

OEA/Ser.L/V/II.
Doc. 189
6 July 2020
Original: Spanish

REPORT No. 179/20
PETITION 232-11
REPORT ON ADMISSIBILITY

ERNESTO ELIAS CHOCOBAR
ARGENTINA

Approved electronically by the Commission on July 6, 2020.

Cite as: IACHR, Report No. 179/20, Petition 232-11. Admissibility. Ernesto Elias Chocobar.
Argentina. July 6, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Stella Maris Martinez
Alleged victim:	Ernesto Elias Chocobar
Respondent State:	Argentina
Rights invoked:	Articles 5 (personal integrity), 7 (personal liberty), 8 (fair trial), 11 (protection to honor and dignity) of the American Convention on Human Rights ¹ , in relation to its article 1.1 (obligation to respect rights), and articles 1, 6, 8, and 10 of the Inter-American Convention to Prevent and Punish Torture ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	February 24, 2011
Additional information received at the stage of initial review:	May 23, 2011 and April 17, 2013
Notification of the petition to the State:	December 9, 2015
State's first response:	September 4, 2017
Additional observations from the petitioner:	January 22, 2018 and August 26, 2019

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 done on September 5, 1984); and Inter-American Convention to Prevent and Punish Torture (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
Rights declared admissible	Articles 5 (personal integrity), 7 (personal liberty), 8 (fair trial), 25 (judicial protection) of the American Convention in relation to its article 1.1 (obligation to respect rights); and articles 1, 6, and 8 of the Inter-American Convention against Torture.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in terms of section VI
Timeliness of the petition:	Yes, in terms of section VI

¹Hereinafter "the American Convention" or "the Convention."²Hereinafter "the Inter-American Convention against Torture."³The observations of each party were duly notified to the opposing party.

V. FACTS ALLEGED

1. The petitioner alleges that in the time frame of an investigation directed towards sanction and identify the responsible ones for the crime of robbery with arms, there was violation to the rights to personal integrity and liberty, to protection to honor and dignity, and to a fair trial of Mr. Ernesto Elias Chocobar (hereinafter also “the alleged victim”), who was detained illegally, tortured, and criminally convicted.

2. The petitioner holds that on May 30, 1994, a search warrant that resulted in the detention of Mr. Chocobar was done by the Police of the province of Tucuman. Said search warrant would have been illegal because the District Attorney of Instruction of the IV Nomination on Criminal Matters of the Province of Tucuman requested the Judge on Criminal Matters of Instruction of the II Nomination to order the detention of “some Japanese which rest of the data is unknown.” The petitioner also claims that the detention was carried out without the presence of witnesses, and that Mr. Chocobar was not taken before a judge until June 16, 1994 when he was released by the district attorney who was in charge of the investigation, and who considered that the legal formalities had not been met. The petitioner claims that the alleged victim, after his detention, had injuries in his body caused by a hard and blunt item manipulated with strength and speed, and seemed like the injuries that are caused by punches or kicks.

3. The petitioner states that the alleged victim was subjected to torture by the employees of the province of Tucuman who pointed at his head with a gun and beat him up on all of his body while he was forced to declare a sworn statement on May 31, 1994. For its part, on June 1, 1994, Mr. Chocobar, while he was being taken to the office of the District Attorney to give his statement, he suffered other threats, and when his defense attorney left, five persons brought a written statement close to him and he was told that if he signed it, he would be released. Finally, on June 2, 1994, Mr. Chocobar was interrogated for a second time by police agents, who would have forced him to declare under oath about some annotations that he had in his personal agenda. Additionally, on June 6, 1994, the alleged victim rectified before the District Attorney of the cause that the police was trying to incriminate him in a crime that he had not committed and he denounced the mistreatment. However, according to the petitioner, the State did not start any investigation on this and holds that as a consequence of the aggressions, the alleged victim now has audition problems in his left ear, sight problems in his left eye, and a muscular deformation in the right knee that impedes him to bend his leg completely.

4. The petitioner indicates that the process for robbery continued located in the federal venue, but the process did not have any movement between April 20, 1995 and December 27, 2001. But it was until May 24, 2002, due to a detention order done by a federal judge, that Mr. Chocobar was detained for a second time on June 18, 2002, and gave his statement denying the imputed facts, which continued to be those from 1994. She argues that the arrest warrant was groundless and that it did not meet the expected demands planned by the procedural law. However, through resolution of July 8, 2002, the judge ordered the indictment of the alleged victim for the crime of robbery with arms, stating in the recitals that the statements obtained under torture: i) had been done according to the procedural norms; ii) in the presence of an attorney; and iii) that they have not been object of questioning or nullity.

5. She indicates that on July 24, 2002, Mr. Chocobar filed an appeal against the resolution of indictment of July 8, 2002, and that on December 20, the Federal Court of Appeals of the Province of Tucuman confirmed the indictment and preventive detention of him, decision that would have been founded in the statements obtained under torture. The petitioner adds that the preventive prison lasted until September 1, 2003, date on which he was released through secured bail bond.

6. She argues that before the refusal of Mr. Chocobar to give a statement, during the period of trial, it was ordered the incorporation of the statements given under coercion and that, in absence of one of the main witnesses of the trial, Mr. Leiva Lopez, the magistrate of the cause also decided the incorporation of statements that could not be confronted by the defense. Thus, on October 31, 2006, Mr. Chocobar was convicted to five years of prison by the Criminal Oral Court, decision that was impugned through appeal for reversal and confirmed on December 11, 2007 by resolution of the Criminal Division of the National Court of Cassation. Finally, this last decision was impugned by complaint appeal, declared inadmissible by the Supreme Court of Justice on August 31, 2010.

7. Regarding the facts set out in the petition, the State alleges that there was jurisdictional control on the procedure of search warrant and detention of Mr. Chocobar on May 30, 1994 because the investigative measures done by the Police of the Province of Tucuman were ordered by the District Attorney of Instruction of the IV Nomination on Criminal Matters of that province and authorized by the Judge on Criminal Matters of Instruction of the II Nomination. Besides, it adds that the alleged victim was presented on the next day of his detention before the district attorney in charge of the investigation and that the issued order was annulled because the detention violated the current legal norms; therefore, Mr. Chocobar was released. It holds that during the statement given by the alleged victim on May 31, 1994, he was informed of his right to refrain from giving a statement and request the presence of a defense attorney. However, he denied and expressed his will to declare at that moment. Besides, in his statement of June 1, 1994, Mr. Chocobar counted with the presence of a defense attorney and he confirmed his previous statement. The State adds that it is opportune to mention that in the Division of Personal Records of the Police of Tucuman, there is a criminal record with the number 807465, which belongs to Chocobar, Ernesto Elías "A" The Japanese, on which his information is detailed, as well as the police and judicial records from 1980.

8. The State affirms that on June 2, 1994, through Report number 2.159, Mr. Chocobar was examined by the coroner team, which report does not show any injuries, and that it was not impugned by the defense of the alleged victim. Additionally, it adds that the alleged victim in his rectification of statement of June 6, 1994, did not mention any acts of torture or possible maltreatment. With regard to the impugnation to the initial statement of Mr. Chocobar done by his defense attorney, the State holds that he limited to request the nullity due to fail to fulfill the formal requirements required by the law, and that he did not mention the alleged coercion in the statement. However, it holds that after this, the attorney of the petitioner requested an order of nullity and evidentiary exclusion denouncing the existence of tortures; in consequence, the district attorney of the cause dictated that at the moment of resolving the conflict of jurisdiction on the venue of the cause, this fact should be considered by the competent public servant. In this way, on December 12, 1994, once decided the competence in favor of the federal venue, the Federal District Attorney ordered the detention of Mr. Chocobar with the purpose of taking a new investigatory statement. This fact did not take place until the year 2002, for this reason, the State claims that Mr. Chocobar was able to count with legal advice, and besides, the statements allegedly obtained by coercion were excluded.

9. The State argues that the sentence given by the Criminal Oral Court and the Federal Penitentiary Institution of the Province of Tucuman shows that the magistrates included the arguments of the technical defense of Mr. Chocobar that impugned the statements done in the judicial headquarters, and that the statements obtained under torture in the decision were not taken into consideration; other evidence was considered like the statements of the victims, different from the testimony of Mr. Leiva Lopez. Additionally, the State holds that, in the appeal for reversal filed by the defense against the sentence of October 31, 2006, it was not alleged the incorporation by reading of the testimony of Mr. Leiva Lopez, and for this reason, it cannot be alleged in international instance, it holds that the petitioner did not impugn before the national tribunals the impossibility to interrogate the witness and adds that the Court of Cassation concluded that said testimony was not decisive. Argentina also claims that the sentence given to Mr. Chocobar was declared prescribed by the Federal Criminal Oral Court of Tucuman acting as a remedy and offsetting the possible delays of the process.

10. The State holds that before the indictment, it was filed an appeal for reversal on which the initial statement of Mr. Chocobar was not questioned. According to the denounces of tortures, the State holds that the defense of Mr. Chocobar did not impugn the veracity of the forensic files on the health status of the alleged victim, even though, the petitioner presented, after his first statement, an expert report regarding his medical conditions done by the same medical team that did the first report. And adds that the Supreme Court of Justice, in its final decision, even if it denied the extraordinary appeal filed, decided the transfer of the file to the provincial court of origin to investigate the alleged facts of torture.

11. Finally, the State questions the admissibility of the petition because it considers that the facts do not characterize a violation to the facts established in the Convention and holds that it would be using the Commission as a court of "fourth instance." Besides, it insists on what it denominates "timeliness in the transfer of the petition," while it was transferred to it four years after it was received by the IACHR.

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

12. First of all, the Inter-American Commission observes that in the present petition, there exist two claims fundamentally set out by the petitioners, related, but which analysis of admissibility has to be done separately. On one side, the claim related to the alleged illegal detention and alleged torture acts committed against Mr. Chocobar; and on the other side, the approaches relative to violations to the right to due process in the time frame of the criminal cause done against Mr. Chocobar due to the alleged crime of robbery.

13. Regarding the criminal process for robbery, it is an accepted fact by the parties that it started in the Provincial Jurisdiction of Tucuman, then, it went to the federal venue, and after accomplishing certain procedural stages and a period of inactivity between 1995 and 2001, this process ended with a decision from the Supreme Court of Justice of the Nation on August 31, 2010. Besides, the petition was received by the IACHR on February 24, 2011. Therefore, the Commission concludes that, according to this plea, the petition meets the requirement of exhaustion of domestic remedies established in article 46.1.a of the American Convention, and with the requirement of period of presentation established in article 46.1.b of that same treaty.

14. Regarding the alleged illegal detention and tortures Mr. Chocobar would have been subjected to, the Commission observes that he was detained on May 30, 1994 and that he was not taken before a judge who could control the legality of his detention until seventeen days later. Additionally, the Commission observes that in different moments throughout the criminal process, Mr. Chocobar informed the judicial authorities about the fact that he had been subjected to acts of coercion and illegal coercion during his detention and first statements, he would have done it like that, for example on June 6, 1994 before the district attorney of the cause. In fact, the Commission observes that the same State in its arguments makes clear that the Supreme Court in its final decision, in which it denied the extraordinary remedy set out by the defense of Mr. Chocobar, it decided the transfer of the file to the provincial court of origin to investigate the acts of torture. However, it does not inform the Commission that, in effect, an investigation on that had been started, and even less, that such investigation had advanced in some way.

15. In this sense, the Commission considers that it is applicable the exception of unjustified delay in the process established in article 46.2.c of the American Convention regarding the lack of investigation of the alleged acts of torture. Additionally, considering that these facts would have occurred in 1994, that were informed to the authorities throughout the process; that the Supreme Court of Justice transferred the actions to the province of Tucuman in 2010; and that the effects of that lack of action from the judicial authorities and the consequences of this alleged acts of torture would stay with the victim until this day, the Commission concludes that the petition was presented in a reasonable period in terms of article 32.2 of its Regulations.

16. Finally, regarding the plea of the State on the alleged “delay in the transfer of the petition,” the IACHR reiterates its constant position that neither the American Convention, nor the Regulation of the Commission establish a period for the transfer of a petition to the State after its reception and that the periods that are established in the Regulations and in the Convention for other stages of process are not applicable by analogy.⁴

VII. ANALYSIS OF COLORABLE CLAIM

17. Regarding the extreme of the petition related strictly with the plea of the petitioner related to the right to due criminal process of the petitioner, the Commission observes that there exist enough elements to consider that the statements allegedly given by the petitioner under coercion and acts of torture were not considered in the course of the procedure as proof for the establishment of the criminal responsibility of Mr. Chocobar. Additionally, the merits related to the origin or not of the incorporation of the statement of Mr. Leiva Lopez, which was initially requested during the process in compliance with the corresponding procedural norms, it is not something which origin or not the IACHR is responsible to decide. On the other side, the State

⁴ See for example IACHR, Report No. 56/16. Petition 666-03. Admissibility. Luis Alberto Leiva. Argentina. December 6, 2016. Also see Inter-American Court on Human Rights, Case *Mémoli vs. Argentina*. Preliminary Exceptions, Merits, Reparations, and Costs. Sentence of August 22, 2013. Series C No. 295, pars. 30-33

indicated that this was neither the only evidence mentioned during the process, nor the decisive evidence to establish the criminal responsibility of Mr. Chocobar. Additionally, the Commission observes, according to what was informed by the State and not questioned by the petitioner, that definitely, the sentence given to Chocobar for the crime of robbery was declared prescribed by the Federal Criminal Oral Court of Tucuman. So, in attention to this considerations and taking into account the information given by both parties, the Commission considers that there are not enough elements to establish *prima facie* facts that may constitute violations to the rights established in the American Convention in relation to the criminal process done against Mr. Chocobar.

18. On the other hand, regarding the specific plea done by the petitioner according to the alleged actions of arbitrary detention and torture committed against the alleged victim during the first moments of the investigation, that include concrete references to possible consequences present in his body; as the lack of investigation and sanction of these acts, the IACHR considers that if these are true, the same could constitute violations to the rights established in articles 5 (personal integrity), 7 (personal liberty), 8 (fair trial), and 25 (judicial protection) of the American Convention in relation to article 1.1 (obligation to respect rights). Just as of articles 1, 6, and 8 of the Inter-American convention against Torture to detriment of Ernesto Elias Chocobar.

19. According to the claim on the alleged violation of article 11 (protection to honor and dignity) of the American convention invoked by the petitioner; the Commission observes that she has not offered plea or enough support that allows to consider *prima facie* its possible violation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 7, 8, and 25 of the American Convention in relation to its article 1.1; and articles 1, 6, and 8 of the Inter-American Convention against Torture, with regard to the alleged arbitrary detention and torture;

2. To find the instant petition inadmissible in relation to Article 11 of the American Convention, and with regard to the criminal case itself; and

3. 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 6th day of the month of July, 2020.
(Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, and Julissa Mantilla Falcón, Commissioners.