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Title/Style of Cause: Gabriel Oscar Jenkins v. Argentina
Doc. Type: Decision
Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Evelio Fernandez Arevalos, Paulo Sergio Pinheiro, Freddy Gutierrez, Florentin Melendez.
Dated: 13 October 2004
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I. SUMMARY

1. On September 9, 1997, the Inter-American Commission on Human Rights (hereafter the "Inter-American Commission," "the Commission" or "the IACHR") received a complaint submitted by Mr. Gabriel Oscar Jenkins (hereafter "the petitioner," "the plaintiff" or "the victim"), against the Republic of Argentina (hereafter "the State," "the Government" or "Argentina"). The petition relates to the petitioner's arrest and confinement in preventive detention for more than three years, and the repeated refusal of the judicial authorities of Argentina to grant him the benefit of conditional release, because of the type of crime of which he was accused. The complaint also refers to the alleged denial of judicial protection and guarantees due to the lack of due diligence in the process of investigating and punishing the prosecution officials who allegedly submitted fabricated evidence during the victim's trial.

2. The petitioner maintains that the State is responsible for violating his right to personal liberty, to a fair trial, and to judicial protection, in relation to the general obligations to respect and ensure the exercise of those rights and to adapt internal legislation, contained in Articles 7, 8, 24, 25, 1(1) and 2, respectively, of the American Convention on Human Rights (hereafter "the Convention" or "the American Convention").

3. The State asked to the Commission to declare the petition inadmissible for failure to exhaust available remedies within the domestic jurisdiction, and also on the grounds that the facts described in the complaint, in the State's view, do not characterize violations of rights protected by the Convention.

4. The Commission concludes in this report, without prejudice to the merits of the case, that the petition is admissible, pursuant to Articles 46 and 47 of the Convention, and it will therefore continue its analysis with respect to the alleged violations of Articles 7, 8, 24, 25, 1(1), and 2 of that instrument.

II. PROCEEDINGS BEFORE THE COMMISSION

5. In notes dated December 8, 1997, April 20, 1998, and September 29, 1998, the petitioner provided the Commission with additional information on his situation in Argentina.

6. The Commission advised the petitioner that it was initiating proceedings and it sent the relevant portions of the complaint to the State, on October 7, 1998, giving the Government 90 days to provide any information it deemed relevant to the facts alleged in the complaint, and on the exhaustion of domestic remedies. On January 6, 1999, the State requested an initial extension of the time limit for presenting the corresponding information, and the Commission, in a note of January 8, 1999, granted the State an additional term of 60 days, and informed the petitioner of this decision in a letter of January 28, 1998. Subsequently, in a communication dated March 10, 1999, the State requested a further time extension for providing the requested information, and it was granted an additional 30 days in a note of March 15, 1999, which was also notified to the petitioner.

7. The Government submitted its response to the complaint in a communication dated April 15, 1999, the relevant portions of which were transmitted to the petitioner on April 22, 1999, giving him 60 days to submit his observations on the State's response.

8. The petitioner submitted his observations to the State's response on July 9, 1999, and these were transmitted to the Government in a communication dated July 13, 1999, giving it 60 days to submit additional information or to offer observations on the petitioner's submission.

9. The State presented its comments on the petitioner's observations on September 16, 1999. The contents of that second submission from the State were reported to the petitioner on September 27, 1999, giving him a period of 60 days to offer observations.

10. On December 7, 1999, the petitioner sent his observations to the new report from the Government, and the contents were communicated to the State on December 20, 1999, giving it a period of 60 days to respond.

11. In a note dated April 19, 2000, the petitioner provided the Commission with updated information on the consequences of the alleged violations, and the pertinent portions were transmitted to the Government on May 30, 2000, asking it to submit any observations within 30 days.

12. The State sent its third set of observations to the Commission on July 3, 2000, and these were transmitted to the alleged victim on July 19, 2000, giving him a period of 60 days to make any observations.

13. The petitioner responded to the State's presentation in a note dated October 5, 2000. The relevant portions of that note were transmitted to the Government on October 10, 2000, giving it 60 days to present any observations.

14. Argentina provided an additional response to the petitioner's submission on January 2, 2001. The contents were made known to the petitioner on January 3, 2001.

III. POSITION OF THE PARTIES A. Position of the petitioner

15. The petitioner maintains that the State is responsible for his arbitrary detention and confinement in preventive detention for an excessive period of time. He contends that Argentina has failed in its duty to investigate and punish the prosecution's introduction of fabricated evidence during his trial for the purpose of ensuring that he would be deprived of his liberty while subject to prosecution. He further complains that the State has prevented adequate reparation for all these violations, with the consequent denial of justice.

16. The petitioner reports that he was arrested on June 8, 1994, in the city of Mar del Plata, and was held in Unit 2 of the Federal Penitentiary Service in Devoto until November 13, 1997, on the basis of a warrant issued by the Ninth Federal Criminal and Correctional Court, under criminal case no. 73, entitled "Padilla Echeverry, José Gilbarido and others for violation of Law No. 23.737" that was being processed before the Sixth Oral Tribunal of the Federal Criminal Court of Buenos Aires.

17. According to the complaint, the trial and subsequent imprisonment of Mr. Jenkins resulted from introduction by the prosecution at the investigation stage of the criminal proceedings of a falsified transcript of a telephone conversation between the petitioner and another of the accused that allegedly took place on April 2, 1994.

18. The petitioner affirms that the conversation was recorded without his knowledge, and that the conversation with the other defendant referred to the purchase of a recreational boat, for which the petitioner was acting as an intermediary.

19. The Sixth Oral Tribunal of the Federal Criminal Court of Buenos Aires, after reviewing the evidence submitted by the Public Prosecutor,[FN1] ruled that the contents of the recorded conversation contained on cassette 40 and the transcription thereof at page 1099 of the judicial file did not coincide. According to the petitioner's defense, in order to induce the court to convict him for participation in a drug trafficking operation with Spain, the transcription of the recorded conversation had been doctored to include a reference by Jenkins and his codefendant Martinez to a trip to Panama to complete a drug deal, when in reality the participants in that conversation had spoken of a trip abroad to complete the sale of a recreational boat. That evidence had led to the order of preventive detention and the filing of criminal charges against Mr. Jenkins.

[FN1] It must be mentioned that this review and the subsequent referral of the case for investigation of the possible crime of falsification were undertaken at the request of Dr. Marcelo Buigo, the petitioner's defense attorney. That request was submitted at the beginning of the trial

in September of 1997. On this point, see pages 160 and 317 of the judgment issued by the Sixth Oral Tribunal of the Federal Criminal Court of Buenos Aires under the case "Padilla Echeverry, José Gilbarido and others s/inf Law No. 23.737," submitted by the petitioner as an annex to his communication of April 20, 1998.

20. Once this irregularity was detected, the Sixth Oral Tribunal of the Federal Criminal Court of Buenos Aires ordered the petitioner's immediate release, which took place on November 13, 1997. The petitioner stresses that he had spent three years and five months in prison on the basis of this one piece of evidence against him, which was clearly false.

21. In its judgment of December 23, 1997, the court accepted the request of the trial prosecutor and of the petitioner's defense, and, because the evidence against Jenkins had been affected by falsification (*falsedad ideologica*), it acquitted the petitioner and ordered the Prosecutor General, the National Federal Criminal and Correctional Chamber, and a Federal Criminal Court to initiate investigations into the possible commission of a public offense, consisting of the submission of falsified evidence in a criminal trial.[FN2]

[FN2] See pages 159, 406 and 418 of the judgment issued by the Oral Tribunal, *supra*.

22. Both the criminal and the administrative proceedings initiated by the Tribunal that acquitted the plaintiffs were dismissed, in April of 1998 and in September of 1999, respectively, on the grounds that the conduct of the prosecutors in the case of "Padilla Echeverry, José Gilbarido and others for violation of Law No. 23.737" did not constitute a violation of the law. In the opinion of the petitioner, those rulings reflected the superficial nature of the investigation conducted by the prosecutor's office into the criminal complaint, and the unwillingness of the investigating magistrate and of the public prosecutor to impose sanctions of any kind on the officials who introduced false evidence into the principal trial.

23. According to the petitioner, on June 9, 1996 he attempted to obtain conditional release under Article 1 of Law 24.390, which requires that preventive detention may not exceed 2 years without the issuance of a judgment. In effect, his defense submitted the appeal for release to the Sixth Oral Tribunal, which had jurisdiction, but the appeal was denied pursuant to Article 10 (11 according to the current numbering) of Law 24.390, which denies the benefit of conditional release to persons accused under Law 23.737 (possession of or trafficking in narcotics).

24. The petitioner challenged the decision of the Oral Tribunal before the National Court of Criminal Cassation, the first Chamber of which ratified the decision issued on February 24, 1997. The petition states that the plaintiff then decided to appeal to the Supreme Court of Justice, which rejected his submission on September 25, 1997.

25. The petitioner has indicated before the IACHR that, at the end of 1999, he filed an administrative complaint in order to obtain payment of compensation for the time that he had

been illegally deprived of his liberty. According to the information before the Commission, that complaint is still pending a decision at first instance.

26. In short, the complaint maintains that the State unnecessarily and excessively prolonged the preventive detention of Mr. Jenkins; denied him the benefit of conditional release established by Article 1 of Law 24.390 on the basis of a clearly discriminatory rule; and denied him justice because the authorities failed to carry out a complete and effective investigation into the irregularities that had led to his detention and trial, and failed to punish those responsible.

B. Position of the State

27. For its part, the State considers that it has complied with its obligations by having acquitted the victim once the falsity of the evidence submitted against him was demonstrated, and by having investigated the facts with the purpose of determining who was responsible for that falsification.

28. In its initial response of March 15, 1999, the State reported that the administrative and criminal proceedings for establishing responsibility for the production and use of falsified evidence under criminal case 73 of the Sixth Oral Tribunal of the Federal Criminal Court, "Padilla Echeverry, José Gilbardo and others for violation of Law No. 23.737," had not been concluded. Consequently, it considered that remedies within the domestic jurisdiction had not been exhausted.

29. In its submission of September 16, 1999, the State admitted that the administrative and criminal proceedings against the prosecutors Eamon Mullen and José Barbaccia before the Sixth Oral Tribunal of the Criminal Court of Buenos Aires had been dropped on the grounds that their conduct was not irregular, and that in fact there was other evidence against the petitioner that could have linked him with the crime of drug trafficking. The State again insisted that Mr. Jenkins had been acquitted in the "Padilla Echeverry, José Gilbardo and others for violation of Law No. 23.737" case, and was in fact released before the judgment was issued, which meant that his allegations with respect to Article 7 were groundless.

30. The State also declared in the second submission that it has at all times respected the petitioner's right to a fair trial and due process, and that it allowed him to intervene throughout the proceedings against him, and to pursue the appeals available within domestic jurisdiction, and that in its opinion there has been no violation of Articles 8 and 25 of the Convention.

31. The Government maintains that the petitioner should initiate civil proceedings to establish whether he was due some form of compensation, and that in any case the alleged violation of Article 10 of the Convention could not have occurred. Given that the petitioner was never convicted, there was no judicial error in the case of "Padilla Echeverry, José Gilbardo and others for violation of Law No. 23.737."

32. In its second to last submission, dated July 3, 2000, the State reported to the Commission that, on April 26, 2000, it had been notified of the action brought by the petitioner before the 10th National Court of Federal Administrative Disputes of Buenos Aires, claiming payment of

damages, which in the Government's view demonstrated that the remedies available within domestic jurisdiction had not been exhausted.

33. Finally, the State declared that the facts alleged in the petition do not characterize violations of Articles 3, 5, 9, 11, 13, 16, 17, 19 and 22 of the American Convention, as claimed by the petitioner.

IV. ANALYSIS OF ADMISSIBILITY

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

34. Under Article 44 of the American Convention, the petitioner is, in principle, entitled to lodge complaints with the IACHR. The petition names as the alleged victim an individual in respect of whom Argentina undertook to respect and guarantee the rights recognized in the American Convention. With regard to the State, the Commission notes that Argentina has been a State party to the American Convention since September 5, 1984, the date on which it deposited the corresponding instrument of ratification. The Commission is therefore competent *ratione personae* to consider the petition.

35. The Commission is competent *ratione loci* to consider the petition, insofar as it concerns rights protected by the American Convention that are alleged to have been violated within the territory of a State party to the Convention. The IACHR is competent *ratione temporis* insofar as the obligation to respect and guarantee the rights protected in the American Convention was already in force for the State on the date on which the acts referred to in the petition are alleged to have occurred. Lastly, the Commission is competent *ratione materiae*, because the petition complains of violations of human rights that are protected by the American Convention

B. Admissibility requirements

1. Exhaustion of domestic remedies

36. Article 46(1) of the American Convention provides as a requirement for admissibility "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." [FN3] Both the Inter-American Court of Human Rights (hereafter "the Court" or "the Inter-American Court") and the Commission have held on repeated opportunities that "under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means." [FN4] Nevertheless, the Convention stipulates that this provision does not apply when domestic remedies are not available in fact or in law. More specifically, Article 46(2) establishes exceptions to the general principle of the exhaustion of domestic remedies, when the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; if the party alleging violation of his rights has been denied access to the remedies under domestic law

or has been prevented from exhausting them; or if there has been unwarranted delay in rendering a final judgment.

[FN3] See I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990, Series A N° 11, para. 17.

[FN4] See I/A Court H.R., Decision in the Matter of Viviana Gallardo and Others, of November 13, 1981, Series A, N° G 101/81, para. 26.

37. In the first place, in the case at hand the petitioner maintains that on September 25, 1997, he exhausted the remedies available within domestic jurisdiction, without success, when he sought the benefit of conditional release pursuant to Article 1 of law 24.390, and a declaration of the unconstitutionality of Article 10 (11 according to the current numbering) of that law, which denied this benefit to persons accused of drug trafficking.

38. Although the State maintained initially that the court rulings on the release question did not constitute grounds for maintaining that domestic remedies have been exhausted, the Commission wishes to point out that, in accordance with its previous jurisprudence, "in the context of pre-trial detention, the presentation of the request for conditional release followed by the denial thereof suffices to substantiate the exhaustion of remedies." [FN5]

[FN5] IACHR, Report No. 12/96, Case 11.245, Jorge A. Giménez, Argentina, March 1, 1996, para. 57.

39. The documentation supplied by the parties shows that on September 25, 1997, the Supreme Court of Justice, acting under Article 280 of the Code of Civil and Commercial Procedure, dismissed the constitutional challenge and the application for conditional release brought by the defense in case 1090, "Jenkins, Gabriel Oscar, motion of unconstitutionality." Consequently the Commission considers that domestic remedies as they apply to this aspect of the petition have been exhausted.

40. Secondly, in its initial presentation the State argued that, with respect to the alleged crimes of falsification on the part of prosecution officials Eamon Mullen and José Barbaccia, the remedies available within domestic jurisdiction had not been exhausted. Subsequently, Argentina admitted that administrative and criminal proceedings against those officials had been dropped.

41. The petitioner maintains that the lack of due diligence in the criminal and administrative investigations against prosecutors who introduced false evidence in the case, together with the fact that federal legislation on criminal procedure did not allow him any remedy against the decision to dismiss the complaint in case 19.756, meant that he was denied effective access to domestic remedies, despite his attempts to have those proceedings continue and thereby give the

State the opportunity to complete its investigation and punish those responsible, something that has not occurred to date.

42. The Commission has confirmed that on April 20, 1998, the Second National Federal Criminal and Correctional Court, in case 19.756, "Oral Tribunal of the Federal Criminal Court, public offense," dismissed the complaint brought by the Sixth Oral Tribunal of the Federal Criminal Court of Buenos Aires, relating to the use of false evidence in case 73 on the record of that Court, "Padilla Echeverry, José Gilbardo and others for violation of Law No. 23.737," without going into any examination of the possible liability of the prosecutors Eamon Mullen and José Barbaccia.

43. The IACHR has also verified that, by administrative resolution MP108/99 of September 6, 1999, the National Prosecutor's Office ordered the definitive suspension of administrative proceeding no. 835/98 against the prosecutors Eamon Mullen and José Barbaccia at the instance of the Sixth Oral Tribunal of the Federal Criminal Court of Buenos Aires, relating to the use of false evidence in case 73 on the record of that Court, "Padilla Echeverry, José Gilbardo and others for violation of Law No. 23.737." This was done on the grounds that, because the criminal charges against the prosecution officials named above had been dismissed, there were no grounds for seeking administrative punishment.

44. In the Commission's opinion, the judicial and administrative decisions referred to in the preceding paragraphs, that brought to a close the remedies available within domestic jurisdiction as they related to the alleged responsibility of prosecution officials for the production and use of false evidence, satisfy the requirements of Article 46(1)(a) of the American Convention.

45. Third, the State argued in its second submission that the petitioner should still exhaust domestic remedies in seeking compensation for any damages. The petitioner, for his part, indicated to the Commission that, at the end of 1999, he brought action for damages against the State and against Dr. José Galeano (the judge who ordered his arrest in 1994), under case 46523/99, "Jenkins, Gabriel Oscar versus the National State, for damages," and that this was being processed by the 10th National Court of Federal Administrative Disputes of Buenos Aires.

46. According to the documentation provided by the petitioner with his communication of October 5, 2000, the motion for damages was partially rejected by the court of first instance on June 8, 2000, accepting the objection of lack of standing filed by the investigating judge who ordered Mr. Jenkins' preventive detention in 1994, on the grounds that no application to withdraw his immunity had been filed pursuant to Articles 115 and 53 of the National Constitution. In that ruling, the judge decided to continue hearing the complaint with respect to the National State, represented in the case by the Ministry of Justice.

47. In light of the information contained in a communication presented to the Executive Secretary of the IACHR by the Mission of the Argentine Republic to the Organization of American States, of February 14, 2003, the Commission understands that the administrative proceedings for damages, which have been underway for more than four years, have still not reached a conclusion at first instance. Under the circumstances, the unjustified delay in the

administration of justice provides grounds for invoking the exception of Article 46(2)(c) of the Convention.

48. On the basis of the foregoing, the Commission concludes that in this case the petitioner has exhausted the remedies available to him within domestic jurisdiction, and that with respect to his claim for damages, the exception of Article 46(2)(c) of the American Convention applies. The Commission wishes to point out, as it has done in previous cases, that invoking the exceptions of Article 46 of the Convention to determine the admissibility of the petition does not imply prejudging the merits of the complaint. The criterion that the Commission follows in analyzing the petition at the admissibility stage is of a preliminary nature. Consequently, while the Commission concludes that the circumstances of the case support its admissibility, the causes and consequences that impeded the exhaustion of domestic remedies will be analyzed, as relevant, during consideration of the merits of the case, in order to determine whether they constitute violations of the American Convention.

2. Timeliness of presentation

49. Article 46(1)(b) of the Convention stipulates that, to be found admissible, the petition must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment at the domestic level. However, according to Article 46(2) of the Convention and Article 32(2) of the Commission's Rules of Procedure, "the rule does not apply when it has been impossible to exhaust internal remedies due to a lack of due process, denial of access to remedies, or unwarranted delay in issuing a final decision [...]. Nor does this rule apply where the allegations concern a continuing situation--where the rights of the victim are allegedly affected on an ongoing basis." [FN6]

[FN6] See IACHR Report N° 72/03, *supra*, para. 60; Report N° 31/99 (Admissibility), Case 11.763, Plan de Sánchez Massacre, Guatemala, April 16, 1999, paras. 29 and 30.

50. In the case at hand, the Commission notes that the complaint was submitted prior to the judgment of the Supreme Court of Justice on the application for conditional release of Mr. Jenkins, dated September 25, 1997; prior to the judgment of the Second National Criminal and Correctional Court of the Federal Capital dismissing the complaint laid by the Sixth Oral Tribunal of the Federal Criminal Court against the prosecutors who used falsified evidence against the petitioner, dated April 20, 1998; and prior to the resolution of the Prosecutor General to suspend administrative proceedings against those prosecution officials, dated September 6, 1999, actions that effectively brought to a close the remedies available within domestic jurisdiction. Consequently, the requirements of Article 46(1)(b) of the Convention relating to these aspects of the petition are satisfied.

3. Duplication of procedures and international *res judicata*

51. It does not appear from the record that the subject matter of the petition is pending before another international proceeding for settlement, nor that it reproduces a petition already

examined by this or any other international organization. Therefore, the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been satisfied.

4. Characterization of the facts alleged

52. The Commission considers that the petitioner's allegations relating to the violation of his rights to personal liberty, to a fair trial and to judicial protection, if confirmed, could characterize a violation of the rights protected by Articles 7, 8, 24 and 25 of the Convention taken in relation to Articles 1(1) and 2 of that instrument. Moreover, there is no evidence that the complaint submitted is groundless or that it is out of order. Consequently, the Commission considers that the requirements of Article 47(b) and (c) of the Convention are satisfied.

53. With respect to the alleged violation of Article 10 of the Convention, which protects the right to compensation for judicial error, the Commission considers that the evidence at hand does not characterize a violation of that right, because the petitioner was never the subject of a final decision of conviction. However, the Commission will deal with the question of compensation that might be due for the prolonged deprivation of liberty to which the petitioner claims he was subjected in its analysis of the merits.

54. In his initial submission of September 9, 1997, the petitioner also claimed violation of the rights protected by Articles 3, 5, 9, 11, 13, 16 and 22 of the American Convention. In his note of September 19, 1999, he also held that the Government violated Articles 17 and 19 of the Convention to the prejudice of his family. Nevertheless, in his subsequent presentations, Mr. Jenkins made no allusion to such violations by the Argentine State, nor did he provide any factual or legal basis to demonstrate them. Consequently, the Commission concludes from its analysis of the facts contained in the petition that they fail to characterize such violations.

V. CONCLUSION

55. The Commission concludes that it is competent to examine the case and that the petition is admissible, pursuant to Articles 46 and 47 of the American Convention.

56. In light of the arguments of fact and law set forth above, and without prejudging the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible with respect to the alleged violations of Articles 7, 8, 24 and 25, taken in relation to Articles 1(1) and 2 of the American Convention on Human Rights.
2. To notify the State and the petitioner of this decision.
3. To continue its analysis of the merits of the case.
4. To publish this decision and to include it in the Annual Report of the IACHR to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 13th day of October, 2004. (Signed): Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez and Florentín Meléndez, Commissioners.