IACHR Inter-American Commission on Human Rights

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REPORT No. 138/19
PETITION 389-09

REPORT ON ADMISSIBILITY

DIEGO OSLVADO GIMENEZ AND AURORA PARDIÑO
ARGENTINA

Approved electronically by the Commission on August 27, 2019.

Cite as: IACHR, Report No. 138/19, Petition 389-09. Admissibility. Diego Osvaldo Giménez and Aurora Pardiño. Argentina. August 27, 2019.

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I. INFORMATION ABOUT THE PETITION

Petitioner:	Diego Osvaldo Giménez, Flavia Lorena Rojas[1] and *Grupo de Mujeres - Argentina*[2]
Alleged victim:	Diego Osvaldo Giménez and Aurora Pardiño
Respondent State:	Argentina
Rights invoked:	Articles 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention on Human Rights[3] in relation to its Article 1 (obligation to respect rights); Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture[4]

II. PROCEEDINGS BEFORE THE IACHR[5]

Filing of the petition:	April 2, 2009
Additional information received at the stage of initial review:	September 30, 2009
Notification of the petition to the State:	July 11, 2012
State's first response:	September 29, 2014 and November 18, 2015
Additional observations from the petitioner:	February 26 and June 11, 2014
Additional observations from the State:	September 15, 2017

III. COMPETENCE

Competence *Ratione personae:*	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis*:	Yes
Competence *Ratione materiae*:	Yes, American Convention (deposit of instrument made on September 5, 1984); IACPPT (deposit of instrument 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 *res judicata*:	No
Rights declared admissible	Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention in conjunction with Article 1.1 of the same instrument; Articles 1, 6 and 8 of the IACPPT and Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará"[6]

[1] Added as joint petitioner on August 10, 2017.
[2] Added as joint petitioners on August 10, 2017.
[3] Hereinafter "the American Convention" or "the Convention".
[4] Hereinafter the "IACPPT".
[5] The observations submitted by each party were duly transmitted to the opposing party.
[6] Hereinafter "the Convention of Belém do Pará".

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of Section VI
Timeliness of the petition:	Yes, in the terms of Section VI

V. FACTS ALLEGED

1. The petition alleges that the State of Argentina illegally detained, tortured and threatened Diego Osvaldo Giménez and his ex-partner, Aurora Pardiño, in order to implicate Mr. Giménez in a homicide.[7] It indicates that there was a failure to investigate the events and that Mr. Giménez was wrongfully convicted of a crime he did not commit, in criminal proceedings carried out without guarantees of due process.

2. The petitioners allege that on February 3, 2007, Mr. Giménez and Mrs. Pardiño were at their home and at around 1:00 pm, Mrs. Pardiño left to go shopping. On the way, a vehicle intercepted her and two policemen forced her inside and transferred her to the police station. There, she was threatened and mistreated and the police asked her for information about Mr. Giménez. Subsequently they called to tell him that Mrs. Pardiño had had an accident and was in the hospital. As he was leaving his house to go to the hospital, Mr. Giménez was detained by police officers that took him to the police station. There, a sub-commissioner and "his assistant" accused him of committing an offense and claimed that they had evidence against him. Petitioners add that he was examined by a doctor and later beaten and threatened in order to confess to the commission of the crime.

3. The next day, Mr. Giménez's clothes and shoes were impounded without a warrant and the beatings continued so that he would incriminate himself. The petitioners state that Mr. Giménez was brought before a prosecutor with his face covered in blood and handcuffed with his hands behind his back and that the prosecutor left when Mr. Giménez refused to plead guilty.[8]

4. Three days after Mr. Giménez's arrest, Mrs. Pardiño was interrogated. The petitioners informed that she was forced to enter a cell where a doctor examined her, making her undress in front of several uniformed officials. The petitioners indicate that the same night an officer named "Nelson" told her that if she had sex with him she would be released more quickly. In response to her refusal, they threw a bucket of water at her and left her locked up and on another occasion she was reprimanded and threatened by a police commissioner.

5. According to the petitioners, in the first statements made in the presence of an appointed defense attorney, Mr. Giménez remained silent following the advice received from his legal representative. Subsequently, in the framework of the criminal proceedings initiated against him, another defense attorney assigned to his case denounced the illegal coercion suffered by Mr. Giménez and Mrs. Pardiño. As appears from the information provided by the petitioners, Mr. Giménez's defense counsel explained that these events had not previously been reported due to the fear of reprisals. The petitioners state that there has been a failure to initiate an investigation into the alleged torture and threats, and that Mr. Giménez was convicted at the first instance of homicide on November 26, 2008. At the trial, the court noted that in his first statements the accused remained silent, and his newly appointed defense counsel complained about his illegal treatment suffered by the presumed victims in the police station. However, according to the information in the file, the court considered that there was no possibility of him being beaten at the police station; there was not even a mere suspicion in the file, given that the police personnel and the prosecutor had denied such a contingency; no signs of beating were evident from his medical certificate, and a photograph taken of him at the police

[7] From the judicial proceedings it appears that on January 31, 2007, a taxi driver, Mr. José Reinaldo Vázquez was murdered by a passenger who fled. According to the petitioners, the case caused protests, a high media profile, and put pressure on the authorities to find the perpetrator.

[8] In the trial, the prosecutor and two police officers stated that the alleged victim had confessed on the day of his detention; however, he rejected his alleged confession and maintains that when he was taken before the prosecutor with signs of torture, he refused to confess.

station showed no signs of injury. According to Mr. Giménez, his appointed defense counsel's actions were inadequate, given that his counsel urged Mrs. Pardiño to make incoherent statements to implicate him.

6. On December 5, 2008, Mr. Giménez filed an appeal that, according to case law of the National Supreme Court of Justice (hereinafter "the CSJN"), should have ensured a thorough and comprehensive review of his conviction as a guarantee of the double instance principle. In his appeal, he maintained: that the first instance court had erred in using his alleged self-incrimination based on the doctrine of the "fruit of the poisonous tree"; that his alleged confession had not been made in the presence of the presiding judge or in the presence of his defense counsel; that he had not signed a police report; that it had been obtained through coercion; and that the medical personnel had examined him before he was beaten. He also stated that the police personnel and the prosecutor who acted as witnesses were the same individuals in charge of investigating the unlawful acts and who were accused of acts of harassment (*apremios*) and coercion and their statements were unreliable. In addition, the appeal also claimed that the first instance judgment was arbitrary and that the court had erred in the legal classification of the offense.

7. On December 18, 2008, the Superior Court of Justice of Río Negro (hereinafter, "the STJ") partially admitted the appeal regarding the legal classification of the offense and declared it inadmissible with respect to the other complaints. When declaring the latter inadmissible, the court found that the alleged victim's statement given to the police and to the prosecutor had been spontaneous and could have been used as evidence. On arriving at this conclusion, the STJ considered that the statement of the police officers and the prosecutors showed that Mr. Giménez's statements had been spontaneous; that Mr. Giménez's medical examination was undertaken after the statement given the police and the prosecutor; that there was no evidence of injuries; and that in his preliminary statements Mr. Giménez had not referred to acts of harassment (*apremios*) and threats. On October 28, 2009, the STJ considered the issue relating to the legal classification of the offense and dismissed the cassation appeal on the grounds that the offense had been correctly classified.

8. On December 21, 2009, Mr. Giménez filed an extraordinary federal appeal *in pauperis*. His technical defense once more referred to the acts of intimidation and attacks suffered by the alleged victims, as well as the arbitrariness of the conviction due to the partiality in the evaluation of the evidence. The STJ dismissed the appeal because it was time barred. According to the court, assessment of the time limit for filing the appeal commenced as from the reading of the decision dismissing the cassation appeal despite the fact that neither Mr. Giménez nor his defense attorney was present at the time. In addition, the STJ considered that the appeal did not contain a disputed federal issue and that the criticisms of the defense were addressed to issues of fact and evidence.

9. Mr. Giménez filed an complaint motion *in pauperis* against this decision, which was later substantiated by his defense lawyers. His defense argued that the STJ had erred when assessing the time limit for the filing of an extraordinary federal appeal from the reading of the resolution dismissing the appeal. In that sense, they argued that this decision of the STJ was arbitrary because neither the defense nor Mr. Giménez was notified of the day that the reading would take place and that they could not be present thereat. In addition, the court also failed to order the transfer of Mr. Giménez from prison to the court so that he could attend. The appeal was declared inadmissible by the CSJN on November 28, 2013, on the grounds that the defense lawyers had failed to append one of the documents required for filing the appeal.

10. For its part, the State disputes the allegations of the petitioners, and maintains that Mr. Giménez, in the presence of a prosecutor and two police officers, confessed to the crime despite having been informed of his right to remain silent. The State adds that, given the lack of a confession statement, the individuals who witnessed Mr. Giménez's spontaneous utterance gave their statements during the trial and these were evaluated along with all the other evidence produced in the proceedings. Furthermore, the State points out that Mr. Giménez's conviction was not based exclusively on the statement he gave to the police and the prosecutor, but that the court considered that there was sufficient evidence to prove his criminal involvement, taking into account the statements of other individuals who had seen him in the vicinity where the taxi was hired; and taking into account other tests carried out – such as the expert that matched a footprint found with the footprint of the espadrilles that he used.

11. With regard to the criticism of the public defender, the State indicates that there was no challenge in this respect during the proceedings, or the corresponding request for a replacement to the Public Defender's Office, which has the mechanism available to that effect.

12. With respect to the alleged acts of torture, miss-treatment and threats suffered by the alleged victims, in the State's view the petitioners have failed to provide any evidence of the filing of a complaint, nor the conclusion of its proceedings at the domestic level. Likewise, the State contests that there was a mention of these complaints in Mr. Giménez's spontaneous utterance; or that he filed motions, petitions or nullities. For this reason the State maintains that domestic remedies have not been exhausted, and that the petition should be declared inadmissible. In addition, it adds that the presumed fear of the alleged victims to an unfavorable decision is not in itself a sufficient reason to amount to an exception to the requirement of the exhaustion of domestic remedies.

13. Lastly, the State refers to the fact that Mr. Giménez had access to domestic remedies, in which he presented his claim and provided evidence, obtaining answers to all his requests, with impartiality and absolute respect for due process. It argues that the petitioners now refer to the IACHR as a court of fourth instance because of their dissatisfaction with the decisions issued by the national authorities.

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

14. The Inter-American Commission notes that the State argues on the basis of what it describes or qualifies as the tardiness in notification of the petition. However, the Commission points out that neither the Convention nor the Commission's Rules of Procedure establish a deadline for the notification of a petition to the State after filing, and that the time limits established in the Rules of Procedure and in the Convention for other stages of the claim are not applicable by analogy. The IACHR also takes note of the State's claim regarding the lack of the exhaustion of domestic remedies when submitting the petition and recalls that the analysis of the requirement of exhaustion of remedies is made on the basis of the situation at the time of its decision on admissibility.[9]

15. With respect to the alleged acts of torture, the State argues a failure to exhaust domestic remedies. However, the IACHR observes that during the criminal proceedings, Mr. Giménez's defense made reference to the allegations of acts of violence and threats suffered by the alleged victims. In these circumstances, the IACHR considers it certain that the authorities were alerted to the alleged victims' situation and recalls that, where the complaint relates to an alleged offense prosecutable *ex officio*, the domestic remedies which must be exhausted are the criminal investigation, which must be undertaken and furthered by the State.[10] Given the lack of information on an investigation aimed at clarifying these events, the IACHR concludes that the exception provided in Article 46.2.c. of the Convention applies to this aspect of the petition. In addition, given that the judicial authorities were informed of the alleged acts of violence and threats between 2008 and 2009 without – according to the information in the case file - an investigation being opened - and that such a situation persists up to the present - the IACHR considers that this complaint was filed within a reasonable period of time in accordance with Article 32.2 of the IACHR's Rules of Procedure.

16. With regard to the allegations of a violation of due process, the IACHR observes that these allegations were raised in the various appeals, both ordinary and extraordinary, filed by the alleged victim after his conviction. In this regard, the appeal was the last available ordinary remedy and this was decided on October 28, 2009. In relation to the extraordinary remedies, the IACHR, on the one hand, has previously held the view that, as a general rule, the only remedies whose exhaustion is necessary are those whose functions, within the legal system, are appropriate to provide protection for remedying a violation of a certain legal

[9] IACHR, Report No. 15/15, Petition 374-05. Admissibility. Members of the Trade Union of Workers of the National Federation of Coffee Growers of Colombia. Colombia. March 24, 2015, para. 39.

[10] IACHR, Report No. 144/17. Petition 49-12. Ernestina Ascencio Rosario and others. Mexico. October 26, 2017, para. 6.

right. In principle, these are ordinary and not extraordinary remedies.[11] On the other hand, the Commission has also decided that if a petitioner considers that extraordinary remedies can have a favorable outcome to remedy the legal situation violated and decides to resort to this route, it must exhaust them in accordance with the procedural rules then in force, provided that reasonable conditions of access to them are provided. [12]

17. In the present case, the State indicates that the extraordinary remedies filed contained formal deficiencies. In this regard, the IACHR observes that Mr. Giménez, who was represented during the criminal proceedings by public defenders, had to file his extraordinary appeals *in pauperis* and that they were subsequently substantiated by public defenders. In addition, the IACHR notes that according to these defenders and the judicial authorities themselves, the calculation of the time limit to file the extraordinary federal appeal began with the reading of the resolution rejecting the appeal despite the fact that neither Mr. Giménez nor his defense counsel was present or notified of the act. In addition, according to the CSJN's judgment, the complaint motion failed to comply with the formal requirements because the defense neglected to append one of the documents required for the filing of this appeal. In these circumstances, considering the deficiencies of the extraordinary remedies, his absence during the reading of the decision rejecting the appeal and the fact that Mr. Giménez was assisted by State appointed defense counsel, the IACHR considers that Mr. Giménez was prevented from adequately exhausting the extraordinary remedies, and that in this respect, the exception set out in Article 46.2.b of the Convention applies. Additionally, given that the filing of these appeals occurred while the petition was already being considered by the IACHR, and that the original petition was filed a few months before the resolution of the cassation appeal, the Commission considers that the petition also fulfills the requirement of Article 32.2 of its Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

18. The IACHR considers that, if proven, the alleged acts of torture, and the lack of investigation thereof; Mr. Giménez's conviction based on evidence obtained through torture and the effect this had on his personal liberty, could characterize a violation of the rights enshrined in Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention in accordance with Article 1.1 of the same instrument to the detriment of Mr. Giménez. In addition, the alleged facts could, if proven, constitute violations of the rights enshrined in Articles 1, 6, and 8 of the IACPPT. Similarly, the IACHR will consider whether the allegations relating to the alleged acts of violence and threats against Mrs. Pardiño, as well as the lack of investigation thereof, if proven, could constitute violations of the rights enshrined in Articles 5 (right to humane treatment), 8 (right to a fair trial), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention in accordance with Article 1.1 of the same instrument, Article 7 of the Convention of Belém do Pará, and Articles 1, 6, and 8 of the IACPPT to the detriment of Mrs. Pardiño.

19. In addition, at the merits stage, the IACHR will consider whether Mr. Giménez was able to obtain a comprehensive review of his conviction in accordance with the guarantees of Article 8 and 25 of the American Convention. Additionally, the IACHR will analyze whether Mr. Giménez's defense counsel appointed by the State acted diligently to guarantee his right of defense in accordance with Article 8 of the Convention.

20. With respect to the State's arguments regarding the fourth instance formula, the IACHR recalls 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 internal proceedings that may be in violation of rights guaranteed by the American Convention.

[11] IACHR, Report No. 161/17. Admissibility. Andy Williams Garcés Suárez and family. Peru. November 30, 2017, para. 12.

[12] IACHR, Report No. 135/18, Petition 1045-07. Inadmissibility. Enrique Alberto Elías Waiman. Argentina. November 20, 2018, paras. 9 and 10.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 7, 8, 24 and 25 of the American Convention in conjunction with Article 1.1 of the same instrument; Articles 1 6, and 8 of the IACPPT; and Article 7 of the Convention of Belém do Pará;

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.

Aprobado por la Comisión Interamericana de Derechos Humanos a los 27 días del mes de agosto de 2019. (Firmado): Esmeralda E. Arosemena Bernal de Troitiño, Presidenta; Joel Hernández, Primer Vicepresidente; Antonia Urrejola, Segunda Vicepresidenta; Margarette May Macaulay, Francisco José Eguiguren, Luis Ernesto Vargas Silva, y Flávia Piovesan, Miembros de la Comisión.