REPORT No. 91/12
PETITION 1336-07
ADMISSIBILITY
JOSÉ GREGORIO MOTA ABARULLO *ET AL.*
(DEATHS AT THE SAN FÉLIX PRISON)
VENEZUELA
November 8, 2012

I. SUMMARY

1. On October 12, 2007, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") received a petition submitted by the *Observatorio Venezolano de Prisiones* OVP (hereinafter "the petitioners") alleging responsibility on the part of the Bolivarian Republic of Venezuela (hereinafter "the State") for the death of José Gregorio Mota Abarullo, Johan José Correa, Gabriel de Jesús Yánez Sánchez, Rafael Antonio Parra Herrera, and Cristian Arnaldo Molina Córdova (hereinafter "the alleged victims") who died in a fire on June 30, 2005 at the Monsignor Juan José Bernal Diagnostic and Treatment Center of the National Institute for Minors (INAM), known as the "San Félix Prison," in the State of Bolívar.

2. The petitioners allege that the State is responsible for violating the rights to life and judicial protection and the rights of the child as established in Articles 4, 19, and 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") in connection with Article 1.1 thereof, to the detriment of the alleged victims and their family members. The names of the victims' family members as reported to the IACHR to date are: Nelys Margarita Correa, Elvia de Jesús Abarullo de Mota, Maritza del Valle Sánchez Ávila, Miryam Josefina Herrera Sánchez, and María Cristina Córdova de Molina. The State alleges that this petition is inadmissible due to a failure to exhaust the domestic remedies.

3. Without prejudging the merits of the complaint, after analyzing the positions of the parties, and in accordance with the requirements of Articles 46 and 47 of the American Convention, the Commission decided to declare the petition admissible for purposes of review with respect to the alleged violation of the rights enshrined in Articles 4, 5, 8, 19, and 25 of the American Convention, in connection with Article 1.1 thereof, to the detriment of the alleged victims. It also decided to inform the parties of this decision, to publish it, and include it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BY THE COMMISSION

4. The Inter-American Commission recorded the petition under Number P-1336-07 and forwarded the relevant portions to the State on May 13, 2008, allowing the State a period of two months to submit its observations. On October 31, 2008 the IACHR repeated its request to the State for comments.

5. The Commission received the State's observations on May 12, 2009 and forwarded them to the petitioners on May 15, 2009.

6. The petitioners' observations regarding the State's response were received on April 14, 2011 and were forwarded to the State on April 29, 2011, allowing it a period of one month to submit its observations. On March 30, 2012 the Inter-American Commission again requested information from the State, but has not received any response as of the approval date of this report.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

7. As background, the petitioners state that José Gregorio Mota Abarullo, Johan José Correa, Gabriel de Jesús Yánez Sánchez, Rafael Antonio Parra Herrera, and Cristian Arnaldo Molina Córdova, inmates at the INAM, had been locked in cell No. 4 as punishment for their alleged participation in a fight and that for some days prior to the fire, their family members knew they were being threatened by some INAM employees and inmates.

8. The petitioners report that the five alleged victims died from burns and suffocation in a fire that occurred in cell No. 4 at the San Félix INAM at approximately 4:30 p.m. on June 30, 2005. They allege that when the fire alarm sounded in the cell the authorities were unable to open the door in time because they could not find the keys and did not have a set of spare keys. They also allege that the fire truck that came to the INAM had no water or foam to smother the fire and that the 171 emergency service employees failed to act promptly. They argue that this conduct on the part of the authorities responsible for the custody of the alleged victims was obviously negligent and constitutes failure to meet the State's obligations as established in Articles 4 and 1.1 of the American Convention.

9. They allege that the investigation of the facts began on June 30, 2005, but that the progress of that investigation and the submission of the final proceeding to the competent courts were delayed without justification for more than two years, even though the three accused had been properly and individually identified and the events occurred in a detention center under the control of the authorities. They maintain that in response to the inaction of the Office of the Public Prosecutor, the petitioners filed a complaint with the competent courts in 2006, a complaint that produced no results.

10. They also allege that more than two years after the investigations began the Scientific, Criminal, and Criminalistic Investigations Force (CICPC) had still not conducted several of the tests ordered by the Prosecutor's Office and that the procedure to reconstruct the crime was conducted more than one year after the investigation began. They state that the procedure was futile because the San Félix INAM authorities had completely changed the facilities to the point that it was impossible to determine the location of the cell where the fire occurred and that even though it was obvious that the alleged victims died from burns and suffocation, the forensic experts failed to determine the cause of death after exhuming their corpses. They also alleged that the reports filed by the fire department of the Municipality of Caroní did not adhere to the truth of what happened.

11. The petitioners state that the criminal process with respect to the facts reported is "stuck" in the trial phase and additionally that the proceedings in this phase have been systematically delayed. In this regard, they state that the hearing opening the trial was originally scheduled for May 14, 2010 and was successively postponed to January 12, 2011 and then to July 18, 2011, because the court itself failed to issue the notices correctly.

12. In view of these facts, the petitioners believe that the State failed to investigate the reported facts with due diligence; that there was an unwarranted delay in the investigations conducted by the Office of the Public Prosecutor; and that the judicial authorities in charge of the process have systematically delayed their proceedings. They allege that there was a pattern of denial of justice to the detriment of the alleged victims' family members, which constitutes a violation of their right of access to justice, in violation of Article 25 of the American Convention. In view of this, they believe that the exceptions to the requirement of prior exhaustion of domestic remedies provided in Article 46.2.c of the American Convention are applicable to this petition.

13. The petitioners also allege that the State violated Article 19 of the American Convention in connection with Articles 6 and 27 of the Convention on the Rights of the Child, "even in the case of youths who had recently reached the age of 18 but were not yet 21." In this regard, they maintain that the alleged victims had been tried and convicted for crimes committed while they were minors –hence tried in accordance with the Organic Law for the Protection of Children and Adolescents–; thus, they were incarcerated in a correctional facility for minors at the moment of the fire.

14. Finally, they allege that the deaths of the alleged victims is not inconsistent with the reality of the Venezuelan penitentiary system but is, rather, part of the State's general failure to comply

with its obligation to protect the lives of and ensure humane treatment for those in its custody. In this regard, they maintain that statistically Venezuela has the highest rates of prison violence on the American continent.

B. Position of the State

15. The State alleges that the petitioners have not exhausted the domestic remedies given that the criminal complaint filed in 2006 is still pending. It also alleges that there is a series of remedies such as appeal, cassation, and constitutional review that must be exhausted before making application to an international body. It also maintains that Article 27 of the National Constitution establishes the appeal for constitutional protection as a mechanism available to everyone to guarantee access to judicial protection for the enjoyment and exercise of their constitutional rights.

16. The State asserts that the competent authorities initiated the investigation of the facts on a timely basis, that the investigation is the responsibility of National Prosecutor's Office No. 42 with Full Jurisdiction and Prosecutor's Office No. 11 of the Second Circuit of the Judicial District of the State of Bolívar, and that these offices have conducted the appropriate proceedings. It states that on September 29, 2008 the Office of the Public Prosecutor indicted the three accused for the alleged commission of the crime of negligent homicide to the detriment of the alleged victims. In the judgment of the State, this fact would constitute evidence that no effort has been made not to guarantee the remedies due the victims and would also prove that the petition does not comply with the requirement to exhaust the domestic remedies.

17. In view of these considerations, the State alleges that domestic legislation provides the judicial remedies and due legal process for the protection of the allegedly violated rights and that the petitioners have not been denied access to those remedies. Therefore, the State believes that the exceptions to the exhaustion of domestic remedies contained in Articles 46.2.a and 46.2.b of the American Convention would not be applicable.

18. With respect to the alleged violation of the rights of the child, the State indicated that the five alleged victims had already reached the age of 18 at the time of the events, reporting that the dates of birth of the alleged victims were as follows: José Gregorio Mota Abarullo, June 26, 1985; Johan José Correa, January 29, 1987; Gabriel de Jesús Yánez Sánchez, April 11, 1987; Rafael Antonio Parra Herrera, December 2, 1986; and Cristian Arnaldo Molina Córdova, April 17, 1987, and thus Article 19 of the American Convention and other related international provisions would not be applicable.

19. Finally, the State reasserts its commitment to comply with applicable international and constitutional provisions in the area of prisons. In this regard, it states that important measures have been adopted, including implementation of the Prison System Humanization Plan; construction of four prisons; creation of ten new Prosecutor's Offices at the national level with jurisdiction over the prison system; creation of the Superior Penitentiary Council; and the graduation of 208 prison guards from the National University Institute of Penitentiary Studies.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

20. The petitioners are authorized by Article 44 of the American Convention to submit petitions to the Commission. The petition indicates individuals as the alleged victims to whom the Venezuelan State agreed to respect and guarantee the rights enshrined in the American Convention. With respect to the State, the Commission indicates that the Bolivarian Republic of Venezuela has been a State Party to the American Convention since August 9, 1977, the date on which it deposited its ratifying instrument. Therefore, the Commission is competent *ratione personae* to examine the petition. In addition, the Commission is competent *ratione loci* to hear the petition, in that it alleges violations of rights protected in the American Convention that took place within the territory of the Bolivarian Republic of Venezuela, a State Party to that instrument.

21. The Commission is competent *ratione temporis* in that the obligation to respect and guarantee the rights protected in the American Convention were already in effect for the State on the date when the events alleged in the petition would have occurred.

22. Finally, the Commission is competent *ratione materiae*, because the petition alleges violations of human rights protected by the American Convention.

B. Exhaustion of domestic remedies

23. Article 46.1.a of the American Convention requires the prior exhaustion of domestic remedies in accordance with generally recognized principles of international law as a requirement for the admission of claims regarding the alleged violation of the American Convention. Article 46.2 of the Convention provides that the prior exhaustion of domestic remedies requirement is not applicable 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.

24. The prior exhaustion requirement applies when there are adequate and effective remedies available in the national system to remedy the alleged violation. The purpose of this admissibility condition is to allow national authorities to hear the alleged violation of a protected right and, if appropriate, to resolve it before the matter is heard by an international body.

25. As established in Article 31.3 of the Commission's Rules of Procedure, when the petitioner contends that it is unable to prove compliance with the requirement to exhaust domestic remedies it shall be up to the State concerned to demonstrate that such remedies have not been exhausted, unless this is clearly deduced from the case file.

26. The State maintains a failure to exhaust the domestic remedies given that the principal proceeding conducted regarding the deaths of the alleged victims has still not been concluded. It believes that the petitioners did not exhaust the appeal for constitutional protection established in Article 27 of the Venezuelan Constitution.

27. Clarification is then needed as to which domestic remedies must be exhausted with respect to this petition. In principle, in cases of alleged violations of the right to life, the appropriate remedy is the investigation and the criminal proceeding initiated and driven *ex officio* by the State to identify and punish those responsible.[1] This criterion has been consistently maintained by the IACHR, *inter alia*, in cases where it is alleged that individuals died while in the custody of the State.[2] In addition, the IACHR has deemed that the appeal for constitutional protection is not a suitable remedy that must be exhausted in cases alleging that individuals died while in the custody of the State.[3]

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[1] Cf., IACHR, Report No. 152/11, Petition 1400-06, Admissibility, Luis and Leonardo Caizales Dogenesama, Colombia, November 2, 2011, para. 43; Report No. 151/11, Petition 1077-06, Admissibility, Luis Gióván Laverde Moreno et al., Colombia, November 2, 2011, para. 26; Report No. 22/09, Petition 908-04, Admissibility, Igmar Alexander Landaeta Mejías, Venezuela, March 20, 2009, para. 45. See also, IAHCR, Report No 52/97, Case 11,218, Arges Sequeira Mangas, *1997 Annual Report of the IACHR*, paras. 96 and 97; and IACHR, Report No. 55/97, Case 11,137, *Abella et al.*, para. 392.

[2] IACHR, Report No. 14/11, Petition 1347-07, Admissibility, Orlando Olivares et al., Venezuela, March 23, 2011, para. 32; Report No. 78/08, Petition 785-05, Admissibility, Rafael Arturo Pacheco Teruel et al. (Death due to Fire at the San Pedro Sula Prison), Honduras, October 17, 2008, paras. 29-31; Report No. 54/07, Petition 4614-02, Admissibility, Wilmer Antonio González Rojas, Nicaragua, paras. 58 and 59.

[3] IACHR, Report No. 14/11, Petition 1347-07, Admissibility, Orlando Olivares et al., Venezuela, March 23, 2011, paras. 29-36.

28. With respect to the criminal process, the petitioners claim that there have been unwarranted delays both in the investigation of the facts and in the trial phase. In this regard, they indicate that there was excessive delay in concluding the investigations, exceeding by far the maximum period established by law; that some of the essential tests in this proceeding were not conducted on a timely basis; and that according to the criminal procedure law now in effect the accused is the only party authorized to petition for the conclusion of the investigations while the victims, in contrast, are not empowered to do so.[4] Regarding the trial phase, they indicate that the court hearing the case has systematically postponed the holding of a hearing to open the trial, always due to a failure to comply with some formal procedural requirement, a failing that cannot be attributed to the victims' representative. Thus, they believe that it has been impossible to formally exhaust the domestic remedies due to the procedural conduct of the State itself.

29. In this regard, the State only points out that the Office of the Public Prosecutor initiated the investigations in a timely manner and filed the formal indictment against the three accused parties in September 2008, but does not refer to the concrete allegations made by the petitioners and does not provide information that would allow us to understand why the competent judicial authorities needed to delay the course of the proceeding. In addition, the State has not provided any updated information regarding potential progress in the domestic criminal proceeding, despite having the procedural opportunity to do so.

30. On this point, the Commission notes that although the investigations began on June 30, 2005, the date of the events themselves, after seven and half years the Fifth Trial Court of the State of Bolívar has not conducted the hearing to open the trial. Therefore, the IACHR concludes that the exception to the rule of prior exhaustion established in Article 46.2.c of the American Convention applies, since there was an unwarranted delay in the decision regarding the domestic remedies.

31. Finally, the Commission reiterates that the exceptions to the rule of prior exhaustion of domestic remedies provided in Article 46.2 of the Convention are closely tied to the determination of possible violations of certain rights enshrined therein, such as the guarantees on access to justice. However, Article 46.2, based on its nature and purpose, is a provision with autonomous content vis-à-vis the substantive provisions of the Convention. Therefore, the determination as to whether the exceptions to the rule of exhaustion of domestic remedies are applicable to the case in question must be made prior to and separate from the analysis of the merits of the case, in that it depends on a standard of assessment different from that used to determine the possible violation of Articles 8 and 25 of the Convention.

C. Deadline for submitting the petition

32. Article 46.1.b of the American Convention establishes that in order for a petition to be admissible by the Commission, it must be submitted within a period of six months from the date when the alleged injured party was notified of the final decision.

33. In the complaint under analysis, the IACHR has established the application of the exception to the exhaustion of domestic remedies stipulated in Article 46.2.c of the American Convention. In this regard, Article 32 of the Commission's Rules of Procedure establishes that in cases where the exceptions to the prior exhaustion of domestic remedies are applicable, the petition must be submitted within a reasonable period of time, in the judgment of the Commission. To that end, the Commission must consider the date when the alleged violation of rights occurred and the circumstances of each case.

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[4] On this point, the Article 313 of the Criminal Procedure Code, which establishes that: "The Office of the Public Prosecutor shall strive to conclude the preparatory phase with the diligence required by the case. When six months have elapsed since the accused was individually identified, the accused may request that the Supervisory Judge establish a prudential period of no less than thirty days and no more than one hundred twenty days to conclude the investigation. In defining this period, the Judge should hear the Office of the Public Prosecutor and the accused and take into consideration the extent of the damage caused, the complexity of the case, and any other circumstance that in his judgment would make achieving the purpose of the proceeding possible." Petition received on October 12, 2007, p. 49.

34. This petition was received on October 12, 2007, the facts covered in the complaint would have begun on June 30, 2005, and the effects thereof in terms of the alleged denial of justice would extend to the present day. Therefore, the Commission believes that the petition was submitted within a reasonable period of time under the terms of the IACHR Rules of Procedure and consistent with its practice in similar cases.

D. Duplication of proceedings and international *res judicata*

35. The case file does not indicate that the subject of the petition is pending any other international proceeding or that it reproduces a petition already examined by this or any other international body. Therefore, it is appropriate to deem the requirements established in Articles 46.1.c and 47.d of the Convention to have been met.

E. Characterization of the alleged facts

36. For admissibility purposes, the Commission must decide whether the facts alleged could tend to establish a violation of rights as stipulated in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order," in accordance with subparagraph (c) of that article. The criterion for evaluating these requirements is different from that used to rule on the merits of a petition; the Commission must perform a *prima facie* evaluation to determine whether the petition establishes the grounds for a possible or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation of rights. This determination constitutes a primary analysis that does not involve prejudging on the merits of the case.[5]

37. In addition, neither the American Convention nor the IACHR Rules of Procedure require the petitioner to identify the specific rights that are alleged to have been violated by the State in the matter submitted to the Commission, although petitioners may do so. In contrast, it is up to the Commission, based on the jurisprudence of the system, to determine in its admissibility reports which provision of the relevant Inter-American instruments is applicable and could be found to have been violated if the alleged facts are proven through sufficient evidence and legal arguments.

38. Given the evidence submitted by both parties and the nature of the matter subject to its review, the IACHR finds that in the current petition it is appropriate to establish *prima facie* that the petitioners' allegations regarding the alleged violation of the rights to life, humane treatment, and judicial guarantees could tend to establish violations of Articles 4, 5, 8, and 25, consistent with Article 1.1 of the American Convention, to the detriment of the alleged victims and their family members.

39. With respect to Article 19 of the American Convention, the Commission notes that as posited by the Venezuelan State and indicated in the case file the alleged victims were already 18 at the time of the fire.[1] However, the Commission notes that in the merits phase the analysis on the possible assignment of responsibility for the facts as reported could include compliance or failure to comply with the duty to guarantee in terms of a preventive component. This analysis, based on its very nature and in accordance with the jurisprudence of the bodies of the inter-American system, could involve determinations regarding the obligations of the State within a timeframe prior to the fire. In this sense, in the merits phase the Commission will be able to take into consideration, as relevant, the special obligations to protect derived from Article 19 of the American Convention.

[5] IACHR, Report No. 12/10, Case 12.106, Admissibility, Enrique Hermann Pfister Frías and Lucrecia Pfister Frías, Argentina, March 16, 2010. para. 46; IACHR, Report No. 10/10, Petition No. 214-08, Admissibility, Koempai et al., Suriname, March 16, 2010. para. 43.

In accordance with the standards of interpretation regarding human rights established in the American Convention,[6] with the criteria established by the Inter-American Court of Human Rights regarding the tendency to integrate the regional system and the international system, and with the concept of *corpus juris* in the area of children,[7] the Commission will take into account for the possible application of Article 19 of the American Convention the provisions of the United Nations Convention on the Rights of the Child.[8]

40. Thus, in view of the factual and legal evidence presented by the parties and the nature of the matter submitted for its hearing, the IACHR believes that the facts reported could tend to establish possible violations of the rights protected in Articles 4, 5, and 19 of the American Convention, consistent with Article 1.1 thereof, to the detriment of the five alleged victims; and of Articles 5, 8, and 25 of the American Convention, to the detriment of their family members, consistent with Article 1.1 thereof.

V. CONCLUSIONS

41. Based on the factual and legal arguments presented above and without thereby entailing prejudgment on the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this complaint admissible with respect to Articles 4, 5, 8, 19 and 25 consistent with Article 1(1) of the American Convention on Human Rights.

2. To inform the Venezuelan State and the petitioner of this decision.

3. To continue with analysis of the merits of the question.

4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 8th day of November 2012. (Signed): José de Jesús Orozco Henríquez, President; Felipe González, Second Vice-President; Dinah Shelton Rodrigo Escobar Gil, Rosa María Ortiz, Rose-Marie Antoine, Commissioners.

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[6] American Convention, Article 29 Restrictions regarding Interpretation. No provision of this Convention may be interpreted as: […] b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; […].

[7] I/A Court H.R., *Case of the "Street Children" (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C, No. 63, paragraph 194. *Case of the "Juvenile Reeducation Institute."* Judgment of September 2, 2004. Series C, No. 112, paragraph 148, *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C, No. 110, paragraph 166. I/A Court H.R., *Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A, No. 17, paragraphs 24, 37, 53.

[8] IACHR. Report No. 74/09 Mickey Alexis Mendoza Sánchez and Family, August 5, 2009, para. 29 and Report No. 72-09 Herson Javier Caro (Javier Apache) and Family, August 5, 2009, para. 34.