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REPORT No. 409/20
PETITION 1550-11
INADMISSIBILITY REPORT

RAFAEL ÁNGEL CALDERÓN FOURNIER
COSTA RICA

Approved electronically by the Commission on November 24, 2020.

Cite as: IACHR, Report No. 390/20. Petition 1550-11. Inadmissibility. Rafael Ángel Calderón Fournier. Costa Rica. November 24, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Hugo Santamaria Lamicq
Alleged victim:	Rafael Ángel Calderón Fournier
Respondent State:	Costa Rica
Rights invoked:	Articles 4 (life), 5 (personal integrity), 8 (fair trial), 9 (principle of legality and retroactivity), 11 (protection of honor and dignity), 13 (freedom of expression) and 25 (judicial protection) of the American Convention on Human Rights ¹ , in relation to its Articles 1.1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic law)

II. PROCESSING BEFORE THE IACHR²

Filing of the petition:	June 6, 2011
Additional information received at the stage of initial review:	November 4, 2011, March 13, 2012, November 13, 2012, December 11, 2014, September 16, 2016, September 28, 2016 and October 10, 2017
Notification of the petition to the State:	August 6, 2018
State's first response:	November 6, 2018
Additional observations of the petitioning party:	September 20, 2019
Additional observations of the State:	August 25, 2010

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 the instrument of ratification made on April 8, 1970)

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:	None
Exhaustion of internal remedies or origin of an exception:	No, in the terms of section VI
Presentation within the deadline:	No, in the terms of section VI

V. FACTS ALLEGED

1. The petitioner claims the State violated the rights of Mr. Rafael Calderón Fournier by criminally convicting him of the crime of embezzlement, through a process that did not follow proper judicial guarantees; and for not treating petitioner in a way that respected his personal integrity and health.

¹ Hereinafter "the American Convention" or "the Convention".

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

2. The petitioner indicates that the alleged victim was President of the Republic of Costa Rica from 1990 to 1994; and that in 2001, when he no longer held that position, he provided political and legal advice to the "Fischel Corporation" for the implementation of a project that consisted of the delivery of 32 million dollars by Finland to the government of Costa Rica for the acquisition of medical equipment. The petitioner indicates that, as a result of this transaction, in 2005 a prosecutor began a political persecution against the alleged victim and his family, and charged him with various crimes of corruption. It maintains that such action was intended to prevent Mr. Calderón Fournier from running again for the office of President of the Republic.

3. On October 13, 2004, the Office of the Prosecutor for Economic Crimes of the First Judicial Circuit summoned Mr. Calderón Fournier to render an investigatory statement. The petitioner argues that said notification did not specify under what crime the alleged victim was being investigated, nor did it detail the existing evidence, limiting itself to stating that he should appear as a defendant in criminal case number 04-005356-042-PE. Petitioner alludes that on October 21, 2004, Mr. Calderón Fournier went to the premises of the aforementioned prosecutor's office, where, after giving his statements, he was arrested and taken to the cells of the San José Judicial Investigation Agency. Petitioner states that the alleged victim suffered blows during his transfer due to the speed and lack of security measures of the vehicle that was transporting him.

4. The petitioner maintains that on October 22, 2004, the Judge of Guarantees ordered the preventive detention of Mr. Calderón Fournier for nine months. This decision was made due to Mr. Calderón Fournier being considered a flight risk, since the alleged victim had financial resources and the facility to travel to Nicaragua, where he was born. On October 27, 2004, the defense of Mr. Calderón Fournier appealed the aforementioned resolution and on November 8, 2004, the trial Court reduced the preventive detention to two months. The petitioner alleges that, after said term expired, the Public Ministry requested that such measure be extended for another seven months, so that on December 21, 2004 the Judge of Guarantees accepted such request and maintained the preventive detention. Petitioner details that on December 22, 2004, the defense of the alleged victim filed an appeal against said resolution, and on December 30, 2004, the Superior Judge of Guarantees reduced the preventive detention to three months. It specifies that Mr. Calderón Fournier filed a habeas corpus action against such decision but on February 2, 2005, such appeal was rejected.

5. On March 17, 2005, the Criminal Court ordered both parties to the proceeding to present arguments regarding the expiration of the preventive detention period, and on March 18, 2005, the Court decided to extend this precautionary measure for three more months. The petitioner argues that the judge who adopted such resolution was an interim judge and that he only held that position from March 9, 2005 to March 18 of the same year. Petitioner argues that on March 21, 2005, the defense of the alleged victim filed an appeal against such decision and that on March 23, 2005, the Superior Criminal Court modified the preventive detention for a measure of house arrest and a bond of 200 million Colones (329,000.00 US dollars, approximately).

6. On April 20, 2005, the defense of Mr. Calderón Fournier filed a protest action for insufficient service of process, in which they alleged that the summons was not issued properly, since they were not informed of the facts or crimes for which he was called to testify. However, on June 20, 2005, the judicial authority dismissed the action and declared it unappealable. After that, the alleged victim filed a habeas corpus action, but on July 12, 2005, this appeal was rejected. Additionally, it indicates that on June 21, 2001, the Criminal Court extended the precautionary measure of house arrest for three months. On June 24, 2005, the defense of the alleged victim appealed such resolution, but on July 12, 2005, the Second Circuit Criminal Court rejected the claim.

7. On March 16, 2007, the Prosecutor's Office filed charges and commenced a trial. On October 5, 2009, the Criminal Court of the Treasury of the Second Judicial Circuit of San José sentenced Mr. Calderón Fournier for two charges of embezzlement as a continuing crime to five years in prison and the confiscation of \$520,000.00. It specifies that the defense of the alleged victim presented an appeal and a cassation appeal against said judgment. However, on March 24, 2010, the Third Chamber of the Supreme Court of Justice granted a hearing to hear only the appeal for cassation. It alleges that such decision was challenged through various judicial remedies, but all were rejected. Finally, it maintains that on May 11, 2011, the Third Chamber of the

Supreme Court of Justice limited Mr. Calderón Fournier's sentence to a single crime of embezzlement, reduced the sentence to three years in prison, and granted him the benefit of conditional reduction of his sentence.

8. The petitioner argues that the criminal proceeding violated the rights of the alleged victim, based on the following allegations: i) his defense did not have access to the complete file; ii) the notification of the process did not inform him of the criminal type for which he was being investigated; iii) an interim judge, without guarantees of stability and who at the same time held the position of prosecutor, decided to extend the preventive detention against him; v) was convicted of atypical conduct; vi) the guarantee of *non bis in idem* was affected; vii) did not have access to a remedy that meets the standard of Article 8.2.h of the American Convention; and viii) its reputation was undermined as a result of the information disclosed to the press.

9. Finally, the petitioner argues that the authorities placed the personal integrity and health of the alleged victim at risk. It reports that in September 2005 the alleged victim requested authorization to carry out an outpatient operation for basal cell carcinoma in a hospital. It alleges that, although the court authorized such an operation, it ordered that the alleged victim be transferred by the authorities' vehicle and that the judicial police officers be present in the operating room. It alleges that the alleged victim's personal doctor rejected such conditions for health reasons, causing the operation to be carried out, in a risky manner, at the alleged victim's home. It also emphasizes that the alleged victim suffered serious blows during his transfer to the cells of the San José Judicial Investigation Agency due to the speed of the vehicle.

10. The State, for its part, maintains that there is a lack of exhaustion of domestic remedies regarding various allegations. It argues that the alleged victim did not file: i) an appeal for review (Article 408.g of the Criminal Procedure Code) or a special review procedure (Law No. 8837) against the sentence that confirmed his criminal conviction; ii) a complaint for malfeasance, recusal or complaint before the Judicial Inspection for the alleged lack of impartiality or independence of the prosecutors and / or judges who analyzed his case; iii) a complaint before the judicial inspection or an appeal for protection for the alleged damage to his personal integrity as a result of his transfer to the San José Judicial Investigation Agency; iv) an appeal for *amparo* for the alleged violation of his right to health while he was detained and for the limitations established for his outpatient operation; and neither v) a complaint for the alleged affectations to his right to honor and privacy.

11. Additionally, it argues that the allegations referring to the inadequate notification of the charges, the imposition of preventive detention, and the alleged damage to personal integrity were submitted late. It explains that the alleged victim questioned the first two matters through habeas corpus proceedings that were resolved in 2005. Given that the petition was filed on June 6, 2011, it considers that there is a six-year delay in submitting such allegations. On the other hand, it maintains that the alleged damages generated by his transfer and detention conditions occurred in 2004, so that this point of the petition does not meet the requirement established in Article 46.1.b) of the American Convention.

12. Finally, the State alleges that the facts denounced do not characterize violations of human rights. It maintains that the Office of the Prosecutor informed Mr. Calderón Fournier in a timely manner of the facts for which he was being investigated and that his private defense had unrestricted access to the file from the beginning of the investigations. Along these lines, it emphasizes that the failure to determine the illegal conduct (the criminal charge) at the time of the arrest does not constitute a violation of the right to defense. On the other hand, it indicates that the appointments and substitutions of the judicial authorities that analyzed the case were carried out in accordance with the guidelines legally established for such cases, without there being a misuse of power or unequal treatment. Along these lines, it highlights that no judge acted at the same time as a prosecutor in the process.

13. Additionally, it maintains that both the precautionary measures and the sanction imposed on the alleged victim were adequately motivated based on the criminal legislation applicable at that time, without any violation of the *non bis in idem* principle or the principle of legality; and that such decisions were issued after a process that guaranteed the rights of the alleged victim to evidence and defense, without undue restrictions on such rights.

14. Finally, it argues that Mr. Calderón Fournier had access to a remedy in accordance with Article 8.2.h of the American Convention. That despite its nomenclature, the appeal allows a comprehensive review of the ruling, and that the Inter-American Court of Human Rights, in the judgment of the case *Amrhein et al. V. Costa Rica* confirmed that the recursive system of Costa Rica had been adequate to the standards of the inter-American system. For these reasons, it requests that the petition be declared inadmissible based on Article 47 (b) of the American Convention, since it considers that the petitioner's claim is that the Commission act as a court of appeal, in contradiction to its complementary nature.

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

15. The petitioner maintains that domestic remedies were exhausted with the cassation ruling of the Third Chamber of the Supreme Court of Justice on May 11, 2011. For its part, the State replies that there is a lack of exhaustion of remedies and that the allegations referring to the inadequate notification of the charges, the imposition of preventive detention and the alleged damage to personal integrity were submitted untimely.

16. In this regard, the Commission reiterates that the requirement of exhaustion of domestic remedies does not imply that the alleged victims have the obligation to exhaust all possible remedies at their disposal. In this regard, the IACHR has maintained that "if the alleged victim raised the issue through any of the valid and appropriate alternatives according to the domestic legal system and the State had the opportunity to remedy the issue in its jurisdiction, the purpose of the international standard it is fulfilled"³. Based on this, the Commission considers that, in the present case, the alleged victim used the ordinary and adequate means to question both the criminal process and the preventive detention and house arrest measures against him, for which reason the petition complies with the requirement established in Article 46.1.a of the Convention. Likewise, it deems reasonable to understand that the cassation ruling of May 11, 2011, as it represents the completion of the main process, proves that the petition was filed within a period of six months in compliance with the requirement established in article 46.1.b of Convention.

17. On the other hand, regarding the alleged damage to the integrity and health of the alleged victim, the petitioning party has not provided information on any action filed to claim for such alleged damage, nor has it denounced the lack of effective remedies for this purpose or that he had been prevented or deterred from exhausting them. For these reasons, the Commission considers that this aspect of the petition is inadmissible because it does not comply with the requirements of Article 46.1.a of the American Convention. The petitioning party has also not provided information on any recourse filed to claim for possible violations of the guarantee of the independent and impartial judge, either through a recusal or other judicial means. Consequently, the Commission considers that in this regard the petition is also not admissible because it does not meet the requirements of Article 46.1.a of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

18. The petitioning party denounces that the alleged victim was sentenced after a criminal proceeding that did not have the due judicial guarantees. The State, for its part, disputes this assertion and argues that the sentence was adequately motivated and that it was the product of a criminal proceeding that respected the rights of the alleged victim.

19. Taking these considerations into account, and based on a detailed analysis of the information provided by the parties, the IACHR observes, first of all, that the alleged victim learned in a timely manner about the facts for which it was being investigated and by the which a preventive prison measure was imposed on him. Likewise, that the authorities based such precautionary measure on the valid cause of flight risk, and that they only maintained it for a period of approximately five months. Therefore, the Commission does not observe *prima facie* elements that constitute violations of the Convention in this regard.

³ IACHR, Report No. 70/04, Petition 667/01, Admissibility, Jesús Manuel Naranjo Cárdenas et al., Retirees from the Venezuelan aviation company VIASA. Venezuela, October 15, 2004, para. 52.

20. On the other hand, the IACHR does not find evidence that the alleged victim had suffered the violation of his right to judicial guarantees. Mr. Calderón Fournier did not face more than one criminal proceeding for the same facts and grounds, he had the possibility of defending himself in all judicial instances, and was finally convicted by means of two decisions that had adequate motivation. Finally, based on the provisions of the Inter-American Court in the case *Amrhein et al. V. Costa Rica*, the IACHR considers that in the instant case the alleged victim had access to a cassation appeal that, despite its nomenclature, allowed for the comprehensive review of his first instance conviction⁴.

21. For the reasons stated, the Commission concludes that the petition is inadmissible based on Article 47 (b) of the American Convention, since the facts presented do not reveal, not even a prima facie case, possible violations of said instrument.

VIII. DECISION

1. Declare this petition inadmissible;
2. Notify the parties of this decision; and 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 24th day of the month of November, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.

⁴ I / A Court HR. *Case of Amrhein et al. V. Costa Rica*. Judgment of April 25, 2018. Preliminary objections, Merits, Reparations and Costs, paras. 264 and 265.