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REPORT No. 188/18
PETITION 894-08
REPORT ON ADMISSIBILITY

CARLOS EDUARDO GIMENEZ COLMENAREZ
VENEZUELA

Approved electronically by the Commission on December 27, 2018.

Cite as: IACHR, Report No. 188/18. Petition 894-08. Admissibility. Carlos Eduardo Giménez Colmenárez. Venezuela. December 27, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioners:	Carlos Eduardo Giménez Colmenárez, Gerin Páez Martínez and Fernando Berrocal Soto
Alleged victim:	Carlos Eduardo Giménez Colmenárez
Respondent State:	Venezuela
Rights invoked:	Articles 5 (humane treatment), 8 (fair trial), 11 (privacy), 14 (reply), 17 (family), 23 (right to participate in government), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights, ¹ and other international treaties. ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	August 1, 2008
Additional information received at the stage of initial review:	August 8 and September 15, 2008; May 21 and 31, 2010; June 3 and 23 and July 20, 2010 ⁴
Notification of the petition to the State:	July 15, 2014
State's first response:	July 31, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes, the American Convention (from August 9, 1977, deposit of ratification instrument, through September 10, 2013, date on which the denunciation went into effect)
Competence <i>Ratione materiae</i>:	Yes

IV. 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 8 (fair trial), 23 (right to participate in government) and 25 (judicial protection) of the American Convention
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

V. ALLEGED FACTS

¹ Hereinafter "Convention" or "American Convention"

² Article 25 of the International Covenant on Civil and Political Rights

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

⁴ Additionally, on January 15, 2016 the petitioners submitted messages inquiring as to the status of the petition.

1. The petitioners state that the alleged victim was the Governor of Yaracuy State in Venezuela. They indicate that in 2006 the Attorney General of Venezuela ordered the opening of an investigation into alleged criminal acts committed in the handling of social programs within a government entity called FUNDESOY, under the supervision of the state Governor. On June 10, 2008, the Supreme Court granted a request for a preliminary hearing to show cause filed by the Attorney General against the alleged victim, and ordered his suspension and disqualification from serving in any public position during the proceedings. The petitioners allege that during the course of the investigation and in the legal proceedings, the State violated the rights to due process, to legal counsel, to legal assistance from trusted defense attorneys, the right to petition and to equal protection, and the principles for the evaluation of evidence and of contradiction, as well as the presumption of innocence and the political rights of the alleged victim. They argue that there is no legal framework regulating pretrial hearings to show cause, and they claim that in the aforementioned events, the proceedings began as a result of reported irregularities at FUNDASOY, but over the course of the investigation, they deviated from that purpose and concluded with a preliminary finding of cause against the Governor of Yaracuy State, while ignoring the fact that FUNDASOY is a functionally autonomous administrative entity. They argue that during the two years of the investigation and prior to the preliminary hearing, the alleged victim was not summoned to appear or even informed of the investigation, and that there are no proceedings at all against the staff or contractors working at FUNDASOY.

2. The petitioners indicate that on March 27, 2008, the Attorney General of Venezuela asked the full Supreme Court (hereinafter “the full Court” or “the Court”) to find that there was cause to pursue a criminal trial against the alleged victim through the ordinary courts for the crimes of criminal embezzlement, circumventing bidding procedures, and collusion with contractors. On April 30, 2008, the full Court upheld the request and summoned the parties to a public hearing on May 20, 2008. On May 6, 2008, the alleged victim filed an *amparo* brief asking for the suspension of the preliminary hearing. The petitioners have not indicated the outcome of that request. They indicate that at the start of the May 20, 2008 hearing, the alleged victim requested a postponement of the hearing because his defense attorney had not been officially assigned to his case and had not had access to the case file. They indicate that the private defense attorneys were only officially assigned to the case on May 21, and were not given access to the complete file until May 23. The Court set the hearing for May 27, 2008 and specified in the order that if the alleged victim or his defense attorneys failed to appear the hearing would still go forward. The alleged victim thus filed a request for reversal of the court’s own decision and asked that the hearing be postponed until there was a ruling on the *amparo* motion. On May 23, 2008, the Court rejected the request for reversal of its own decision indicating that this could only be used within criminal proceedings, and that for the time being, there was no criminal proceeding against the alleged victim.

3. On May 27, 2008, attorneys for the alleged victim asked for a postponement of the hearing a second time, as they were technically prevented from appearing due to the short time frame in which they were allowed to prepare their defense, and because the *amparo* motion was still pending. The petitioners state that the response from the Court was to interpret the request as “abandonment of technical defense”. They indicate that the hearing was held in the absence of the defendant, and that a court-appointed attorney was designated. They indicate that this occurred against the will of the alleged victim and in violation of his right to be represented by attorneys trusted by him, and, as a consequence, of the right to due process. On May 30, 2008 the alleged victim filed a brief in which he requested a reversal of the appointment of the public defender. That same day he requested complete nullity of the order issued on May 27, 2008 (scheduling of the hearing and determination that it should be held *in absentia*, if necessary), alleging violations of rights including due process and the right to legal counsel, the right to rebuttal and to intervene, and the right not to be judged *in absentia*.

4. On June 10, 2008, the Court decided—based on the hearing held May 27—to grant the motion for a preliminary hearing to show cause, declared that Mr. Giménez was legally suspended and disqualified from holding any public position during the trial, and to dismiss the motion to nullify. On June 19, 2008, the Attorney General sought clarification before the competent court for the prosecution of high ranking government officials, and regarding the effect of a waiver of the privilege of a pretrial hearing to show cause by the alleged victim. On June 25, of that same year, the alleged victim also requested a clarification of the decision on the consequences and scope of the suspension of the Governor from his duties, and whether

as a result of the declaration of disqualification he was prohibited from holding any government position, alleging that the presumption of innocence had been violated since he was removed from his post without having been convicted. On July 22, 2008 the Supreme Court said it did not have competence to resolve the conflict of rules in order to determine the competent court for prosecution of high ranking government officials, and declined the jurisdiction to the Constitutional Court. It also found the Attorney General's request regarding a waiver of the prerogative of a pretrial hearing to be inadmissible. As for the acts violating the fundamental rights of the alleged victim in the process of the pretrial hearing to show cause, and regarding the consequences of the disqualification, the Constitutional Court said that it lacked competence to review such violations and stated that all requests to this end were inadmissible. The Court mentioned that there were other remedies and challenges available to the petitioners to accomplish their purposes, but did not identify them.

5. The petitioners indicate that on August 8, 2008, the alleged victim accepted, in a filing before the Regional Electoral Board, his nomination for the position of Governor in elections to be held November 23, 2008. However, in a decision issued August 11, 2008, the National Electoral Board instructed the Regional Electoral Board of Yaracuy State to find that the application for nomination had not been filed, because of the suspension ordered in the preliminary hearing by the Supreme Court. On August 13, 2008, the Regional Board found that the alleged victim's registration as a candidate had not been filed because there was no record of the remaining collections required by law. On August 20, 2008, the alleged victim filed a brief before the National Board alleging that the decisions of August 11 and 13 violated his rights and were based on a decision that was not final because the request for clarification had not been answered. He requested reconsideration of the decision finding that he had not registered as a candidate. On August 22, 2008, the National Board found that the challenge to the decision by the Regional Board was admissible, and ordered the parties to present their arguments and relevant evidence. On September 4, 2008, the alleged victim requested a response to the reconsideration appeal. There is no knowledge of the resolution status of said resource.

6. According to the information provided by the petitioners, the Office of the Prosecutor has not yet filed a criminal action against the alleged victim, who is presently in Costa Rica.

7. The State, in turn, alleges that the petition does not meet the requirements set forth in Article 46.1 of the American Convention, because the alleged victim's trial is still underway, and has not even been able to start because the alleged victim is a fugitive of justice. The State further indicates that the pretrial hearing to show cause is not itself a criminal trial but a procedural prerogative. Accordingly, it is apparent that the domestic legal remedies have not been exhausted due to the alleged victim's behavior. It argues that it has not known the whereabouts of the alleged victim since March 13, 2008, when he failed to appear in court. For this reason and since the Constitution forbids *in absentia* trials, an order for his arrest was issued in order to bring him to trial. From records, it appears that the alleged victim left the country on November 13, 2008.

8. The State indicates that even assuming that there had been any harm to the rights of the alleged victim, these could still be protected by the decision in the criminal trial, and through the various ordinary and special legal remedies which could ultimately be filed. The State argues that in order to exhaust domestic remedies, first it must complete the criminal trial of the alleged victim, which has not been possible due to his own conduct. Secondly, he should have made use of ordinary judicial remedies to appeal the future judgment, as contemplated in Articles 451 and following ones in the Organic Code of Criminal Procedure, as well as the criminal cassation remedy provided for in Articles 459 and following articles of the Code. The State says that the petitioners filed a request for review of the decision that authorized the start of the trial, and that the Constitutional Court found it inadmissible on August 14, 2008 because his attorneys had not met the legal requirements to represent him. They indicated that there is nothing preventing the alleged victim from trying again to remedy the technical flaw in his motion. Finally, the State points out that the Inter-

American Court of Human Rights has already heard and reached a decision on a very similar case⁵ in which it expressly stated that domestic remedies had not been exhausted.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF PETITION

9. The petitioners allege that on May 6, 2008, the alleged victim filed an *amparo* before the Constitutional Chamber of the Supreme Court. They indicate that on May 27, 2008, the pretrial hearing to show cause was held in the absence of the alleged victim and its defenders, since the Court concluded an abandonment of technical defense and sworn in a public defender. They indicate that on May 30, the alleged victim filed a brief in which he requested a reversal of such appointment. On the same day, he requested the complete nullity of the order of May 27. However, on June 10, 2008, the Court rejected the request for nullity filed by the alleged victim, granted the motion for a preliminary hearing to show cause filed by the General Prosecutor of the Republic and stated that the alleged victim shall be suspended and disqualified from exercising any public office during the process. On July 22, 2008, the Supreme Court published its decision on the clarification appeals filed by the Attorney General and the alleged victim. The Court noted that it did not have jurisdiction to hear the violations of fundamental rights purportedly suffered by the alleged victim in the course of the pre-trial proceedings and declared his requests inadmissible. On August 11, 2008, the National Electoral Board denied his registration for the post of Governor, by virtue of the suspension order pronounced following the pre-trial hearing. On August 13, 2008, the Regional Electoral Board of the State of Yaracuy found that the alleged victim's registration as a candidate had not been filed. The petitioners indicate that on August 20, 2008, the alleged victim requested reconsideration of this decision. On September 4, 2008, a response was requested to the reconsideration appeal. No more information has been provided in this regard. For its part, the State alleges that the judicial process to which the petitioner is subject is still in process and has not been decided, because the alleged victim is a fugitive from the Venezuelan justice system. It argues that the pretrial hearing to show cause is not itself a criminal trial but a procedural prerogative. Therefore, the criminal process is suspended and it is clear that domestic remedies have not yet been exhausted. It indicates that, even assuming that there had been any harm to the rights of the alleged victim, they could still be protected throughout the criminal process, as well as through the different ordinary and extraordinary judicial remedies that could be exercised by the alleged victim, including ordinary judicial remedies and the criminal cassation remedy.

10. The Commission notes that the alleged victim filed an application for nullity of the decision of May 27, 2008, regarding the appointment of a public defender and the conclusion of abandonment of technical defense, which was rejected on June 10, 2008, in the same decision in which the existence of probable cause was declared for the prosecution of the alleged victim, as well as his inability to exercise any public office while the criminal proceedings were taking place. The Commission observes that the alleged victim filed a request for clarification with respect to the latter decision, regarding the alleged violations of his fundamental judicial and political rights, which was declared inadmissible by the Supreme Court on July 22, 2008. Likewise, the Commission observes that the petitioners adduce irregularities and violations of judicial guarantees that would have occurred in the framework of the investigation and the pre-trial proceedings, which resulted in his destitution from the office of Governor of the State of Yaracuy and his inability for the following elections, confirmed in decisions from August 11 and 13, 2008. The Commission notes that the decision on the clarification motions mentions that there would be other remedies available to the alleged victim, but does not identify them. In addition, the Commission considers that the remedies identified by the State are not adequate to resolve the claim regarding the suspension of political rights. Therefore, the Commission considers that, with respect to the pre-trial process and its consequences on the position of senior official of the alleged victim, the latter exhausted the domestic remedies with the decision of July 22, 2008, in accordance with Article 46.1.a of the American Convention. The decision of the Supreme Court was notified to the alleged victim on July 23, 2008, the petition before the IACHR was presented on August 1, 2008. Therefore, the Commission concludes that the present petition meets the requirement established in the article 46.1.b of the American Convention.

⁵ The State is referring to IACtHR, Case of Brewer Carías v Venezuela (preliminary objections), decision of May 26, 2014.

11. Regarding the criminal proceeding against the alleged victim, the Commission notes that it is suspended because the alleged victim fled the Venezuelan justice system. Thus, the Commission considers that it is not possible to enter into a ruling on the alleged violation of the judicial guarantees and their consequences on the development of this same process, since there is still no certainty as to how the process would continue and if the allegations presented could be corrected internally. In the same vein, it has not been possible for the alleged victim to lodge the appeal and cassation remedies. Therefore, the Commission considers that the admissibility of the petition is limited to the allegations about the pre-trial process and its consequences on the ability of the alleged victim to exercise public office.

VII. ANALYSIS OF COLORABLE CLAIM

12. In view of the factual and legal elements alleged by the parties, the Commission considers that, if proven, the allegations regarding the claimed failure to notify the alleged victim of the investigation initiated by the Office of the Prosecutor, the violation of the reasonable period allowed for the preparation of the defense within the preliminary hearing process, the imposition of a public defender and the hearing in the absence of the alleged victim, together with its possible effects on its ability to exercise public office, could characterize possible violations of Articles 8 (fair trial), 23 (right to participate in government), 25 (judicial protection) of the American Convention on Human Rights in relation to its article 1.1 .

13. Regarding the claim about the alleged violation of articles 5 (humane treatment), 11 (privacy), 14 (reply), 17 (family), 24 (equal protection) of the American Convention, the Commission observes that the petitioners did not submit sufficient proof or arguments to *prima facie* consider their possible violation.

14. On the other hand, in relation to the International Covenant on Civil and Political Rights, the Commission lacks competence to establish violations of the norms of said treaty, without prejudice to which it may take it into account as part of its interpretative exercise of the norms of the American Convention at the merits stage of this case, under the terms of Article 29 of the Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 23 and 25 of the American Convention, in relation to Article 1.1. of the same treaty;

2. To find the instant petition inadmissible in relation to Articles 5, 11, 14, 17 and 24 of the American Convention; and

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

Approved by the Inter-American Commission on Human Rights on the 27th day of the month of December, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.