

**MOTION FOR RECONSIDERATION
OF GUSTAVO GÓMEZ LÓPEZ**

Introduction and Summary

1. The Commission's September 28, 1998 decision (the "Decision") dismissing my human rights complaint against the Venezuelan Government without a hearing is unfair as a matter of procedure and due process and wrong as a matter of fact and law. I respectfully request that the Commission reconsider and withdraw its Decision and allow my complaint to proceed.

Procedural Unfairness.

2. The Commission issued its Decision even though my complaint against the Venezuelan Government was not yet fully briefed. The Commission itself *requested* that I file a brief in response to the Government of Venezuela's April 21, 1998 submission. But the Commission then decided my case before the expiration of the November 15 deadline set by the Commission for filing my brief. By doing so, the Commission denied me a full and fair opportunity to be heard. Moreover, the Commission's premature action was highly prejudicial because it prevented me from bringing facts to the Commission's attention that directly contradict the purported grounds for dismissal set forth in the Commission's Decision.

The Incorrect Nature of the Decision.

3. *The Commission's Decision is not only premature, but it is also plainly wrong.* As I explain in detail below, the Commission, relying on the misrepresentations contained in the Venezuelan Government's April 21 submission, based its Decision on the wholly incorrect premise that I have not exhausted domestic remedies in Venezuela because I supposedly have never filed an *amparo* action in

Venezuela. *See* Decision at ¶ 21. But, in fact, I have filed two *amparo* actions in Venezuela -- both of which, not surprisingly, have utterly failed to stop or redress the Venezuelan Government's continuing violations of my human rights. The Decision also errs in concluding (*id.* at ¶ 22-23) that I presented no evidence to support my contention that Venezuelan's judicial system is biased against me, which would under Commission precedent excuse any exhaustion requirement. In fact, I presented substantial "objective evidence" (*id.* at ¶ 22) on that point, including admissions by the Venezuelan Government itself. The Decision failed to address or consider this evidence in any way.

4. Accordingly, I respectfully urge the Commission (i) to vacate and withdraw its premature and erroneous Decision, (ii) to honor my right to submit a brief in response to the Venezuelan Government's last filing, as the Commission requested that I do, (iii) to declare my petition admissible, and (iv) to proceed to a full investigation and early hearing on the merits of my complaint.

Argument

I.

THE COMMISSION'S DECISION WAS PREMATURELY ISSUED BEFORE MY COMPLAINT AGAINST THE VENEZUELAN GOVERNMENT WAS FULLY BRIEFED

5. The Commission's action in issuing its premature ruling in my case, without a hearing and well before my human rights complaint against the Government of Venezuela was fully briefed, is fundamentally unfair.

6. I filed my initial complaint on November 27, 1996, and supplemental submissions on December 9, 1996 and July 14, 1997. Rather than

respond in a timely fashion, Venezuela ignored the Commission's rules governing when responses to complaints should be filed and did not respond to my complaints until August 25, 1997. I then filed a reply to the Venezuelan response on November 24, 1997. Venezuela replied to that submission on April 21, 1998.

7. By letter dated June 22, 1998, the Commission informed me of Venezuela's April 21 submission. In that letter, the Commission *expressly requested* that I file a brief in response to the April 21 submission:

Tengo el agrado de referirme al caso arriba citado, relacionado con la situación en Venezuela.

Me permito informarles que el Gobierno de Venezuela, en nota de 21 de abril de 1998, ha dado respuesta a nuestra solicitud de información respecto a este caso. Las partes pertinentes de dicha respuesta se acompañan a la presente.

Le rogamos que nos envíen, en el plazo de 45 días, sus observaciones sobre la respuesta del Gobierno, junto con cualquier información nueva o complementaria, a fin de que puedan ser consideradas por la Comisión.

(Ex. __.) (emphasis added.)

8. As a consequence of my criminal trial in Venezuela this past summer, however, I was unable to prepare the brief the Commission had requested within the original forty-five day period. Accordingly, on August 6, 1998 -- before the Commission's original 45-day deadline had expired -- my attorneys from the law firm of Paul, Weiss, Rifkind, Wharton & Garrison contacted the Commission and requested an extension of the deadline. Dr. Milton Castillo, on behalf of the Commission, readily agreed to extend the deadline to October 15, 1998. The

Commission's extension of the deadline was confirmed in a letter from my attorneys to the Commission dated August 6, 1998 (Ex. ___).

9. On October 9, 1998, at my attorneys' request, Dr. Milton Castillo, on behalf of the Commission, readily agreed to further extend the deadline to file my brief, this time from October 15 to November 15, 1998. The Commission's extension was confirmed in a letter from my attorneys to the Commission dated October 9, 1998 (Ex. ___). Dr. Castillo did not indicate in any way to my attorney that a brief filed on November 15 would be untimely. Certainly, he did not suggest that my complaint had been already dismissed -- which was in fact the case.

10. Nonetheless, on October 18, 1998, *nearly a month before my brief was due*, my attorneys received, by fax transmittal, a copy of the Commission's September 28 Decision in my case. (Ex. ___).

11. The procedural irregularity with which the Commission has handled my case is thus manifestly clear: The Commission expressly requested that I file a brief in response to the Venezuelan Government's April 21 submission, but inexplicably dismissed my complaint well before the deadline for filing that brief had expired.

12. For this reason alone, the Commission must, I respectfully submit, withdraw its Decision and allow my complaint to proceed, so that the Commission can review my case with the benefit of my final comments on my still evolving human rights complaint against the Government of Venezuela.

13. Moreover, the Commission's action in issuing its premature Decision was highly prejudicial because it prevented me from presenting new facts

and arguments to the Commission supporting my human rights complaint against the Venezuelan Government.

14. *First*, I have been prevented from responding to and correcting the Government of Venezuela's factual misrepresentations in its April 21 submission to the Commission. As I demonstrate below in greater detail, the Government of Venezuela in its April 21 submission affirmatively misled the Commission when it asserted that I have never filed an *amparo* action in Venezuela. *See* Govt.'s April 21, 1998 Submission at 12-13. This is wrong -- in fact, I have filed two such proceedings, both of which have failed to obtain me any relief. *See infra* at ¶¶ ____ & Exhs. ____.

15. *Second*, the Commission's premature Decision in my case has deprived me of the opportunity to present new evidence to the Commission of the Government of Venezuela's most recent violations of my human rights, which have occurred after my November 24, 1997 submission. In particular, the record of the handling of my criminal trial demonstrates that the Government of Venezuela continues to violate my fundamental human rights.

16. In my *in absentia* trial, the court closed the proceedings even though I had not yet presented 83 witnesses that were on my court-approved witness list and were essential to my defense. **[Note: We had presented 34 witnesses, and apparently the gov't presented 1 live witness]** Then, after barring this substantial portion of my proof, the Court issued a 1,500 page decision convicting me and sentencing me to 15 years in prison. The judge issued that lengthy decision only three days after she arbitrarily and improperly ended the trial. Given that the trial

had lasted nearly eight months and that the record consisted of thousands of pages of exhibits and the testimony of 35 witnesses, the court could not have given full consideration in a single day even to the limited evidence that I had been permitted to present.

17. Thus, the conduct of my trial deprived me of fundamental rights protected by Article 8 of the American Convention, including (i) the right to a hearing before a competent, independent and impartial tribunal (Art. 8(1)); (ii) the right to adequate time and means for preparation of my defense (Art. 8(2)(a)); and (iii) the right to call witnesses on my behalf (Art. 8(2)(f)). Yet, the Decision could not take these facts into account because its premature release denied me an opportunity to present them.

18. *Third*, the Commission's action deprived me of the opportunity to respond to the erroneous arguments in Venezuela's April 21 submission, such as the claim that "the courts in Venezuela are independent of the Executive Branch" Govt.'s April 21, 1998 Submission at ¶ II.4, and the contention that I have failed to provide evidence of a lack of impartiality by the Venezuelan judiciary.

19. In light of the foregoing, I respectfully, but urgently, request that the Commission withdraw its premature and prejudicial Decision of September 28 and, at the very least, honor my right to file a brief in response to the Government of Venezuela's April 21 submission.

II.

THE FUNDAMENTAL FACTUAL PREMISES OF THE DECISION ARE ENTIRELY ERRONEOUS

20. The Commission based its decision on the erroneous premise that, because I have supposedly never filed an *amparo* action in Venezuela to vindicate my human rights, I cannot claim that domestic remedies are exhausted or excused:

21. De las posiciones de las partes se demuestra que el peticionario no ha intentado siquiera ejercer los recursos domésticos que le ofrece el ordenamiento jurídico venezolano. . . . Existe en la legislación venezolana el recurso de amparo para proteger los derechos protegidos por la Convención. No ha quedado demostrado por ningún medio que el peticionario se le haya negado el acceso al recurso o haya sido impedido para agotarlo, dado que ni siquiera lo ha intentado. Debido a lo anterior, tampoco es posible alegar un retardo injustificado en la decisión del recurso, que aún no ha sido interpuesto.

Decision at ¶ 21.¹⁷

21. The Commission is, I respectfully submit, just plain wrong. As I explain below, I have filed not one, but two *amparo* actions in Venezuela.

¹⁷ [From the positions of the parties it is evident that the petitioner has not even exercised the domestic remedies that Venezuelan law offers him. Given the secondary nature of international law, the petitioner should, in the first instance, employ the remedies that the domestic system offers him to resolve the alleged irregularities in the legal processes against him. He should petition the State so that the State can resolve these issues. Article 46(2) of the American Convention contemplates three exceptions to this principle. Nevertheless, the Commission does not find that these exceptions apply to the present case. Venezuelan legislation contains the remedy of an amparo action to protect the rights set forth in the Convention. It has in no way been demonstrated that the petitioner has been denied access to this remedy or that he has been impeded from using it, given that he has not even attempted to do so. In light of the foregoing, it is not even possible to allege an unjustified delay with respect to issuing an amparo decision, given that an amparo action has not even been filed.]

Moreover, the outcomes of both of those filings, which I detail below, is further evidence that the exhaustion of domestic remedies should be excused in my case: (a) there has been an “unwarranted delay” in rendering a decision with respect to my first *amparo* action, a delay that has caused me substantial and irreparable harm, excusing exhaustion under Article 46(2), and (b) as demonstrated by the status of both of my *amparo* actions, the *amparo* remedy is ineffective in redressing the violations of my human rights by the Venezuelan Government. In any event, the exhaustion requirement should be excused because I have presented overwhelming, objective evidence that I have been denied due process of law before Venezuelan courts -- evidence not considered in the Decision. I discuss each of these reasons below.

A. There Has Been an Unwarranted Delay in the Rendering of a Decision in My First *Amparo* Action

22. Article 46(2)(c) of the American Convention on Human Rights provides, in relevant part, that exhaustion of domestic remedies “shall not be applicable when . . . there has been unwarranted delay in rendering a final judgment under” domestic remedies. The Commission itself correctly acknowledged in its September 28 Decision that “un retardo injustificado en la decisión del recurso” of *amparo* is sufficient reason to excuse the exhaustion of domestic remedies. See Decision at ¶ 21.

23. I commenced my first *amparo* action on November 10, 1997, to redress the violations of my fundamental rights during my *audiencia pública del reo*. See Ex. __. The Venezuelan Government’s April submission does not even address the circumstances of that *audiencia pública del reo*, which I documented in a

videotape (Ex. 46) and described in my November 24, 1997 submission to the Commission as follows:

- As Venezuela concedes, it has spent years presenting its allegations against me. Yet when my in absentia hearing on the criminal charges finally took place on July 15, 1997, the presiding judge overstepped her authority and issued “mandatory rules” that allotted my attorney only *ten minutes* to present my entire case, and he was required to do so without even the use of any notes. As a result of these *ad hoc* rule, which have no basis in Venezuelan procedural law, I was given only ten minutes to respond orally to a prosecution that has lasted over three years and which has resulted in a prosecution file of literally hundreds of thousands of pages.
- By contrast, no time limit was placed on the representatives of the Attorney General's Office, who also were afforded the opportunity to use whatever notes they wished. This unequal treatment of the parties is yet another example of how the Venezuelan judiciary is incapable and unwilling to safeguard my legal rights.
- The judge in my criminal case decided at the last minute and in contravention of Venezuelan law to move the venue of the hearing from the previously scheduled courtroom to a public hallway. As the videotape documents, the noise from the street (*e.g.*, dogs barking, passing traffic and sirens) required the parties' attorneys to use bullhorns. In this circus-like atmosphere, in violation of all standards of judicial decorum and deliberation, a fair and proper hearing was impossible.

24. The judge presiding over my *audiencia pública del reo*, and before whom my human rights were violated, declared herself without subject matter jurisdiction to review my *amparo* action and referred it to the Tribunal Superior de Salvaguarda.

25. On February 18, 1998, the Tribunal Superior de Salvaguarda also declared itself without subject matter jurisdiction to review my *amparo* action and

referred it to the Supreme Court of Venezuela, which as of today -- more than a year after I filed an amparo action -- has yet to rule.

26. The delay in rendering a decision with respect to my first *amparo* action has caused me substantial and irreparable harm because, despite the year-long pendency of my *amparo* action before the Supreme Court of Venezuela, the judge presiding over the criminal case against me proceeded with the Venezuelan Government's criminal prosecution against me and sentenced me to 15 years in prison.

27. With respect to my first *amparo*, there has thus been the "unwarranted delay" in the rendering of a judicial decision with respect to domestic remedies -- a delay that has caused me grave harm -- that mandates that the exhaustion of domestic remedies requirement be excused under Article 46(2)(c) of the Convention.

B. As the History of My Second *Amparo* Demonstrates, The *Amparo* Remedy is Ineffective to Redress Violations of My Human Rights

28. I filed my second *amparo* action on July 29, 1998, challenging the decision of the judge presiding over the Venezuelan Government's criminal prosecution of me to close prematurely the oral phase of the criminal trial against me. Ex. ___

29. On July 15, 1998, with 83 witnesses on my behalf yet to testify but after the Government of Venezuela had presented its case against me, the trial court judge, without warning and without basis in Venezuelan law, unilaterally closed the oral phase of my criminal trial, thereby denying me my fundamental right to

present a full defense to the criminal charges against me. See Rafael del Naranco, *Abrupto final para el juicio del Latino* (Abrupt ending to Latino trial), *El Mundo*, 16 de julio de 1988, at 2.

30. Again, the trial judge declared herself without subject matter jurisdiction to consider this *amparo* action and referred it to the Tribunal Superior de Salvaguarda, which dismissed my *amparo* action on purely technical grounds and automatically referred its decision to the Supreme Court of Venezuela for ratification.

[Mark - let's discuss.]

31. The dismissal on purely technical grounds of this *amparo* action has caused me substantial and irreparable harm because, despite the clear violation of my fundamental rights caused by the illegal and premature closing of the oral phase of the criminal trial against me, the judge presiding over the criminal case found me guilty and sentenced me to 15 years in prison.

32. The dismissal of this *amparo* on technical grounds has not only served to deny me access to domestic remedies, thereby excusing exhaustion under Convention Article 46(2)(b), but it is further evidence that the *amparo* remedy is an entirely inadequate and ineffective means to redress the continuing violations of my human rights by the Venezuelan Government. The *amparo* is a means for challenging a specific act by a specific court. Under Venezuelan law, *amparo* is not available as a remedy for the sort of overall unfairness and bias in a criminal prosecution that is reflected in my complaint. Simply put, an *amparo* action is incapable of -- and, under Venezuelan legislation, not meant to be a mechanism for -- redressing, in a global sense, the unrelenting violations of my fundamental rights.

33. Under these circumstances, Commission and Inter-American Court precedent establish that there is no requirement that I exhaust domestic remedies. *See, e.g., Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H. R. (Ser. C.) No. 4 (1988), at ¶ 63 (exhaustion is not required when domestic remedies are formally available but their "adequacy and effectiveness" is questionable); Nov. 24, 1998 Submission at ¶¶ 3-9.

C. The Decision Ignores the Undisputed, Objective Evidence That Theoretical Venezuelan Domestic Remedies Are Unavailable to Me, Excusing Exhaustion Under 46(2)(a)

34. As I explained in my complaint and in my submission of November 1997, regardless of the technical existence in Venezuelan legislation of the *amparo* remedy, the problems with the Venezuelan judiciary -- both in general and in my particular case -- render the *amparo* remedy and any other domestic proceedings the sort of purely theoretical remedy that the Commission and the Inter-American Court have repeatedly found to be insufficient to require exhaustion under Article 46(2)(a) of the Convention. *See* Article 46(2)(a) & Decision at ¶ 21. The Commission's premature Decision ignores the evidence supporting this showing, asserting instead that my claims are based only on mere "subjective fears." The record here -- entirely ignored in the Decision -- demonstrates this conclusion is incorrect and that in fact, my fears are "objectively justified," excusing exhaustion. Decision at ¶ 22.

35. *First*, the Commission's Decision fails to take into account the undisputed evidence I presented that due process of law is not respected in Venezuela.

(a) The Commission's Decision does not address the admissions made by the Government of Venezuela itself before a United States Federal court, when Venezuela asked the court to take "judicial notice"^{2/} of the following facts contained in a report entitled Halfway to Reform, the World Bank and the Venezuelan Justice System, a report jointly prepared and published by the Lawyers Committee for Human Rights and the Venezuelan Program for Human Rights Education and Action (PROVEA):

1. There is a crisis in the Venezuelan judicial system rooted in political interference, corruption, and institutional neglect.
2. Arbitrariness, corruption and delays are among the most serious problems in the Venezuelan courts.
3. Judicial administration and case management in Venezuela are in a catastrophic state.
4. There are serious problems in the Venezuelan judicial system that are crippling its ability to provide anything resembling fair and efficient justice.

* * *

7. Corruption is viewed as the most profound -- and perhaps intractable -- ill plaguing the [Venezuelan] courts. It is the most serious or one of the most serious issues in connection with legal reform. . . .

* * *

14. The Venezuelan judiciary's autonomy and independence are precarious because it is powerless to counter interventions by the executive and legislative branches.

^{2/} Under American law, judicial notice is taken of facts that are not subject to reasonable dispute. Fed. R. Ev. 201.

* * *

16. There is extensive corrosion of the judicial functions in Venezuela which has been brought about by extensive political interference and corruption.

* * *

19. The use of torture as a normal investigation technique is widespread in Venezuela.

* * *

20. The Venezuelan prison system has been described as one of the worst in Latin America. Venezuela prisons remain plagued by violence, corruption and a serious lack of health and social services.

See Submission of November 24, 1997 at _____.

(b) The Commission's Decision also ignores the findings of Professor Keith S. Rosenn, professor of law at the University of Miami Law School and an expert on Venezuelan affairs, which findings the Venezuelan Government has adopted and submitted to another United States Federal court, and which I quoted in my original complaint:

10. The Venezuelan judiciary is notoriously dilatory, beleaguered by corruption, and lacks independence

11. An unpublished 1992 World Bank study reached a similar conclusion:

[T]he Venezuelan judiciary is in crisis. The penal and civil courts are encountering serious case backlogs, procedural congestion, and judicial delays with the resulting effect of inefficient, costly and detrimental delivery of services. These delays contribute to the appearance of impropriety and public perceptions that the courts are unresponsive, corrupt, and politically influenced

13. A recent article by Janet Kelly, Dean of the Institute for Advanced Study of Administration in Caracas, confirms the malfunctioning of the Venezuelan judiciary:

The legal system in Venezuela requires an overhaul and, until such time as citizens begin to have faith in it, will continue to undermine the legitimacy of the political systems as a whole. The problem is both economic and cultural. A recent study undertaken by a team from the Simon Bolívar University found that 98 percent of the courts were operating below the minimum standard necessary to carry out their daily business.

The Question of Inefficiency and Inequality: Social Policy in Venezuela, in LESSONS OF THE VENEZUELAN EXPERIENCE 282, 295-296 (Louis W. Goodman et al. 1995).

14. This perception of an inefficient and corrupt judicial system is also shared by Venezuela's political leaders, including its presidents. Jaime Lusinchi, when he was President of Venezuela, urged all sectors of society to unite in a campaign to remove judges illegally enriching themselves in Venezuela's corrupt, overloaded and underfunded judicial system. "Lusinchi Condemns Corrupt Judges," Latin America Regional Report, Andean Group, July 30, 1987, at 2, col. 1. Then former President Rafael Caldera (now once again president of Venezuela) sharply criticized the functioning of judiciary, stating that Venezuelan society does not believe in the administration of justice. "Caldera en la Universidad Santa María: La sociedad venezolana no cree en la administración de justicia," El Universal, Oct. 7, 1991, sec. 1, p. 12.

15. These conclusion about the lack of judicial independence, the rife corruption, and judicial inefficiency are thoroughly supported by an academic empirical diagnostic of the Venezuelan judiciary by Mariolga Quinter, JUSTICIA Y REALIDAD: UN ENFOQUE ANALITICO DE LA ADMINISTRACIÓN DE JUSTICIA EN LA VENEZUELA CONTEMPORANEA (Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas

1988). She found that even though on paper the Venezuelan legal system appears to have all the earmarks of a well-functioning constitutional republic with a well-developed independent judiciary, in practice the judiciary is heavily dependent upon the executive and the legislative branches, enormously inefficient, and all too susceptible to corruption.

Complt. at __ & Ex. 8.

(c) The Decision also fails to address:

(i) the numerous United States Department of State reports that document the political domination and manipulation of the Venezuelan judicial system by the executive branch, *see* Complt. at ¶ 32; or

(ii) the comments of countless Venezuelan Government officials, including Petit da Costa, one-time Procurador General of Venezuela and Minister of Justice in the Caldera administration, Dr. Henrique Meier Echeveria, the former Minister of Justice and Legal Advisor to Caldera, Dr. Eduardo Roche Lander, the Comptroller General of Venezuela, Dra. Cecilia Sosa Gómez, the President of the Venezuelan Supreme Court, Gisela Parra, a member of the Judicial Council that oversees Venezuelan judges, and President Caldera himself, all of whom have observed that due process is not afforded to criminal defendants within the Venezuelan judiciary, *see* Complt. at ¶ 34 & November 24, 1997 Submission at ¶¶ 16 & 18.

36. This evidence establishes the objective basis for my contention that the Venezuelan legal system cannot offer me effective relief. And if that were not enough, I also offered specific evidence that *I* personally have been denied due process of law by the Venezuelan Government. For example:

(a) The Commission ignores the uncontroverted evidence that I have presented that the Venezuelan Government has waged a virulent press campaign *aimed specifically at me* to prejudice the courts and the Venezuelan public against me, *see* _____;

(b) The Commission does not address the evidence that the Venezuelan Government has created special *ex post facto* courts to hear my case, courts which are more easily manipulated by the executive branch and more susceptible to the press campaign the Venezuelan Government has mounted against me, *see* _____; and

(c) The Commission failed to take into account the ample evidence that the Venezuelan Government has singled me out for prosecution while taking no action against other bankers who were political allies of the Government. *See* _____.

37. Accordingly, I respectfully submit that the Commission is wrong when it suggests that my claim that I have been denied due process is premised only on "subjective fears." Decision at ¶ 22. I have presented powerful, undisputed and *objective* evidence that the Venezuelan Government and judiciary have singled me out to deny me due process under the laws of Venezuela. Under the Commission rules and relevant precedents, the blatant and continuing denial of due process I have demonstrated renders the exhaustion requirement inapplicable here. *See* Article 46(2)(a) & November 24, 1997 Submission at ¶¶ 6-10.