compliance with the penalty imposed, on November 14, 2016.

(b) The principle of freedom from the *ex post facto* application of criminal law: the petitioners allege that the Criminal Code that was applied to the defendants was promulgated after the facts investigated had occurred. They explain that the investigated events occurred in 1995 and the proceeding was conducted under the criminal descriptions of fraud and swindling, enshrined in the Criminal Code of 1910. However, in 1998, the new Paraguayan Criminal Code, Law 1160/97, came into force, repealing the previous Code and introducing breach of trust as a new criminal description, offense for which Mr. Flores, Mr. Orrego and the other prosecuted individuals were eventually convicted. The judges of first instance, appeals and *cassation*, justified the retroactive application of this legislation in that, supposedly, it would be more benign or favorable for the defendants. In the opinion of the petitioners, however, this is not the case, because that favorability assessment was carried out by the judges taking into account the minimum applicable penalty, which was five years for the crime of breach of trust, but they eventually received a larger sentence, established in another subsection of the same article of the new Criminal Code, which provides for an increase in the penalty of up to ten years in “especially serious” cases; whereas under the Criminal Code of 1910 the crime of fraud involved a different way of calculating the sentence in accordance with the monetary value of the damages, up to a maximum of ten years as well. The petitioners also explain that the Supreme Court of Justice presented an additional justification for the retroactive application of the criminal description of breach of trust, consisting in that both the repealed Criminal Code and the new one incorporated an implicit prohibition of causing property damage to others, which materialized into the different explicit criminal descriptions, and that therefore there had not been a significant change between one legislation and the next, despite the differences in the descriptions of the criminal conducts.

(c) The right to criminal proceedings of reasonable duration: the petitioners allege that, in accordance with applicable domestic law, the statute of limitations of the criminal prosecution had elapsed at the time of the conviction. The petitioners explain that the events that led to the criminal proceedings occurred, according to the Supreme Court of Justice's estimate, between September 1995 and November 2010, over more

than fifteen years. According to the rules of the Code of Criminal Procedure, the statute of limitations for the crime of breach of trust is calculated in accordance with the maximum applicable custodial sentence, which would be ten years. Therefore, in the opinion of the petitioners, the statute of limitations had operated more than five years before the conviction was handed down against the alleged victims.

The petitioners invoked the statute of limitations before the Supreme Court of Justice, but this highest court rejected such argument, explaining that the operation of the statute of limitation had been suspended in application of different legal provisions. It specifically resorted to the legal theory of “Dead Time-limits” and concluded that the procedural stagnation of this case, which it attributed to the multiplicity of appeals and obstacles filed by the defense of the accused, constituted an objectively insurmountable circumstance that, in accordance with the criminal procedural law, suspended the operation of the statute of limitations. For the petitioners, this position is incompatible with Paraguayan criminal procedural legislation, since under that system, they argue, the operation of the statute of limitations is suspended only when the criminal prosecution cannot be initiated or continued due to objectively insurmountable circumstances, which they consider was not the case here. One of the circumstances classified as dilatory by the Supreme Court, and disputed by the petitioners, was an offer made by the Supreme Court to the technical defense of the multiple defendants, and not accepted by them, to join under a single deadline the submission of all appeals and motions for annulment. This procedural event was later invoked by the Supreme Court as one of the reasons for considering that the operation of the statute of limitations for the criminal action had been suspended, which the petitioners reject and also consider is incompatible with the conventional judicial guarantee that the defendant be granted adequate time and means for the preparation of his defense.

The petitioners also report that they requested before the Court of Appeals that it declare that the statute of limitations of the criminal action had operated, but said Court rejected the request, stating that the criminal procedural legal provision that establishes the rules for calculating the statute of limitations, invoked by the petitioners, was unconstitutional. The petitioners hold that with this decision the Court of Appeals invested itself with prerogatives which are exclusive to the Constitutional Chamber of the Supreme Court of Justice, and made an incorrect application of Inter-American jurisprudence, insofar as it invoked in its defense a ruling of the Inter-American Court on the inapplicability of statutory limitations to crimes against humanity, a precedent that the petitioners consider blatantly inapplicable.

Additionally, the petitioners explain that the State Attorney General's Office, in its opinion on the appeals for cassation, requested the Supreme Court to declare that the statute of limitations for the criminal action had operated in the case. However, the Supreme Court declared the prosecution's intervention was untimely, insisting on its position about the suspension of the statute of limitations in the case –which the petitioners consider was incompatible with the domestic legal system in matters of statutory limitations in criminal cases.

(d) The right to due process: by virtue of various irregularities that the petitioners describe as follows: (i) they were not notified in a proper or timely manner about the composition of the Criminal Chamber of the Supreme Court of Justice, preventing them from exercising their right to challenge the designation of the judges; (ii) the Supreme Court incurred in an irregular delay in the decision of the case, since the file was there for more than six months without any decision being issued; a situation that, under article 142 of the Code of Criminal Procedure should have given rise to the presumption of favorable resolution to the appellant; (iii) the Supreme Court irregularly decided, within the same special procedure, the partial appeals and the appeals for *cassation* filed against the decisions of the Court of Appeals-First Chamber, despite the fact that the criminal procedural legislation establishes different and specific proceedings to hear each one of these motions, which are different in nature; (iv) the Judge of the Criminal Chamber Luis María Benítez Riera, before his intervention in the proceedings as a member of the Supreme Court, had already intervened in the same case as a member of the Court of Appeals, where he recused himself from the proceedings on August 23, 1999; this constituted grounds for disqualification that, however, the petitioners allegedly could not raise because they had not been informed in a timely manner of the composition of the Criminal Chamber that was to decide the case; and (v) the Constitutional Chamber of the Supreme Court declared in 2003 the unconstitutionality of article 5 of Transition Act No. 1444, according to which the criminal action would be extinguished for any proceedings initiated under the Code of Criminal Procedures of 1890 that had not concluded with a final judgment as of February 28, 2003; the petitioners allege that this decision was applied *erga omnes* and without notifying them

as the affected party, while at the same time, Articles 136 and 137 of the Code of Criminal Procedure, which establish the maximum duration of the criminal proceedings, were declared inapplicable to Mr. Flores and Mr. Orrego.

(e) The right of defense and the right to adversarial proceedings: given that Messrs. Flores and Orrego were prosecuted starting in the year 2000, three years after the criminal proceedings were initiated and after the development and closure of the summary stage of investigation, evidence-gathering and formulation of charges. These facts did not only violate the legal principle by which a procedure may not be returned to a closed stage, but more generally disregarded their right of defense.

(f) The presumption of innocence: insofar as the conviction was allegedly based on facts not duly proven.

(g) The right to equality: on the basis that the bankruptcy and liquidation of NBW was allegedly caused by several financial undertakings, cited in the convicting judgment; in said ruling, six different loans were mentioned, only one of which was that of the *Parque Cementerio Las Acacias* granted to the CUT. Despite this, not all of the persons and entities involved in these six loans were subjected to the criminal prosecution, but only two of them: those related to the *Parque Cementerio Las Acacias* and the Mariano Roque Alonzo Housing Complex.

(h) The right to judicial protection: due to the lack of resolution of the motion for unconstitutionality filed on June 21, 2009 against the second-instance ruling issued by the Court of Appeals. The petitioners explain that the Constitutional Chamber of the Supreme Court of Justice has kept this motion in the stage of assessment for admission.

(i) The freedom of association and the rights of Messrs. Flores and Orrego as union leaders. Mr. Flores notes that he was prosecuted since June 22, 2000, date at which, in his capacity as President of CUT, he was taking part in a general 48-hour strike summoned in the framework of several protests against the policy of privatization of public entities undertaken by the Government. They also allege political persecution against them.

8. In its response, the State requests that the petition be declared inadmissible, because in its opinion the petitioner has resorted to the IACHR as an international appeals body or “fourth instance”. It also presents substantive arguments on the merits to conclude that there were no human rights violations in the case under examination, and to request that the provisions of Article 47 of the Convention be applied, stating that Paraguay “*absolutely denies all the alleged points and affirms that in no case has the State violated any right enshrined in the American Convention*”.

9. The substantive arguments of the State regarding the absence of human rights violations are summarized as follows:

(a) Regarding the alleged violation of personal liberty, the State holds that the precautionary measures ordered against the alleged victims were valid, well-founded, and complied with the legal requirements for their application, within the time limits established therein. In this sense, it holds that:

The precautionary measures issued in criminal proceedings are intended to subject the defendants to the jurisdiction of the national courts and to the results of the trial. For this reason, the Commission cannot fail to consider the fact that Mr. Alan Alberto Flores Cabrera, enjoying transitory freedom during the trial, became a fugitive of the Paraguayan judicial system days after the conviction became final, as can be seen from his application for political asylum filed in the Argentine Republic on June 6, 2011.

(b) Concerning the allegation of violation of the right to equality, the State indicates, first, that the petitioners were tried and sentenced along with twenty other persons, including directors and officials of the NBW, “*thereby diminishing the weak argument used to try to sustain the alleged violation of the right to equality*”.



*before the law [...] based on the criminal case involving an alleged trade-union persecution*". The State emphasizes that by virtue of article 33 of the Criminal Code, each participant in a criminal act is punished according to his or her responsibility and regardless of the criminal responsibility of others, *"and based on this rule they were convicted according to their own degree of participation and guilt in the commission of the crimes of which they were accused and which were proven in court"*. For Paraguay, the correct application of this legal provision in the framework of the criminal trial disproves the alleged discrimination invoked in the petition.

(c) With respect to the alleged violation of the presumption of innocence, the State presents different substantive and evidentiary arguments aimed at showing that the Paraguayan judges considered it proven that Messrs. Flores and Orrego did indeed engage in the illicit conduct for which they were convicted. The State then clarifies the specific role that was played by both Mr. Flores and Mr. Orrego, which the judges considered proven, in the loans requested by them without complying with the legal requirements for such request, or providing suitable collateral for compliance.

(d) Regarding the alleged violation of the principle of freedom from the ex post facto application of criminal law, the State alleges that although the acts were committed under the 1910 Criminal Code, which enshrined the criminal figures of aggravated fraud and swindling, the sentence on the accused was imposed after the subsumption of their conduct under the criminal description of breach of trust provided for in the Criminal Code in force since 1998, *"taking into account the most benign law for those convicted"*. The State argues at length that said application of the principle of favorability was supported by domestic criminal legislation and was compatible with the American Convention; and it emphasizes that had the old Criminal Code been applied to them, a heavier sentence would have been imposed, in accordance with the sentencing rules established therein.

(e) Regarding the aforementioned violation of the reasonable duration of the criminal proceedings, the State affirms that this violation did not occur, and that the proceedings were developed within a term consistent with normal parameters, taking into account the extreme complexity of the case, the number of defendants and the seriousness of the criminal conduct investigated, as well as the numerous appeals filed by each of the defendants, the private prosecution and the Public Prosecutor. The State emphasizes that the casefile consists of 197 volumes of 200 pages each, and that *"the different actions that slowed down the processing of the proceedings were produced at the express request of the accused,"* being resolved by the judicial authorities within reasonable time limits and without unjustified delays. In this regard, Paraguay cites *in extenso* the decision of the Supreme Court of Justice that rejected the request for application of the statute of limitations to the criminal action.

(f) Regarding the alleged lack of notification to the defendants about the composition of the Criminal Chamber that would judge them in the Supreme Court of Justice, the State holds that *"the rules of the Paraguayan Code of Criminal Procedure establish grounds for disqualification, which were not claimed at that time by the petitioners, nor does the petition evince the grounds of grievance of the complainants on this point"*.

(g) As for the obligation to provide a motivation for the ruling, the State holds that the convictions have adequate and reasonable justifications, and it explains why it was indeed demonstrated that there was financial damage to NBW due to the insufficient loan guarantees provided in the funeral niche business transaction.

(h) In relation to the alleged violation of freedom of association and union rights, the State holds that it is an unfounded allegation, referring back to its description of the substantive reasons for which the alleged victims were criminally prosecuted and convicted; and it highlights that the trade union organizations to which the petitioners belong have continued to operate normally, including participating in ILO meetings and activities.

10. Finally, regarding the petitioners' recourse to the Inter-American system as a fourth international instance, the State holds that no guarantee of the alleged victims was violated during the criminal proceedings. It specifies that Messrs. Flores and Orrego were duly heard, with full guarantees, by competent, independent and impartial courts, and that they exercised their right to challenge the decisions of first and

second instance, receiving decisions adopted within reasonable periods of time in accordance with the circumstances of the case. Therefore, it considers that the petitioners have simply expressed their disagreement with the interpretation and application of the law to the facts of the case by the domestic judges, which is not a sufficient reason to admit the petition.

## VI. ANALYSIS OF DUPLICATION OF INTERNATIONAL PROCEDURES

11. Firstly, the Commission must establish whether there has been a duplication of international procedures in the instant case, bearing in mind that the International Labour Organization (ILO) has issued certain opinions about the criminal proceedings in which Messrs. Flores and Orrego were convicted. It is recalled in this regard that Article 46.1.(c) of the American Convention establishes that for a petition to be declared admissible by the IACHR it is required that “the subject of the petition or communication is not pending in another international proceeding for settlement”, and in its article 47(d) that the IACHR will find inadmissible any petition which “is substantially the same as one previously studied by the Commission or by another international organization”.

12. In this case, due to the criminal prosecution of its leaders, the CUT trade union filed a complaint against Paraguay with the ILO, for violation of Conventions 97 and 98. The Committee made a series of recommendations regarding some procedural and substantive irregularities. The ILO Governing Body approved in June 2002, at its 284th Annual Meeting, the Committee's recommendations and thus, in its Resolution No. 328, it recommended that the State take all the necessary measures to free Mr. Alan Flores, Mr. Jeronimo Lopez and Mr. Reinaldo Barreto Medina, and expressed its hope that the judicial authority would speed up the procedures. In November 2002, through Resolution No. 329, the Committee's report was approved, in which it deeply regretted that the recommended measures had not been adopted and urged the State to do so. In November 2003, through Resolution No. 332, the Governing Body indicated that the ILO had found that the judge of first instance had violated the prohibition of giving ex post facto application to subsequent criminal legislation, and that the conviction was handed down on the basis of a criminal description enacted after the events that were being prosecuted, and thus the ILO firmly urged “the Government, therefore, once again, to take immediate action to secure the release of trade union leaders Reinaldo Barreto Medina, Jeronimo Lopez and Alan Flores” .

13. The Commission has held that in order to conclude that there is duplication or international res judicata in a given case, the petition must be under consideration, or have been resolved, by an international body empowered to adopt decisions regarding the specific facts contained in the petition, and to order measures aimed at effectively resolving the dispute in question<sup>5</sup>. In this sense, the Commission has established that the recommendations issued by the ILO Freedom of Association Committee do not have the same nature as the proceedings before the Inter-American Human Rights protection system<sup>6</sup>, insofar as the former system produces recommendations and not “an effective settlement of the violation denounced”; its decisions do not entail any binding legal effect, either pecuniary, restorative, or compensatory<sup>7</sup>.

14. Therefore, the Commission concludes in this case, just as it concluded in Report No. 106/11 on the related case of the other Paraguayan union leaders convicted in the same criminal trial, that there has been no duplication of international procedures.

## VII. ANALYSIS OF EXHAUSTION OF LOCAL REMEDIES AND TIMELINESS OF THE PETITION

15. In the present case, the main criminal proceedings against the petitioners resulted in a conviction judgment that was confirmed at the level of the Court of Appeals and also in *casation* by the

<sup>5</sup> IACHR, Report N° 89/05, Case 12.103, Indamissibility, Cecilia Rosa Nuñez Chipana, Venezuela, par. 37.

<sup>6</sup> I/A Court H.R., Case of Baena Ricardo et al. v. Panama. Preliminary Objections. Judgment of November 18, 1999. Series C No. 61, par. 57.

<sup>7</sup> IACHR, Report No. 14/97, Case 11.381 (Nicaragua), March 12, 1997, par. 47; IACHR Report No. 21/06, Petition 2893-02, Employees of “Fertilizantes de Centroamérica” (FERTICA, Central America Fertilizers), Costa Rica, March 2, 2006, par. 40; IACHR Report No. 23/06, Petition 71-03, Union of Ministry of Education Workers (ATRAMEC), El Salvador, March 2, 2006, par. 27; IACHR Report No. 140/09, Petition 1470-05, Members of the Union of State Workers of Antioquia (SINTRAOFAN, Colombia, December 30, 2009, par. 75.



Supreme Court of Justice through Agreement and Judgment No. 694 of December 29, 2010, which allegedly became final after the resolution of the appeals for clarifications filed on June 1, 2011.

16. The State has not disputed in this case that domestic remedies were filed and exhausted by the petitioner in compliance with the duty established in Article 46.1.a) of the American Convention. The IACHR has repeatedly considered that in the event that this allegation is not presented in due time before the Commission, the State loses the possibility of making use of this means of defense in subsequent stages of the proceedings<sup>8</sup>.

17. In view of these considerations, and of the fact that it is not a matter of controversy between the parties that the main criminal proceedings at the domestic level were exhausted, the Commission concludes that the present petition meets the requirements of exhaustion of domestic remedies and timeliness of the petition established in Articles 46.1.a) and 46.1.b) of the American Convention.

18. On the other hand, although the criminal proceedings against Messrs. Flores and Orrego has already resulted in a conviction judgment, which was confirmed and is final, it is observed that the alleged victims filed a motion for unconstitutionality before the Constitutional Chamber of the Supreme Court of Justice on June 21, 2009 against Agreement and Judgment No. 37 of the Court of Appeal, of which to date there is no information regarding its resolution. Although this fact is secondary to the analysis of the exhaustion of domestic remedies, the Commission may take it into account in the merits stage of this report when analyzing the alleged violation of Article 25 (judicial protection) of the American Convention.

### VIII. ANALYSIS OF COLORABLE CLAIM

19. First, the IACHR takes note of the State's allegation in the sense that the petitioners have resorted to the Inter-American system as an international "fourth instance", expressing their mere dissatisfaction with validly adopted domestic judicial decisions that were unfavorable to them. The Inter-American Commission has adopted a uniform and consistent position, in the sense that it is indeed competent to declare a petition admissible and decide on its merits in cases related to domestic proceedings that may violate the rights protected by the American Convention<sup>9</sup>.

20. Along these lines, the IACHR partially concurs with this argument of the State, but only with regard to the arguments of the petition that are aimed at challenging the evidentiary assessment made by the Paraguayan judges in the conviction judgments of first-instance, second-instance and *cassation*, with regard to the commission of the criminal conduct of breach of trust by Messrs. Flores and Orrego, allegations summarized above, and classified by the petitioners as a violation of their presumption of innocence. Given that these allegations are aimed at having the IACHR act as a reviewer of the analysis and assessment of evidence carried out by domestic judges, they are outside the scope of the competence of this Inter-American body, and consequently they will not be admitted.

21. The situation is different with regard to the other allegations raised by the petitioners, since in them the eventual violation of certain rights protected by the American Convention can be observed *prima facie*, for example: (a) the alleged violation of the right to personal liberty, resulting from the irregular imposition of pretrial detention on the alleged victims and its excessive duration, and in prison conditions allegedly incompatible with their human dignity; (b) the possible violation of the right to a fair trial due to (i) the alleged violation of the reasonable period of time of the trial of the alleged victims; (ii) the improper notification of the identity of the judges who would make up the Criminal Chamber of the Supreme Court in their case, affecting their right to recuse them despite having well-founded reasons to do so, and therefore their

<sup>8</sup> I/A Court H.R., Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, par. 21. Cfr. I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, par. 88; I/A Court H.R., Case of Heliodoro Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, par. 14, and I/A Court H.R., Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, par. 16.

<sup>9</sup> IACHR, Report No. 122/19. Petition 1442-09. Admissibility. Luis Fernando Hernández Carvajal et al. Colombia. July 14, 2019; Report No. 116/19. Petition 1780-10. Admissibility. Carlos Fernando Ballivián Jiménez. Argentina. July 3, 2019, par. 16; Report No. 111/19. Petition 335-08. Admissibility. Marcelo Gerardo Pereyra. Argentina. June 7, 2019, par. 13.

right to an impartial and independent judge; (iii) the fact that they were subjected to criminal prosecution three years after the initiation of the proceedings, and when the investigative stage was already closed, for which reason, despite the case being formally reversed, they allegedly were not able to materially participate in the collection of evidence nor contradict the evidence obtained; (iv) the alleged change in the in the criminal description of the conduct applied by the judges, at an advanced stage of the proceedings; (v) the violation of the guarantee of adequate motivation for the conviction judgments, since no examination of the specific individual responsibility of each one of the accused and convicted persons was carried out, but rather, as described by the petition, a collective analysis was undertaken for all the trade unionists being prosecuted; (c) the possible violation of the principle of freedom from ex post facto criminal law, due to the retroactive application of the criminal legislation to their case under an argument of alleged favorability or beneficial character of the subsequent legislation, which the petitioners expressly question; (d) the possible violation of trade union rights, insofar as grounds have been provided to plausibly characterize the criminal prosecution of these two trade union leaders as part of a persecutory position undertaken by reason of their activities in the trade unions; and (e) the right to judicial protection, given the alleged lack of resolution of the unconstitutionality motion filed against the second-instance conviction judgment.

22. The Commission recalls in this regard that the evaluation criteria during the admissibility phase differ from those used to rule on the merits of a petition. In this first phase, the Commission must carry out a *prima facie* evaluation to determine whether the petition establishes the grounds for a violation, possible or potential, of a right guaranteed by the Convention, but not to establish the existence of a violation of rights as such. This determination about the characterization of violations of the American Convention constitutes a primary analysis, which does not imply prejudging the merits of the matter<sup>10</sup>.

23. Thus, the Commission considers that the allegations of the petitioner are not manifestly groundless and could constitute *prima facie* violations of Articles 5 (humane treatment), 8 (fair trial), 9 (freedom from ex post facto laws), 16 (freedom of association), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention, in relation to Article 1.1 (obligation to respect rights) thereof, and of Article 8.1.a) (trade union rights) of the Protocol of San Salvador, to the detriment of Alan Alberto Flores Cabrera and Teodoro Ronal Orrego Verdun, in the terms of the present report. With regard to Article 24 (equal protection) of the American Convention, the Commission considers that the petitioners have not provided sufficient grounds to justify a possible characterization of its violation<sup>11</sup>.

## IX. DECISION

1. To find the instant petition admissible in relation to Articles 5, 8, 9, 16, 25 and 26 of the American Convention, in connection to its Article 1.1; and article 81.a) of the Protocol of San Salvador;

2. To find the instant petition inadmissible in relation to Article 24 of the American Convention; and,

3. 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 26<sup>th</sup> day of the month of October, 2021. (Signed): Antonia Urrejola, President; Julissa Mantilla Falcón, First Vice-President; Flavia Piovesan, Second Vice-President; Margarette May Macaulay; Esmeralda E. Arosemena Bernal de Troitiño; and Edgar Stuardo Ralón Orellana, Members of the Commission.

<sup>10</sup> IACHR, Report No. 69/08, Petition 681-00. Admissibility. Guillermo Patricio Lynn. Argentina. October 16, 2008, par. 48.

<sup>11</sup> The Commission arrived at the same conclusion in: IACHR, Report No. 106/11, Petition 1082-03. Admissibility. Reinaldo Barreto Medina and Florencio Florentín Mosquera, Paraguay, July 22, par. 56.