

REPORT N° 36/06
PETITION 577-05
ADMISSIBILITY
FRANCISCO USÓN RAMÍREZ
VENEZUELA¹
March 15, 2006

I. SUMMARY

1. On May 23, 2005, the Inter-American Commission on Human Rights (hereinafter the "Commission," the "Inter-American Commission," or the "IACHR") received a petition submitted by Mr. Héctor Faúndez Ledesma (hereinafter the "petitioner"), in representation of Brigadier General (retired) Mr. Francisco Usón Ramírez (hereinafter the "alleged victim", or "Mr. Usón"). In his complaint the petitioner alleges that the Bolivarian Republic of Venezuela (hereinafter "the Venezuelan State," "Venezuela," or "the State") is responsible for the alleged violation of articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 13 (right to freedom of thought and expression) and 25 (right to judicial protection) of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention"), with prejudice to Mr. Usón. The complaint also asserts that the State has failed to comply with the obligations provided for by articles 1.1 (obligation to respect and guarantee rights) and 2 (obligation to adapt domestic legislation) of said instrument.

2. The petitioner claims that when the State, under military jurisdiction, arrested, prosecuted, found guilty and sentenced Mr. Usón for the crime of "insults to the National Armed Forces," for statements he made on a television program, it violated his rights to personal liberty, to freedom of expression as well as to a fair trial and judicial protection. The petitioner also claims that the conditions under which Mr. Usón was kept in preventive detention, and is now serving his prison sentence, constitute cruel, inhuman and degrading treatment, violating his right to humane treatment.

3. The State contends that the criminal proceedings under military jurisdiction against Mr. Usón "were at all times respectful of legal and constitutional principles, as well as of the international human rights instruments signed and ratified by the Republic of Venezuela." Regarding the petitioner's allegations about the violation of his right to humane treatment, the State claims that the prison conditions to which Mr. Usón is subjected do not amount to cruel, inhuman or degrading treatment, and that "they have as their basis the guarantee of the welfare of the inmate population."

4. Pursuant to the provisions of articles 46 and 47 of the American Convention and articles 30 and 37 of the Commission's rules of procedure, and after analyzing the petition without prejudging the merits of the case, the Commission decided to declare the petition admissible regarding the alleged violations of articles 7, 8, 13 and 25 of the American Convention, in connection with articles 1.1 and 2 of same. The Commission declared the complaint inadmissible with respect to article 5 of the American Convention. The Commission also decided to notify this decision to the parties, publish it and include it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BEFORE THE COMMISSION

5. The complaint was lodged by the petitioner before the Executive Secretariat of the Commission on May 23, 2005. On June 1, 2005, the Commission began processing the petition under number 577/05. Subsequently, on June 28, 2005, the Commission transmitted the relevant portions of the petition to the State, granting it two months to submit its observations.

6. On August 24, 2005, the State requested an extension of thirty days to submit its observations, which was granted by the Commission on August 29, 2005.

¹ Commissioner Freddy Gutiérrez, of Venezuelan nationality, did not participate in the deliberations or in the voting related to this report, pursuant to the provisions of article 17.2.a of the IACHR's Rules of Procedure.

7. On October 13, 2005, the State presented its brief to the Commission responding to the complaint lodged by the petitioners. The Commission, in turn, transmitted the observations to the petitioner on October 26, 2005, granting one month to submit observations. At the time of writing of this report, the Commission has not received new observations on the part of the petitioner.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

8. The petitioner states that Mr. Francisco Usón Ramírez is a Venezuelan citizen and a retired Brigadier General of the Army of Venezuela.

9. The petition states that on April 16, 2004, Mr. Usón and Ms. Patricia Poleo were invited to appear on a television program, where they were interviewed regarding a fire that had occurred on March 30, 2004, in a punishment cell of Fort Mara, in Maracaibo.² According to the petitioner, in the interview, reference was made to the theory that soldiers had been burned with a flamethrower. In response to the questions posed by Ms. Marta Colomina, host of the program, regarding said theory, the petitioner states that Mr. Usón, "without endorsing this version [...] restricted himself to offering a technical opinion, explaining how a flamethrower works, that it was invented during the Second World War, and that it uses a mix of gasoline and napalm."

10. The petitioner claims that around or about 8:30 a.m. of May 22, 2004, Mr. Usón was arrested in the airport of the city of Puerto Ordaz pursuant to an order of the *Tribunal Militar Primero de Primera Instancia Permanente de La Guaira* [First Military Tribunal of the First Permanent Instance of La Guaira]. The petitioner further asserts that the order responded to an arrest warrant filed on May 21, 2004 by the Military Prosecutor of the jurisdiction of the Permanent War Council of Caracas, due to the "unfounded and irresponsible statements made by citizen and retired Brigadier General (Army) Francisco Vicente Usón Ramírez to Venezuelan media." The petitioner states that the arrest of Mr. Usón was arbitrary, and was carried out "to persecute him as an adversary of the regime."

11. The petitioner claims that the State violated Mr. Usón's right to personal liberty since at the time of his arrest he was "vaguely informed of the reasons for it and of the charges made against him. Moreover, he was not taken without delay before a judge or judicial officer: this did not happen until more than 48 hours after his detention." In addition, the complaint states that at 16:00 hours (4:00 p.m.) of May 24, 2004, Mr. Usón was taken "before [the *Juzgado Segundo de Primera Instancia Permanente en lo Penal Militar de Caracas* (Second Criminal Military Court of the First Permanent Instance of Caracas)], where a preliminary hearing was held regarding his case."³ This court, according to the petitioner, denied Mr. Usón his right to pretrial release, arguing that there was a "risk of his absconding." The court also stated that the criminal proceedings against him would not be made public, under "the pretext that the facts of the case constituted a serious disturbance to the security of the State."

12. According to the petition, on October 11, 2004, in a judgment published on November 8, 2004, the First Military criminal Trial Court of the Metropolitan Area of Caracas sentenced Mr. Usón to five years and six months in prison for the crime of "insult against the National Armed Forces", typified by article 505 of the *Código Orgánico de Justicia Militar de Venezuela* [Organic

² According to information collected by the IACHR, the day before the abovementioned program came on the air, Ms. Patricia Poleo, in a column in the daily newspaper *Nuevo País*, published a version of the events of Fort Mara, according to which the incident had been caused by the use of a flamethrower from outside the punishment cell. The information received by the IACHR indicates that in the incident two soldiers were killed and several other suffered very serious burns.

³ The Commission takes note of the fact that among the annexes provided by the petitioner, there is the statement that on May 23, 2004 Mr. Usón was originally taken before the First Military Tribunal of the First Permanent Instance of La Guaira. However, the tribunal concluded the hearing declaring itself incompetent to hear the case. On that same day, it is stated, the tribunal, "against the rules of criminal procedure," forwarded the case file to the Second Criminal Military Court of the First Permanent Instance of Caracas, so that the hearing could be held "yet again."

Code of Military Justice of Venezuela],⁴ and to the accessory punishments of disenfranchisement and loss of the right to rewards, as provided by subsections 1 and 3 of article 407 of said law.

13. It is asserted in the complaint that the judgment of the First Military Tribunal was subsequently confirmed in its entirety on January 27, 2005 by the *Corte Marcial del Circuito Judicial Penal Militar* [Martial Court of the Criminal Military Justice Circuit]. Acting as an appeals court, the latter denied the appeal lodged by Mr. Usón's defense on November 23, 2004. The petition also states that on February 28, 2005 a *recurso de casación* [motion to vacate] was filed against the Martial Court's decision before Criminal Chamber of the Supreme Court of Venezuela, arguing "the manifest incompetence of the tribunals, and of the organs of investigation of the military criminal jurisdiction, to examine this case." The petition also states that on June 2, 2005, the Criminal Chamber of the Supreme Court of Justice of Venezuela denied the motion to vacate, considering it "manifestly groundless," and confirmed the conviction handed down by the *Tribunal Militar Primero de Juicio Área Metropolitana de Caracas* [First Military Trial Court of the Metropolitan Area of Caracas] on October 11, 2004.

14. The petitioner claims that the statements made by Mr. Usón during the television interview were taken out of context in the proceedings under military jurisdiction. According to the petitioner, in his statements, Mr. Usón "did not deny or endorse the theory that those soldiers had been burned with a flamethrower. He did not blame anybody in particular regarding these facts, either." His statements, according to the petitioner, were in the context of a "debate on a subject of legitimate public interest, related to the *Reglamento de Castigos Disciplinarios* [Rules of Disciplinary Punishment] applied by the National Armed Forces; to the appropriateness of these punishments delivered without a trial of any kind or procedural guarantees; and to the circumstances under which those soldiers were burned, notwithstanding that they had nothing flammable in that cell." To make these statements, the petitioner contends, is to engage in a legitimate use by Mr. Usón of his freedom of expression, which "does not [impinge upon] the rights or the reputation of anybody in particular, nor does it [put] national security, public order, public health, or public morals in danger."

15. In this same respect, the petitioner contends that Mr. Usón's sentence for the crime of "insult of the National Armed Forces" is disproportionate and therefore violates article 13 of the American Convention in that the imposition of punishments of this nature to protect the honor of an institution such as the National Armed Forces "is [unnecessary] in a democratic society."

16. The petitioner also states that several violations of articles 8 and 25 of the American Convention were committed over the course of the military criminal proceedings: Mr. Usón "was denied the right to pretrial release"; there "was a violation of the principle of equality of arms, providing the prosecution with resources that were denied the defense"; the "Military Prosecutor's Office failed to comply with the legal deadlines for the submission of documents [while] testimony and documentary evidence submitted by the defense were rejected," and "his trial" was kept from being "public." The petitioner also contends that the Executive Branch interfered several times in the case to determine the content of its judicial decisions, thus violating "the separation of powers."

17. Finally, the petitioner contends that the prison conditions to which the alleged victim has been subjected constitute cruel, inhuman and degrading treatment, in violation of article 5 of the American Convention. Specifically, the petitioner claims that Mr. Usón is "confined to his cell 24 hours a day, except three periods of two hours each, of weekly yard and gym hours." In addition, visits of next of kin who are minors are prohibited, hindering his possibility of communicating with other members of his family, "who must submit to searches each time they visit him," and, his laptop computer has been confiscated.

4 In Book Two, Title III, Chapter IV, Section IV of the Organic Code of Military Justice of Venezuela, the following crimes are typified: "insults against the sentry, the flag and the Armed Forces." In this section, article 505 states: Article 505. Insult, offense or scorning of the National Armed Forces or some of its units. The penalty for the person whom in any way insults, offends or scorns the National Armed Forces or any of its units, shall be three to eight years imprisonment.

B. Position of the State

18. The State contends that “[f]rom the beginning of the military criminal investigation [...] legal and constitutional principles were respected at all times, as well as human rights instruments signed and ratified by the Bolivarian Republic of Venezuela, in the course of carrying out its duty to exercise *ius puniendi* in representation of the Venezuelan State.” In his respect, the State argues that in the criminal proceedings against Mr. Usón “legal deadlines for the submission of documents or of testimonial evidence,” were always respected: should it have been to the contrary, the military judicial organs, guarantors of effective judicial protection and of due process, would have declared these submissions absolutely null.”

19. Regarding the claims on the part of the alleged victim of a violation of his freedom of expression, the State asserts that Mr. Usón had held “that the facts that occurred in ‘Fort Mara’ had been premeditated,” thus engaging in “abusive expressions [that] insult and offend the National Armed Forces” and that these statements contain an “opinion that goes beyond the purely technical.” In this respect, the State contends that although Mr. Usón was expressing himself in a manner protected by the constitutional right of freedom of expression, “he also [was assuming] full responsibility for all of his statements.”

20. The State also claims that the military tribunals were those “competent” to try this case, since “when the insult is committed against the National Armed Forces or one of its units, it is a crime of a military nature, which shall be heard by the Criminal Military Tribunals. Thus, the *Sala de Casación Penal* [Chamber of Criminal Cassation] established that the crime for which proceedings were instituted against Brigadier General Francisco Usón was of a military nature; it was therefore up to the aforementioned tribunals to hear the case; in this way the argument of incompetence was rejected.”

21. With respect to the claims of violations of the right to humane treatment of the alleged victim, the State argues that the *Tribunal Militar Primero de Ejecución de Sentencias* [First Military Tribunal for the Execution of Judgments] “makes regular visits as frequently as the law demands in order to learn first hand about the particular problems of each inmate, and grants them the opportunity, in their personal interview with the Judge, to explain all that is necessary.” The State maintains that Mr. Usón “has not made said statements before the Tribunal.” The State also points out that “any center of military inmates has a routine of activities for them; they must be followed without distinctions” and that all these centers prohibit the entry of minors “outside of the programmed hours.” These prison rules, according to the State, “do not constitute an infringement on humane treatment, nor are they followed using cruel, inhuman or degrading treatment.” The State argues that “they are rules whose basis is the goal of guaranteeing the welfare of the entire inmate population.”

22. Finally, the State asserts that the alleged victim is currently “receiving decent treatment, according to his human condition,” while he is serving his sentence.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

23. The Commission notes that Venezuela is a party to the Convention since August 9, 1997, date on which it deposited its instrument of ratification.

24. Pursuant to article 44 of the American Convention and article 23 of the Rules of Procedure of the IACHR, the petitioner, as a attorney who represents the alleged victim, has standing to file a petition before the Commission concerning the alleged violations of the rights provided for by the American Convention. The alleged victim, Francisco Usón Ramírez, is an individual with respect to whom the State undertook the commitment to guarantee rights provided for by the Convention. Therefore, the Commission is *ratione personae* competent to examine the petition.

25. The Commission is competent *ratione materiae* because the petition refers to complaints regarding violations of human rights protected by the American Convention. The Commission also is competent *ratione temporis* since the obligation to respect and ensure the rights protected under the American Convention was already binding upon the State on the date the facts alleged in the petition were said to have occurred. Finally, the Commission is *ratione loci* competent to take cognizance of the petition inasmuch as it alleges violations of rights protected under American Convention, said to have occurred in the territory of a State party to said instrument.

B. Requirements for the admissibility of the petition

1. Exhaustion of domestic remedies

26. The petitioner claims that the judgment of the Martial Court of the Military Criminal Judicial Circuit of January 27, 2005, which denied the appeal lodged against the judgment handed down on October 11, 2004 by the First Military Trial Court of the Metropolitan Area of Caracas, exhausted the remedies provided by Venezuela's domestic legislation. In its response to the complaint, however, the State has not submitted observations regarding the exhaustion of domestic remedies.

27. The Commission considers it advisable to note that on June 2, 2005, the Criminal Chamber of the Supreme Court of Justice of Venezuela denied the motion, lodged by Mr. Usón's defense, to vacate the Martial Court's decision of January 27, 2005.

28. It is important to emphasize that the IACHR has previously noted that the exhaustion of domestic remedies is a requirement established by the Convention, in order to avoid the State having to respond internationally without having before had the opportunity to solve the problem using its domestic mechanisms. This requirement is consequently a defense and, as such, can be waived by the State, even by implication, as in the instant case.⁵ Therefore, the Commission considers that domestic remedies have been exhausted in this case and the requirement provided for by article 46.1.a of the American Convention has been met.

2. Timeliness of the petition

29. In the instant petition, the IACHR has established the State's tacit waiver of its right to use the defense of lack of exhaustion of domestic remedies. For this reason, the requirement provided for by article 46.1.b is not applicable. However, the conventional requirements of exhaustion of domestic remedies and of filing within six months of the judgment that exhausted the domestic jurisdiction are independent of each other. Therefore, the Inter-American Commission must establish whether the petition under examination was filed within a reasonable time period. In this respect, the IACHR notes that the petition was received on May 23, 2005 and that, hence, that it was lodged within a reasonable time period, given the features of the instant case.⁶

4. International duplication of proceedings and *res judicata*

30. The Commission understands that the file concerning the petition contains no information that would suggest that this complaint is currently pending in another international proceeding and it has received no information to the contrary. The Commission furthermore considers that it does not replicate another petition or communication that it might already have been settled by the Inter-American Commission on Human Rights. Therefore, the IACHR concludes that it has met the provisions of articles 46.1.c and 47.d of the Convention.

⁵ I/A Court H.R., Case of Loayza-Tamayo. Preliminary Objections. Judgment of January 31, 1996. Series C, No. 25, para. 40; I/A Court H.R., Castillo-Páez Case. Preliminary Objections. Judgment of January 30, 1996. Series C, No. 24, para. 40; Neira-Alegría et al. Case. Preliminary Objections. Judgment of December 11, 1991. Series C., No. 13, para. 30.

⁶ IACHR, Report No. 31/03, Petition 12.195, Chile, March 7, 2003; IACHR, Report No. 57/03, Petition 12.337, Chile, October 10, 2003; IACHR, Report No. 3/02, Petition 11.498, Argentina, February 27, 2002.

4. Description of the facts

31. In the instant case, at this stage of the proceeding, the Commission does not decide whether the alleged violations of the alleged victim's human rights according to the articles of the Convention, took place. For the purposes of admissibility, the Commission must only decide if facts are layed out which, should they be proven, could constitute violations of the Convention, as provided for by article 47.b of the American Convention, and if the petition is "manifestly groundless" or "obviously out of order," pursuant to subsection (c) of the same article.

32. The criterion to assess these matters is different from the one necessary to judge on the merits of the complaint. The IACHR must carry out a *prima facie* evaluation and determine whether the complaint provides evidence of an apparent or potential violation of a right guaranteed by the Convention; it does not need to establish the existence of said violation. The examination it should carry out at this stage is simply a preliminary analysis that does not imply a prejudgment or opinion on the merits of the case. The Rules of Procedure of the Commission itself, in establishing two clear stages of admissibility and of merits, provides this distinction between the evaluation that the Commission must make in order to declare a petition admissible and the one required to establish the existence of a violation.

33. It is the opinion of the Commission that the arguments of the State contending that there were no violations of the rights to personal liberty, freedom of expression, to a fair trial and to judicial protection, do not address questions of admissibility which could demonstrate that the petition is manifestly groundless or obviously out of order. These arguments shall be examined in the merits stage of the case.

34. In the instant case the Commission considers that the arguments submitted by the petitioner, regarding the possible violation of articles 7, 8, 13, and 25 of the American Convention, in connection with articles 1.1 and 2 of same, are not manifestly groundless.

35. With respect to the complaint regarding the alleged violation of article 5 of the American Convention, it is the opinion of the Commission that the petitioner has not provided proper grounds and therefore this portion of the petition is inadmissible.

V. CONCLUSION

36. The Commission concludes that it is competent to hear this petition and that the petition meets the requirements of admissibility, in accordance with articles 46 and 47 of the American Convention, and with articles 30, 37 and others in concordance, and its rules of procedure. Based on the foregoing arguments in fact and in law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, DECIDES:

1. To declare the petition admissible concerning articles 7, 8, 13 and 25 of the American Convention, in connection with articles 1.1 and 2, and to declare inadmissible the complaint regarding article 5 of same.
2. To notify the State and the petitioners of this decision.
3. To proceed with the analysis of the merits of the case.
4. To publish this decision and include it in the *Annual Report* of the IACHR to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 15th day of the month of March, 2006.
(Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President;

Florentín Meléndez, Second Vice-President; Clare K. Roberts, Paolo Carozza and Víctor E. Abramovich, Commissioners.