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Doc. Type: Decision
Decided by: President: Evelio Fernandez Arevalos;
First Vice-President: Paulo Sergio Pinheiro;
Second Vice-President: Florentin Melendez;
Commissioners: Freddy Gutierrez, Paolo G. Carozza, Victor E. Abramovich.
Dated: 23 October 2006
Citation: Velez Loor v. Panama, Petition 92-04, Inter-Am. C.H.R., Report No. 95/06,
OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
Represented by: APPLICANT: Jose Villagran
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I. SUMMARY

1. On February 10, 2004, the Inter-American Commission on Human Rights (hereinafter referred to as “IACHR”) received, by e-mail, a petition lodged by Jesús Tranquilino Vélez Loor (hereinafter referred to as “the alleged victim”) in which he claims to have undergone torture, forced isolation, and mistreatment at the hands of Panamanian police officers at two Panamanian detention centers without being given the opportunity to defend himself, without the benefit of any court of law, without being allowed to make a telephone call, and while being deprived of all medical care. The petition alleges violation by the Panamanian State (hereinafter known as “the State”) of Articles 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 10 (Right to Compensation), 21 (Right to Property), and 25 (Right to Judicial Protection) of the American Convention on Human Rights in conjunction with Article 1.1, and Articles 1, 2, 3, 7, 8, 9, 10, and 11 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, to the detriment of Mr. Vélez Loor.

2. Mr. Vélez Loor, who is an Ecuadorian citizen, states that the Panamanian border police arrested him on November 10, 2002 because he was not in possession of valid papers and did not have the necessary visa. He was deported ten months later, on September 10, 2003. He says that he was stripped of his possessions and that these were never returned to him. He also claims that he was kept in two different detention centers, and that he was mistreated in both in a variety of ways. He alleges that while he was held in detention he was sometimes tortured and that he did not receive the medical care necessary to treat the consequences of the torture he had suffered. He adds that no legal investigation into the torture has been initiated and that he has had no access to suitable and effective legal remedies that would guarantee his right to justice.

3. The State informs that Mr. Vélez Loor was sentenced to a prison term for having repeatedly entered Panama illegally. Consequently, the State emphasizes that his arrest was legal and that the party alleging violation of his rights benefited from all the available guarantees to safeguard his rights. The State points out that Panamanian law provides that foreign nationals, who repeatedly enter Panama, without the necessary papers, will be imprisoned for two years and then deported. In response to the official complaint lodged by Mr. Vélez Loor at the Panamanian Embassy in Ecuador after he was deported, in which he claimed that he had been mistreated in Panamanian prisons, the State emphasizes that the Ministry of Foreign Affairs opened an investigation of the complaint both with the National Police and the National Directorate of Immigration. At the same time, it rejects Mr. Vélez Loor's allegations with regard to his purported lack of medical care and provides details regarding the six occasions on which Mr. Vélez Loor was attended to by the prison doctor.

4. After analyzing the positions of the parties, the Commission concluded that it has jurisdiction to decide on the complaint made by the petitioners and that the case was admissible, under Article 46 of the American Convention. The Commission has decided to declare the case admissible under Articles 1.1, 2, 5, 8, 21, and 25 of the American Convention as well as under Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. The Commission also declares inadmissible the alleged violation of Article 10 of the American Convention. As a consequence, the Commission will serve notice of its decision to the parties concerned and will publish the present admissibility report in its Annual Report.

II. PROCESSING BY THE COMMISSION

5. The original petition was received at the Commission on February 10, 2004 and was registered as petition No. 92 of 2004. On August 3, 2004 the Commission received additional information from Mr. Vélez Loor. On March 17, 2005 Mr. José Villagrán (hereinafter "the petitioner") was retained as Mr. Vélez Loor's lawyer and presented arguments on April 12 and April 21 and again on June 14, 2005. On October 7, 2005 a hearing was requested before the Commission. In a letter dated November 7, 2005, Mr. Villagrán informed the Commission that he was working on the case with the Permanent Committee for the Defense of Human Rights, in Guayaquil, Ecuador. On December 21, 2005, the Commission communicated the petition to the State in accordance with Article 30.3 of its Rules of Procedure and granted the State a two-month period within which to reply. On February 10, 2006 the State requested a one-month extension so as to present its observations, and this was granted until March 6, 2006. On March 7, 2006 the Commission received the State's reply and this was transmitted to the petitioners on the same day. On March 9, 2006 the lawyer Walter Mendoza Yépez of the Legal Unit of the Permanent Committee on Human Rights in Ecuador (CDH), working in conjunction with the petitioner, Mr. Villagrán, requested the Commission to declare that Panama had violated the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture. On March 13, 2006 the Commission conducted a hearing on the admissibility of the case during its 124th regular session. On May 1, 2006 the Commission transmitted to the State the observations submitted by the petitioner on the State's response and the arguments put forward during the hearing held in March 2006.

III. POSITIONS OF THE PARTIES

A. The Petitioner

6. On November 10, 2002, Jesús Tranquilino Vélez Loor, a citizen of Ecuador, a merchant and translator by profession, declared that he had been passing through Panama when he was arrested. Mr. Vélez Loor acknowledges that he did not have the required visa and that he was, in fact, not in possession of valid papers. He was captured by border police in the town of Nueva Esperanza, in Darién Province. He says that the policemen menaced him with AK 47 guns and demanded that he prostrate himself on the ground, threatening that they would kill him, while they searched his baggage, in which he was carrying US\$1,900, a camera, his identity card, and other personal effects. Mr. Vélez Loor points out that the personal possessions that he had with him at the time of his arrest were confiscated and never returned to him. He states that he was handcuffed, his feet were shackled, and he was forced to walk barefoot to a small military barracks in a small indigenous town in Embera. There he was handcuffed to a metal post for eight hours until a helicopter belonging to the former Panamanian Air Force moved him to the town of Meteti. There he was to remain for one week in a small cell and was told that he would be held in custody for 3 or 4 years. From there he was taken by boat to the Penitentiary located on La Palma Island, where more than 150 people were in detention.

7. According to Mr. Vélez Loor, La Palma is a prison for extremely dangerous persons. He claims that he was kept with other prisoners who lived in fear of explosions as there was an enormous petrol depot in the middle of the cellblock, which also had a suffocating effect on the prisoners at night. Mr. Vélez Loor states that, because of the conditions of his detention, he started a hunger strike with other people who had been imprisoned for lack of documentation, demanding that they be deported immediately.

8. Mr. Vélez Loor declares that following his protest, he was savagely tortured, receiving a blow to his spine and "a fracture" in his head with a wooden stick. He claims that he recognized "Alirio" as one of the policeman who attacked him along with others who were not wearing badges on their jackets. Mr. Vélez Loor indicates that Leoncio Ochoa, also Ecuadorian, was present when this beating occurred. In the course of the public hearing held during the 124th regular session, Mr. Ochoa described to the Commission the manner in which the beating was conducted:

Mr. Ochoa declared that it was the jail-keeper who "administered a heavy blow on the head" to Mr. Vélez Loor. He pointed to the part of Vélez Loor's head that had been struck. He indicates that on that same day no medical attention was given to Mr. Vélez Loor. The rest of the prisoners tried to bind his head so as to help take care of him, but despite their efforts on his behalf, Mr. Ochoa emphasized that Vélez was in extremely poor shape.

The petitioner adds that Mr. Vélez Loor received no medical care, because at a hospital in La Palma he was told that he would have to pay.

9. Mr. Vélez Loor maintains that the other detainees in La Palma were deported by boat to Colombia, and that he was left alone with an injured back. On December 18, 2002, Mr. Vélez

Loor was transferred by land to La Joyita prison, cellblock 6, in Panama City where he was to stay for six months until June 1, 2003. After another hunger strike he was sent to maximum security block 12 where he was to endure both physical and psychological torture until September 10, 2003, at which time he was deported to Ecuador.

10. Mr. Vélez has stated in his complaint that he was not allowed to communicate with either his family or with the Ecuadorian Embassy. He further asserts that it was only thanks to a telephone, kept illegally in the prison, that he was able to get in touch with the Consulate and ask them to inform his family that he had been arrested.

11. The petitioner alleges that in La Joyita Prison, in February 2003, in poor health as the result of the terrible beatings he had endured at La Palma, he once again asked to be treated by a doctor—however, this request was denied. Mr. Vélez Loor maintains that he was also suffering from an ulcer and that the doctor who was treating him, whose name was José Aníbal Rodríguez Torres, prescribed for him some out-of-date medicine that made him vomit and that produced intoxication. In March 2003 he fainted and was taken to Santo Tomás hospital and there doctors informed him that he would have to pay USD \$ 300 for the check-ups but since he had no money, he would be left to die.

12. The petitioner alleges that on Sunday June 1, 2003 the victim began another hunger strike, begged for medical attention and sewed his mouth shut. As a reply, a police officer went to see him and told him that death would soon follow. He was transferred to the high-security punishment block, designed for extremely dangerous prisoners. He was flung into a damp and dark cell and told that they were going to unzip his lips with the benefit of gas and truncheon. Then they stripped him naked, threw him to the ground, and started beating him with a club on his back, his legs, and his feet. Meanwhile they scraped his scalp with their boots. He claims that while he was face downward, they lifted up his head and poured tear gas in his face and eyes; he could not breathe and he had to force open the stitches in his mouth in order to be able to breathe. He felt suffocated and unstitched his mouth and this produced bleeding. They hit him on the soles of his feet while twisting the tendons of his legs. After this lengthy torture, he recounts that Lieutenant P. locked him up, still naked, in a small cell known as “the discotheque” in block 12 of La Joyita, where they used the “rotura blanca” (“clean break” method) which would not leave any traces. There they poured tear gas powder on his body and around the cell; the prisoners who have undergone this punishment refer to this dust as anthrax on account of the terrible suffocation that it produces. Then a member of the guard proposed that he submit to oral sex if he wanted to buy his way out of the Discotheque. The petitioner said that he refused this offer and, as a result, the guard took out white powder from his bag and threw it on his back, smeared it on a pencil and inserted it into his rectum. According to the petition, this burnt like fire and turned his whole body bright red.

13. Mr. Vélez Loor alleges that after a few hours they took him out of the Discotheque and put him into a dark, cold, and damp cell where four extremely dangerous prisoners were being kept. But nobody asked him anything as he was at death's door with his mouth half stitched up. He lay down on a piece of newspaper and ran a high fever. After 17 days of the hunger strike, he started drinking a cup of tea every morning but he maintains that his health was shattered. On July 27, 2003 a fellow prisoner paid some money so that a guard could arrange a medical

appointment for him and it was during this consultation that the doctor detected an ulcer. The report on his situation was sent to the Ecuadorian Embassy in Panama.

14. Mr. Vélez Loor adds that despite the gravity of his condition and the lack of specialized medical care, the doctors sent misleading reports to the Ecuadorian Embassy in which they stated that they were in fact treating him. During the period of his detention, he had no access to a lawyer, was not aware of the charges that were being brought against him, and he had no knowledge of the judicial authority that had ordered his detention.

15. In the original complaint, he stated that he lacked sufficient evidence of the torture he had received because any document that implicated the police officers was forbidden.[FN1]

[FN1] In the original complaint, received on February 10, 2004, the petitioner identified some policemen who had allegedly participated in his torture during his detention at La Palma prison (Darién Province). He refers to a policeman called “Arturo”, a policeman who had the nickname “Músculo”. During the time he was held at La Joyita prison, he refers to Mike Castillo and “Lieutenant Wallker” [sic], Lieut. Patiño, Adalides Batista, Corporal (“Cabo”) García, Police Officer Camargo and “others that cannot be identified because they tried to conceal their names.”

16. In a number of communications, the petitioner gave information about the steady decline of his health due to the consequences, both physical and psychological, of the torture he had received. The Commission was told that the alleged victim did not have the support of the Ecuadorian State, that he did not have the financial wherewithal for medical treatment, that he was not well enough to perform many tasks, and that his life was at risk.

17. With regard to the State’s arguments about the nonexistence of the criminal complaint presented by the petitioner with regard to the alleged torture that he had suffered, the petitioner points out that after filing the complaint with the Panamanian Embassy in Ecuador, subsequent to September 10, 2003, the Panamanian State should have initiated the pertinent criminal proceedings in order to investigate the facts of the case. He adds that the State cannot divest itself of the burden of proof with respect to the initiation of criminal proceedings. The petitioner points out that the sole remedy available to him once he was outside of Panamanian territory, was to approach the Embassy of Panama. He alleges that the State is willing to move forward with investigations only now that the case has been denounced abroad.

18. Moreover, Mr. Vélez Loor points out that he was not informed as to his rights at the time he was arrested. He adds that the Panamanian government never notified the Ecuadorian Consular Mission of his arrest, so that his expatriation might be processed. He states that the imposition of a prison term was done without considering the possibility of allowing him to defend himself and that no judge tried his case. Specifically, the petitioner highlights the statement made by the Minister of Justice in the course of the public hearing held in the 124th regular session, to the effect that no judicial authority is informed during the proceedings in which a prison sentence is imposed on repeat-offender illegal immigrants. The petitioner points out that he was not given a public defender and he was not allowed access to a private lawyer,

given that he had been forcibly prevented from making any contact with the outside world. Moreover, he points out, it is unlikely that a private lawyer would want to defend an immigrant, without papers, and with no money to guarantee payment of his fees. The petitioner states that the administrative process involved in putting an undocumented immigrant on trial makes no provision for possible defense and that the person who orders the imprisonment is an administrative authority.

19. The petitioner alleges that as a consequence of the actions taken against him that Panama is responsible internationally for the violation of articles 5 (personal integrity), 7 (personal liberty), 8 (due process), 10 (indemnization), 21 (right to property) and 25 (access to justice) of the American Convention.

B. The State

20. In its response, dated March 6, 2006, the State introduced its argument by pointing out that Mr. Vélez Llor had entered Panama illegally on a number of previous occasions. The State notes that on September 16, 1996, Mr. Vélez Llor was arrested by Units of the National Police and sent to the National Directorate for Migration and Naturalization (hereinafter referred to as “the Directorate of Migration”) for having entered Panamanian territory through Darién Province, without any documents to accredit his identity or nationality. In light of the above, on September 18, 1996, Mr. Vélez Llor was deported for having entered the country illegally, pursuant to resolution No. 6425 of September 18, 1996. This resolution stated that Mr. Vélez Llor would be unable to enter Panama again without the express agreement of the Directorate of Migration. Moreover, this resolution informed Mr. Vélez of the content of Article 67 of Decree Law No. 16 of June 30, 1960:

Article 67. Foreigners sentenced to deportation who evade this sentence by staying in the country in a clandestine way or who flout the decision by returning will be forced to carry out agricultural tasks in the Coiba Penal Colony for two (2) years and forced to leave the country after this period has finished; they may be released if they submit travel tickets for leaving the country in a manner satisfactory to the Ministry of the Interior and Justice.

21. The State points out that despite the above warning, Mr. Vélez Llor was arrested by the National Police on January 3, 2002 near the town of Tupiza, Darién Province, close to the border with Colombia. The reason for his arrest was the fact that he “did not have any document which justified or authorized his physical presence on national territory”. Mr. Vélez was handed over to the Migration authorities and subsequently deported pursuant to Resolution No. 0185 of January 9, 2002, leaving the country for Quito, Ecuador.

22. The State points out that on September 11, 2002, the Police of Darién arrested Mr. Vélez Llor for a third time, after he circumvented immigration controls by entering once again through Tupiza, Nueva Esperanza, Darién Province, near the border with Colombia. The State wishes to note that, upon his arrest, Mr. Vélez Llor was carrying no documentation authorizing his presence in Panama, nor was he carrying any document to accredit his identity and nationality, nor was he in possession of valuables of any kind. On November 12, 2002, Mr. Vélez was placed at the disposal of the Directorate of Migration and Naturalization,[FN2] and registered on the

same day. The State alludes to the fact that in this register, the detainee declared inter alia that his objective had been “to reach Mexico because his grandfather lives there and he had, a few days previously, been arrested by the FARC [Revolutionary Armed Forces of Colombia] and was afraid that this might happen again”. The State points out that the prisoner's background information file (diligencia de filiación) made no reference to any personal possessions of value to be recorded.

[FN2] Official Letter No. ZPD/SDIIP 92-02, of November 12, 2002.

23. The State notes that on November 12, 2002, Mr. Vélez Loor was transferred to the La Palma Public Prison in Darién. Once there, he was kept, for one month, in a cellblock for well-behaved and elderly prisoners.

24. On December 6, 2002, the Directorate of Migration and Naturalization issued Resolution No 7306, in which it applied the aforementioned Article 67 of Decree Law 16 of 1960 to Mr. Vélez Loor. It sentenced him to two years' imprisonment, given that Mr. Vélez had been deported on two previous occasions and that he had previously been forbidden to re-enter the country. An order was then issued for him to be transferred to the La Joyita Penitentiary. On December 11, 2002, the Penitentiary System Directorate recorded the fact that Mr. Vélez had entered the system and he was duly transferred on December 19, 2002.

25. The State points out that, once the necessary formalities for repatriation had been complied with, on September 8, 2003 the Directorate of Migration and Naturalization issued Resolution No. 8230 on September 8, 2003, in which it invalidated the resolution of December 6, 2002. As a result, the departure of Mr. Vélez Loor was ordered and he was transferred on September 9, 2003 to the facilities of the Directorate of Migration and Naturalization of the Ministry of the Interior and Justice with a view to his subsequent deportation. On September 10, 2003, he traveled to his native country, Ecuador, on Avianca Airlines flight 061 at 6:40 pm.

26. The State reports that, once he was in Ecuador, Mr. Vélez Loor made a formal complaint to the Panamanian Embassy in Ecuador, regarding the physical mistreatment that he had been allegedly subjected to within the Panamanian prison system. The State explains that this led to an investigation of the facts, as of January 27, 2004, carried out by the Ministry of Foreign Affairs. The National Police and the Directorate of Migration and Naturalization sent reports relating to the legality of the detention. This information was sent to the Panamanian Embassy in Quito on April 13, 2004, for forwarding to Mr. Vélez.

27. On September 15, 2004, Mr. Vélez Loor once again complained about the alleged mistreatment he had received and he submitted a new complaint relating to the payment of 2500.00 balboas for the issuance of a tourist visa, allegedly issued by the Panamanian Consulate in Cartagena de Indias, Colombia. In this regard, on September 27, 2004, the Foreign Policy Directorate of the Ministry of Foreign Affairs sent a reply to Mr. Vélez Loor,[FN3] asking him to provide proof of the payment that he had made. The State indicated that it made this request because there was no evidence in the Directorate of Migration archives that payment in that

amount had been made for a visa. The State says that it never received any reply to its request regarding this matter.

[FN3] Note DGPE-CC-2866-04 of September 27, 2004.

28. With regard to the complaints relating to physical mistreatment, the State points out that during his imprisonment, Mr. Vélez Loor was treated by the prison doctor on six occasions. The State notes that on April 10, 2003, Mr. Vélez was summoned for a medical evaluation but that he refused to go. On April 22, 2003, he was evaluated for headaches and dizziness, the product of a former cranial fracture, and a CAT scan of the brain was prescribed. On June 2, 2003, Mr. Vélez said he was on a hunger strike and said that he would not be taking any medicine. The State points out that on June 11, 2003, Mr. Vélez was attended to on account of his having been on a hunger strike for eleven days, with half of his lips stitched together. At this point he was alleging that he had not been attended to and that he was suffering from gastritis, which had been diagnosed as a consequence of his refusal to take any food, and medical treatment was ordered. On June 12, 2003 Mr. Vélez was taken by security personnel to the Clinic but he denied that he required medical attention and said that he would refuse any medicine. According to the State, on June 27, 2003, Mr. Vélez was once again examined by the doctor, who reached the conclusion that the detainee had light-to-moderate anemia and clinical signs of likely gastritis. The State adds that at one point Mr. Vélez was moved to the clinic at the La Joya prison to receive medical care for a common ailment.

29. According to the State, the Directorate of the Penitentiary System pointed out that in the medical check-ups that had been carried out, there was no evidence of physical abuse, nor did the prison report suggest that Mr. Vélez had been the victim of the alleged abuse.

30. In wrapping up the statement in its defense, the State argues that given that the focus of the investigation thus far has been of an administrative nature, no criminal investigation strictly speaking has been set in motion, “inasmuch as the petitioner has filed no formal application with the domestic judicial authorities having jurisdiction to order the performance of the necessary inquiries in response to the allegations that have been made, to clarify the facts of the case, and to try and prosecute those responsible.” The State calls upon the Commission to kindly lend “its assistance so that a request can be made to the petitioner to provide all additional evidence and information to enable the national government to initiate appropriate criminal investigations warranted by the case at hand, in order to clarify the facts described by Mr. Vélez Loor in his petition and thereby ensure, through the domestic jurisdiction of the Panamanian Government, that those responsible for perpetrating the alleged crimes may be brought to justice.” Finally, the State requests that the petition be deemed inadmissible and that the case in question be filed.

IV. ANALYSIS CONCERNING JURISDICTION AND ADMISSIBILITY

A. Jurisdiction

1. The Commission's jurisdiction *rationae personae*, *ratione loci*, *ratione temporis*, and *ratione materiae*

31. The petitioner is entitled under Article 44 of the American Convention to lodge petitions with the Commission. The petition names Jesus Velez Loor as the alleged victim, whose rights under the American Convention Panama has pledged to respect and guarantee. As for the State, the Commission points out that Panama signed the American Convention on November 22, 1969 and ratified it on June 22, 1978. Additionally, Panama ratified the Inter-American Convention to Prevent and Punish Torture on August 28, 1991. Therefore, the Commission has jurisdiction *rationae personae* to examine the petition.

32. The Commission has jurisdiction *ratione loci* because the alleged violations are said to have taken place within the territory of a State party to the American Convention.

33. With regard to the Commission's jurisdiction *ratione temporis* to examine the petition, the facts are said to have occurred as of November 2002, by which time the international human rights instruments applicable to the case were already in force in Panama.

34. Finally, the Commission is competent *ratione materiae*, because the petition denounces violations of human rights protected by the American Convention and by the Inter-American Convention to Prevent and Punish Torture.

2. Exhaustion of domestic remedies

35. Article 46.1.a of the American Convention states that admission by the Commission of a petition or communication lodged in accordance with Article 44 shall be subject to the requirement that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to allow national authorities to learn of the alleged violation of a protected right and, in appropriate cases, to resolve it before it is taken before an international instance.

36. The requirement of prior exhaustion of remedies is met when the national system is furnished with remedies that are adequate and effective to repair the alleged violation. In this connection, the exception to the requirement to exhaust domestic remedies, contained in Article 46.2 of the American Convention, does not apply when there is denial of justice: 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; 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 there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. As indicated by Article 31 of the Commission's Rules of Procedure, when the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

37. Based on inferences from the principles of international law, as reflected in precedents established by the Commission and the Inter-American Court of Human Rights, it is especially important that the State against which a claim is being lodged should invoke the plea of non-exhaustion of domestic remedies in the early stages of the proceedings before the Commission.[FN4] At the same time, given the burden of proof incumbent upon it in such matters, the State that alleges non-exhaustion should point to the domestic remedies that need to be exhausted and give proof of their effectiveness.[FN5]

[FN4] I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case*, Preliminary Objections. Judgment of February 1, 2000, para. 53; I/A Court H.R., *Castillo Petruzzi Case*, Preliminary Objections. Judgment of September 4, 1998, para. 56; I/A Court H.R., *Loayza Tamayo Case*, Preliminary Objections. Judgment of January 31, 1996, para. 40. The Commission and the Court have found that the early stages of the proceedings should be defined as the stage for assessing the admissibility of the proceedings before the Commission —i.e., before any assessment of the merits. See, for example, IACHR, Report No. 71/05, P-543/04, *Admissibility*, Ever de [Jesús] Montero Mindiola, Colombia, October 13, 2005, which cites, I/A Court H.R., *Herrera Ulloa Case*. Judgment of July 2, 2004, para. 81.

[FN5] Cf. IACHR, Report N° 32/05, P-642/03, *Admissibility*, Luis Rolando Cuscul Pivaral et al. (persons living with HIV/AIDS), Guatemala, March 7, 2005, paras. 33-35; I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case*, Preliminary Objections, Judgment of February 1, 2000, *supra*, note 4, para. 53; I/A Court H.R., *Durand and Ugarte Case*, Preliminary Objections, Judgment of May 28, 1999, para. 33; *Cantoral Benavides Case*, Preliminary Objections, Judgment of September 3, 1998, para. 31.

38. In the instant case, the petitioner first invoked the exception established in Article 46.2 of the American Convention, whereby the party alleging violation of his rights, Mr. Vélez Loor, was not allowed access to domestic remedies, in light of his deportee status. His second argument in support of applying the exception to the requirement to exhaust domestic remedies is the fact that the alleged victim was unable to pay a lawyer to take the case to the Panamanian courts, pursuant to Advisory Opinion 11/90 of the Inter-American Court. The petitioner explains that it was impossible for Mr. Vélez Loor to have access to remedies under domestic law as he had no fixed employment, given that he is a person who makes a living from selling miscellaneous articles, such as markers, etc.

39. Also attached are a number of complaints made by Mr. Vélez Loor before the Human Rights Commission of the National Congress of Ecuador, the Office of the Ombudsperson of Ecuador, and the Panamanian Embassy in Ecuador. Dated September 16, 2003, six days after his deportation, the Executive Director of the Ecumenical Commission of Human Rights (CEDHU) sent a letter to the Consul General of the Republic of Ecuador in Panama, asking for his help in recovering the passport, identity card, military passbook and medical certificates belonging to Mr. Vélez Loor. At the same time, a complaint about the torture that had been administered during his period in detention and the confiscation of his possessions was faxed to the Panamanian Embassy in Ecuador on February 2004. According to the petitioner, the complaint led to an investigation which concluded that the detention had been legal.

a. It is alleged that the party alleging violation of his rights was denied access to domestic remedies, in light of his deportee status

40. In previous cases, the Commission has declared admissible petitions of individuals who were deported and not permitted to re-enter the State which allegedly violated their rights, to enable them to challenge the human rights violations they have allegedly endured.[FN6] In the Chamorro Quiroz case, petitioners argued as follows:

... that Mr. Chamorro was not “materially” able to invoke domestic legal remedies before leaving the country because he was taken directly from where he was captured to the place where he was deported. According to the petitioners, detaining undocumented immigrants for several hours before deporting them is an administrative measure, taken within highly summary, almost automatic, proceedings, that does not allow them the opportunity of filing or attempting to seek any domestic remedy, including habeas corpus. In addition, since they had no papers and no means of economic support, they were unable to reenter Costa Rica to formulate complaints or invoke the applicable legal remedies, as claimed by the State.[FN7]

[FN6] See IACHR, Admissibility Report N° 37/01, Case 11.529, José Sánchez Guner Espinales et al. (Costa Rica), February 22, 2001, and IACHR, Admissibility Report N° 89/00, Case 11.495, Juan Ramón Chamorro Quiroz (Costa Rica), October 5, 2000.

[FN7] Ibid. Admissibility Report N° 89/00, para. 35.

41. In Chamorro Quiroz, the IACHR decided to allow the petition on account of the fact that this was a clear case of the circumstances referred to in Article 46(2)(b) of the American Convention which states that Article 46(1)(a) and 46(1)(b) shall not be applied when:

the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.

The facts of the Chamorro Quiroz case demonstrated to the Commission that, despite the official position expressed by the State, to the effect that deported foreigners had access to the legal remedies of annulment (revocatoria) and appeal (apelación) proceedings, it was later proven that in actual fact they were not in possession of these rights. The Law concerning Migration and Aliens, according to the manner in which the State of Costa Rica interpreted its own laws, was interpreted to mean that undocumented aliens, on account of the fact that their situation was "absolutely illegal" (in other words, because they had entered the State's territory without proper authorization, without immigration papers), enjoyed no such rights.[FN8]

[FN8] Ibid., para. 34.

42. Mr. Chamorro lacked an opportunity to invoke domestic legal remedies prior to leaving Costa Rica because he was driven directly from the place he was captured to the place from which he was deported. Comparing the case of Mr. Vélez Loor with that of Mr. Chamorro, Mr. Vélez also lacked the opportunity of invoking domestic remedies before leaving the country as he was driven to a detention center where he was not allowed any contact with the outside world. He alleges that he was not allowed to use the telephone or have any contact with consular agents from Ecuador. He furthermore asserts that he was only allowed access to one lawyer who was unable to visit him in person. Consequently, irrespective of whether the administrative or legal remedies could have been available to him, for practical purposes such remedies were out of his reach.

43. The Commission finds that with regard to the first argument presented by the petitioner, the State did not allow Mr. Vélez Loor access to remedies under domestic law to challenge the alleged arbitrary detention and the mistreatment and torture that he purportedly suffered. The Commission concludes that Mr. Vélez Loor was prevented from exhausting these remedies because he was arrested and then forbidden to use the telephone or have any other contact with the world outside his prison. Consequently, the requirement of exhaustion of remedies under domestic law is not applicable to the petitioner in accordance with the exception enshrined in Article 46.2.b of the American Convention.

b. The petitioner is asserting that he lacked the means to pay for a lawyer to take his case before Panamanian courts

44. The petitioner also adduces the extreme state of hardship in which Mr. Vélez Loor found himself as justification for not being required to exhaust domestic remedies in Panama in addition to invoking the impossibility of gaining access to the justice system or of challenging by legal means his arrest and subsequent expulsion. According to the case file, Mr. Vélez Loor lives off selling different kinds of articles as an itinerant trader and he receives no support from his family. It is a matter of record that Mr. Vélez Loor lives in a room which he rents with other people and that he is in declining health. He alleges that his economic situation does not allow him to have the medical treatment that he requires. One day he fainted and one of the people with whom he rents the room found him lying on the floor.[FN9] The petitioner alleges that Mr. Vélez Loor has received no medical attention since the cruel violations of human rights to which he was subjected in Panama. According to his lawyer, Mr. Vélez Loor complains of numerous ailments and there are a number of movements that he cannot make easily, for example, he cannot stoop down as the blood pressure in his head hurts him, or turn to one side when he is lying down as his spine causes him pain.[FN10] Moreover, according to the complaint, the after-effects of the torture have led to a number of relapses which have prevented him from carrying out his work as he otherwise would.

[FN9] Letter from Mr. José Villagrán, attorney for Mr. Vélez Loor dated November 7, 2005.

[FN10] Ibid.

45. With regard to indigent cases, the Inter-American Court has pointed out that a State that fails to provide free legal advice in cases of indigence may not later argue that a given remedy was available but not utilized.[FN11] In particular, the Inter-American Court has pointed out that if an individual requires legal aid to protect a right guaranteed by the Convention and his indigence prevents him from obtaining it, he is relieved of responsibility for exhausting domestic remedies.[FN12] Mr. Vélez Loor was sentenced in Panama to a prison term for having repeatedly entered Panama in an illegal fashion. Due process requires that someone against whom charges are made must have the right to defend himself personally or be helped by a defense attorney of his own choosing and if he does not do so he has the inalienable right of being helped by a defense lawyer provided by the State, whether or not pro bono under domestic law.[FN13] Given that Mr. Vélez Loor was not Panamanian, it is obvious that he needed to retain a Panamanian lawyer to defend himself against the charges brought against him in Panama. This is how the Convention guarantees the right to legal aid in legal proceedings.[FN14] Although Mr. Vélez Loor has been provided with legal aid to bring his case before the Commission, he was able to document the difficulty he had obtaining legal aid, particularly at the time of his arrest and throughout the period of his detention in Panama.

[FN11] I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Art. 6.1, 46.2.a, and 46.2.b of the American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990, para. 28.

[FN12] Ibid., para. 31.

[FN13] Ibid., para. 25.

[FN14] Ibid.

46. Consequently, based on the terms of Article 48 of the Convention and Article 31 of the Rules of Procedure, in reviewing the case, particularly taking into account the fact that Mr. Vélez Loor was unable to exhaust domestic remedies as he was deprived of liberty and was without legal counsel, the IACHR finds in favor of applying the exception provided for in Article 46.2.b of the American Convention, given that the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.

3. Period for filing the petition

47. In accordance with the provisions of Article 46.1.b of the Convention, admission by the Commission of a complaint shall be subject to the following requirements—namely, that the petition or communication is 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 national level. The six-month rule guarantees legal certainty and stability once the decision has been adopted.

48. Under Article 32.2 of the Commission's Rules of Procedure, in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. Under said Article, the Commission "shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

49. With regard to the petition to be examined, the Commission has established applicability of the exception regarding lack of access to the remedies referred to in Article 46.2.b and must therefore evaluate whether the petition was presented within a reasonable period in accordance with the specific circumstances of the case at hand. In this regard, by virtue of the particular circumstances in which the petition was submitted, which include allegations of arbitrary detention, mistreatment, and torture, and considering that the petitioner argues that he was not in a position to seek remedies in Panama and had instead to file complaints with the Panamanian Embassy in Ecuador (according to the petitioner, in February 2004) and given that the State has provided no details about any criminal proceedings undertaken in connection with these complaints, the Commission finds that the petition under consideration was filed within a reasonable period.

4. Duplication of procedures and international res judicata

50. There is no suggestion in the case file that the subject of the petition or communication is pending in another international proceeding for settlement, nor that the petition or communication is substantially the same as one previously studied by the Commission or by another international organization. Accordingly, the requirements established in Articles 46.1.c and 47.d of the American Convention shall be deemed to have been met.

5. Characterization of the facts alleged

51. For purposes of admissibility, the Commission shall decide whether the petition or communication does state facts that tend to establish a violation of the rights guaranteed by this Convention, as stated in Article 47.b of the American Convention, if the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order, according to paragraph (c) of the same Article.

52. The standard for assessing these criteria is different from the standard required for deciding on the merits of a complaint. The Commission must carry out a “prima facie” assessment so as to examine whether the complaint establishes the apparent or potential violation of a right that is guaranteed under the Convention and not so as to establish the existence of a violation. Such an examination is a summary analysis that does not imply any prejudice or preliminary opinion on the merits.[FN15]

[FN15] IACHR, Admissibility Report N° 21/04, Petition 12.190, José Luíz Tapia González et al., (Chile), February 24, 2004, para. 33.

53. The Commission does not find that the petition is “manifestly groundless” or that it is “obviously out of order”. As a result, the Commission considers that, prima facie, the petitioner has met the criteria set forth in Article 47.b and c.

54. Mr. Vélez Loor was incarcerated pursuant to resolution N° 7306 dated December 6, 2002 of the National Office of Migration (Dirección Nacional de Migración), which sentenced him to two years in prison, without a trial or even a hearing, on the basis of the provisions of article 67 of Decree law N° 16 of June 20, 1960 (supra para. 20). This Decree Law provides that anyone who is a recidivist in clandestinely entering Panama without the appropriate documentation will be sentenced to two years of “agricultural work in the Penal colony in Coiba” and will be obliged to leave the country at the end of that period. On July 29th, the National Director of Migration, by means of note N° DNMYN-AL-274-03 notified that if Mr. Vélez was in possession of the respective ticket or airline ticket to leave Panama, Resolution N° 736 would be rendered without effect. The Ecuadorian Embassy in Panama, however, maintains that the liberation of Mr. Vélez could not be achieved earlier due to the fact that the Director of Migration had discussed the case by telephone with the consulate and informed it that she would only authorize the deportation of detainees for this kind of crime when the period of detention had been completed. In fact, however, Mr. Vélez Loor was detained for ten months and was deported back to Ecuador with passage obtained by the Ecuadorian Embassy through a private businessman.

55. The Commission is of the opinion that detention pursuant to Decree Law N° 16 of June 30, 1960 raises questions of the “arbitrariness of the arrest or detention” of Mr. Vélez Loor, (under Article 7.3 of the American Convention, as well as questions regarding Mr. Vélez Loor’s right to challenge the detention and to defend himself against the two year prison term (under Article 7.5 and (6)). In addition Mr. Vélez Loor was held in different prisons and not in the detention center at Coiba where he was supposed to perform “agricultural work” pursuant to the Decree Law that authorized his detention. In this context, the Commission also recognizes that the petitioner has alleged a violation of Article 21 in that his property was taken from him when he was detained by the authorities. Since the State argues that he had no possessions on him when he was detained, in the next stage of the proceedings the petitioner will be required to prove these allegations.

56. The fact that this was a situation in which administrative authorities imposed a two year prison sentence on an “illegal” or undocumented person, allegedly, in transit, without the possibility of judicial review, constitutes a possible violation of Article 2 of the American Convention regarding the responsibility to adopt measures to give effect to the American Convention at the national level, Article 8.1 regarding the right to due process and Article 25 regarding access to justice. The petitioner also argues a violation of his right to due process in that the law was only a decree law issued by the Executive and not a law debated and sanctioned by Congress before being approved by the Executive.

57. In addition, the petitioner points out that Mr. Vélez Loor was subjected to conditions of detention that were at times accompanied by cruel, inhumane, and degrading treatment, including torture in alleged violation of Article 5 of the American Convention. At the same time, he asserts that he did not have access to legal aid during his detention. Moreover, he states that he did not receive medical attention of the kind necessary to enable him to cope with the after-effects of his alleged torture.

58. With regard to the complaint made about alleged torture, the State refers to the reports of the Directorate of Migration and Naturalization [and] the Directorate of Prisons so as to point out

that the procedures for deportation and the imposition of penalties were in compliance with the law.

59. The Inter-American Commission considers that the alleged torture described in the petition and the lack of information about criminal investigations and penalties relating to these facts (denial of justice) constitute a possible violation of Articles 5, 8, and 25 of the American Convention and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. Moreover, the allegations about a lack of suitable medical attention to treat the after-effects of torture amount to a possible violation of Article 5 (Right to Humane Treatment) of the Convention. At the same time, the Commission will analyze the legal and prison rules that apply to undocumented immigrants and the effect they may have had on the possible violations of rights which have been alleged in this case. There will be an investigation of the extent to which the authorities abided by guarantees relating to consular assistance and established procedures as a requirement for deportation. In conclusion, all the foregoing considerations will be analyzed in connection with the obligation to respect and guarantee rights referred to in Articles 1 and 2 of the Convention.

60. As regards a possible violation of Article 10 of the American Convention, a right to compensation, if someone has been sentenced by a final judgment through a miscarriage of justice, the Commission considers that this provision is not applicable to the situation at hand. Mr. Vélez Lóor was not subject to a judicial proceeding, but rather was the alleged victim of an administrative order, that permitted him no right to participate in the proceedings nor to defend himself. There is no possible “miscarriage of justice” since there was no question of justice being dispensed by a judicial authority.

V. CONCLUSIONS

61. Based on the considerations of fact and law set forth herein, and without prejudging the substantive merits of the question, the Commission finds that the present case meets the requirements for admission as set forth in Article 46 of the American Convention.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the petition under consideration admissible, under Articles 1.1, 2, 5, 7, 8, 21, and 25 of the American Convention, as well as Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.
2. To declare the part of the petition, alleging violation of Article 10 of the American Convention, inadmissible.
3. To notify the State and the petitioner of this decision.
4. To initiate proceedings into the merits of the case.
5. To publish this decision and include it in its Annual Report, to be presented to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 23rd day of the month of October, 2006.
(Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President;
Florentín Meléndez, Second Vice-President; Freddy Gutiérrez, Paolo G. Carozza and Víctor E.
Abramovich, Commissioners.