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REPORT No. 136/19
PETITION 1628-09
REPORT ON ADMISSIBILITY

CARLOS SAÚL DÍAZ
ARGENTINA

Approved electronically by the Commission on August 14, 2019.

Cite as: IACHR, Report No. 139/19, Petition 1628-09. Admissibility. Carlos Saúl Díaz.
Argentina. August 14, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Public Defendants' Office
Alleged victim:	Carlos Saúl Díaz
Respondent State:	Argentina
Rights invoked:	Articles 5 (personal integrity), 7 (personal freedom), 8 (judicial guarantees), 19 (rights of the child) and 25 (judicial protection) of the American Convention on Human Rights ¹ in relation to article 1 (obligation to respect) and article 2 (duty to adopt domestic legislation) of the same instrument; articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	December 18, 2009
Additional information received at the stage of initial review:	April 19 and June 28, 2010
Notification of the petition to the State:	September 26, 2012
State's first response:	December 1, 2015
Additional observations from the petitioner:	February 8, 2017 ⁴
Additional observations from the State:	None
Notification of the possible archiving of the petition:	January 27, 2017
Petitioner's response to the notification regarding the possible archiving of the petition:	February 8, 2017

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 (deposit of instrument of ratification on September 5, 1984); ICPPT (deposit of instrument of ratification on March 31, 1989)

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
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¹ Hereinafter "the American Convention" or "the Convention".

² Hereinafter "the ICPPT"

³ The observations submitted by each party were duly transmitted to the opposing party.

⁴ In its communication, the petitioner forwarded observations that had already been sent to the IACHR on August 8, 2016.

Rights declared admissible	5 (personal integrity), 7 (personal freedom), 8 (judicial guarantees), 19 (rights of the child) and 25 (judicial protection) of the American Convention on Human Rights in relation to article 1.1 (obligation to respect) and 2 (duty to adopt domestic legislation) of the same instrument; 1, 6, 8 and 10 of the ICPPT
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

V. ALLEGED FACTS

1. The petitioner alleges that Carlos Saúl Díaz, a teenager at the time of the events, was illegally detained, tortured by State security forces to confess to the abduction and death of Mr. Axel Blumberg (hereinafter "Mr. Blumberg") and convicted in a proceeding carried out without the observance of judicial guarantees and without taking into account the best interests of the child. He adds that the State has denied the alleged victim access to justice because the violence suffered was not duly investigated and the criminal proceeding filed against the alleged perpetrators was dismissed.

2. The petitioner indicates that on March 17, 2004, Mr. Blumberg was kidnapped by a group of people, including the alleged victim, and after a frustrated attempt to pay the ransom, he was found dead on March 23, 2004. It points out that the death of Mr. Blumberg generated a great national commotion. It alleges that on April 10, 2004, in the Province of San Luis, the alleged victim was illegally detained by the police along with Sergio Miño and Mauro Abraham Maidana, all minors at the time of the events, for their alleged participation in the kidnapping and death of Mr. Blumberg. Regarding the arrests, the petitioner affirms that the police were outside of where the alleged victims lived waiting for a search warrant when they saw Carlos Saúl Díaz coming out and decided to intervene to arrest him. After his arrest, the police illegally searched the residence to arrest the rest of the people.

3. The petitioner contends that Carlos Saúl Díaz was kicked and punched on his body and genitals. After this, the alleged victim was transferred to a police station in the Province of San Luis. There they hit him again, on several occasions in the body, in the ears and in the testicles, and they suffocated him with a thread. Later, they transferred him in a van to the Province of Córdoba and continued to attack him. In Córdoba, the three detainees were loaded onto a plane belonging to the presidential fleet flying to the Province of Buenos Aires. During the trip, the alleged victim remained hooded and the assaults continued. After a transfer of more than 24 hours, the alleged victim was questioned by the prosecutor without the presence of a defense lawyer. In his statement, the alleged victim allegedly gave up his right to a previous interview with a lawyer, confessed his participation in the alleged facts and requested to be assisted by a public defender.

4. On May 31, 2004, the alleged victim filed a complaint for torture before two juvenile deputy clerks of the Chamber of Appeals of San Martín who met with him as part of a routine inspection at the detention center. On June 7, 2004 the facts were reported to the Federal Criminal Court No. 2 of San Isidro (hereinafter "the Correctional Court") by the deputy clerks. On June 8, 2004, the Correctional Court ordered a medical study to establish whether the alleged victim presented injuries and ordered the referral of the proceedings to the Prosecutor's Office to determine if he wished to initiate criminal proceedings for the facts denounced.

5. On June 17, 2004, the Prosecutor's Office commenced the investigation for the crime of illegal coercion and requested the list of personnel who intervened in the detention and in the transfers. He also requested that, if the injuries in the ordered medical expertise were confirmed, to summon the possible perpetrators to give their statement. On June 23, 2004, the Correctional Court took the statement of the alleged victim. On June 25, 2004, the Forensic Medical Corps sent to the Correctional Court a report prepared on June 8, 2004, in which it stated that Mr. Díaz had not mentioned the injuries suffered during his detention and that, during the physical examination, no injuries were noticed. On August 27, 2004, the Prosecutor's Office requested the filing of the proceedings. In September 2004, the Correctional Court rejected the request

on the grounds that it was based solely on the absence of visible injuries, which was not logical due to the time elapsed since they were made, and that the other requests of evidence made by the Prosecutor's Office had not even been carried out.

6. On November 9, 2004, the Correctional Court ordered carrying out certain proceedings and the incorporation of evidence such as the report made by the police doctor of the province of Córdoba -which referred to the lack of signs of violence- and the medical report of the police of the Province of San Isidro - which highlighted that the alleged victim had excoriations on both sides of the neck, on the back of the right hemithorax, of a mild nature and of recent date-. On November 12 and 24, 2004, the Correctional Court requested the names of the police officers who had participated in the detention and in the transfers, and in December took the statement of the doctor who prepared the report of April 11, 2004, who stated that the injuries that he had found were mild and had been produced between 24 and 48 hours before the test.

7. On June 28, 2005, the police of the Province of San Luis affirmed that they had only assisted in the detention and that the transfers were conducted by the police of the Province of Córdoba. In the framework of this investigation, statements were also taken from two witnesses who indicated that they did not witness the arrest, but that when they arrived at the place of the proceedings the persons had already been arrested and were handcuffed and thrown on the ground. On July 8, 2005, the Correctional Court considered that the crime of unlawful coercion was not proven due to the fact that the medical reports did not confirm the existence of serious injuries and the witnesses could not confirm the beatings and, hence, ordered the dismissal of the proceedings.

8. The petitioner argues that the body in charge of the investigation was directly interested in ensuring the success of the criminal case in which a crime was attributed to the person who had denounced being tortured. In addition, it maintains that the medical reports carried out lacked impartiality and objectivity since they were carried out by physicians who organically belonged to the provincial police which had been denounced for torture. In relation to the lack of promptness and thoroughness, it indicates that in a year and a half only five procedures were carried out and the statements of all the police involved in the different transfers were not even taken.⁵

9. The petitioner highlights that it is reasonable for a person detained and subjected to full control of the police and prison authorities to be afraid to report acts of torture immediately. It also states that the lack of signs of violence in a medical examination conducted two months after the attacks, according to the Istanbul Protocol, cannot be considered as an indication that torture has not occurred.

10. In relation to the criminal proceeding, the petitioner states that the co-defendants were accused of the kidnapping of two persons, as well as of the kidnapping and death of Mr. Blumberg. It affirms that during the trial the defense attorneys alleged the nullity of all the proceedings due to the irregularities and illegalities committed in the process, among them, the lack of impartiality of the investigators and judges, the aggressions suffered by the co-defendants and the questioning made late at night without the presence of a lawyer. However, on October 25, 2006, all the accused were convicted in the first instance for the crimes charged, based mainly on the confessions of the co-defendants and on the statements of the victims of the different kidnappings. According to the court: i) the alleged irregularities were only untidiness and had not intended to harm the co-defendants and therefore did not affect the impartiality of the authorities; ii) the aggressions were not fully proven; and iii) the statements given without the presence of a defender had been validated by subsequent statements in which the defenders had been present. At the time of sentencing, the court of first instance noted that if the alleged victim was an adult, he would have been sentenced to life imprisonment, but since he was a minor, the penalty was set at 20 years of imprisonment.

11. On December 14, 2006, an appeal was presented. The defense of the alleged victim considered that the first instance court, without valid arguments, had applied a penalty of purely retributive

⁵ He adds that according to Inter-American standards, it is a duty of the State to carry out *ex officio* an investigation that meets all international standards, among them, that the investigating body be impartial; a requirement that was not fulfilled in the present case due to the interest of this body in the outcome of the criminal case. Thus, it is a duty of the State to ensure that the investigation that must be carried out *ex officio* is conducted by an independent and impartial body, without the interested parties having to question it for the lack of impartiality. In these cases, contrary to the position of the State, the victim cannot be demanded, nor charged with the obligation to become himself/herself as a private accuser or plaintiff in order to request the disqualification of a judge, as the victim may also have fears of be a part of the process.

content, which was against the Criminal Regime for Minors and the best interests of the child. The lawyers of the other defendants again argued the nullity of the proceedings. On March 26, 2008, the appeals were rejected. The court of second instance also considered that the irregularities had not caused damages and that, beyond the constraints and the irregular form in which the condemned had confessed, they had ratified their statements in other instances with their lawyers.

12. This decision was challenged by filing an extraordinary federal appeal before the same body. The court decided not to hear the appeal and a complaint was filed for denial of the extraordinary federal appeal, which was rejected by the Supreme Court of Justice on June 23, 2009, finalizing the criminal proceedings.

13. The petitioner alleges a series of violations during the criminal proceedings. First, it mentions that the lack of access to a defense lawyer during the initial investigation seriously affected the alleged victim's right to defense. In this regard, it states that, in relation to children, the American Convention not only grants the right to have a defense lawyer, but, based on the best interests of the child provided for in article 19 of that instrument, imposes on the State the duty to guarantee its presence in all instances of the procedure; a duty that in the present case was not fulfilled. It adds that in the present case the alleged waiver of the right to have a lawyer occurred late at night and after a transfer of more than 24 hours during which the alleged victim was unable to sleep and suffered abuse. He claims that the right not to plead guilty has also been violated because, in the circumstances in which the waiver to be assisted by a lawyer was made, the decision cannot be considered to have been taken freely and in an informed manner.

14. In addition, in relation to the punishment imposed on the alleged victim, it alleges that it was merely retributive, without considering that the accused was a minor at the time and without granting him the possibility of tutelar treatment until he came of age. In addition, he was not imposed the shortest sentence possible as determined by the Convention on the Rights of the Child. It also argues that the penalty was set based on a rule that deals with the fixing of sentences for adults and, thus, incompatible with the American Convention as it does not take into account the best interests of the child. It concludes that the alleged victim does not present itself before to the IACHR as a court of fourth instance and that it is incumbent upon the organs of the Inter-American Human Rights system to verify whether the international obligations derived from the Inter-American instruments were violated in the steps taken at the domestic level.

15. For its part, the State alleges that the IACHR transmitted the petition to the State extemporaneously and, hence, it must be declared inadmissible for failure to exhaust domestic remedies and for lack of colorable claim in relation to the violation of the alleged victim's rights. In relation to the exhaustion of domestic remedies, he affirms that the alleged illegality of the detention and the search of the domicile where he resided has not been challenged internally. In addition, it affirms that it was not alleged that the judge in charge of the criminal proceedings for the alleged acts of torture lacked impartiality.

16. With regard to the colorable claim, it argues that the alleged victim brings the case before the IACHR as a court of fourth instance to question the assessments on which the decisions of the domestic courts were based. On the one hand, it affirms that the alleged illegal constraints and torture were investigated diligently and points out the difficulty of carrying out an investigation based on a complaint filed 57 days after the alleged facts. It adds that the alleged victim had the possibility of establishing himself as a complainant to present evidence and eventually challenge the decisions taken and did not do so. In any case, he affirms that the evidence does not show a lack of diligence and speed in the investigation.

17. On the other hand, it alleges that the alleged victim was informed of his rights and that it appears in the minutes when he was read his rights that he refused to sign the minutes. He adds that the waiver to be assisted by a lawyer was done freely and voluntarily and that during the process the person ratified his statement. In addition, it maintains that the alleged coercion and the absence of legal assistance during the initial investigation were considered by the judicial authorities both in the first and in the second instance.

18. Finally, it alleges that in determining the punishment, the authorities analyzed his tutelar file before imposing the sentence of 20 years. In addition, they took into account that the alleged victim was a minor at the time and was sentenced to less than life imprisonment; the penalty that would have been imposed on an adult. It adds that the alleged violation of the principle of subsidiarity of the criminal sanction

in the area of juvenile criminal justice, the alleged lack of proportion of the sanction imposed and the lack of modification of the rules and practices of the courts have also already been analyzed by the national authorities.

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

19. With respect to the allegations of torture, the Commission reiterates that, in accordance with international standards applicable to cases such as the one in which serious human rights violations are alleged and are to be prosecuted *ex officio*, the appropriate and effective remedy is precisely the initiation and development of a criminal investigation aimed at clarifying the facts, and, if applicable, identifying those responsible and establishing the corresponding responsibilities.⁶ Based on this, the IACHR does not consider that it is necessary for an alleged victim to be demanded to act as a party or complainant to ensure that the investigation and the proceeding are carried out in accordance with the judicial guarantees and to be able to challenge possible decisions. It is a duty of the State to take these steps *ex officio* and ensure that the investigation is conducted in accordance with the standards of the Inter-American system.

20. In the present case, the petitioner maintains that the investigation of the alleged acts of torture was dismissed on July 8, 2005 and that only the Public Prosecutor's Office could appeal said decision and did not do so. It also maintains that, until the date of the petition's presentation in December 2009, the authorities had not reopened the investigation of these alleged facts, a situation that, according to the information in the file, persists to this day. Considering that after the dismissal of this investigation, the alleged acts of torture continued throughout the main case both in the oral proceeding and in the remedies filed later, which the prosecution did not appeal, that only these authorities can reopen the investigation and that the investigation had not been reopened at the time of filing the petition, the IACHR considers that, in this regard, the exception to the rule of exhaustion of domestic remedies provided for in Article 46.2.b of the American Convention applies and that the petition has been submitted within a reasonable period of time in accordance with Article 32.2 of the IACHR's Rules of Procedure.

21. With respect to the alleged violations of judicial guarantees that would have occurred in the framework of the criminal proceeding, the IACHR considers that the criminal proceeding was concluded on June 23, 2009, the date on which domestic remedies were exhausted. Given the foregoing and taking into account that the petition was filed on December 18, 2009, the IACHR considers that the petition, in this regard, meets the requirements of Articles 46.1.a and 46.1.b of the American Convention.

22. In relation to the alleged illegality of the detention and raiding, the IACHR observes that the petitioner alleges that these allegations were used as factual elements of context, since the focus was on the violation of the right to personal integrity directed at obtaining a confession that took place in the context of such deprivation of liberty. For this reason, the IACHR does not consider it necessary to analyze the exhaustion of domestic remedies on this matter.

23. The Commission takes note of the State's claim regarding what it qualifies as the lateness in the transfer of the petition. The IACHR notes that neither the Convention nor its Rules establish a deadline for the transfer of a petition to the State and that the deadlines established in the Rules and in the Convention for other stages of the procedure are not applicable by analogy.

VII. ANALYSIS OF COLORABLE CLAIM

24. With respect to the State's arguments regarding the fourth-instance formula, the Commission recognizes that it is not competent to review the judgments handed down by domestic courts which act within its sphere of competence and apply due process and judicial guarantees. Nevertheless, it reiterates that, within the framework of its mandate, it is competent to declare a petition admissible and to rule on the merits when it refers to domestic proceedings that could be in violation of the American Convention. On the other hand, regarding the claim about the alleged violation of Article 20 (right to

⁶ IACHR, Report No. 156/17, Petition 585-08. Admissibility. Carlos Alfonso Fonseca Murillo. Ecuador. November 30, 2017, par.13

nationality) of the American Convention, the Commission notes that the petitioner has not offered allegations or evidence to allow *prima facie* consideration of its possible violation.

25. In this regard, the IACHR considers that the alleged torture of the alleged victim, as well as the alleged lack of a diligent investigation, if proven, could constitute violations of the rights enshrined in articles 5 (personal integrity), 8 (judicial guarantees) and 25 (judicial protection) of the American Convention in accordance with its article 1.1 (obligation to respect the rights) of the same instrument and articles 1, 6 and 8 of the ICPPT. In addition, in the merits stage, the IACHR will analyze whether these alleged violations, in turn, would have affected the development of the criminal proceeding against the alleged victim due to the alleged use for the conviction of presumably illegal evidence and, consequently, the personal freedom of the alleged victim. victim based on a sentence allegedly based on such evidence, which could constitute a violation of the rights enshrined in articles 7 (personal liberty) and 8 (judicial guarantees) of the Convention in accordance with its article 1.1 and in article 10 of the ICPPT.

26. On the other hand, the IACHR considers it pertinent to analyze, in the merits stage, whether the national authorities, in the development of the criminal process and in the determination of the punishment, have acted in accordance with the best interests of the child or if their actions had generated a violation of the rights enshrined in articles 8 (judicial guarantees) and 19 (rights of the child) of the American Convention in accordance with articles 1.1 and 2 (duty to adopt provisions of domestic law) of the same instrument.

VIII. DECISION

1. To find the instant petition admissible in relation to articles 5, 7, 8, 19 and 25 of the American Convention, in accordance with articles 1.1 and 2 of the same instrument; and
2. To find the instant petition admissible in relation to articles 1, 6, 8 and 10 of the ICPPT; and
3. To notify the parties of the decision; to continue with the analysis on the merits and to publish this decision and to 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 14th day of the month of August, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.