

REPORT No. 4/11¹

PETITION 289-08

ADMISSIBILITY

JIMMY RAFAEL GUERRERO MELÉNDEZ AND RAMÓN ANTONIO MOLINA PÉREZ AND FAMILY
VENEZUELA

February 19, 2011

I. SUMMARY

1. On March 10, 2008, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition lodged by Juan Carlos Guerrero and the Committee of Relatives of the Victims of the Events of February-March 1989 (COFAVIC) (hereinafter "the petitioners") which alleges the responsibility of agents of the Bolivarian Republic of Venezuela (hereinafter "the State", "the Venezuelan State," or "Venezuela") in the killings of Jimmy Rafael Guerrero Meléndez and Ramón Antonio Molina Pérez (hereinafter "the alleged victims") on March 29, 2003, in the city of Punto Fijo, Falcón State, as well as the failure of the judicial system to solve the crimes.

2. The petitioners hold that the State is responsible for the violation of the rights to life, humane treatment, personal liberty, a fair trial, and judicial protection recognized in Articles 4(1), 5, 7, 8, and 25(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention"), taken in conjunction with Article 1(1) of said treaty and Article 2 of the Inter-American Convention to Prevent and Punish Torture. The State, for its part, argued that the claims of the petitioners were inadmissible on account of their failure to exhaust remedies under domestic law and that the facts alleged in the petition did not constitute colorable claims of violations of rights under the American Convention

3. Having examined the positions of the parties in accordance with Articles 46 and 47 of the American Convention, the Commission decided to declare the complaint admissible as regards the alleged violations of Articles 4, 5, 7, 8, and 25, in connection with the obligations set forth in Article 1(1) of the American Convention and Article 2 of the Inter-American Convention to Prevent and Punish Torture, and, in application of the *iura novit curia* principle, Articles 6 and 8 of the latter treaty; to notify the parties of the report, and to order its publication in the Annual Report of the IACHR to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

4. The IACHR registered the petition as number P289-08 and after a preliminary analysis proceeded on April 30, 2008, to transmit a copy of the pertinent portions to the State, to which it gave two months to present information in accordance with Article 30(3) of its Rules of Procedure. On October 29, 2008, the Commission reiterated its request for information to the State. On January 12, 2009, the State requested the Commission for a copy of the record of the petition in reference. On January 12, 2009, the Commission again forwarded a copy of the pertinent portions to the State with a request that it provide information. On June 4, 2009, the Commission received a brief from the State containing its observations, which were relayed to the petitioners for comment. On July 2, 2009, the IACHR received a brief containing the comments of the petitioners, which was conveyed to the State for comment. On October 20, 2009, the Commission reiterated its request for information to the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

¹ Pursuant to Article 17(2) of the Rules of Procedure of the IACHR, Commissioner Luz Patricia Mejía Guerrero, a Venezuelan national, did not participate in the discussion or decision in the present case.

5. The petitioners claim that the facts in the instant case are part of a practice of illegal and arbitrary detentions followed by extrajudicial executions, and of indiscriminate use of force, mostly attributed to regional police forces, which has been denounced in Venezuela for more than a decade. The petitioners also say that said practice follows a pattern in which the victims are young men from economically more-vulnerable social sectors and the *modus operandi* has the following characteristics: i) presentation of the incident as a confrontation; ii) tampering with the scene of the crime; iii) transfer of the wounded victim by the same agents who assaulted them; iv) abandonment of the victim –usually deceased– at a public hospital without information as to what had occurred; v) use of official uniforms, weapons, and equipment; vi) public discrediting or criminalization of the victim by claiming that they resisted the authorities or had criminal and/or police records; and vii) intimidation, threats, and even murder of witnesses of the crime and the victim's next of kin.

6. The petitioners say that in 2000 there was a restructuring of the Falcón State Police Force (hereinafter "FAPF") and elite police units were created, such as the Metropolitan Police Motorized Brigade (hereinafter "PM") and the Special Action Brigade of the Penal and Criminal Scientific Investigations Corps (hereinafter "CICPC"). According to the petitioners, thereafter the "red pages" of the regional newspapers began to report a significant increase in the number of persons who lost their lives in confrontations with the police.

7. Specifically, the petitioners say that Jimmy Rafael Guerrero Meléndez (26 years old) lived in Urbanización Los Medanos, City of Coro, Falcón State, where he was self-employed as a taxi driver and street vendor. They say that from 2002 to 2003 he was persecuted and harassed by FAPF agents. According to the petitioners, in that time the FAPF and CICPC had arrested Jimmy Rafael Guerrero Meléndez (hereinafter "Jimmy Guerrero") for illicit possession of a firearm and vehicle theft. They also say that according to information supplied by his relatives, Jimmy Guerrero had received death threats and been unlawfully arrested on several occasions by officials reputedly attached to the FAPF.

8. They claim that in view of the constant harassment, Jimmy Guerrero endeavored always to be in the company of neighbors whenever he left home, and it was very often they who let his relatives know when he had been arrested. They say that as a result of this situation on August 16, 2002, he filed a complaint with the Office of the Falcón Superior Court Prosecutor alleging reiterated death threats against him by personnel of the FAPF Motorized Brigade, particularly by one senior officer. They say that on September 18, 2002, the Office of the First Prosecutor opened a case numbered 11F1-0686-02; however, Jimmy Guerrero did not receive any protection.

9. They claim that on September 27, 2002, Jimmy Guerrero again visited the Office of the Falcón Superior Court Prosecutor to report the harassment to which he was being subjected, which he said was the result of a problem with a supposed first class officer of the Falcón police. In that complaint he mentioned an alleged illegal raid on the residence of his mother, Emilia Guerrero, in which the FAPF had reportedly "planted" weapons to incriminate his relatives. They say that on October 28, 2002, Jimmy Guerrero made a statement to the Office of the Ombudsman in which he said, "Whenever they see me in the street they arrest me," and that he had been detained on October 23 and 25, 2002, by the CICPC and the FAPF, respectively. They mention that the statement was forwarded to the Superior Court Prosecutor on that same day, October 28, 2002, enclosed in official letter DP/DDEF No. 02358-02.

10. According to the petitioners, on November 4, 2002, the Office of the Second Prosecutor in and for Falcón State received another complaint from Jimmy Guerrero, who had returned to the Office of the Ombudsman on November 2, 2002, to report that he had been arrested again. They claim that owing to the continuing harassment, on February 17, 2003, Erimay Loyo, Jimmy Guerrero's partner, went to the Office of the Ombudsman to report that he had been arrested again. That day Jimmy Guerrero stated that he had been physically assaulted by FAPF agents, who had covered his head to prevent him from identifying them. They say that according to a forensic examination of Jimmy Guerrero on February 19, 2003, the results of which were forwarded to the Office of the Second Prosecutor, he had a "traumatic edema on the frontal region and secondary ecchymosis on his right side. Closed thoracic trauma; complicated by intercostal neuritis of a [trau]matic origin [...] Lesions caused by a blunt instrument; light in nature [...]".

11. The petitioners also say that in statements made at the Office of the Ombudsman on February 19 and March 10, 2003, Jimmy Guerrero said that he had been under surveillance in the area around his residence. They say that given the seriousness of the situation, on February 25, 2003, five months after the first harassment complaint, the Office of the Ombudsman requested the Falcón State Superior Court Prosecutor to open an investigation as soon as possible and to adopt measures to protect Jimmy Guerrero's physical integrity. However, according to them effective protection was not provided.

12. The petitioners say that on March 29, 2003, at approximately 7:00 p.m. Jimmy Guerrero left Coro, the capital city of Falcón State, in the company of his sister, Yarelis Guerrero; his cousin, Dayana Pirela; and his neighbor, José Gregorio Hernández La Concha. They set off for Punto Fijo to attend the *novenario* for his cousin, Jaime Rafael Molina, the son of Ramón Antonio Molina Pérez (hereinafter "Ramón Molina"). They say that en route from Coro to Punto Fijo they were stopped by police who, according to relatives of the alleged victims, informed the police headquarters of the direction taken by a vehicle whose description matched that of Jimmy Guerrero's.

13. They say that after arriving at the *novenario*, Jimmy Guerrero, Ramón Molina, and José Gregorio Hernández La Concha decided to go out to buy some food and beverages. According to the petitioners at some time between 11:30 p.m. and 12:30 a.m. the above persons, who were traveling in a Chevrolet Monza owned by the mother of Jimmy Guerrero, were stopped upon their arrival at an establishment by the name of "Distribuidora Rodríguez," situated in the Buenos Aires Alley, Urbanización Santa Irene, by presumed police agents dressed in black who were driving a dark blue Ford Explorer SUV with tinted windows, no license plates, and a Chevrolet Century as escort.

14. They claim that when Jimmy Guerrero got out of the car the presumed police agents shot him several times in the chest and abdomen and then, while thus gravely wounded, brutally assaulted him. They say that Ramón Molina tried to intervene and he asked the police why they were shooting at him, in response to which he was shot dead. They say that José Gregorio Hernández La Concha survived the attack with wounds in one arm. The petitioners say that the autopsy performed on Jimmy Guerrero's corpse revealed signs of torture on his body, presumably caused by the blows he received while wounded.

15. The petitioners note that on March 30, 2003, the CICPC prepared a police report which says that on that same day the above agency received a call from Los Taques Police Precinct in Punto Fijo which reported that Ramón Molina's corpse was found in Buenos Aires Alley in Urbanización Santa Irene and that Jimmy Guerrero's body was found at Santa Irene service station on the Giraldot extension. They say that on the same day, March 30, 2003, CICPC officials proceeded with the removal of Jimmy Guerrero's corpse and that the autopsy report indicated that the body showed signs of torture. They say that on April 1, 2003, Jean Carlos Guerrero, the brother of Jimmy Guerrero, filed a complaint with the Office of the Falcón State Superior Court Prosecutor for the killing of his brother and his uncle Ramón Molina, the perpetrators of which he said were "the state police because my brother received death threats from the state forces [...] and was arrested in operations in which he was unjustly and unlawfully detained." They say that Jean Carlos Guerrero ratified his complaint on April 2, May 13, and November 12, 2003.

16. The petitioners say that the killings of Jimmy Guerrero and Ramón Molina were justified by the authorities and described by the media as a confrontation between gangs. They say that the head of the CICPC for Falcón State told *El Falconiano* -a local newspaper- that Jimmy Guerrero was "highly dangerous," presenting the alleged victim as a criminal as if to justify the crimes committed. The petitioners say that the relatives of the alleged victims have refuted those claims through the local newspapers.

17. The petitioners note that on March 30, 2003, the Office of the Sixth Prosecutor for Falcón State opened a criminal inquiry, which is being conducted in conjunction with the Office of the Second Prosecutor for that district. However, they say that the investigation has not progressed beyond the

preliminary stage and none of the culprits have been identified. They say that the CICPC has failed to conduct the majority of the procedures requested by the Office of the Attorney General.

18. In sum, the petitioners claim that the State is responsible for violation of the rights to life, humane treatment, a fair trial, and judicial protection recognized in Articles 4, 5, 8, and 25 of the American Convention, to the detriment of Jimmy Guerrero and Ramón Molina; the right to personal liberty protected in Article 7 of the American Convention, to the detriment of Jimmy Guerrero; and the rights to humane treatment, a fair trial, and judicial protection protected in Articles 5, 8, and 25 of the American Convention to the detriment of the relatives of Jimmy Guerrero and Ramón Molina, all in conjunction with the duty to ensure rights provided in Article 1(1) of the American Convention and Article 2 of the Inter-American Convention to Prevent and Punish Torture.

19. As to compliance with the requirement of prior exhaustion of domestic remedies provided at Article 46(1)(a) of the American Convention, the petitioners argue that the exceptions provided in Article 46(2)(c) regarding unwarranted delay in a decision under those remedies are applicable. In that regard, the petitioners argue that more than six years after the crimes the investigation is still at the preliminary stage, which denotes lack of diligence on the part of the authorities in elucidating the facts. They say that the perpetrators have not been identified, no one has been charged with legal responsibility, and the relevant final decision has not been forthcoming.

B. Position of the State

20. In response to the petitioners' complaint, the State argued that the remedies under domestic law have not been exhausted in accordance with Article 46(1)(a) of the American Convention. It also argues that the exceptions set forth in Articles 46(2)(a) and 46(2)(b) of the Convention are not applicable because in the State there exists a legal procedure for protection of the rights allegedly violated and that, moreover, the State has not prevented access for the alleged victims to the remedies under domestic law.

21. In its brief the State recounted in detail the steps taken by the Ombudsman and the Office of the Attorney General, and said that on March 3, 2009, the Office of the 10th Prosecutor for the Judicial District of Falcón State, which has been commissioned to assist in the investigations, either jointly with or separately from the lead prosecutor's office, requested the CICPC office in Punto Fijo to forward all supplementary proceedings so that the appropriate final decision could be adopted. Accordingly, the State argued that its competent authorities are actively moving the proceedings forward, held that all the rights which the petitioners allege violated have been ensured, and requested the Commission to declare the petition inadmissible.

IV. ANALYSIS

A. Competence

22. The petitioners have standing under Article 44 of the American Convention to lodge petitions on behalf of the alleged victims. For its part, the Venezuelan State ratified the American Convention on August 9, 1977, and the Inter-American Convention to Prevent and Punish Torture on August 26, 1991. Therefore, the Commission has *ratione personae* competence to examine the petition. Furthermore, the Commission is competent *ratione temporis* because the American Convention and the Inter-American Convention to Prevent and Punish Torture were in force for the State at the time the events described in the petition are alleged to have occurred.

23. The Commission is competent *ratione loci* because the alleged violations are purported to have occurred within the jurisdiction of a state party to said treaty. Finally, the Commission has *ratione materiae* competence because the petition alleges violations of human rights protected by the American Convention and the Inter-American Convention to Prevent and Punish Torture.

B. Admissibility requirements

1. Exhaustion of domestic remedies

24. Article 46(1)(a) of the American Convention provides that admission of petitions alleging violation of the Convention 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.

25. Article 46(2) of the Convention provides that the rule on prior exhaustion of domestic remedies does not apply when:

- a) 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;
- b) 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
- c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

In keeping with the Rules of Procedure of the IACHR and as the Inter-American Court has found, the State claiming non-exhaustion of domestic remedies has an obligation to prove that the domestic remedies that remain to be exhausted are "adequate" for dealing with the violation alleged, in other words, that the function of those remedies in the legal system of the country is suitable to address an infringement of a legal right.²

26. In the instant case the State argues that the petition does not meet the requirement of prior exhaustion of domestic remedies provided at Article 46(1)(a) of the American Convention and that the exceptions contained in Articles 46(2)(a) and 46(2)(b) thereof are not applicable. For their part, the petitioners argue that the exception provided in Article 46(2)(c) of the Convention is applicable because more than six years have elapsed since the incident and opening of the criminal inquiry, which is still at a preliminary stage and has failed to identify any of the culprits, as a result of which the violations have remained in impunity.

27. In view of the arguments offered by the parties, to begin with, the Commission must clarify which domestic remedies need to be exhausted in the instant case. The precedents established by the Commission indicate that when a publicly actionable offense is committed, the State has the obligation to institute criminal proceedings and pursue them,³ and that in such cases, this is the best way to clarify the facts, judge the perpetrators, and establish the corresponding criminal punishment, in addition to providing for other forms of reparation, including financial reparation. The Commission finds that the facts described by the petitioner include alleged violations of the rights to life and humane treatment which are publicly actionable offenses under the country's domestic laws that the state is required to investigate and prosecute.

28. The Commission notes that in the instant case, on March 30, 2003, the Office of the Sixth Prosecutor for Falcón State Criminal Jurisdiction opened an inquiry for the intentional homicide of Jimmy Guerrero and Ramón Molina. Based on information supplied by the parties, the Commission notes that more than seven years have passed since the investigation was opened and it remains at the preliminary stage; a large number of procedures that the Office of the Attorney General ordered the CICPC to carry out have not been done so, and none of the culprits suspected of the alleged crimes have been prosecuted and found guilty. Therefore, given the characteristics of the instant case and the time elapsed since the facts that are the subject of the petition occurred, the Commission finds to be applicable the

² I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, par. 64.

³ IACHR, Report No. 99/09, Petition 12.335, *Gustavo Giraldo Villamizar Durán*, Colombia, October 29, 2009, par. 33. See also IACHR, Report No. 52/97, Case 11.218, *Arges Sequeira Mangas*, *Annual Report of the IACHR 1997*, pars. 96 and 97, and IACHR, Report No. 55/97, Case 11.137, *Abella et al.*, par. 392.

exception provided in Article 46(2)(c) of the American Convention as regards the delay in domestic judicial proceedings. Therefore, the rule on exhaustion of domestic remedies is not required.

29. Invocation of the exceptions to the rule of exhaustion of domestic remedies provided in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights set forth therein, such as guarantees of access to justice. However, Article 46(2), by its nature and purpose, is a self-contained provision *vis á vis* the substantive provisions contained in the Convention. Therefore, to determine whether or not the exceptions to the rule of exhaustion of domestic remedies are applicable to a particular case requires an examination carried out in advance of and separate from the analysis of the merits of the case, since it depends on a different standard of appreciation to that used to establish whether or not there has been a violation of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects that have prevented exhaustion of domestic remedies in the instant case will be examined, where pertinent, in the report that the IACHR adopts on the merits of the dispute, in order to determine if they constitute violations of the American Convention.

2. Timeliness of the petition

30. The American Convention provides that for a petition to be admissible, it must be presented within six months of the date on which the party alleging violation of rights was notified of the final judgment. In the complaint under review the IACHR has determined that the exceptions to the rule of exhaustion of domestic remedies pursuant to Article 46(2)(c) of the American Convention are applicable. In this regard, Article 32 of the Commission's Rules of Procedure states that when the exceptions to the rule requiring prior exhaustion of domestic remedies apply, the petition is to be presented within what the Commission deems to be a reasonable period. The Commission must therefore consider the date on which the alleged violation of rights occurred and the circumstances of each case.

31. In the instant case, the petition was received on March 10, 2008; the facts with which the petition is concerned occurred in 2003; and their reputed effects, in terms of the alleged failure in the administration of justice, continue at present. Therefore, in light of the context and characteristics of the instant case, as well as the fact that an investigation is still open at an initial stage, the Commission considers that the petition was lodged within a reasonable time and that the admissibility requirement regarding the timeliness of the petition must be deemed met.

3. Duplication of international proceedings and *res judicata*

32. There is nothing in the record to suggest that the subject matter of the petition is pending in another international proceeding for settlement or that it is substantially the same as one previously studied by the Commission or by another international organization. Therefore, the Commission finds that the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Colorable claim

33. In light of the arguments of fact and of law made by the parties and the nature of the matter before it, the Commission finds that the petitioners' claims of alleged extrajudicial execution of Jimmy Guerrero and Ramón Molina could characterize violations of the rights to life and humane treatment protected in Articles 4 and 5 of the American Convention, in conjunction with Article 1(1) thereof.

34. The Commission considers that the petitioners' submissions concerning alleged physical assault and illegal detention of Jimmy Guerrero could characterize violations of the rights to humane treatment and personal liberty recognized in Articles 5 and 7 of the American Convention, in conjunction with Article 1(1) thereof. Furthermore, given the evidence submitted in the petition, it is appropriate for Commission to analyze the State's responsibility with respect to the alleged violation of Article 2 of the American Convention and, under the principle of *iura novit curia*, Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Jimmy Guerrero.

35. In addition, the Commission considers that the reputed failure to investigate and punish those responsible and the consequences for the next of kin could characterize violations of the rights to humane treatment, a fair trial, and judicial protection enshrined in Articles 5, 8, and 25 of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of the relatives of Jimmy Guerrero and Ramón Molina.

V. CONCLUSIONS

36. The Commission concludes that it is competent to examine the complaints lodged by the petitioners concerning alleged violation of Articles 4, 5, 7, 8, and 25 of the American Convention, in conjunction with Article 1(1) thereof; Article 2 of the Inter-American Convention to Prevent and Punish Torture, and, in application of the *iura novit curia* principle, Articles 6 and 8 of the latter treaty, and that said complaints are admissible in accordance with the rules set out in Articles 46 and 47 of the American Convention.

37. Based on the factual and legal arguments given above and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the petition sub examine admissible with respect to Articles 4, 5, 7, 8, and 25 of the American Convention, and Article 2, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.
2. To notify the Venezuelan state and the petitioners of this decision.
3. To begin proceedings on the merits of the complaint.
4. To publish this decision and include it in the Annual Report to be submitted to the OAS General Assembly.

Approved on the 19th day of February 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Paulo Sérgio Pinheiro, Felipe González and María Silvia Guillén, Commissioners.