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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 24/04; Petition 723/01
Session: Hundred and Nineteenth Regular Session (23 February – 12 March 2004)
Title/Style of Cause: Tirso Roman Valenzuela Avila v. Guatemala
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: 26 February 2004
Citation: Valenzuela Avila v. Guatemala, Petition 723/01, Inter-Am. C.H.R., Report No. 24/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by: APPLICANT: the Institute for Public Criminal Defense of Guatemala
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I. SUMMARY

1. On October 5, 2001, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition lodged by the Institute for Public Criminal Defense of Guatemala (hereinafter “the petitioner”) against the Republic of Guatemala (hereinafter “Guatemala,” “the State,” or “the Guatemalan State”) for having tortured Tirso Román Valenzuela Ávila (hereinafter “the alleged victim”), in violation of Articles 1(1), 5, 7, 8, and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and Articles 8 and 9 of the Inter-American Convention to Prevent and Punish Torture.

2. The Guatemalan State claims that domestic remedies with respect to the death penalty have not been exhausted and that it was unaware of the alleged incidents of torture and, consequently, that there have been no violations of the Convention.

3. The IACHR has decided to admit the case and to continue with an analysis of its merits.

II. PROCESSING BY THE COMMISSION

4. On November 7, 2001, the Commission began processing the petition; it forwarded the relevant parts of the complaint to the Guatemalan State and, in accordance with to Article 30(3) of its Rules of Procedure, asked it to submit information within a period of two months.

5. On November 7, the petitioner asked the Commission to include the Center for Justice and International Law (CEJIL) as a co-petitioner.

6. On January 15, 2002, the Commission granted the twenty-day extension that the State had requested in a note dated January 8, 2002. The State presented its comments on February 7, 2002.

7. In a communication dated March 22, 2002, the IACHR asked the petitioners for their comments on the report sent by the State. The petitioners sent their comments on May 13, 2002, and these were subsequently conveyed to the State.

III. POSITIONS OF THE PARTIES

A. Petitioners

8. The petitioners claim that the alleged victim, Mr. Tirso Román Valenzuela Ávila, was prosecuted for the crimes of murdering Public Prosecution Service (MP) prosecutor Silvia Anabella Romero de Herrera, illegal possession of offensive firearms, public use of an assumed name, and evading arrest, in proceedings 38-99, 3rd officer, before the Sentencing Court of Quetzaltenango Department. In those proceedings he was sentenced to death penalty in a judgment of October 21, 1999, against which an amparo relief challenge has been filed with the Constitutional Court.

9. The petitioners state that the alleged victim was arrested in the afternoon of May 27, 1998, as he was returning to his home in the city of Quetzaltenango, by four police officers who were wearing civilian clothes and armed with both handguns and rifles. After his detention, they state, the alleged victim was placed in the rear of the vehicle, taken to an unknown location, and tortured for a period of one hour: beaten in the abdomen and ribs, asphyxiated with Gamezan,[FN1] and then beaten again, in order to force him to confess that he had murdered the Public Prosecution Service's prosecutor.

[FN1] In their complaint the petitioners relate how the rubberized cloth used to cover the alleged victim's face while he was being tortured was impregnated with the substance known as "gamezan," a rat poison. According to the petitioners, this poison was commonly used in asphyxiation tortures during the armed conflict.

10. According to the petitioners, after the inhuman treatment to which the alleged victim was subjected, the police officers took him to his home, which was already being searched by other officers. Also there were officials of the Public Prosecution Service, several journalists, and a judge. The petitioners say that a police officer introduced weapons into the house, making it appear that they had been found there and that they belonged to the alleged victim.

11. They add that the entire search and arrest procedure was carried out without the presence of a lawyer and that the police officers present at the family home prevented the victim and his wife, Mrs. María Rosa López, from contacting an attorney.

12. The petitioners say that the officers took the alleged victim to a house in an unknown location, where he was subjected to further torture by the officers who had detained him, together with another seven officers who joined the group. They began to interrogate him, hitting and insulting him, trying to secure a confession in the murder of the prosecutor. Since the alleged victim refused to admit the murder, he was fitted with the “rubber sheet”[FN2] on a number of occasions, causing him to faint several times. After this session he was taken to the lavatory, where he was tortured by the insertion of a greased club into his rectum. He was tortured in this fashion until he lost consciousness.

[FN2] Material used in asphyxiation tortures. The petitioners note that asphyxiation using the rubber sheet occurs within 30 and 40 seconds.

13. The petitioners state that although Mr. Tirso Valenzuela, at trial, reported these incidents to the judicial authorities and the Public Prosecution Service,[FN3] the competent Guatemalan authorities began no investigation into the victim’s claims of torture and, as a result, no prosecutions have begun and none of the guilty have been punished.

[FN3] During the death-penalty proceedings initiated in 1998, the alleged victim denounced the torture he had suffered and he was confronted, on several occasions, with his alleged torturers: officers of the Criminal Investigation Service (SIC) responding to the names of Víctor Manuel González Sánchez, Cándido Abigail Linares de León, and Eladio Chali Chacach. The statements can be found on pages 95 to 101 of the record of proceedings 38-99, 3rd Off.

14. The petitioners state that during the victim’s trial he was on several occasions confronted with his torturers and that irrespective of the fact that he recognized them and was suffering the after-effects of the torture sessions,[FN4] the authorities pursued no investigation with a view to punishing the torturers, and neither were any forensic medical examinations carried out.

[FN4] The physical after-effects left by the torture involve internal injuries to the gastrointestinal tract; he has problems defecating and has undergone surgery for those injuries.

15. The petitioners report that on June 17, 2001, there was a jailbreak from the Zone Eighteen Preventive Detention Center for Men, where the alleged victim was being held, and that he was told that if he did not join in the escape, he would be killed. On that date, along with another 77 inmates, the victim escaped from prison. On July 11 of that year, he was recaptured;

he was then tortured again, by men seeking information about the death of the aforesaid prosecutor and about the escape.

16. They state that the torture the victim suffered at the prison was carried out with the acquiescence of the Director of the Zone Eighteen Preventive Center in Guatemala City, where he was placed in sector 11, known as El Infiernito (“Little Hell”).

17. The petitioners claim that the torture was carried out by agents of the Criminal Investigation Service and entailed, inter alia, “burning his testicles with a cigarette; picking him up by the testicles; pushing an iron rod through one of his wrists, from one side to the other.” In addition to this, he was kept in inhuman detention conditions, including no access to sunlight, unsound food that caused him gastrointestinal upsets, and the denial of family and conjugal visits. His attorney is not allowed free access, all his interviews are monitored, and he is at risk of reprisals for the allegations he has made.

18. The petitioners state that the torture the alleged victim suffered during his arrest was never investigated or prosecuted, in spite of several denunciations, statements during the criminal proceedings, and confrontations with his alleged torturers. They note that with respect to the torture and mistreatment he has been suffering since his re-arrest, he was the subject of a remedy of personal exhibition lodged on July 11, 2001, and denied on July 30, 2001. They explain that this is the ideal remedy under Guatemalan domestic law, since the country’s legal system does not offer due legal process for asserting the right to humane treatment or for halting the torture of detainees.

B. State

19. In its written reply of February 7, 2002, the State concentrated its comments on defending Guatemalan domestic law’s application of the death penalty. This defense was based on the claim that the petition should not be admitted because the remedies offered under domestic law had not yet been exhausted. In its submission the State noted that an amparo remedy was pending in connection with the enforcement of the death penalty.

20. The Government says that it respects the independence of the Guatemalan judiciary and, consequently, that the executive cannot intervene in the judicial decisions of that branch of government. It adds that:

Moreover, the enforcement and interpretation of the domestic legal provisions used by the domestic courts, now being brought before the inter-American human rights system, cannot be discussed, since that would constitute the creation of a third instance and the weakening of Guatemala’s institutions by raising doubts about a matter that has gone through all the steps and procedures of regular Guatemalan law, in compliance with the Code of Criminal Procedure (Decree 51-92 of the Congress of the Republic as amended) and other applicable laws.

21. The State continues its argument by maintaining that under Guatemalan law, the death sentence can only be imposed at a trial carried out in strict observance of all guarantees of due process and that, in the case at hand, Tirso Valenzuela did have access to an independent and

impartial tribunal and did pursue all means of defense necessary to challenge the courts' decisions.

22. Finally, with respect to the torture allegations, the State holds that, "to date there is no expert report, document, or any other form of evidence demonstrating the torture that Mr. Tirso Valenzuela claims to have suffered." The State did not make any claims, with regard to the alleged torture, about the nonexhaustion of domestic remedies.

IV. ANALYSIS

Preliminary Considerations

23. The Commission will limit its analysis to the admissibility requirements regarding the allegations of torture and cruel, inhuman, and degrading treatment and punishments suffered by the alleged victim, which is the sole issue to which the petitioners have constrained their filing.[FN5] Although the petitioners maintain that the torture was inflicted in order to secure a confession, at no point have they claimed before this Commission that due process was violated as a result thereof, even though the confession would have been used at the criminal trial in which the alleged victim was sentenced to the death penalty. In fact, the petitioners themselves state that as regards this issue, the remedies offered by domestic jurisdiction have not yet been exhausted.

[FN5] Comments by the petitioner, May 16, 2002.

24. Having defined the scope of the petition, the Commission will now analyze the requirements for admissibility set forth in the American Convention.

A. Competence of the Commission

25. The Commission has competence *ratione materiae* to hear this petition since it alleges violations of rights protected by the American Convention, to which the State of Guatemala is a party by reason of having ratified it on May 25, 1978, and by the Inter-American Convention to Prevent and Punish Torture, which it ratified on January 29, 1987.

26. The Commission has competence *ratione personae* to hear this petition since the identities of both the petitioners and the alleged victim satisfy the requirements set forth, respectively, in Articles 44 and 1.2 of the Convention.

27. The IACHR has competence *ratione temporis* to hear this petition since the obligation of respecting and ensuring the rights protected by the American Convention, together with those enshrined in the Inter-American Convention to Prevent and Punish Torture, was already in force for the State on the date on which the incidents described in the petition allegedly occurred.

28. Finally, the Commission has competence *ratione loci* to hear this petition since it alleges violations of rights within the territory of the respondent state party.

B. Admissibility Requirements of the Petition

1. Exhaustion of Domestic Remedies

29. The State of Guatemala, in its comments on this petition, claimed the nonexhaustion of domestic remedies since there was an amparo remedy still pending before the Constitutional Court. It therefore falls to the Commission to analyze whether the remedies invoked by petitioners were the appropriate ones to comply with the admissibility requirements set by the American Convention.

30. The Inter-American Commission has ruled that when a crime that can be prosecuted on an *ex officio* basis is committed, the State is obliged to bring and pursue criminal proceedings to their final consequences and that, in such cases, this is the best way to clear up the facts, judge the guilty, and set the corresponding criminal punishments, in addition to enabling other forms of monetary compensation to be established.[FN6]

[FN6] See, for example: IACHR, Annual Report 1997, Report N° 52/97, Arges Sequeira Mangas, Case 11.218, (Nicaragua), paragraphs 96 and 97.

31. So, based on the jurisprudence of the inter-American system,[FN7] the Commission holds that in cases involving torture and cruel, inhuman, and degrading treatments or punishments, the State is obliged to investigate all situations entailing violations of personal integrity through the commission of these crimes and that it must do so on an *ex officio* basis through those of its agents who are aware of their commission and, in addition, it must initiate the corresponding criminal proceedings. In other words, in torture cases, the ideal remedy is a prompt and impartial criminal investigation.

[FN7] See: Inter-Am.Ct.H.R., Maritza Urrutia Case, Judgment of November 27, 2003, paragraph 128; IACHR, Case No. 11.509, Manuel Manríquez, Mexico, Report N° 2/99 of February 23, 1999, paragraph 58.

32. Additionally, when a victim is being tortured, amparo or habeas corpus remedies are the best way for stopping the torture in the act, as soon as it is reported. The Inter-American Court has ruled thus, stating that habeas corpus is a procedure for judicially verifying the legality of an arrest or detention that requires the detainee to be physically brought before a competent judge or court. Likewise, the Court has upheld the importance of those procedures for “ensuring that a person’s life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.”[FN8]

[FN8] Inter-Am.Ct.H.R. Habeas Corpus in Emergency Situations (Articles 27.2, 25.1, and 7.6 of the American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987, Series A N° 8, paragraph 35. See also: Inter-Am.Ct.H.R., Maritza Urrutia Case, Judgment of November 27, 2003, paragraph 111.

33. Having made these comments, the Commission will now analyze the exhaustion of domestic remedies in this case.

34. Initially, it should be noted that in the case at hand the petitioners are reporting three violations that occurred at different points in time: First, the torture suffered by the victim when he was arrested on May 27, 1998, on suspicion of having abducted and killed a public prosecutor. During that arrest, the victim was allegedly tortured in order to secure a confession of guilt in the crimes of which he was accused. Second, the torture he allegedly suffered on July 11, 2001, when he was re-arrested after having broken out of the prison where he was serving his sentence. That torture was supposedly inflicted as a punishment and in order to obtain information about the death of the public prosecutor. Third, the cruel, inhuman, and degrading treatment he suffered in prison following his re-arrest.

35. In the case at hand, the State noted in its comments that it was unaware of the torture suffered by the alleged victim since it had no evidence regarding those allegations; it also argued that in this case, the available domestic remedies had not been exhausted.

36. With respect to the torture that took place during the alleged victim's arrest on May 27, 1998, the petitioners note that the victim reported that incident during criminal proceedings 38-99 3rd Off. The Commission indeed notes that the case file contains a copy of the statements made by the alleged victim at the criminal trial, on pages 95 to 101 of the deed of proceedings of trial 38-99 3rd Off., in which he denounces the torture he was subjected to during his detention by agents of the State. In addition, the victim was confronted with his alleged torturers during those same proceedings. The Commission notes, however, that the State of Guatemala has not begun an ex officio investigation into the alleged victim's torture claims, as required by the practice of the inter-American system,[FN9] even though the torture was duly reported before the Guatemalan Court of Appeals, as shown by the documentary evidence submitted along with the petition.

[FN9] See: 31 and 32 supra.

37. With respect to the torture the alleged victim claims to have suffered when re-arrested, the petitioners say they filed a personal exhibition remedy in July 2001 in order to put a halt to the torture that Mr. Tirso Valenzuela had been suffering since July 11, 2001. This remedy was ruled inadmissible on July 30, 2001. As stated above, the Inter-American Court holds that the exhibition of a person is the ideal remedy for ensuring that the person's integrity is respected and

for protecting that person from torture or other forms of cruel treatment.[FN10] The Guatemalan judiciary denied the personal exhibition request and began no legal proceedings to investigate the torture reported in the filing.

[FN10] Inter-Am.Ct.H.R., Advisory Opinion OC-8/87, paragraph 35.

38. With respect to the cruel, inhuman, and degrading treatment, the petitioners claim that after he was re-arrested, the alleged victim was, in addition to being tortured, treated in a cruel, inhuman, and degrading fashion in prison, subjected to a regime of inhuman conditions such as being kept in the dark, receiving unsound food, and being denied conjugal visits. However, the petitioners do not clarify whether this treatment meted out to the alleged victim was reported to the Guatemalan authorities or not. Indeed, the personal exhibition remedy contained in the case file shows that it was lodged by the victim in order to denounce the torture he was then suffering and did not denounce the detention conditions in which he was kept after his re-arrest.

39. The Commission holds that allegations of torture, such as those contained in this petition, must be investigated on an ex officio basis by State authorities.[FN11] Consequently, the judge who heard the victim's allegations of torture during the criminal trial for abduction, 38-99 3rd Off., and under the personal exhibition remedy, 143/01, was under the obligation of forwarding the torture complaint to the Public Prosecution Service—the competent body under Guatemalan law – for it to begin the relevant investigations. By not doing so, the Guatemalan judiciary failed to investigate the alleged perpetrators of the acts in question.

[FN11] The Inter-American Convention to Prevent and Punish Torture, ratified by the State of Guatemala on January 29, 1987, expressly requires its state parties to do so. The Commission also notes that the crime of torture is prohibited in the State of Guatemala under Articles 24-bis and 24-quater of the Code of Criminal Procedure; it must be prosecuted on an ex officio basis, under Articles 297 and 298 of the Code of Criminal Procedure; and must be denounced on an ex officio basis as soon as any public official or employee becomes aware that it is being carried out.

40. In light of the characteristics and context of this petition—and particularly considering the passage of six years, in one case, and three years, in the other, without the commencement of the relevant investigations, in spite of the fact that the victim did denounce the violations he suffered—the exception provided for in Article 46(2)(c) of the American Convention is thus applicable to the torture inflicted on Mr. Tirso Valenzuela. With respect to the complaint about the conditions in which the victim was held and subjected to cruel, inhuman, and degrading treatment, the Commission believes that the available domestic remedies have not been exhausted.

41. The Commission has stated, on several previous occasions, that invoking the exceptions to the exhaustion of domestic remedies rule contained in Article 46(2) of the Convention is

closely tied in with determining possible violations of other rights set forth therein, such as guarantees of access to justice. However, by its very nature and purpose, Article 46(2) is a provision with autonomous content vis-à-vis the Convention's substantive precepts. So, the decision as to whether the exceptions to the exhaustion of domestic remedies rule are applicable in the case at hand must be taken before the merits of the case are examined and in isolation from that examination, in that it depends on a different criterion from the one used to determine whether Articles 8 and 25 of the Convention were indeed violated. It should be noted that the causes and effects that have prevented the exhaustion of domestic remedies in the case at hand will be analyzed, as relevant, in the IACHR's report on the merits of the controversy, in determining whether or not the American Convention was in fact violated.

2. Timeliness of the Petition

42. With respect to the instant petition, the Commission has admitted the exception provided for in Article 46(2)(c) of the Convention, regarding the State's unwarranted delay in investigating and punishing the alleged torture suffered and reported by Mr. Tirso Valenzuela. Thus, the Commission affirms that the petitioners are exempt from complying with the requirement set forth in Article 46(b) of the American Convention.

3. Duplication of Proceedings and Res Judicata

43. The petition dossier contains no information to indicate that this matter is pending in any other international settlement proceeding or has been previously examined by the Inter-American Commission. The IACHR therefore concludes that the requirement contained in Article 46(1)(c) of the American Convention has been met.

C. Characterization of the Alleged Facts

44. With reference to the torture allegations, the State of Guatemala has said that, "to date there is no expert report, document, or any other form of evidence demonstrating the torture that Mr. Tirso Valenzuela claims to have suffered."

45. The Commission holds that this stage in the proceedings is not intended to establish whether or not a violation of the American Convention was committed. At the admissibility stage, the IACHR must decide whether the stated facts tend to establish a violation, as stipulated in Article 47(b) of the American Convention, and whether the petition is "manifestly groundless" or "obviously out of order," as stated in section (c) of that same article.

46. The level of conviction regarding those standards is different from that which applies in deciding on the merits of a complaint. The IACHR must conduct a *prima facie* assessment to examine whether the complaint entails an apparent or potential violation of a right protected by the Convention and not to establish the existence of such a violation. That examination is a summary analysis that does not imply prejudging the merits or offering an advance opinion on them. Thus, the Commission's Rules of Procedure, by setting two clearly separate phases for admissibility and for merits, reflects the distinction between the evaluation that the IACHR must conduct to declare a petition admissible and the assessment necessary to establish a violation.

47. As regards the instant petition, the Commission believes that resolving the arguments presented by the State requires an analysis of the merits of the case. Consequently, the IACHR does not find the petition to be “manifestly groundless” or “obviously out of order.” In addition, the IACHR believes that, *prima facie*, the petitioners have met the requirements contained in Article 47(b) and (c).

48. Consequently, the Commission believes that the allegations regarding the violation of the right to humane treatment, judicial guarantees, and judicial protection made by the petitioners could entail violations of the rights enshrined in Articles 5, 8, and 25 of the American Convention, in conjunction with the general obligation incumbent on the State to respect and uphold those rights set forth in Article 1(1) thereof, together with Articles 1, 8, and 9 of the Inter-American Convention to Prevent and Punish Torture.

V. CONCLUSIONS

49. The Commission concludes that it is competent to examine this matter and that, under Articles 46 and 47 of the American Convention, the petition is admissible with respect to Articles 1(1), 5, 8, and 25 of that instrument and with respect to Articles 1, 8, and 9 of the of the Inter-American Convention to Prevent and Punish Torture, and that it is inadmissible with respect to Article 7 of the American Convention.

50. Based on the foregoing considerations of fact and law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the petition admissible as regards the possible violation of Articles 1(1), 5, 8, and 25 of the American Convention on Human Rights and of Articles 1, 8, and 9 of the Inter-American Convention to Prevent and Punish Torture.
2. To declare the allegations regarding Tirso Román Valenzuela’s detention conditions inadmissible because of the nonexhaustion of domestic remedies, pursuant to Article 47(a) of the American Convention.
3. To give notice of this decision to the parties.
4. To continue with its analysis of the merits of the complaint.
5. To publish this decision and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 26th day of February, 2004. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez, and Florentín Meléndez.