

OEA/Ser.L/V/II.166
Doc. 188
30 November 2017
Original: Spanish

REPORT No. 157/17

PETITION 286-07

REPORT ON ADMISSIBILITY

CARLOS ANDRADE ALMEIDA ET AL
ECUADOR

Approved by the Commission at its session No. 2110 held on November 30, 2017
166th Regular Period of Sessions

Cite as: IACHR, Report No. 157/17, Petition 286-07. Admissibility. Carlos Andrade Almeida *Et Al.* Ecuador. November 30, 2017.

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 NOVEMBER 30, 2017

I. INFORMATION ABOUT THE PETITION

Petitioner:	Permanent Committee for the Defense of Human Rights
Alleged victim:	Carlos Andrade Almeida and others
State denounced:	Ecuador
Rights invoked:	Articles 4 (life), 5 (personal integrity), 8 (judicial guarantees), 13 (thought and expression) and 25 (judicial protection) of the American Convention on Human Rights ¹ and Articles 1, 2, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture ²

II. PROCEDURE BEFORE THE IACHR³

Date on which the petition was received:	March 9, 2007
Date on which the petition was transmitted to the State:	22 April, 2008
Date of the State's first response:	September 12, 2008
Additional observations from the petitioning party:	October 29, 2008, May 28 and November 18, 2010, and February 8, 2011
Additional observations from the State:	August 3, 2010, May 12, 2011 and April 3, 2017
Date on which the petitioner was notified of the possible archiving of the petition:	April 11, 2016
Date on which the petitioner responded to the notification regarding the possible archiving of the petition:	May 13, 2016
Precautionary measure granted:	MC 699-03. Precautionary Measure granted on December 3, 2003 and lifted on November 5, 2012

¹ Hereinafter the "Convention" or "American Convention".

² Hereinafter "IACPPT".

³ The observations presented by each party were duly transmitted to the opposing party.

III. COMPETENCE

Competence <i>Ratione personae</i> :	Yes
Competence <i>Ratione loci</i> :	Yes
Competence <i>Ratione temporis</i> :	Yes
Competence <i>Ratione materiae</i> :	Yes, ACHR (instrument deposit made on December 28, 1977); Inter-American Convention on Forced Disappearance of Persons ⁴ (deposit of instrument made on July 27, 2006); and IACPPT (instrument deposit made on November 9, 1999)

IV. ANALYSIS OF DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i> :	No
Rights declared admissible	Articles 3 (recognition of legal personality), 4 (life), 5 (personal integrity), 7 (personal liberty), 8 (judicial guarantees) and 25 (judicial protection) of the American Convention, in relation to its Articles 1.1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic law); I and IX of the IACFDP; and 1, 6 and 8 of the IACPPT
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, exceptions in Article 46.2.b and c of the ACHR applicable
Timeliness of the petition:	Yes, in terms of Section VI

V. ALLEGED FACTS

1. The petitioners state that on the morning of November 19, 2003, there was an attempted robbery at the Fybeka pharmacy facility located in the northern area of the city of Guayaquil. The robbery was stopped by a group of policemen who happened to be at the scene. They point out that the police officers opened fire indiscriminately on the alleged perpetrators and those present, without distinction. They allege that, as a result of the shooting, the alleged victims Carlos Andrade Almeida, Guime Cordova Encalada, José Cañar Reyes, Jazmani Rosero López, Raúl Salinas Chumacera, Miguel Ángel Quispe Portillo, Richard Tello Jácome and Genny Aguilar were killed. In addition, they point out that Johnny Elias Gómez Balda, César Augusto Mata Valenzuela and Erwin Vivar Palma were disappeared and Seydi Natalia Vélez Falcones was arrested by the police. They relate that the authorities at first reported that the events had occurred in the context of a police operation undertaken to thwart the assault and that the officers had responded to shots fired by the alleged robbers.

Alleged Extrajudicial Executions

2. The petitioners maintain that the police actions were disproportionate and that there had been an excessive and arbitrary use of force, since the eight alleged victims killed received several shots in the back and rear neck. They detail, for example, that Carlos Andrade Almeida (hereinafter "Mr. Andrade Almeida") was a customer at the pharmacy who, at that time, was buying diapers for his newborn daughter and, although he had identified himself, was shot eight times. They allege that the police later placed a grenade next to his corpse and stated that he was part of the gang of robbers. In the same sense, they indicate

⁴ Hereinafter "IACFDP".

that Guime Cordova Encalada (hereinafter "Mr. Córdova Encalada") was the pharmacy's courier and when forced to the floor, received three shots in the back and head.

3. They note that, in response to the inconsistencies between the first official versions and the alleged extrajudicial executions and disproportionate use of force denounced by the relatives of the alleged victims, on December 2, 2003, the General Inspectorate of the Police reported that the Police commanders had not ordered the operation in the pharmacy; and that the chief in charge of the operation did not belong to the local Police Unit and had acted without the knowledge or authorization of his superiors; that there had been no confrontation between the alleged criminals and the police; and that due to the misuse of procedure there was no streamlined progressive use of force.

4. In that sense, they indicate that on April 26, 2004, in the context of the proceedings undertaken by the police, the President of the Second District Court of National Police - accepting the version of a confrontation with the alleged criminals and contradicting the reports previously cited - acquitted 14 police officers involved and established the responsibility of six others for not having reported the operation to their superiors. This ruling was appealed and on September 24, 2004, the Second District Court of the National Police issued an acquittal in favor of the 20 agents, arguing that since they had acted in self-defense, they were under emotional stress causing them to react instinctively, and therefore it was unreasonable to expect a rational response.

5. They indicate that the authorities did not undertake an investigation in the ordinary jurisdiction, despite the evidence showing that the eight alleged victims had been extrajudicially executed. In this regard, they indicate that the complaints filed on November 19, 2003, by the next of kin of Messrs. Andrade Almeida and Córdova Encalada with the Public Prosecutor's Office were dismissed by the prosecutor assigned to the case on September 23, 2004, on the grounds that an acquittal with regard to the deaths had already been issued by the police justice system.

6. They state that based on Ecuador's Truth Commission Report, the case was reopened in June 2012 for the extrajudicial executions of the eight alleged victims and that it is currently under appeal with the National Court of Justice, without there being an enforceable judgment against those responsible.

Alleged forced disappearances

7. On the other hand, Seydi Natalia Vélez Falcones (hereinafter "Mrs. Vélez Falcones" or "Seydi Vélez") the only person officially arrested after the shooting, said in her statements that two men with their hands tied and their faces covered were put into a red car along with herself. It is presumed that these men were Johnny Elías Gómez Balda (hereinafter "Mr. Gómez Balda") and César Augusto Mata Valenzuela (hereinafter "Mr. Mata Valenzuela"), who, to date, are disappeared. They point out that these statements can be corroborated by a sequence of photographs taken by a journalist from the *El Universo* newspaper, showing a man with his hands tied and covered with his own white T-shirt being led away by a plainclothes policeman to a red car. After the publication of these photos, the family identified Mr. Gómez Balda as the handcuffed individual and the authorities indicated that the person arresting him was a former police agent.

8. They indicate that on the night of November 19, 2003, Mr. Gómez Balda's wife María Dolores Guerra Tábara, received two brief frantic phone calls from her husband telling her that he was being held in a red car in the courtyard of the Judicial Police and asking her to go and look for him because he was afraid they were going to kill him. They state that Mrs. Guerra Tábara went there at once to find out the whereabouts of her husband and that, despite her pleading and tears, the police did not let her enter the yard and assured her that they had no information about the alleged victim. They allege that the same thing happened to Mr. Mata Valenzuela's brother, Ivan Stalin Mata Valenzuela, who went to the aforementioned police yard after receiving short calls for help from his brother, but without obtaining any results. Due to the foregoing, both relatives immediately filed their respective complaints with the Office of the Prosecutor for the disappearance of the alleged victims.

9. They also state that on the morning of November 19, 2003, Erwin Vivar Palma (hereinafter "Mr. Vivar Palma") and his niece Seydi Vélez, went to the Fybeca pharmacy to ask for a employment. They point out that Mr. Vivar Palma's wife, Mrs. Mireya Vélez, did not hear from her relatives for the entire day, and that only in the evening did she learn through the media that her niece had been arrested for the attack on the pharmacy. With this information, she immediately called her husband, who told her that he was being detained and, crying, asked her to take care of their son, and then abruptly hung up the call. They indicate that Seydi Vélez stated that she did not know anything more about her uncle since the time of the shooting. His relatives filed a complaint about his disappearance with the Public Ministry on November 24, 2003.

10. The petitioners state that on November 24, 2003, they filed a writ of habeas corpus on behalf of Gómez Balda, Mata Valenzuela and Vivar Palma, which was never resolved by the authorities. In addition, they state that at the time of the events, the offense of the forced disappearance of persons was not specifically outlined in Ecuadorian law; for that reason, the investigations began into the offense of kidnapping. However, on January 28, 2005, it was decided to dismiss the charges, because the prosecutor and judicial authorities considered that Gómez Balda, Mata Valenzuela and Vivar Palma were on the run after the pharmacy's robbery and were not disappeared. This decision was challenged in an appeal for annulment on August 18, 2005, before the Second Criminal Chamber of Guayaquil, which on August 28, 2008, found that the order of dismissal was enforceable due to the fact that the remedy had not been resolved within the 90-day time limit.

11. They indicate that in January 2015, as a result of Ecuador's Truth Commission Report, the State Prosecutor General's Office offered to initiate investigations into the forced disappearances on behalf of the alleged victims' relatives. They maintain that the opening of the investigation is still pending, and that therefore impunity persists to this day. Moreover, there has been no progress in locating the alleged disappeared victims nor in obtaining further information about their whereabouts.

Alleged illegal detention and violation of judicial guarantees of Seydi Natalia Vélez Falcones

12. On the other hand, they state that on November 20, 2003, a criminal investigation in the ordinary jurisdiction was initiated for the robbery at the pharmacy. They allege that due to Ms. Vélez Falcones' arrest and incommunicado detention in the cells of the Judicial Police, on November 24, 2003, the petitioners filed a writ of habeas corpus. They point out that they learned through the press that this remedy was rejected, but they were never formally notified by the judicial authorities.

13. They indicate that, in the context of the criminal proceedings for the robbery at the pharmacy, in December 2004 they filed a recusation due to the lack of impartiality shown by the prosecutor assigned to the case. They maintain that according to procedural requirements, the investigative file should have been sent to another prosecutor, but was archived pending resolution of the recusation, thereby violating the rules and guarantees of the alleged victim. They point out that on March 9, 2004, after being ratified in the investigation, the prosecutor subject to recusation issued an indictment against Seydi Vélez for the offense of aggravated robbery, declared Mr. Gómez Balda, Mata Valenzuela and Vivar Palma to be fugitives from justice. The petitioners state that the procedural irregularities in the resolution of the recusation prevented the alleged victim's access to justice. They point that complaints were made to the judges in charge of the case, to the President of the Court of Justice, to the National Council of the Judiciary and to the District Attorney's Office. These did not issue a response due to the politicization and corruption of judiciary. In addition, they say that they filed an *amparo* for release due to their illegal detention that was rejected by the president of the Superior Court of Guayaquil on November 17, 2005.

14. Finally, on March 20, 2006, the Third Criminal Court of Guayas sentenced Mrs. Vélez Falcones to six years in prison. The petitioners allege that no appeal was filed because at the time of sentencing, the alleged victim had already been in prison for almost 3 years, that is, half of the sentence imposed. For this reason, she preferred to benefit from early release.

15. The State maintains that the petition was submitted after the deadline established in the American Convention. It provides details that two proceedings were started; the first an investigation into the

alleged crimes of homicide in the police jurisdiction, which culminated on September 24, 2004, with a definitive acquittal of the accused policemen issued by the Second District Court of Police Justice; and the second, for the robbery perpetrated at the Fybeca pharmacy in the ordinary jurisdiction, which culminated with the conviction and sentencing of Seydi Vélez, issued by the Third Criminal Court of Guayas on March 20, 2006. In that sense, since the petition was filed on March 9, 2007, the State alleges that the time limits have been exceeded by 36 and 12 months, respectively, since the last definitive domestic decisions. On the other hand, in Mrs. Vélez Falcones case, it points out that domestic remedies have not been exhausted, because the petitioners could still file an appeal for reconsideration of the judgment and a cassation appeal, which are effective and adequate to challenge decisions parties consider erroneous.

16. The State considers that the petitioners are expressing their disagreement with the judicial decisions handed down in domestic proceedings and, therefore, they intend to have a new evaluation of the evidence and a determination Seydi Vélez's innocence. However, the State maintains that, by virtue of the formula of the fourth instance, the Commission cannot review the decisions of national courts acting within the sphere of their competence. It also maintains that the facts denounced in the petition do not characterize violations of human rights, since all the guarantees of due process were fulfilled in favor of the alleged victims in the domestic proceedings.

17. Additionally, the State indicates that it undertook new investigatory, prosecutorial, sanctioning and reparation measures on the facts related to the alleged extrajudicial executions of the alleged victims after publication of the Final Report of Ecuador's Truth Commission in June 2010. Therefore, on December 16, 2014, the Court of Criminal Guarantees of the Special Chamber for Criminal, Court-Martial, Criminal Police, and Traffic Matters of the National Court of Justice convicted ten accused individuals. All the accused challenged this decision through successive appeals and cassation appeals, which are currently pending resolution before the National Court of Justice. On the other hand, the State emphasizes that the alleged victims have recourse to proceedings set forth in the Law for the Reparation of Victims, and its Regulations. By virtue of all the foregoing, it considers that the petition is inadmissible because the domestic remedies have not been exhausted.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

18. The petitioners state that impunity persists in the case because the investigations into the deaths of the eight alleged victims took place in the police jurisdiction, which ordered the definitive acquittal of the agents involved. They also maintain that, despite the reopening of the case, up to now these proceedings have not produced definitive results. On the other hand, in connection with the three alleged victims of forced disappearance, the petitioners filed a writ of habeas corpus that the authorities failed to resolve and emphasize that the criminal investigations have not been reactivated. Finally, in connection with the prosecution of Seydi Vélez for the robbery at the pharmacy, the alleged victim did not have access to effective judicial remedies against the alleged irregularities committed by the prosecutor and the judicial authorities. For its part, the State emphasizes that the new criminal proceeding initiated on the extrajudicial executions of the alleged victims is still pending before the National Court of Justice; and with regard to Mrs. Vélez Falcones, the State alleges that the petitioners did not exhaust the remedies of review and cassation appeal. It also considers that the petition is untimely, since it was submitted 12 and 36 months after the resolutions issued in the proceedings taken in the police and criminal jurisdictions, respectively.

19. In relation to the alleged eight extrajudicial executions, the Commission has repeatedly indicated that special jurisdictions (either military or police) do not constitute an appropriate forum, and therefore do not provide an adequate remedy to investigate, prosecute and punish violations of human rights enshrined in the American Convention, allegedly committed by members of the Security Forces, or with their collaboration or acquiescence.⁵ On the other hand, the Commission observes that despite the reopening of the investigations ordered on January 17, 2012, as a result of Ecuador's Truth Commission Report, to date there

⁵ IACHR, Report No. 50/17, Petition P-464-10B. Admissibility. José Ruperto Agudelo Ciro and family. Colombia. May 25, 2017, para. 9; and Report No. 84/12, Petition 677-04. Admissibility. Luis Fernando García García and family. Ecuador. November 8, 2012, para. 37.

is no final decision regarding the punishment of those responsible. Therefore, the Commission considers that the exceptions established in Article 46.2.b. and c. of the Convention are fulfilled.

20. Regarding the alleged forced disappearance of three of the alleged victims, the IACHR notes that on November 24, 2003, the petitioners presented a habeas corpus as an adequate remedy that was not resolved by the judicial authorities. In addition, the Commission notes that, to date, the circumstances surrounding the disappearances have not yet been clarified. There has been no determination as to their whereabouts nor those responsible. The Commission takes into account the judicial authorities' view that the alleged victims are "fugitives from justice", but does not have information at this stage demonstrating an investigation after the complaint. The foregoing is sufficient to conclude that there is an unjustified delay in the terms of Article 46.2.c. of the American Convention.

21. Regarding the alleged violations of judicial guarantees for Ms. Vélez Falcones, the Commission observes that the alleged irregularities in the criminal proceedings against her - such as the recusation proceedings against the prosecutor, and the lack of timely judicial response to the respective claims filed with different authorities - have caused a delay in the proceedings. This alleged delay resulted in her preventive detention's being equal in length to the time necessary to obtain early release. In this regard, the IACHR takes into account that filing an appeal against the conviction would not have been appropriate for the purpose of obtaining the alleged victim's release, since it would have prolonged her deprivation of liberty further. Consequently, the Commission considers that the exception provided for in Article 46.2.b of the Convention is fulfilled.

22. In addition, with regard to the reparation proceedings provided for in the Law for the Reparation of Victims and its Regulations, the Commission has repeatedly held that recourse to this does not constitute an appropriate remedy vis-a-vis the analysis of the admissibility of a claim such as the present,⁶ since it is not adequate to provide comprehensive reparation and justice to family members.

23. Finally, because of the characteristics of the present case, the Commission considers that with respect to the alleged extrajudicial executions and forced disappearances of the alleged victims, the petition was presented within a reasonable time and that the admissibility requirement regarding timeliness is satisfied.

VII. COLORABLE CLAIM

24. In view of the factual and legal elements presented by the parties and the nature of the matter brought to its attention, the Commission considers that the alleged extrajudicial executions of the eight alleged victims as a result of the police actions in the operation carried out at the Fybeca pharmacy, and the lack of investigation and punishment of those responsible could characterize possible violations of Articles 4 (right to life), 5 (right to personal integrity), 8 (judicial guarantees) and 25 (judicial protection) of the American Convention in relation to its Article 1.1, to the detriment of the alleged victims and their families.

25. In addition, the alleged forced disappearances of Gómez Balda, Mata Valenzuela and Vivar Palma and the lack of effective judicial protection, could characterize possible violations of Articles 3 (right to recognition of personality legal), 4 (life), 5 (personal integrity), 7 (personal liberty), 8 (judicial guarantees) and 25 (judicial protection) of the American Convention in relation to its Article 1.1 and 2; as well as Articles I and IX of the Inter-American Convention on Forced Disappearance of Persons, due to the continued nature of the crime of forced disappearance and the alleged lack of investigation, to the detriment of the alleged victims and their next of kin. Likewise, the Commission considers that it should analyze at the merits stage whether the alleged suffering and anguish of the alleged victims, the uncertainty over their fate, the desperate contact with their families and the threats allegedly made by the police agents constitute violations of Articles 1, 6

⁶ IACHR, Report No. 72/16. Petition 694-06. Admissibility. Onofre Antonio de La Hoz Montero and Family. Colombia. December 6, 2016, para. 32.

and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the alleged victims.

26. Regarding the alleged lack of clarification of the facts and the consequent violation of the right to the truth, they will be analyzed in the merits stage in light of the articles 8 (judicial guarantees) and 25 (judicial protection) of the American Convention in relation to its Article 1.1, to the detriment of the alleged victims and their families and not as an autonomous violation of article 13(freedom of thought and expression) as alleged by the petitioners⁷.

27. On the other hand, the alleged irregularities committed in the criminal proceedings against Seydi Vélez Falcones could characterize possible violations of Articles 7 (personal liberty), 8 (judicial guarantees) and 25 (judicial protection) of the American Convention, in relation to its Article 1.1.

28. With respect to the State's arguments regarding the fourth instance formula, the Commission acknowledges that it is not competent to review judgments handed down by national courts acting with their sphere of competence and applying due process and judicial guarantees. However, it reiterates that, within the framework of its mandate, it is competent to declare a petition admissible and to rule on the merits when the petition refers to domestic proceedings that may be in violation of rights guaranteed by the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 3, 4, 5, 7, 8 and 25 in conjunction with Articles 1.1 and 2 of the American Convention; and Articles I and IX of the Inter-American Convention on the Forced Disappearance of Persons; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture;

2. To find this petition inadmissible in relation to Article 13 of the American Convention;

3. To notify the parties of this decision;

4. To continue with the analysis on the merits; and

5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 30th day of the month of November, 2017. (Signed): Francisco José Eguiguren, President; Margarette May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners.

⁷ IACHR, Lawsuit before the Inter-American Court of Human Rights in the case of Juan Gelman, María Claudia García Iruretagoyena de Gelman y María Macarena Gelman García Iruretagoyena (Case 12.607) against the Oriental Republic of Uruguay, January 21, 2010, para. 74.