

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 56/07; Petition 399-99
Session:	Hundred Twenty-Eighth Session (16 – 27 July 2007)
Title/Style of Cause:	Mariano Gerpe v. Argentina
Doc. Type:	Decision
Decided by:	President: Florentin Melendez; First Vice-President: Paolo Carozza; Commissioners: Sir Clare Roberts, Evelio Fernandez Arevalos, Freddy Gutierrez Trejo. Commissioner Victor E. Abramovich, of Argentine nationality, did not participate in the deliberations or the decision in the instant case, in keeping with Article 17(2) of the Commission's Rules of Procedure.
Dated:	23 July 2007
Citation:	Gerpe v. Argentina, Petition 399-99, Inter-Am. C.H.R., Report No. 56/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)
Represented by:	APPLICANTS: Andres Becar Varela, Rodolfo and Tomas Ojea Quintana
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I. SUMMARY

1. The current report refers to the admissibility of petition 399-99, launched by the Inter-American Commission on Human Rights (hereinafter the “Inter-American Commission,” “the Commission,” or “the IACHR”) pursuant to the submission of a petition, via fax, on September 3, 1999, by Mr. Andrés Becar Varela, Mr. Rodolfo and Mr. Tomás Ojea Quintana, legal representatives of the Diocesan Legal Service of the Episcopate of San Isidro (Servicio Jurídico Diocesano del Obispado de San Isidro), Province of Buenos Aires against the Argentine Republic (hereinafter “Argentina” or “the State”). The petitioners allege that the State is responsible under the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) for keeping Mr. Mariano Gerpe in prolonged preventive custody without justification.

2. The petition indicates that Mr. Mariano Gerpe was detained on April 18, 1998 accused of having committed the crime of aggravated robbery (robo calificado). It also points out that in addition to the crime which initiated the cause; other charges were added that had begun previously for attempted burglary and injuries.

3. The petitioners indicated that in the event that Mr. Gerpe were convicted, the maximum sentence would enable him to request a conditional execution, which is why the petitioners requested his release on three occasions, in April, June, and December 1998. The petitioners allege that on every opportunity, the motion for release (recurso de excarcelación) was denied for

reasons that are not contemplated in the Argentine legislation, such as the suspicion that if he were released, he would commit other crimes.

4. Through communication of September 23, 2003, the petitioners informed the Commission that Mr. Mariano Gerpe had been released in August 2001, after being held, according to them, unjustly in preventive custody for three years and four months.

5. The State argues that Mr. Mariano Gerpe was arrested on April 18, 1998, when found in a car for which he was unable to prove ownership, and was ordered preventive custody 10 days after his arrest. The State indicates that in addition to the case held for the crime of aggravated robbery (robo calificado), there were already other crimes such as non-aggravated robbery (robo simple), minor injuries (lesiones leves), attempted burglary (hurto en grado de tentativa), and aiding and abetting (encubrimiento).

6. The State adds that the judges' resolutions regarding the refusal to release Mr. Gerpe are lawful and that the petitioners' purpose in submitting the matter to the Commission is to seek a review of the factual and legal evaluations of the domestic judges and courts on the ruling to keep Mr. Mariano Gerpe in preventive custody. Therefore, the State considers that the case should be declared inadmissible.

7. Pursuant to Articles 46 and 47 of the American Convention, as well as Articles 30 and 37 of the Commission's Rules of Procedure, and after analyzing the parties' positions, the Commission decided to find the petition admissible. Accordingly, the IACHR decides to notify the parties of its decision and to continue analyzing the merits with regard to the alleged violations of Articles 7 (right to personal liberty), 8 (right to a fair trial), and 25 (right to judicial protection), in relation to Article 1(1) (obligation to respect the rights) of the American Convention. The Commission also decided to give notice of this decision to the parties, publish it, and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BEFORE THE COMMISSION

8. The complaint was submitted by the petitioners to the Executive Secretariat of the Commission via fax on September 3, 1999, requesting, at the same time, that precautionary measures be granted on behalf of Mr. Mariano Gerpe; they reiterated this request through a brief received October 29, 1999. The Commission did not grant the precautionary measures, since the circumstances were not covered by the conditions set forth in the Commission's Regulations.

9. On September 22, 2003, additional and updated information was received from the petitioners in response to a request from the Commission, and based on that the IACHR began processing the petition on February 3, 2005 when it transmitted the pertinent parts of the petition to the State and asked that it submit a response within two months.

10. On June 13, 2005, the State submitted the report requested by the Commission, which was transmitted to the petitioners by communication of July 17, 2006.

III. THE PARTIES' POSITIONS

A. The petitioners' position

11. According to the petitioners' account, Mr. Mariano Gerpe was arrested on April 18, 1998, accused of having committed the crime of aggravated robbery (robo calificado). They allege that subsequent to his arrest, Mr. Gerpe was detained in three different police stations, in precarious conditions, and that on December 15, 1998 he was taken to Jail Unit 1 (Unidad Carcelaria Número 1) of Olmos, where he remained as of the date the petition was filed.

12. In their initial petition, the petitioners indicated that Mr. Gerpe did not have a condemnatory criminal background, and that there was not yet a verdict from the trial court in the criminal case for which he was detained. They added that at the same time, he was being tried for allegedly having committed other minor crimes, in which the proceedings had not concluded either.[FN2]

[FN2] Of the annexes provided by the petitioners, one notes several cases against Mr. Gerpe. Case 50.302, held for the crime of aggravated robbery (robo calificado), which was subsequently attached to Case 40.522, which begun in May 1996 for the crime of aggravated slight injuries (lesiones leves calificadas). At the same time, cases 33.889 and 36.746, for the crimes of non-aggravated robbery (robo simple), attempted larceny (hurto en grado de tentativa), and aiding and abetting (encubrimiento), were ongoing.

13. The petitioners indicated that in the event that Mr. Mariano Gerpe was convicted of the crimes for which he was accused, according to the provision in the criminal law, Mr. Gerpe would have been able to have obtain a conditional sentence; accordingly, in April 1998, his legal representatives submitted a motion for release to the judge hearing the case, which was denied since the judge considered that "there were well-founded reasons for understanding that [Mariano Gerpe] poses a certain threat of harm to legal interests and especially of recurrent criminal conduct." They add that in June 1998, they filed a new motion for release on behalf of Mr. Mariano Gerpe, which was denied in the same terms. Finally, in December 1998 they once again sought his release, on personal recognizance and secured bond; nonetheless, it was also denied.

14. The petitioners indicated that pursuant to the Code of Criminal Procedure of Buenos Aires (Código Penal Procesal de Buenos Aires), the only justification for preventive custody is the noticeable possibility of the accused hindering, obstructing, or evading the proceeding by which he is accused. The petitioners allege that in the case in question, the judges' decision to hold Mr. Gerpe in preventive custody was not based on those grounds, but solely on the assumption that if released, he would commit new crimes considering "that his criminal life has not ended."

15. The petitioners argued that justifying the detention based on the criminal cases against the accused, implies recurring to assumptions that have no basis in the law of the domestic

jurisdiction or in the American Convention, and that the consideration of these accusations clearly violates the presumption of innocence principle and the concept of rehabilitation. Additionally, the petitioners emphasized the fact that the alleged victim did not have any prior conviction for other crimes and that the judges relied, in denying the motion for release, on the premise that Mariano Gerpe would commit new crimes due to the circumstance that he was being tried in two other cases at the same time.

16. In additional information received on September 22, 2003 the petitioners reported that Mr. Gerpe regained his liberty in August 2001, after being unjustly held in preventive custody for three years and four months. They also referred to the apparent proceedings going forward against Mr. Mariano Gerpe, and indicated that more than five years had elapsed since the case was opened without any resolution even in the first instance court. In view of all the above, the petitioners assert that the State has breached Articles 7, 8, and 25 in relation to Article 1(1) of the American Convention.

B. The State's position

17. The State indicates that Mr. Mariano Gerpe was arrested on April 18, 1998, along with another person, by members of the Buenos Aires police, when both were in a car that they could not prove was theirs. Therefore, case 50.302 was filed: "Gerpe Mariano/ aggravated robbery" before Criminal and Correctional Court No. 10 of San Isidro. The State added that 10 days after the arrest the judge in the case ordered the preventive custody of Mariano Gerpe as he was considered, *prima facie*, to be the alleged criminally liable perpetrator for the crime of aggravated robbery.

18. According to the State, on April 28, 1998 the judge ruled that he had no jurisdiction, upon learning that Mariano Gerpe had a prior case, dated May 15, 1996, said to be pending before the Departmental Criminal and Correctional Court No. 5. From that moment, case 50.302 for aggravated robbery was processed together with case 40.522 for aggravated injuries (*lesiones calificadas*).

19. The State indicated that on June 26, 1999 the case was referred to the prosecutor, who had issued the indictment of Mariano Gerpe as co-perpetrator of the crimes of attempted larceny (*hurto simple en grado de tentativa*) and aggravated robbery, criminally liable instigator for the wrongful act of aggravated minor injuries and of the crime of concealment (*receptación sospechosa*), all as part of a series of related criminal acts.

20. The State noted that on March 17, 2000 the case was ready for judgment to be issued; nonetheless, on March 21, 2000, the prosecutor asked for a one-year extension of the preventive custody imposed on Mariano Gerpe, justifying that request on the complexity of the proceedings, due to Mr. Gerpe being accused of several crimes. The motion was granted on March 29, 2000, in view of the impossibility of completing the proceeding within the two-year term provided for by Article 437 of the Code of Criminal Procedure. According to the State, the resolution was based on the number of acts of which Mr. Gerpe was accused, the plurality of actors, and the evident complexity of the case. That judicial resolution was upheld on May 11, 2000, by the

Court of Appeals and Departmental Guarantees (Cámara de Apelación y Garantías Departamentales).

21. The State indicated that on June 27, 2000, judgment was ready to be issued on the case, but due to jurisdictional conflicts a motion was filed regarding the court's jurisdiction, which was resolved in May 2003, until which time "the procedure was at a virtual standstill."

22. The State added that on May 24, 2004, Mr. Mariano Gerpe was convicted and sentenced to four years and six months in prison as he was found criminally liable co-perpetrator for the crime of reiterated non-aggravated robbery (robo simple reiterado) and aggravated robbery (robo agravado). On that same date Mr. Mariano Gerpe's release was ordered, considering that the sentence imposed had already been served in preventive custody. However, the State clarifies that the release was not made effective since a sentence was pending in case 7122, which was initiated in October 2003 and investigated his alleged criminal liability for aggravated robbery (robo agravado) of a vehicle left in the public way. For said case he was ultimately found guilty and sentenced on April 27, 2005 to three years in prison.

23. With respect to the motions for release, the State makes no reference to those that the petitioners filed in April and June 1998. With regard to the motion filed on December 18, 1998, it notes that it was denied and the decision upheld by the Court of Appeals on February 26, 1999. In addition, the State refers to another motion filed by Mr. Gerpe's defense counsel on October 4, 1999, which was denied by a resolution the next day, appealed, and then upheld on November 3, 1999, by the court of review.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci*

24. The petitioners have the legal standing to lodge a petition to the Commission in accordance with the provisions of Article 44 of the American Convention. The petition names as alleged victim an individual whose rights under the American Convention the State has agreed to respect and protect. The Commission notes that Argentina has been a State party to the Convention since September 5, 1984, when it deposited its instrument of ratification. Therefore, the Commission has competence *ratione personae* to examine the petition.

25. The Commission has competence *ratione loci* to examine the petition since the petition alleges violations of rights protected under the American Convention which took place within the territory of a State party to the Convention. The IACHR has competence *ratione temporis* because the obligation to respect and protect the rights enshrined in the American Convention was already in force for the State at the date on which the violations of rights alleged in the petition took place. Finally, the Commission has competence *ratione materiae* because the petition alleges violations of human rights enshrined in the American Convention.

B. Other admissibility requirements of the petition

1. Exhaustion of domestic remedies

26. Article 46(1)(a) of the American Convention states that for a petition lodged before the Commission to be admissible according to Article 44 of the Convention, it is necessary that all remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to ensure that the State in question has the possibility to resolve disputes within its own legal jurisdiction.

27. In the instant case, the petitioners adduced that they duly exhausted domestic remedies by filing the three motions for release in April, June, and December 1998, which were successively denied. For its part, the State asserted that the petitioners had kept silent about the possible remedies that could have been pursued, which rendered the petition inadmissible under Article 46(1) of the American Convention.

28. It should be noted that the Inter-American Court has ruled repeatedly that "the State claiming non-exhaustion has an obligation to demonstrate that domestic remedies remain to be exhausted and of their effectiveness." [FN3] In the instant case, the State asserted that there were "possible remedies that could have been pursued." Nonetheless, the State never explained what those remedies were, or why the motion for release would not be the suitable remedy.

[FN3] I/A Court H.R., Velásquez Rodríguez Case. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 88; Fairén Garbi and Solís Corrales Case, Preliminary Objections. Judgment of June 26, 1987, Series C No. 2, para. 8; Godínez Cruz Case, Preliminary Objections. Judgment of June 26, 1987, Series C No. 3, para. 90; Gangaram Panday Case, Preliminary Objections, Judgment of December 4, 1991, Series C No. 12, para. 38; Neira Alegría et al. Case, Preliminary Objections. Judgment of December 11, 1991, Series C No. 13, para. 30; Castillo Páez Case, Preliminary Objections. Judgment of January 30, 1996, Series C No. 24, para. 40; Loayza Tamayo Case, Preliminary Objections. Judgment of January 31, 1996, Series C No. 25, para. 40; Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC 11/90, August 10, 1990. Series A No.11 (1990).

29. As the Commission has previously indicated, to comply with the requirement of prior exhaustion, the petitioners have to exhaust the suitable remedies, i.e. those that are available and effective for resolving the situation that is the subject of the complaint. In the instant case, the petitioners filed several motions for release during the preventive custody of Mr. Mariano Gerpe. At the time his complaint was forwarded to the Inter-American Commission, the alleged victim had filed three motions for release, all of which were denied in 1998 and 1999. For its part, the State also made reference to the motions for release brought in December 1998, October 1999, and July 2000, which were also the subject of unfavorable rulings to the alleged victim. As the central claim submitted revolves around preventive custody, the motion for release is prima facie the suitable remedy. In the present case, the motions for release filed by the petitioners, sufficiently comply with the requirement of exhaustion of domestic remedies provided in Article 46(1) of the American Convention.[FN4]

[FN4] See Annual Report of the IACHR 1995, Report 12/96, March 1, 1996, Argentina, Case 11,245 of Mr. Jorge Alberto Jiménez, para. 57: "In the context of preventive detention, the presentation of the request for conditional release followed by the denial thereof suffices to substantiate the exhaustion of remedies."

30. In light of the foregoing analysis, the Commission concludes that Mr. Mariano Gerpe invoked the regular remedies provided by the State's legal system and, therefore, the State had full cognizance of the claims that gave rise to the petition in question.

2. Time period for submitting the petition

31. Under Article 46(1) of the Convention, in order for a petition to be submitted it must be filed within the stipulated time of six months from the date on which the person whose rights were allegedly violated has been notified of the final decision issued at the national level. The six-month rule guarantees legal certainty and stability once a decision has been adopted.

32. In the instant case, it should be considered that in April, June, and December 1998 the representatives of Mr. Mariano Gerpe filed motions for release before the judicial authorities, all of which were denied. On March 4, 1999, Mr. Gerpe was given notice of the motions' final decision as resolved by the Court of Criminal Cassation (Cámara de Casación Penal) on February 26, 1999. Based on the above, and since the petition was received, via fax, at the Executive Secretariat of the Commission on September 3, 1999, the requirement stipulated in Article 46(1)(b) of the American Convention was met.

3. Duplication of procedures and res judicata

33. Article 46(1)(c) establishes that admission of a petition is subject to the requirement that the matter "is not pending another international proceeding for settlement" and Article 47(d) of the Convention stipulates that the Commission will not admit a petition that is "substantially the same as one previously studied by the Commission or by another international organization". In the instant case, neither the parties have alleged it, nor does it appear from the proceedings, that any of those circumstances of inadmissibility are present.

4. Characterization of the alleged facts

34. Article 47(b) of the American Convention declares inadmissible those petitions that do not state facts that tend to establish a violation of the rights guaranteed in the Convention.

35. In the instant case, it is not for the Commission, at this stage of the proceeding, to decide whether the alleged violations of the American Convention occurred. The IACHR made a prima facie evaluation and determined that the petition sets forth allegations which, if proven, could tend to establish possible violations of the rights guaranteed by the Convention. In that respect, the Commission is competent to analyze the situation alleged, in light of Articles 7, 8, and 25 of

the American Convention, with respect to the obligations of the State in relation to the rights to personal liberty, the presumption of innocence, prompt access to judicial protection, and judicial guarantees.

36. The petitioners' main allegation is that the preventive custody of Mr. Mariano Gerpe, which begun in April 1998, lacks a legal foundation since Argentine legislation establishes that it can only be justified if there is a noticeable possibility that the accused may hinder, obstruct, or evade the trial held against him. Nonetheless, the petitioners affirm that in the case of Mr. Mariano Gerpe, the judges relied on the mere assumption that he would commit new crimes, this being contrary to international and domestic law, in addition to violating, to the detriment of Mr. Gerpe, the right to presumption of innocence. In this respect, the State recognized that on May 24, 2004, Mr. Gerpe was convicted and sentenced to four years and six months in prison for being criminally liable co-perpetrator of the crime of reiterated non-aggravated robbery and aggravated robbery (robo agravado), clarifying that the same ruling ordered his release considering that the sentence imposed had already been served in preventive custody.

37. In this regard, the Court recognizes that an individual's deprivation of liberty must always be a measure applied on an exceptional basis, thus: "Article 8(2) of the Convention establishes the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure." [FN5] In this regard, the petition poses matters that could, if proven, tend to establish a possible violation of the rights enshrined in the American Convention, and they should be evaluate in the merits phase.

[FN5] I/A Court H.R., Suárez Rosero Case. Judgment of November 12, 1997. Series C No. 35, paras. 76-78.

38. Based on the information and arguments presented with respect to the excessive time elapsed during the criminal proceedings, the Commission notes that if proven, they could tend to establish violations of Article 25 of the Convention, in terms of the right to prompt access to judicial protection, as well as the judicial guarantees contemplated in Article 8 of the American Convention.

39. Accordingly, in the instant case, the Commission concludes that the petitioners have made allegations which, if compatible with other requirements and demonstrated to be true, could tend to prove the violation of rights protected under the American Convention, more specifically of those provided for in Articles 7 (right to personal liberty), 8 (right to a fair trial), and 25 (right to judicial protection), in relation to Article 1(1) (obligation to respect and ensure the rights).

V. CONCLUSIONS

40. The Commission concludes that it has competence to examine the case and that the petition is admissible in accordance with Articles 46 and 47 of the American Convention.

41. Based on the foregoing arguments of fact and law, and without prejudging on the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To find the instant case admissible in relation to the alleged violations of the rights recognized in Articles 7, 8, and 25, in conjunction with Article 1(1) of the American Convention.
2. To notify the parties of this decision.
3. To proceed to the analysis of the merits.
4. To make this report public and to publish it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 23rd day of the month of July, 2007.
(Signed): Florentín Meléndez, President; Paolo Carozza, First Vice-President; Sir Clare Roberts, Evelio Fernández Arévalos, and Freddy Gutiérrez Trejo, Commissioners.