

REPORT No. 49/13¹
PETITION 1225-04
ADMISSIBILITY
GERARDO CRUZ PACHECO
MEXICO
July 12, 2013

I. SUMMARY

1. On November 10, 2004, the Inter-American Commission on Human Rights (hereinafter “the Commission,” “the Inter-American Commission” or “the IACHR”) received a petition that Gerardo Cruz Pacheco (hereinafter “the petitioner” or “the alleged victim”) lodged against the United Mexican States (hereinafter “the State,” “the Mexican State” or “Mexico”). In the petition, the alleged victim claims that the Mexican State is responsible for his prolonged detention, for having tortured him both physically and psychologically, and for having prosecuted him unlawfully in courts of ordinary jurisdiction, when he should have been tried by courts of military jurisdiction, as he was in active service in the Army.

2. The petitioner alleges that the State violated all the articles of the Inter-American Convention to Prevent and Punish Torture.

3. The State, for its part, maintains that the petition should be declared inadmissible on the grounds that the petitioner would have the Commission act as a court of fourth instance.

4. Without prejudging the merits of the matter, and after examining the positions of the parties and checking for compliance with the requirements established in articles 46 and 47 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), the Commission decides to declare the present case admissible for purposes of an examination of the alleged violation of the rights recognized in articles 5, 7, 8 and 25 of the American Convention, read in conjunction with Article 1(1) thereof, to the detriment of Gerardo Cruz Pacheco. It also decides to declare the petition admissible with respect to the alleged violation of the rights recognized in articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. The Commission further decides to notify the parties of its decision, to publish the decision and include it in the Commission’s Annual Report to the OAS General Assembly.

II. PROCESSING WITH THE COMMISSION

5. The Commission received the petition on November 10, 2004, and classified it as number 1225-04. On March 16, 2009, it forwarded the pertinent parts of the petition to the State, asking that it file its response within two months, in keeping with Article 30(2) of the Commission’s Rules of Procedure. The State’s response was received on May 19, 2009 and was promptly forwarded to the petitioner.

¹ In accordance with Article 17(2) of the Commission’s Rules of Procedure, Commissioner José de Jesús Orozco Henríquez, a Mexican national, did not participate in the discussion of and decision on the present case.

6. The Commission also received information from the petitioner on February 24, 2011, December 13, 2011, July 31, 2012 and March 8, 2013. Those communications were duly forwarded to the State.

7. It received additional information from the State on August 27, 2009, July 27, 2011, July 12, 2012 and July 1, 2013. Those communications were promptly sent to the petitioner.

Preliminary question on the petition's processing

8. In this matter, the State contends that the delay between the time the petition was received and its processing "has exceed time limits and the limits of reason, thereby affecting legal certainty and procedural equality of arms", since the petition was forwarded to the State 4 years and 4 months after it was filed by the petitioner. The State adds that this leaves the State in a defenseless position, and argues that it does not matter whether the delay was due to a lack of diligence on the part of the petitioner or needless delay on the part of the Commission. It therefore asks that the Commission consider the possibility of declaring the petition out of order.

9. In a communication dated December 14, 2009, the Commission told the State that "according to the standards governing the inter-American human rights system, the amount of time that passes between the time the Commission receives a petition and its referral to the State is not, by itself, sufficient grounds to close the record on a petition." It also noted that the Commission has previously held that when petitions are in process with the Commission, there is no rule under which the Commission's jurisdiction expires *ipso jure* based solely on the amount of time that has passed.² Nevertheless, the IACHR noted that in the pertinent report on the petition, it would take the State's argument under consideration, along with the information supplied by the petitioner and the effect of the delay on the subject matter of the case.

10. The IACHR observes that as of the date on which this report was prepared, that facts that prompted the complaint persist; it therefore again makes the point that in the individual cases processed with the Commission there is no rule under which the Commission's jurisdiction would, *ipso jure*, expire over time. Moreover, all the information provided has been relayed to both parties so that they can make whatever observations they deem relevant, in observance of the provisions of the Convention and pertinent rules.

III. POSITIONS OF THE PARTIES

A. The petitioner

11. The petitioner, who was a lieutenant in the Mexican National Army, observes that on October 2, 1996, he was studying with twenty armed forces officers on a military base of the military police's second battalion of presidential guards, when he was abducted by military authorities. With that, he denied the State's assertions that he had allegedly been taken into custody some days earlier, outside a private home.

² See IACHR, Report No. 33/98, Case 10,545, Clemente Ayala Torres *et al.* v. Mexico, May 15, 1998, paragraph 28; IACHR, Report No. 68/08, Case 12,671, Ernesto Trevisi v. Argentina, October 16, 2008, paragraph 26.

12. The petitioner claims to have been tortured at the General Headquarters of the Presidential Guard Corps to get him to incriminate himself and to sign his resignation in statements taken between October 10 and 11, 1996 in the presence of the Military Prosecutor. He claims to have been the victim of electric shock everywhere on his body, including his genitals, of having suffered asphyxia when a plastic bag filled with water was placed over his head, of having been beaten on the head and the soles of his feet with a thin board, of having been wrapped in wet sheets and beaten with a weapon. He also contends that he suffered psychological pressure from being forced to listen to recordings of his family members being beaten. The petitioner states that this lasted until October 11, the date on which he was handed over to federal civilian authorities and placed in a maximum-security prison, "La Palma" Social Rehabilitation Center No. 1.

13. According to the petitioner, he was charged with possession of illegal weapons and murder. He states that on December 3, 1997, the judge of the First Court of Federal Criminal Cases delivered a verdict of acquittal and ordered his release, as his criminal guilt had not been proven. The Federal Public Prosecutor's Office appealed that ruling. According to the petitioner, on April 22, 1998, the Second Unitary Court "A" of the Second Criminal Circuit (a court of second instance) had allegedly sentenced him to 50 years in prison as the co-author of various murders; the court did not take into account the evidence introduced. To challenge this verdict, the petitioner filed a petition seeking direct *amparo* relief. He claims that in a ruling delivered on February 12, 2004, the First Collegiate Court of the Second Circuit in Toluca, State of Mexico, denied his petition of *amparo*. The petitioner then filed a complaint with the Supreme Court, which was denied on March 11, 2004.

14. The petitioner is also alleging that he was tried and convicted by a court that was not competent to hear his case, since he should have prosecuted under the military justice system. He points out that Article 13 of the Mexican Constitution establishes that military courts have jurisdiction over crimes committed in violation of military discipline. He further alleges that under Mexican law, even common crimes committed by military personnel are to be prosecuted by the courts of military jurisdiction because they are deemed to be crimes committed while in active service. He argues that he was intentionally handed over to a civilian federal court to cover up the abuse of authority and torture. He also notes that he was illegally stripped of his military rank one day before he was incarcerated.

15. The petitioner further maintains that all the proceedings were riddled with irregularities; he was allegedly deprived of liberty without an order from a competent judicial authority; the defense attorney who assisted him in the statement he made in the presence of the Public Prosecutor's Office, which was the basis for his conviction, was allegedly an intern who, according to the petitioner, worked for the prosecutor as his secretary; evidence was invented, as were confrontations that the petitioner claims never happened.

16. The petitioner further alleges that on several occasions he wrote to the National Human Rights Commission (Case number 96/8408), but without any positive outcome.

17. As for the torture, the petitioner encloses a medical certificate issued when he entered the "La Palma" facility, which documents the presence of multiple scars resulting from "electrical burns on the anterior and posterior thorax". It also encloses two sheets of paper that would appear to be the verdict by the court of first instance where reference is made to a medical certificate issued by a physician at the Federal Social Rehabilitation Facility and dated October 12, 1996, which states the following: "corroborating that the above-named accused person was tortured [...] and, as can be seen in the medical certificates [...] Gerardo Cruz Pacheco bears signs of recent external wounds [...], multiple

wounds that have become scarred tissue, apparently caused by the application of electric shock administered eight to ten days ago.” As for the investigation of the allegations of torture, the petitioner maintains that the finding of the lower-court judge led to a preliminary inquiry, required under the Law to Prevent and Punish Torture. He states that on May 23, 1997, the agent from the Public Prosecutor’s Office of the Metropolitan Delegation of the Office of the Attorney General of the Republic declared that he did not have competence because the accused was military personnel; with that, an inquiry was instituted in the Office of the Military Judge Advocate because of a complaint filed by the petitioner. He alleges that the inquiry has not yet been concluded.

18. As for the exhaustion of local remedies, the petitioner reportedly filed a petition seeking *amparo* relief to challenge the verdict of second instance that convicted him. He points out that the First Collegiate Court of the Second Circuit in Toluca, in a ruling delivered on February 12, 2004, denied his petition. The petitioner then filed a complaint with the Supreme Court, which was denied on March 11, 2004. With that, the internal remedies were reportedly exhausted.

B. The State

19. The State maintains that the petition should be declared inadmissible because the petitioner wants the Commission to become a court of fourth instance.

20. According to the State, the investigations conducted by the Office of the Attorney General of the Republic found that the alleged victim was reportedly involved in the crimes of murder and conspiracy to commit crime, to the detriment of three members of the Federal Judicial Police and a civilian. It indicates that according to the inquiries, the alleged victim claimed to belong to a crime ring with connections to organized crime and drug trafficking.

21. On October 9, 1996, a warrant was issued for Gerardo Cruz Pacheco’s arrest for the crime of murder. The State contends that the alleged victim was released from service in the Military Police’s Second Battalion of the Presidential Guard Corps and from the Mexican Army and Air Force because that was what he requested. On October 11, he was allegedly arrested by military personnel outside his home; he was carrying a .45 caliber firearm that is for the exclusive use of Mexican Army and Air Force personnel. Upon his arrest, he was taken to the facilities of the Military Judge Advocate’s Office accused of crimes in violation of military discipline.

22. On October 12, 1996, the formal order for the alleged victim’s detention was issued. On October 13, 1996, his detention in the custody of the Military Judge Advocate’s Office was confirmed and that same day he gave his preliminary statement in which he asserted that he was taken into custody by military personnel and tortured from October 2 to October 10. He said that he had no knowledge of the matters being attributed to him.

23. The State contends that before making his prosecutorial statement, he was given a medical checkup and a medical certificate was issued describing the alleged victim’s condition: “old skin abrasions which appear to be the remains of first-degree burns in the frontal region, an old amputation of the third finger joint of the middle finger on the left hand with keloid scarring on the stump, healthy and no evidence of external injuries.” The agent from the Military Judge Advocate’s Office provided the details of the preliminary inquiry to the Office of the Attorney General of the Republic, as this was a federal offense involving the death of public servants, which is why the alleged victim was handed over to the agent of the Federal Public Prosecutor’s Office.

24. On October 14, 1996, a formal order for his imprisonment was issued. On December 3, 1997, the First District Court decided to acquit the defendant. The Federal Public Prosecutor's Office appealed the verdict and on April 22, 1998, the alleged victim was convicted by the court of second instance and given a 50-year prison sentence and ordered to pay an 82 days of minimum wage as a fine and reparations for the damages caused by his involvement in the crime of homicide and conspiracy to commit crime. The alleged victim filed a petition seeking direct *amparo* relief; however the court upheld the decision to overturn his acquittal. On February 12, 2004, the alleged victim filed another petition seeking direct *amparo* relief, this time against the reversal of his acquittal; his petition was denied and the conviction was confirmed. At the present time the alleged victim is serving his sentence at the "Penal del Altiplano" Federal Social Rehabilitation Center No. 1, in the state of Mexico.

25. The State asserts that in keeping with domestic and inter-American case law, and contrary to what the petitioner claims, the military courts do not have jurisdiction to take up the crimes of homicide and conspiracy to commit crime because these are not crimes or violations of military discipline. Furthermore, at the time of the events, the alleged victim was no longer in active service, as he had left military service. Therefore, the civilian authorities had jurisdiction in the case.

26. The State also points out that the military courts prosecuted a case for the crime of desertion because desertion is a violation of military discipline. In that case, on January 21, 1999 and in compliance with the decision by the court of second instance, the 4th Military Judge convicted the alleged victim and sentenced him to a prison term of two years and eight months.

27. As for the exhaustion of domestic remedies, the State argues that in the instant case, there is nothing in the petition suggesting arbitrary conduct in the court proceedings. Quite the contrary, each and every ruling was duly substantiated and reasoned on the basis of the rules of due process established in Mexican law. Therefore, the IACHR cannot reopen a case prosecuted in the domestic courts to review, yet again, the arguments made. Otherwise, it would be serving as a court of fourth instance.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. The Commission's competence *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

28. The petitioner is, in principle, authorized to file a petition with the Commission under Article 44 of the American Convention. The alleged victim named in the petition is a natural person whose rights under the American Convention the Mexican State undertook to respect and ensure. As for the State, the Commission notes that Mexico has been a State party to the Convention since March 24, 1981, the date on which it deposited its instrument of ratification. Mexico also ratified the Inter-American Convention to Prevent and Punish Torture on June 22, 1987. Hence, the Commission has competence *ratione personae* to examine the petition. The Commission also has competence *ratione loci* to take up the petition, inasmuch as it alleges violations of rights protected by the American Convention and the Inter-American Convention to Prevent and Punish Torture, said to have occurred within the territory of Mexico, a State Party to those conventions.

29. The Commission has competence *ratione temporis* because the obligation to respect and ensure the rights protected under the American Convention and the Inter-American Convention to

Prevent and Punish Torture was already in effect for the State on the date when the facts alleged in the petition were said to have occurred. Finally, the Commission has competence *ratione materiae* because the petition denounces possible violations of human rights protected by the American Convention and by the Inter-American Convention to Prevent and Punish Torture.

B. Exhaustion of local remedies

30. Article 46(1)(a) of the American Convention provides that for a petition alleging a violation of the Convention to be admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. Article 46(2) of the Convention sets out the three conditions under which the rule requiring prior exhaustion of local remedies does not apply: a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, or c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

31. According to the information supplied by the parties, the IACHR notes that the alleged victim was acquitted by the lower court on December 3, 1997. The Federal Public Prosecutor's Office filed an appeal and the Judge of the Second Unitary Court of the Second Circuit delivered a ruling on April 22, 1998 in which he changed the verdict and held that the alleged victim was guilty of the crimes of murder and conspiracy to commit crime. He sentenced him to a 50-year prison term, a fine of 82 days of minimum wage and payment of reparations for damages caused.

32. In response to that court ruling, the alleged victim filed a petition seeking direct *amparo* relief which was denied on February 12, 2004 by the First Collegiate Criminal Court of the Second District, which held that the verdict being challenged was lawful. Not satisfied with that court ruling, the alleged victim filed a complaint with the Supreme Court. In a ruling delivered on March 11, 2004, the Supreme Court dismissed the complaint *in limine* on the grounds that the complaint was obviously out of order. The Supreme Court wrote that "none of the grounds cited in Article 95 of the *Amparo* Act is present in this case, so that the vehicle used to file the challenge is obviously out of order and must therefore be dismissed." It also wrote that "the verdict being appealed does not contain any decision as to the constitutionality of a law or any direct interpretation of a constitutional principle, which are the circumstances under which a petition seeking review on direct *amparo* would be admissible."

33. The IACHR notes that the petitioner is alleging that the basis for his criminal prosecution and conviction is related to the torture that he claims to have initially endured, which was allegedly inflicted to force him to incriminate himself. Thus, while the Commission notes that the criminal case in the domestic courts has been closed since March 2004, the investigation into the allegations of torture could lead to a substantial change in the case against the alleged victim, should it be determined that he was the victim of torture and was forced to incriminate himself. In its analysis of the question of exhaustion of local remedies, the Commission will focus on the State's response to the complaints of torture which, according to the petition, are the basis for the case against the alleged victim and his criminal conviction.

34. The information the IACHR has in its possession indicates that on several occasions the petitioner filed complaints with the court authorities claiming acts of torture to which he had allegedly

been subjected. For example, he filed such a complaint with the court of first instance and when he filed his *amparo* petition challenging his conviction. The petitioner states that the Public Prosecutor's Office declared that it did not have jurisdiction to investigate the acts of torture and that the military justice system had not issued a finding in that regard. The State has not contested that information.

35. The IACHR observes that in cases where torture is alleged, which in Mexico is a criminal offense that the State prosecutes *ex officio*, the adequate and effective remedy is normally an investigation and criminal trial, which the State has an obligation to set in motion and pursue to their conclusion. In the case of crimes that the State prosecutes *ex officio*, the IACHR has repeatedly stated that "the judicial authorities are obliged to conduct a thorough criminal investigation calculated to clarify the facts and determine blame."³

36. In the instant case, the IACHR notes that in the lower-court case, the court authorities allegedly established possible acts of torture and launched an investigation which was transferred to the military justice system in 1997. According to the petition, that inquiry allegedly never concluded and the State has provided no information to refute that claim. The Commission also notes that in its decision on the petition of direct *amparo*, dated February 12, 2004, the First Collegiate Criminal Court of the Second Circuit wrote that "[...] the prosecuting authority is responsible for conducting the necessary investigations and for determining whether a prosecutable crime has been committed. According to various records in the case file, the prosecution followed up on the complaint and if, as the complainant alleges, no criminal action has as yet been taken against the persons alleged to have tortured him, it is because the prosecution did not find a crime to prosecute."

37. According to the information available and because, as previously noted, the authorities must conduct a criminal investigation in a case of torture, to shed light on what happened and establish blame, the Commission finds that the alleged failure to investigate acts of torture must be examined in the merits phase. Therefore, the IACHR concludes that the Convention Article 46(2)(c) exception to the rule requiring exhaustion of local remedies applies in this case.

38. All that remains is to stipulate that invocation of the exceptions to the rule requiring exhaustion of domestic remedies, which are set out in Article 46(2) of the Convention, is closely linked to the determination of possible violations of certain Convention-protected rights, such as the guarantees of access to justice. However, given its nature and purpose, Article 46(2) stands separate and apart from the Convention's substantive provisions. Therefore, the determination as to whether the exceptions to the rule of prior exhaustion of domestic remedies apply to the case at hand must be done prior to and separate from the analysis of the merits, because it relies on a standard of assessment that is different from the standard used to determine possible violations of Articles 8 and 25 of the Convention. It is worth noting that the causes and effects that prevented exhaustion of local remedies in the present case will be examined, wherever relevant, in the report that the Commission adopts on the merits, to determine whether violations of the American Convention have occurred.

³ IACHR, Report No. 14/06 (Admissibility), Raquel Natalia Lagunas and Sergio Antonio Sorbellini, Argentina, March 2, 2006, paragraph 44.

2. Deadline for filing the petition

39. The American Convention provides that for the Commission to declare a petition admissible, the latter must be lodged within six months of the date on which the alleged aggrieved party was notified of the final decision in his or her case. In the instant case, the IACHR has established that the exception to the Convention Article 46(2)(c) exception to the rule requiring exhaustion of local remedies applies to this case. Article 32 of the Commission's Rules of Procedure provides that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

40. In the present case, the petition was received on November 10, 2004, eight months after the *in limine* dismissal of the petition of *amparo* and absent any court ruling on the complaints of torture. Therefore, the Commission considers that the petition was received within a reasonable period of time and that the admissibility requirement involving the deadline for filing should be deemed satisfied.

3. Duplication of proceedings and international *res judicata*

41. Nothing in the case file suggests that the subject of the petition is pending in another international proceeding for settlement or that it is substantially the same as one previously studied by the Commission. Thus, the Commission considers that the requirements established in Articles 46(1)(d) and 47(d) of the Convention have been met.

4. Characterization of the facts alleged

42. For admissibility purposes, the Commission must decide whether the petition states facts that could tend to establish a violation, as set forth in Article 47(d) of the Convention, and whether the petition is "manifestly unfounded" or "obviously out of order", as provided in subparagraph c) of that article.

43. Neither the American Convention nor the Commission's Rules of Procedure require a petitioner to identify the specific rights alleged to have been violated by the State in the matter brought to the Commission, although the petitioners are free to do so. It is up to the Commission, based on the jurisprudence of the system, to determine in its admissibility reports which provisions of the relevant inter-American instruments are applicable; it may determine that those instruments were violated if the facts as alleged are proven based on sufficient evidence and information.

44. Accordingly, the IACHR considers that the facts alleged, if proven, could establish possible violations of the rights recognized in articles 5, 7, 8 and 25 of the American Convention, read in conjunction with Article 1(1) thereof, to the detriment of Gerardo Cruz Pacheco. The IACHR also decides to declare the petition admissible with respect to the alleged violation of the rights recognized in articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

V. CONCLUSIONS

45. The Commission concludes that it has competence to examine the merits of this case and that the petition is admissible under articles 46 and 47 of the American Convention, and decides to proceed to its analysis of the merits in respect of the alleged violations of articles 5, 7, 8 and 25 of the American Convention, read in conjunction with Article 1(1) thereof, in the case of Gerardo Cruz Pacheco. It also decides to declare the petition admissible in respect of the alleged violation of articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

46. Based on the foregoing arguments of fact and of law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**DECIDES:**

1. To declare the present petition admissible in respect of the alleged violations of the rights recognized in articles 5, 7, 8 and 25 of the American Convention, read in conjunction with Article 1(1) thereof, to the detriment of Gerardo Cruz Pacheco. To declare the petition admissible in respect of the alleged violations of the rights recognized in articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

2. To notify the parties of this decision.

3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 12th day of July 2013. (Signed): Tracy Robinson, First Vice-President; Rosa María Ortiz, Second Vice-President; Felipe González, Dinah Shelton, Rodrigo Escobar Gil and Rose-Marie Antoine, Commissioners.