



**ORGANIZATION OF AMERICAN STATES
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

**CASE 12.608
LIAKAT ALI ALIBUX
Vs.
SURINAME
Written final observations**

INTRODUCTION

Mr. Liakat Ali Alibux was subjected to criminal prosecution between 2002 and 2003 for crimes allegedly committed in his official capacity in 2000 while he served as Minister of Finance and Natural Resources of Suriname. Said criminal prosecution ended with his acquittal regarding some of the charges and his conviction regarding one charge of forgery. In November of 2003, he was sentenced by the Supreme Court of Suriname to a one year prison term and barred from holding public office for 3 years.

Mr. Alibux was prosecuted and convicted in relation to facts that took place while he served his last year as Minister in 2000. At that time there was no legal or institutional basis upon which the State could prosecute and punish holders of political office for crimes committed in the exercise of their functions. The legal and institutional basis to do that was enacted a year later, in October of 2001, through the adoption of the Act for the Indictment of Political Office Holders. The State does not dispute that prior to that Act it was not legally possible to prosecute or punish a high official for acts committed in the exercise of his or her functions.

Because he was charged in relation to actions taken in his official capacity, he was prosecuted and convicted in a single instance before the High Court of Suriname. The legal regime provided him no possibility to appeal the conviction or sentence.

During the process, Mr. Alibux was prohibited from leaving Suriname. As detailed in its merits report, the Commission had no information to establish that the requirements of legality, suitability, necessity and proportionality were met. As established in the jurisprudence of the Inter-American system, it is for the States to justify the compatibility of a restriction to the exercise of human rights with the American Convention.

Mr. Alibux was also unable to seek a constitutional remedy because, on the one hand, the High Court declined to exercise jurisdiction on the motions Mr. Alibux presented to seek protection for his constitutional rights during the process. On the other hand, the Constitutional Court called for in the 1987 Constitution of Suriname, the tribunal that should be providing constitutional control, has yet to be established.

The Inter-American Commission found that the prosecution and conviction of Mr. Alibux constituted a violation of Articles 8.2 h), 9 and 25 of the American Convention. The Commission also concluded that the restriction to leave the country imposed as a precautionary measure, constituted a violation of Article 22 on the American Convention.

Taking into account the main legal debates of the case and the questions of the Honourable Court in the public hearing, the Commission will present its final observations as follows: i) The debate on the principles of non-retroactivity; ii) The violation of the right to appeal the judgment to a higher Court; and iii) The violation of the right to judicial protection.

1. The debate on the principles of non-retroactivity

As mentioned since the submission of the case to the Court, the instant case raises a new and important debate concerning the principle of non-retroactivity of criminal law under Article 9 of the American Convention that have not yet been dealt with by the Inter-American Court. There is no debate that under the American Convention States are prohibited from applying substantive norms retroactively. However, there are situations in which it is not self evident the substantive or procedural nature of a norm and, consequently, in which it is not clear whether the principles set forth in Article 9 of the Convention are applicable or not.

This is precisely the case of Mr. Alibux whose prosecution and conviction was possible because of the creation of a norm, the Act for Indictment of Political Office Holders, that did not exist when the crimes were allegedly committed. The particular aspect of this norm is that before its existence, it was not possible to prosecute a high rank political office holder, given than the norm set forth for the first time the procedure to do so, as well as certain standards that would be applied in the decision-making.

In that sense, the legal question to be answered by the Court is whether the application of the Act for Indictment of Political Office Holders to prosecute Mr. Alibux for crimes committed before its entry into force, but which were already established as offenses in the Criminal Code, constituted a violation of Article 9 of the American Convention.

The Commission considers that the answer to this question requires to recall the general principles established by the Inter-American Court in previous cases related to Article 9 of the American Convention; to consider the approach of other judicial or cuasi-judicial bodies of other humn rights systems; and to analyze under those principles and case by case approach, the specific facts of the instant case.

General principles established by the Inter-American Court in previous cases

The Court has decided a number of cases in which has interpreted and applied Article 9 of the American Convention and has established general principles that should serve as the starting point of analysis of the instant case.

In general terms, the Court has held that "under the Rule of Law, the principle of freedom from *ex post facto* laws governs the actions of all State agencies, in relation to their

respective duties, particularly when they must exercise their punitive power".¹ In the *García Asto and Ramírez Rojas vs. Peru* case, the Court recalled the following paragraphs from previous cases:

The American Convention requires States to make every effort to apply criminal sanctions with strict respect for people's basic rights, after carefully ascertaining the actual existence of illegal conduct.²

In this regard, it is incumbent upon the criminal judge, upon applying criminal law, to strictly abide by the provisions thereof and be extremely rigorous when likening the accused person's conduct to the criminal definition, so as not to punish someone for acts that are not punishable under the legal system.³

The Commission underlines the following paragraph in which the Court has repeatedly characterized the scope of the principle of non-retroactivity:

Pursuant to the principle of non-retroactivity of unfavorable criminal laws, the State must not exercise its punitive power by applying, retroactively, criminal laws that impose heavier penalties, establish aggravating circumstances or create aggravated definitions of the crime. Likewise, this principle implies that a person may not be convicted of an act that, at the time of its commission, was not criminalized or punishable.⁴ (highlighted section not from the original)

In other cases, such as *Castillo Petruzzi and other vs Peru*, *Ricardo Canese vs. Paraguay* and *Baena Ricardo and others vs. Panamá*, the Court worded the last part of this paragraph as follows: "[principle of non-retroactivity] is also designed to prevent a person being penalized for an act that, when it was committed, was not an offense or could not be punished or prosecuted". (highlighted section not from the original)

The Commission considers that there are two relevant conclusions that result from the reading of the previous paragraphs and that, although of general character, can be considered as the starting point of analysis of the debate of the case. First conclusion is that the language used shows a sort of strict analysis on the part of the Court regarding compliance with Article 9 of the American Convention, which is compatible with the special importance that the Inter-American bodies have given to principles of legality and non-retroactivity. Second conclusion is that it appears that the Court's case law tends to an extensive interpretation of Article 9 of the Convention, not limiting its application to the norms that criminalizes an act, but also to those norms that permit the actual possibility of prosecution.

¹ I/A Court H.R., Case of García-Asto and Ramírez-Rojas v. Peru. Judgment of November 25, 2005. Series C No. 137. Para. 187.

² I/A Court H.R., Case of García-Asto and Ramírez-Rojas v. Peru. Judgment of November 25, 2005. Series C No. 137. Para. 189. Quoting. *Case of Baena Ricardo et al.* Judgment of February 2, 2001. Series C No. 72, para. 106.

³ I/A Court H.R., Case of García-Asto and Ramírez-Rojas v. Peru. Judgment of November 25, 2005. Series C No. 137. Para. 190.

⁴ I/A Court H.R., Case of García-Asto and Ramírez-Rojas v. Peru. Judgment of November 25, 2005. Series C No. 137. Para. 191.

Relevant aspects of the approach in other human rights systems

Both, in the European Human Rights System and in the Universal System, it has been recognized the relevance of the principles of legality and non retroactivity, established in Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant of Civil and Political Rights, respectively. There is an extensive development in the case-law of both bodies regarding those provisions.

It is relevant to emphasize that, in general, the European Court and the Human Rights Committee are consistent in avoiding an automatic dismissal of application of the principles of legality and non-retroactivity to specific norms, exclusively on the basis of its *prima facie* nature as "procedural" or "non substantive". In fact, the analysis is more related to the specific facts of the case and the substantial impact of the norm at issue in the particular situation of the alleged victim. Moreover, in more recent cases both bodies have expressly accepted that procedural norms can have that type of impact and, therefore, fall within the prohibition established in Articles 7 and 15, respectively.

For example, in the case *David Michael Nicholas vs. Australia*, the Human Rights Committee established that:

changes in rules of procedure and evidence after an alleged criminal act has been committed, may under certain circumstances be relevant for determining the applicability of article 15, especially if such changes affect the nature of an offence.

On its part, in the case *Del Rio Prada v. Spain*, the European Court took into account whether the retroactive application of a norm had a "decisive impact" in the situation of the person. Another important aspect to note from the European case law, is that it has considered the possibility to analyze the "statute of limitations" under the scope of Article 7 of the European Convention. The Commission notes that the "statute of limitations" is generally understood as a legal institute of a procedural nature.

Finally, the Commission brings into the analysis the concept of foreseeability first developed within the European System. In the cases *Scoppola v. Italy*, *Alimucaj vs. Albania*, *Gurguchiani v. Spain*, *Cantoni v. France*, *Kokkinakis v. Greece* and *Kafkaris v. Cyprus*, the European Court has developed different components and elements of analysis of this concept. Although it has been applied by the European Court mainly with regard to the predictability of the act or omission as a crime, or the penalty itself, the Commission already indicated that under Article 9 of the American Convention the Inter-American Court has included not only those aspects but also the possibility of prosecution. In that regard, within the ambit of the Inter-American System, it is reasonable to consider the possibility to apply the foreseeability test not only to the crime and the penalty, but also to the possibility of prosecution.

Relevant aspects of the instant case

In this section the Commission recalls the relevant facts of the case that should be considered by the Court in the analysis under the standards described in the previous sections of this final observations:

- It is not disputed that Article 140 of the Constitution of Suriname established in 1987 that Political Office Holders shall be liable to trial before the High Court, for indictable acts committed in discharging their official duties.
- It is not disputed that forgery was established as a crime in criminal law prior to the acts allegedly committed by Mr. Alibux in 2000.
- It is not disputed that the Act for Indictment of Political Office Holders was enacted in October 2001. This Act constituted the institutional and legal basis for the implementation of Article 140 of the Constitution. It also established substantive criteria for the National Assembly to proceed to indict political office holders. An example of this substantive criteria is the mention in the Act to "public interest from a political and administrative point of view" as the basis for the decision indict. As stated in the Explanatory Notes of the Act for Indictment of Political Office Holders, the opinion of the National Assembly, reached on the basis of this substantive criteria, is definitive in the decision of initiate the prosecution, and that decision is final.
- It is not disputed that such substantive criteria were not mentioned in Article 140 of the Constitution in 1987.
- Taking into account the previously mentioned factors, it is reasonable to argue that the application of the Act for Indictment of Political Office Holders to crimes allegedly committed before its entry into force, had a substantive and decisive impact in the legal situation of Mr. Alibux.
- Finally, it is not disputed that between the enactment of the Constitution in 1987, and the enactment of the Act for Indictment of Political Office Holders, no political office holder was prosecuted for crimes committed in the discharge of their functions. The State has recognized that before the enactment of the Act in 2001 it was not possible to do so.

In that regard, in its analysis, the Commission drew a distinction between a merely procedural change in the law, and the application of a law that enables the exercise of the punitive power of the State -- including not only procedural rules, but also substantive criteria to determine whether the person should be prosecuted. The Commission considers that the retroactive application of the Act for Indictment of Political Office Holders to Mr. Alibux fell within the second category and, consequently, constituted a violation of Article 9 of the American Convention.

Final consideration

The Commission underlines that the judgment on this point of law is relevant not only for the case but for the inter-American jurisprudence and the definition of criteria that will

affect the approach of future cases regarding the scope of the principle of non retroactivity. In that sense, for the Commission it is a matter of Inter-American public order that the judgment of the Court follows a comprehensive analysis of the different elements presented by the Commission, which include a conceptual basis of the debate, previous criteria of the Inter-American Court that show a trend to an extensive and *pro persona* interpretation of Article 9 of the Convention and the progressive developments of the approach in other human rights system towards a case by case determination of the substantive effects of a norm.

Finally, the Commission considers relevant to mention that the extensive and *pro persona* interpretation of Article 9 of the American Convention should not be considered as an open door for impunity in cases in which States have an special obligation to prosecute and punish, such as in cases of grave human rights violations or crimes against humanity. The debate that the Court needs to decide in the instant case refers to the normative content of Article 9 of the American Convention. That is a different debate on the possible permissible restrictions in cases of grave human rights violations or crimes against humanity, in which it is well established in the case-law of the Commission and the Court, that the State must comply with its obligation of prosecute and punish given the nature of the violation as well as the relevance of the rights of the victims involved. However, that is a debate that is not presented in the instant case and that is not affected by the decision of the Court on the normative content of the rights established in Article 9 of the Convention.

2. The violation of the right to appeal the judgment to a higher Court

Mr. Alibux was convicted in a process with one instance, before the High Court, because the legal regime at the time provided for no appeal for indicted office holders. The Commission and Court have referred in reiterated opportunities to the right to obtain a judicial review of a conviction under Article 8.2.h, and the fundamental protection this provides.

In the case of *Barreto Leiva v. Venezuela*, the Court had the opportunity to refer to the violation of this provision precisely as a consequence of trials of one instance due to special immunities and jurisdiction in the case of high officials. In the words of the Court:

The case-law of this Court has emphasized that the aim of the right to appeal a judgment is to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors unduly prejudicial to a person's interests, from becoming final.⁵

The right to review by a higher court, expressed by means of the complete review of the conviction, ratifies the grounds and provides more credibility to the judicial acts of the State and, at the same time, offers more security and protection to the rights of the accused.

⁵ Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C N°. 107, para. 158.

(...)

[States] may not establish restrictions or requirements inimical to the very essence of the right to appeal a judgment.⁶ The State may establish special judicial privileges for the prosecution of high-ranking government authorities and these privileges are compatible, in principle, with the American Convention (*supra* para. 74). However, even in these situations, the State may allow the accused the possibility of appealing a condemnatory judgment. This would happen, for example, if it were decided that the proceedings at first instance would be conducted by the president or of a courtroom of a superior tribunal and the appeal would be heard by the full tribunal, to the exclusion of those who already issued an opinion on the case.

The Commission takes due note of the amendment enacted in August of 2007 to provide persons convicted under the Act to Indict Political Office Holders an instance of appeal. The Commission values the reform but considers that in Mr. Alibux's case the effects of the absence of judicial review under Article 8.2 h) of the American Convention have been fully realized.

3. The violation of the right to judicial protection

The third aspect of the present observations focuses on the violation of the right to judicial protection, enshrined in article 25 of the American Convention, to the detriment of Mr. Alibux. In order to establish the alleged violation, the Commission will refer to two aspects: i) the inexistence of the Constitutional Court; and ii) the lack of competence of other judicial bodies to review the constitutionality of legal dispositions.

In first place, the IACHR wishes to highlight the lack of willingness of Suriname to create a Constitutional Court despite the fact it is established in its Constitution of 1987. According to article 144 of the Constitution of Suriname, a Constitutional Court would be in charge of verifying the constitutionality of laws or parts of laws, as well as the decisions of government institutions. Nonetheless, twenty five years have passed without the creation of this judicial body.

As a consequence, the Commission considers that the inexistence of a Constitutional Court generated the lack of a judicial resource in Suriname's legal framework that could have reviewed the constitutionality of the application of the Act on Indictment of Political Office Holders against the victim. Therefore, Mr. Alibux was denied the possibility to present a resource to a judicial authority that could have had the competence to review the constitutionality of the process carried out against him. The IACHR concludes that this situation led to a violation of article 25 of the American Convention.

In second place, and taking into account Judge Ferrer Mac-Gregor's question during the public hearing, the Commission considers that, at the time of the facts of this case, there

⁶ Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C N°. 107, para. 161.

were not other judicial bodies, including the High Court, with the competence to verify the constitutionality of Suriname's legal framework.

Indeed, according to Suriname's Constitution, the only judicial body with the aforementioned competence is the Constitutional Court which, as it has been indicated before, it has not been created. Due to this situation, Mr. Alibux tried to challenge the constitutionality of the process against him, which was based on the Act on Indictment of Political Office Holders, by filing interlocutory motions before the High Court. However, the High Court did not deal with these motions on their merits, but rather dismissed those indicating that it did not have competence to deal with aspects of a constitutional nature.

The Commission notes that the High Court expressly indicated that once the National Assembly decided to indict Mr. Alibux, the formal obligation had been met. Moreover, it stated that "a further assessment as to whether or not the Parliament has followed the correct procedure upon the adoption of the document for the Indictment has passed over the High Court since it has no constitutional jurisdiction to assess this procedure". As a result, the IACHR concludes that the High Court itself considered that it did not have competence to review the constitutionality of the Act on Indictment of Political Office Holders.

Furthermore, non-governmental organizations like the International Commission of Jurists⁷, and several international human rights bodies like the Human Rights Committee⁸, the Committee on the Rights of the Child⁹, and the Committee on the Elimination of Racial Discrimination¹⁰, have expressed their concern regarding the lack of establishment of a Constitutional Court. In that sense, they have urged Suriname to establish it in practice in order to have a mechanism that could analyze the constitutionality of Suriname's legal dispositions.

In conclusion, the Commission wishes to highlight that the lack of the Constitutional Court in Suriname not only had a direct effect on Mr. Alibux by violating his right to judicial protection, but also it constitutes a structural deficiency in its legal system. This broad context transcends the specific case and has an impact in the protection of human rights of the population of Suriname as a whole. The IACH takes due note that the State itself has recognized the importance of establishing the Constitutional Court as a way of ensuring that the laws and other acts of public power are consistent with the Constitution and, very especially, the fundamental rights of the population.

⁷ International Commission of Jurists. Independent Observation Mission to the Trial of President Desiré Delano Bouterse and Others in Relation to Extrajudicial Executions That Took Place in December 1982 at Fort Zeelandia, Paramaribo, Suriname. 29 May 2012. Available in: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Suriname-trial-Bouterse-1982-executions-trial-observation-report-2012.pdf>.

⁸ Human Rights Committee. Human Rights Committee begins review of Suriname's report. Eightieth Session. 12 March - 2 April 2004. Available in: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=6583&LangID=E>.

⁹ Committee on the Rights of the Child. Concluding Observations. Suriname. 28 June 2000. Available in: <http://www.unhchr.ch/tbs/doc.nsf/0/2bec41e619552be7802569000037dad1?OpenDocument>.

¹⁰ Committee on the Elimination of Racial Discrimination. Concluding Observations. Suriname. 13 March 2009. Available in: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/411/07/PDF/G0941107.pdf?OpenElement>.

Taking into account this situation, the IACHR considers that due to the general nature of this institutional deficit that continues up to the present, one of the pertinent measures of non-repetition the Court could order would be precisely the adoption of the measures necessary to establish in practice the Constitutional Court contemplated in Suriname's Constitution.

Washington, D.C.
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