

OEA/Ser.L/V/II.
Doc. 99
26 July 2018
Original: Spanish

REPORT No. 87/18
PETITION P-26-08
REPORT ON ADMISSIBILITY

GARY JAY CALOW
MEXICO

Approved by the Commission electronically on July 26, 2018.

Cite as: IACHR, Report No. 87/18. P-26-08. Admissibility. Gary J. Calow. Mexico. July 26, 2018.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Gary Jay Calow
Alleged victim:	Gary Jay Calow
Respondent State:	Mexico ¹
Rights invoked:	None

II. PROCEDURE BEFORE THE IACHR²

Filing of the petition:	January 7, 2008
Additional information received at the stage of initial review:	March 17, May 27 and June 23, 2010; July 10, October 24 and December 7, 2012; January 3 and 14, February 4 and November 25, 2013
Notification of the petition to the State:	April 14, 2014
State's first response:	August 26, 2014
Additional observations from the petitioner:	January 5, March 20 and 30, April 15, May 21, July 20 and September 22, 2015; February 6 and 26, June 23, July 18 and September 19, 2016
Additional observations from the State:	July 13, 2015

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention ³ (deposit of ratification instrument on March 24, 1981) and Inter-American Convention to Prevent and Punish Torture (deposit of ratification instrument on June 22, 1987)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to Articles 1.1 and 2 thereof; Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

¹ In accordance with Article 17.2.a of the IACHR Rules of Procedure, Commissioner Joel Hernández García, a Mexican national, did not participate in the discussion or the decision on this matter.

² The observations submitted by each party were duly transmitted to the opposing party.

³ Hereinafter "Convention" or "American Convention."

V. ALLEGED FACTS

1. Mr. Gary Jay Calow (hereinafter “the petitioner” or “the alleged victim”), American, indicates that due to a petition filed by American officials, Mexican authorities initiated a criminal investigation against him and his wife, Lizbeth Maya Toral, on the charges of conspiracy and crime against public health in the form of illicit trade of narcotic drugs and psychotropic substances. This was so because the accused sold these substances online from their home, exporting them to the United States of America without authorization. He reports that his wife was apprehended on January 10, 2007 and that so was he on January 12, 2007 in the State of Mexico, and that he was tortured and mistreated by his guards. He alleges violation of the right to personal liberty in view of a measure of pretrial detention that has extended for over a decade, in the framework of a criminal action that has infringed his rights to judicial protection and due process.

2. The petitioner claims that following his arrest he was held in a “*casa de arraigo*” (a pretrial detention facility) where he was interrogated until an arrest order against him was issued on April 10; and that on April 11, 2007 he was admitted to the Federal Prison for Social Rehabilitation in El Altiplano, Almoloya (CEFERESO No. 1). He submits that at that facility he was beaten by the guards, who also deprived him of water and warm clothing, and that, consequently, on the following day the judge ordered that he be taken to the hospital—where he stayed for five days. He claims that on his return to prison he was repeatedly beaten against the wall by the guards and that despite his obvious injuries he was held incommunicado for three weeks. He alleges that the detention conditions were degrading. In this regard, he indicates that inmates were made to undress before guards and officers; that they were allowed to be outside their cells for only one hour a day; that they were deprived of sleep; that medication or treatment were inadequately provided; and that they were not allowed to keep for themselves a copy of the legal rules concerning their right of defense. He argues that in September and November 2008 he went on several hunger strikes demanding better living conditions at the prison. He submits that his last strike finished when the guards entered the infirmary and made him eat under torture, causing him a rupture. He indicates that all these incidents were repeatedly and timely reported to the Mexican Committee on Human Rights (CNDH), the judge who filed the criminal proceeding and through complaints to the Judiciary Council. As for the alleged torture, he affirms that he lodged a complaint before the Public Prosecutor’s Office in December 2008, but these were not investigated.

3. He indicates that on July 13, 2007 the Second District Judge for Federal Criminal Matters in the State of Mexico issued an imprisonment order against him, which was challenged and ruled against him on August 10, 2007 by the Fifth Unitary Court of the Second Circuit. He indicates that on November 25, 2015 the Second District Judge sentenced him and his wife to thirty years and twenty-five years in prison respectively, for conspiracy and crime against public health in the form of illicit trade and export. He argues that on the following day he lodged an appeal, and that the Second Circuit Fourth Unitary Court scheduled the hearing for April 28, 2016—he does not provide further details on the results of this.

4. The petitioner claims that although he did not speak or understand Spanish and despite his several requests, few times did he have an interpreter; that none of his public defense counsels spoke English, and that only in July 2013 was he able to hire an English-speaking defense counsel, who many times was prevented from meeting him at the prison. Moreover, he indicates that evidence was fabricated and that he was deprived of his right to disprove it. He affirms that he was prevented from being confronted with the Drug Enforcement Administration (DEA) officer, who never confirmed in court the reports that he sent from the United States and which gave rise to the investigation against him, or with the Mexican officers participating in the fabrication of evidence in the United States. He argues that each evidentiary proceeding was challenged and, as a result, the remedies in his case are over 30, which demonstrates the lack of an effective remedy to protect his rights.

5. He also submits that the judicial authorities repeatedly overturned his requests for procedures aimed at demonstrating that the offense attributed to him is not an illicit inasmuch as he was accused of trading medication in the United States without the authorization from the Mexican Ministry of Health—an institution alleging lack of competence to grant such permission. He adds that the courts have misinterpreted the laws because the offense of conspiracy involves the participation of three persons at least, while in his case, the accused were him and his wife.

6. The petitioner claims having been transferred to CEFERESO No. 7 federal prison, in Durango, on March 28, 2016, where he was mistreated and tortured by the guards. He adds that on June 24, 2016 he was transferred to CEFERESO No. 12 prison in Guanajuato, being arbitrarily moved out from the place where the criminal action against him takes place. He submits that both, during his transfer and at said prison he has also sustained torture and mistreatment that he does not receive his medication; that consequently he has gone on several hunger strikes and filed constitutional appeals. Publicly available information indicates that the last of these remedies was resolved in his favor on January 6, 2017, by the Eleventh Court of the District of Guanajuato, which ruled that measures be immediately adopted for providing health-care assistance to the alleged victim, and that the Special Unit of the Attorney General's Office open an investigation into the alleged acts of torture.

7. For its part, the State argues that the petition is inadmissible in view of the lack of exhaustion of domestic remedies and colorable claim. As for the criminal proceedings, it indicates that Mr. Gary Jay Calow lodged the petition when the legal action was in the stage of preliminary investigation; that domestic remedies had not been exhausted accordingly; and that the remedies of appeal for review and constitutional appeal were still to be exhausted. It also claims that during the proceedings the petitioner has resorted to a dozen of courts by filing several appeals, complaints and appeals for review, which demonstrates his ability to resort to domestically available remedies to challenge all the court decisions he disagreed with. At the same time, it submits that the criminal proceedings have been delayed in view of the presentation of several remedies, inasmuch as the duration of proceedings depends on the strategy of the defense and the Prosecutor's Office and not of the courts.

8. Likewise, it alleges that the petitioner makes no reference to events establishing human rights violations. It argues that no acts of torture or mistreatment were inflicted on him and that in view of the results of a physical and mental health screening he underwent on his admission to prison, he was sent to the infirmary of the prison because it was found that he suffered from a hypertensive crisis and not because of injuries from mistreatment. The State presents documents to prove that the petitioner has always been provided with special health-care assistance, medication, blankets, and the opportunity to receive visitors, mail and telephone calls. In addition, it indicates that he was assisted by his private counsel and that a public defense counsel has assisted him for years, ensuring his access to all the available remedies. Lastly, it argues that the IACHR is not entitled to hear final decisions, such as those by which the courts declined the request to present evidence or expert reports, because these were adopted by domestic courts acting within the boundaries of their jurisdiction.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

9. The petitioner claims that the facts concerning his torture and mistreatment during his arrest and his pretrial detention were timely reported to the Public Prosecutor's Office and notified to the judicial and prison authorities, and that, however, no criminal investigations followed. Based on publicly available information, the last constitutional appeal related to the alleged torture and lack of access to medication was resolved in his favor by the Eleventh Court of the District of Guanajuato on January 6, 2017; and that the court ordered that he receive health-care assistance and that an investigation be open. Based on the available information, the Commission observes that several complaints and legal remedies were filed; that, however, there is nothing to indicate that authorities have finished the corresponding investigations. Likewise, although the State does not allege lack of exhaustion of domestic remedies in relation to this, it does not refer to any criminal investigation or proceeding filed or in progress in connection with the reported events either. Therefore, the IACHR establishes that the instant petition fulfils the requirement of prior exhaustion of domestic remedies foreseen in Article 46.1.c of the Convention, regarding the allegations of torture and mistreatment.

10. As for the alleged excessively long pretrial detention, the Commission has established that "the presentation of the request for conditional release followed by the denial thereof suffices to substantiate

the exhaustion of remedies.”⁴ In this regard, the Commission observes that the petitioner appealed the imprisonment order issued on July 13, 2007, and that it was dismissed by the Fifth Unitary Court of the Second Circuit on August 10, 2007. Likewise, the Commission notes that the petition was lodged on January 7, 2008; thus, it decides that, in relation to this aspect, the petition meets the requirement set forth in Article 46.1 paragraphs a and b of the Convention.

11. Regarding the criminal proceeding, the petitioner informs that the trial court sentenced him to 30 years in prison on November 25, 2015, thus he filed an appeal on November 26, 2015 and a hearing was scheduled for April 28, 2016 accordingly. The State alleges lack of exhaustion of domestic remedies because of the non-exhaustion of appeals for review and constitutional appeals. Consequently, based on the information submitted by the parties, there is nothing to indicate which has been the result of the appeal that the petitioner lodged against the sentence. In view of this and considering that the information submitted by the parties indicate that the criminal proceeding has extended for over a decade, the Commission decides that the exception to the requirement of prior exhaustion of domestic remedies, established in Article 46.2.c of the American Convention applies in relation to this aspect of the petition.

12. Finally, the petition was presented before the Commission on January 7, 2008; the alleged facts subject matter of this petition began on January 12, 2007 and certain effects persist to date. Therefore, in view of the context and the characteristics of the instant case, the Commission believes that the petition was filed within a reasonable time and that the admissibility requirement of timeliness must be declared met.

VII. ANALYSIS OF COLORABLE CLAIM

13. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that, if proven, his alleged excessively long pretrial detention period, his restriction of preventive custody (*arraigo*), the acts of torture and mistreatment as well as the alleged violations of due process in the framework of the criminal process filed against the alleged victim all may establish violations of the rights protected through Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to Articles 1.1 and 2 thereof; as well as Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the alleged victim.

14. Finally, as to the State’s claim about the establishment of a court of fourth instance and replace the domestic courts’, the Commission observes that by declaring this petition admissible it does not seek to replace the competence of domestic authorities. The Commission will analyze in the merits stage whether the domestic judicial proceedings conformed to the rights of due process and judicial protection and ensured the alleged victim’s right of access to justice under the terms of the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 7, 8 and 25 of the American Convention, in connection with Articles 1.1 and 2 thereof; and in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture;

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 26th day of the month of July, 2018. (Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Antonia Urrejola, and Flávia Piovesan, Commissioners.

⁴ IACHR, Report No. 61/15. Petition 1241-04. Admissibility. Gabriel Benítez. Argentina. October 26, 2015, par. 22