

REPORT N° 8/08
CASE 11.426
ADMISSIBILITY
MARCELA ALEJANDRA PORCO
BOLIVIA
March 4, 2008

I. SUMMARY

1. On December 30, 1994, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") received a communication and a request for precautionary measures submitted by the organization Servicio Paz y Justicia, the Center for Justice and International Law ("CEJIL"), the Asociación Justicialista de Abogados, Fernando Rizzi, and Gaspar Porco (hereinafter "the petitioners") on behalf of Marcela Alejandra Porco (hereinafter "the alleged victim"), an Argentine citizen, 25 years of age at the time.¹ The petition was filed against the Bolivian State (hereinafter "the State" or "the Bolivian State") for alleged irregularities in the criminal proceeding against her and for having been kept in prison despite suffering mental alterations without providing her the care and security that her physical and psychological condition required. The petition alleges that the facts narrated constitute violations of the right protected by Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 11 (protection of honor and dignity), and 25 (judicial protection), in connection with the general obligations established at Articles 1(1) and 2 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention").

2. The State argues that in the instant case the petitioners have failed to comply with Articles 46 and 47 of the American Convention, indicating that there is no information, nor has it been proven, that the complainants exhausted domestic remedies, nor that the procedural time frames have been abided by. For this reason, it argues, the petition should be found inadmissible.

3. Without prejudging on the merits of the matter, the IACHR concludes in this report that the petition is admissible inasmuch as it meets the requirements set forth in Articles 46 and 47 of the American Convention. Therefore, the Inter-American Commission decides to notify the parties of this decision and continue with its examination of the merits of the alleged violation of Articles 5(1), 7, 8(1), 11(1), and 25 of the American Convention, all in connection with the general obligations to respect and ensure the rights, provided for by Articles 1(1) and 2 of the Convention. The Commission also decides to notify the parties of this report, and to publish it, and include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BEFORE THE COMMISSION

4. The Commission received a communication on December 30, 1994, in which the petitioners presented information on the case and requested precautionary measures for Marcela Alejandra Porco. By note of January 27, 1995, the petitioners submitted additional information on the case. On February 2, 1995, the IACHR forwarded those communications to the State, giving it 90 days to submit information. In addition, it informed the parties that it had begun to process the complaint, assigning it number 11.426.

5. The petitioners, by note of February 7, 1995, asked the IACHR to grant a hearing before the plenary of the Commission. The IACHR, on February 8, 1995, communicated to the

¹ As of June 2001, the Inter-American Commission has only received communications from CEJIL.

parties that it had granted the hearing, which was scheduled for February 14, 1995. The petitioners, by communication of February 14, 1995, submitted additional information on the case.

6. The petitioners, by communication of February 15, 1995, asked the Commission to approach the Government of Bolivia, and convey their willingness to pursue a friendly settlement, and to seek provisional measures from the Inter-American Court.

7. The IACHR sent an aide memoire dated February 15, 1995, to the Bolivian State, which was given until February 17, 1995 to agree to pursue a friendly settlement, with a view to Marcela Porco being transferred to Argentine territory for medical care. The IACHR indicated that otherwise it would send the Court the request for provisional measures. The State, by note of February 16, 1995, submitted information on the case, which was transmitted to the petitioners on March 2, 1995.

8. The petitioners, by communication of February 23, 1995, submitted additional information on the case and reiterated their desire for the Commission to seek provisional measures from the Inter-American Court. That information was transmitted by the IACHR to the State by note of February 27, 1995, giving it 60 days to respond.

9. By note of April 24, 1995, the State submitted additional information on the case dated April 18, 1995. That information was made known to the petitioners on April 26, 1995; they were given 30 days to submit observations. The petitioners, by note of May 23, 1995, requested an extension of the term for submitting observations, which was granted by the IACHR on May 26, 1995, for 45 days.

10. The IACHR, by note of November 6, 1996, reiterated to the petitioners the request made in its communication of May 26, 1995. The petitioners submitted information on the case on January 17, 1997. On September 5, 1997, the petitioners submitted observations on the case, which were transmitted to the State on September 16, 1997. The State, by note of December 17, 1997, submitted its observations, which were transmitted to the petitioners on December 29, 1997; they were given 30 days to submit information.

11. The IACHR, by note of December 4, 1997, placed itself at the disposal of the parties for the purpose of pursuing a friendly settlement in the case, and gave the parties 30 days to respond. By note of December 22, 1998, the IACHR informed the parties of the petitioners' intent to pursue a friendly settlement.

12. The petitioners, on May 14, 1999, provided information in relation to the process for reaching a friendly settlement, which was transmitted to the State on August 2, 1999. The State, in a note of August 30, 1999, submitted information on the case, which was forwarded to the petitioners, who were given 45 days to submit observations.

13. The petitioners, in a note of November 5, 1999, provided information on the case, which was transmitted to the State on November 16, 1999; it was given 30 days to submit information. The State, on December 9, 1999, asked the IACHR for an extension to respond to the observations, which was granted by the IACHR on December 13, 1999. By notes of February 28, 2000, and May 2, 2000, it requested additional extensions for submitting observations, which were granted by the IACHR.

14. By communication of June 12, 2000, the petitioners asked the IACHR to request that the State submit observations on the petitioners' communication of November 5, 1999.

15. By note of July 31, 2000, the State submitted its observations on the case. The petitioners, on October 20, 2000, asked the IACHR for a copy of the original complaint before the Commission. In a communication of November 13, 2000, the petitioners submitted their observations, which were transmitted to the State on December 5, 2000. The State, by note of December 29, 2000, asked for a 90-day extension for submitting information. The IACHR, by communication of January 9, 2001, granted the State a 60-day extension.

16. The State, by note of March 16, 2001, submitted its observations, which were made known to the petitioners on March 27, 2001, and gave them 30 days to submit observations. The petitioners submitted their observations on June 13, 2001, which were transmitted to the State on June 18, 2001.

17. The State, by note of July 27, 2001, and July 30, 2001, submitted its observations to the petitioners' response. That information was made known to the petitioners on October 9, 2001. By communication of November 7, 2001, the petitioners requested a 45-day extension for submitting observations, which was granted by the IACHR on November 9, 2001. The petitioners, by communication of December 17, 2001, requested a two-month extension to submit their observations. On January 15, 2002, the IACHR granted a 45-day extension.

18. The petitioners submitted their observations on the case on March 1, 2002; these were transmitted to the State on March 14, 2002, which was given 30 days to submit observations. The State, by note of May 6, 2002, asked the IACHR for a 30-day extension to submit observations, which was granted by the IACHR on May 8, 2002. The State submitted its observations by note of June 10, 2002, which were transmitted to the petitioners on June 13, 2002; they were given 30 days to submit observations.

19. By communication of July 18, 2007, the IACHR reiterated to the petitioners the request for information made on June 13, 2002, indicating that otherwise it would archive the petition within 30 days. The petitioners, by note of August 1, 2007, asked the IACHR for a one-month extension to submit their observations. The IACHR granted the extension requested on August 14, 2007. By note of September 14, 2007, the petitioners submitted their observations on the information submitted by the Bolivian State, which were transmitted to the State on September 25, 2007; it was given one month to submit observations.

20. As of the date of this report, the State had not answered the petition.

PROCESSING OF THE PRECAUTIONARY MEASURES

21. By note of December 30, 1994, the petitioners asked the IACHR to adopt precautionary measures on behalf of Marcela Porco, to protect her from the alleged inhuman and degrading treatment to which she was subjected during the time she was held at the Palmasola jail, in conjunction with the impediment to filing a writ of *habeas corpus* due to the express prohibition, in Law 1008, on extending the conditional release (*libertad provisional*) to persons detained under that law.

22. On January 6, 1995, the Commission adopted precautionary measures on behalf of the victim.

23. On January 25, 1995, the petitioners asked the IACHR for a hearing with the plenary of the Commission for the purpose of asking the Court to adopt provisional measures on behalf of Marcela Porco, in view of the fact that she was detained, in subhuman conditions and without the medical treatment she needed, as she suffered from an acute case of schizophrenia. On February 15, 1995, the petitioners requested provisional measures, arguing that even though the

IACHR had granted precautionary measures, these had not produced any concrete result, for they argue that the Government of Bolivia was not in a position to offer security and specialized medical treatment such as that which the victim required. As follow-up to the precautionary measures issued by the IACHR, Marcela Porco was declared not guilty by reason of insanity by judgment of February 22, 1995, and on May 18, 1995, the Supreme Court ratified that she was not guilty by reason of insanity. Accordingly, Marcela Porco was repatriated to the Argentine Republic in June 1995.

III. THE PARTIES' POSITIONS

A. The petitioners

24. The petitioners argue that Marcela Alejandra Porco, an Argentine citizen, was detained on June 2, 1994, pursuant to the Law on the Regime for Coca and Controlled Substances (hereinafter "Law 1008"). Subsequently, they indicated that she was released on June 7, 1995, and remained deprived of her liberty for approximately one year and subjected to a special proceeding regulated by Law 1008.² The petitioners argue that Marcela Alejandra Porco had a history of acute and chronic schizophrenic psychosis and, due to the conditions of her detention, she suffered a serious deterioration in her health caused by various actions taken by the Bolivian State, which are detailed next.

25. The petitioners argue that several irregularities were committed by the Bolivian State against Marcela Alejandra Porco, including: (1) failure to provide timely medical treatment to Marcela Porco while she was detained, which accentuated her physical and mental deterioration; (2) lack of guarantees for her security, since, they argue, she was a victim of sexual violence while in the custody of the State; and (3) being subjected to a judicial proceeding under Law 1008, a law that they consider has several provisions that violate human rights.

26. The petitioners allege that Marcela Porco was detained on June 2, 1994, by the Bolivian authorities (Fuerza especial para la lucha contra el narcotráfico, hereinafter "FELCN"), at the Viru Viru airport of Santa Cruz, Bolivia, on charges of transporting cocaine, set forth in Article 55 of Law 1008. They argue that Marcela Porco made a statement for the first time to the police authorities on June 7, 1994, and in that statement she said that she suffered from a serious mental illness and that she needed to be supplied with her medications.

27. They state that after her detention she was transferred to the Women's Prison, Palmasola, Santa Cruz, also known as the "hell of Palmasola," without access to the medical treatment she needed because of her illness. They allege that the name "hell" is not capricious, and that the case of Marcela Porco is one example. They argue that the female sector of the Palmasola prison housed both convicts and defendants, in violation of the American Convention and the Standard Minimum Rules for the Treatment of Prisoners of the United Nations. They argue that Marcela Porco was locked in a dark cell, in solitary confinement, merely because of her mental illness, and without the proper safeguards. They argue that her place of confinement was a small space delimited by a pair of curtains, through which water ran, which is the reason why she was given a bed frame to keep the water from wetting the mattress on which she slept. They allege that it happened after a strike by her fellow female prisoners motivated by the wretched conditions in which Marcela Porco was being held.

² The petitioners cite: Law 1008, Law on the Regime of Coca and Controlled Substances of Bolivia, of 1988, which regulates the coca regime, alternative development, and the substitution of coca crops, controlled substances, prohibition, and control, the crimes the law punishes and the penalties, the application and trial, the judicial police investigation, debates and judgments, and the agencies competent in the matters addressed by the law.

28. The petitioners adduce several irregular practices in the prison that affected all the prisoners. They allege, for example, that those who entered the prison were forced to pay rent or build themselves a cell after paying US\$ 300. They argue that food had to be brought by relatives or the inmates had to pay for it. They adduce that according to the testimony of visitors "the internal security of the prison is run by inmates called kingpins." They argue that these subhuman conditions accelerated the deterioration in Marcela Porco's mental health, which reached such an advanced state that her father found her on July 15, 1994 lying naked in a section called "the boat" (*"el bote"*) in wastewater, with worms on her feet and in her vagina; completely lost and delirious, suffering serious malnutrition; her father had to spoon-feed her.

29. The petitioners also argue that the guarantees established at Articles 8 and 25 of the American Convention were not respected. They allege that Law 1008 contains several violations, which render the rights and freedoms set forth in the American Convention ineffective. Among the violations alleged they adduce that there was a grave disparity between the legal term of three months established in Law 1008 for processing the matter and the time of approximately one year that the victim was detained. In addition, they argue that Article 121 of Law 1008 presumes that persons accused are guilty, since that article requires that the prosecutor appeal acquittals so that such cases go a second judicial instance. Meanwhile, a detainee who is acquitted must remain in prison, because the law does not allow his or her provisional release. They argue that such indefinite prolongation resulted in damages to the mental and physical health of Marcela Porco.

30. The petitioners argue that Law 1008 has not offered adequate time or means for the preparation of her defense, and that Marcela Porco did not have access to a suitable remedy to protect her rights. They adduce that the defendants have three days to present their defense, the term cannot be extended, and the order initiating the trial (*auto de apertura del proceso*) does not allow for any appeal, among others. In addition, they argue that under Law 1008 the investigation was conducted by non-judicial officers of the Special Force to Fight Drug Trafficking (*Fuerza Especial de Lucha contra el Narcotráfico*), who did not meet the requirements of independence and impartiality demanded of judges or courts under international standards.

31. The petitioners allege that Marcela Porco was barred from being granted parole for the purpose of undergoing medical treatment. The petitioners argue that Marcela Porco's medical diagnosis, according to a report issued by the authorities of the hospital Clínica San Agustín S.R.L. in Argentina, where she received psychiatric treatment, showed that Marcela Porco suffered an "acute psychosis with characteristics of exotoxicity, schizophrenic psychosis, chronic delirious psychosis." They adduce that even though the authorities knew about this information, and there were warnings made by other specialists, she was not offered appropriate treatment for her condition. They mention one psychological report in the record that states that "her psychopathological picture worsened considerably after being confined in these two places" (referring to the Conchocorito prison and the prison known as the "boat").³

32. The petitioners state that Marcela Porco's father believes she may have been sexually abused by guards while detained, based on comments that he received from other female prisoners. They also argue that the State itself recognized that Marcela Porco had sexual relations with another in-patient at a mental health center. They allege that such recognition shows the State's tolerance for and failure to prevent such acts. They also adduce that such an act constitutes sexual violence due to the mental illness that Marcela Porco was suffering.

³ The petitioners make reference to the Official Report prepared by Ms. Katya E. Talavera Pinto, Psychologist, Santa Cruz, December 22, 1994, which is at folio 175 of the record.

33. They argue that the judges of the First Court of Controlled Substances who conducted the trial of Marcela Porco allowed her to receive psychiatric treatment in prison, but did not allow her transfer to an adequate place for her treatment. This was pursuant to Article 74 of Law 1008, which prohibits medical admissions outside of prisons for defendants in pre-trial detention. They also state that since the prison lacked a medical service, Marcela Porco did not receive treatment. They argue that Amnesty International visited Marcela Porco in the prison and confirmed that she was in "deplorable" health conditions, and that she would die soon if she didn't receive attention. The petitioners allege that the lack of security guarantees allowed for the violation of Marcela Porco's right to physical and mental integrity, and to the recognition of her dignity.

34. The petitioners argue that on January 14, 1995, the Bolivian court ordered Marcela Porco to be committed to the Mental Health Center of Santa Cruz (Centro de Salud Mental de Santa Cruz) for a period of seven days in order to perform the necessary medical exams to establish her mental condition. They argue that the court demanded two civilian escorts and ruled that the costs for her stay at the health center would be charged to the victim's family. They also allege that on January 14, 1995, the director of the psychiatric institution refused to receive Marcela Porco, alleging that he could not guarantee her committal due to the lack of adequate infrastructure. Nonetheless, they adduce that the court demanded that she be admitted at that health care facility even though it was not a suitable for receiving the treatment required.

35. The petitioners argue that on January 23, 1995, the medical expert in the case determined that the victim was mentally alienated and ordered that she undergo prolonged treatment with commission of no less than 60 days. The petitioners allege that on January 23 the court ruled that Marcela Porco should continue to be committed, under surveillance, and ordered that the expert report weekly on how she was evolving.

36. Finally, the petitioners allege that even though Marcela Porco was released and repatriated to the Argentine Republic, the Bolivian State has not made reparations to the victim for the violations of her rights and guarantees perpetrated during the proceeding, nor has it followed through on the duty to investigate, sanction, and make reparation in keeping with the provisions of the American Convention. The petitioners adduce that the failure to provide timely treatment and the abuses suffered in prison produced permanent damage to the health of Marcela Porco.

37. As for exhaustion of domestic remedies, the petitioners allege that the existence of domestic remedies cannot be merely enunciated without any analysis as to the adequacy and effectiveness of the remedies in the face of a given situation. They argue that the State mentions habeas corpus, constitutional *amparo*, and criminal remedies as mechanisms provided for in Bolivian legislation to protect and guarantee rights, but does not mention how these remedies could have resolved the situation alleged by the petitioners. The petitioners argue that the prohibition on the benefit of provisional release provided for at Article 109 of Law 1008 made it impossible for her to pursue the remedies of constitutional *amparo* and habeas corpus in this specific case. They indicate that the article provides: "In trials where controlled substances are at issue, the benefit of provisional release shall not apply."

B. The State

38. The State argues that Marcela Porco was detained at the Viru Viru airport in the city of Santa Cruz de la Sierra, when 2,970 grams of cocaine hydrochloride were found on her during a routine check. In addition, it argues that the investigations by the Special Force to Fight Drug Trafficking (FELCN) as well as the judicial proceedings and the courts were set forth in Law 1008. This law stipulates a penalty of 8 to 12 years in prison and 1,000 to 500 days fine for the crime of transport.

39. The State argues that when Marcela Porco was detained and subsequently declared before the police, she said she was unaware that there was cocaine in her suitcase, and informed them of her psychotherapeutic treatment. Nonetheless, it argues that persons engaged in the illegal trafficking of controlled substances always deny knowing that the drugs found were there, and seek some excuse to be released. The State indicates that the police assigned to the case testified that Marcela Porco appeared to be normal when she gave her statement to the FELCN.

40. It argues that by means of a brief, a request was made to have Marcela Porco admitted for medical treatment and a medical certificate was attached. Nonetheless, considering that Article 74 of Law 1008 prohibited commission for medical treatment outside of prison quarters, the State argues that the First District Court for Controlled Substances rejected that petition and ordered that she was to be given medical care in prison, and ordered the adaptation of a room for her to receive treatment.

41. The State argues that in response to a request by the bar association, the First District Court for Controlled Substances ordered the director of the "Benito Manni" Psychiatric Center to report on Marcela Porco's health conditions; he suggested she be admitted into a specialized center.

42. The State argues that regarding the protection for Marcela Porco's physical and psychological integrity, on September 12, 1994, the authorities ordered the commission of Marcela Porco to a mental health center to receive the appropriate treatment. It alleges that the physicians at the psychiatric center in charge of the supervision of Marcela Porco informed the court that she did not show any psychotic symptoms; she was diagnosed with simulation, thus there was no justification for her stay in that center. As a result, the State indicates that on September 23, 1994, Marcela Porco was transferred to the prison.

43. Subsequently, the State alleges that in January 1995, the judicial authority ordered specialized treatment and an expert report. It states that as a result of that order and the report by a psychiatrist who served as adjudicator, as of January 23, 1995, Marcela Porco was committed to a mental health center, where she remained until she was released. In addition, the State indicates that the expenditures arising from her committal and treatment, and for her sustenance, were covered by the State.

44. With respect to the conditions of detention, the State indicates that the Commission of the Ministry of Justice carried out a surprise visit to the Palmasola prison on January 14, 1995, where Marcela Porco was being imprisoned. It argues that on that visit it was found that part of the dining hall had been set aside as her cell, which was surrounded by curtains for her privacy. It also indicates that Marcela Porco was found in conditions that could not be improved upon, and that there was no indication of any type of abuse, neglect in her clothing, malnutrition, or unclean conditions.

45. Regarding the allegations of sexual abuse, the State argues that when the Commission of the Ministry of Justice carried out a surprise visit to the Palmasola prison, the other female prisoners did not report at any time that Marcela Porco was the victim of any abuse.

46. It also argues that the statements by witnesses from the psychiatric center where Marcela Porco had been committed, establish that she voluntarily had sexual relations with a man who answered to the name of Alejandro Tineo, who was at that same center. It further states that when she was surprised while having such relations, she stated that Mr. Tineo was her boyfriend and that she could have such relations.

47. The State argues that it provided legal assistance for the defense of Marcela Porco at no charge, and that such assistance succeeded in having her admitted to a private mental health center, and that she was declared in a court judgment not guilty by reason of insanity (“inimputable”).

48. On the allegedly drastic nature of Law 1008, the State indicates that by Law 1685 of February 2, 1996, the Law on Bond against Delays in Criminal Justice was issued, Law 1008 was amended, by establishing the possibility to grant parole when a series of procedures are pursued on behalf of the defendant. Regarding the Palmasola prison, the State argues that since 1994 the prison has undergone remodeling, and has a new infrastructure that allows for personal hygiene, medical services, and better living conditions for the inmates.

49. The State argues that the petition is inadmissible because there is no clear identification of the circumstances in which measures were taken to proceed against the persons allegedly responsible. In addition, it argues that there was no proof of indicia of guilt, and particularly that no complaints were lodged indicating the persons, circumstances, or acts consummated, nor was there any evidence of the existence of the alleged perpetrator or perpetrators of the action incriminated. Therefore, there is no legal definition of a crime or indictability, accordingly the State cannot be attributed of criminal liability for those situations.

50. In terms of the procedural timeframe, the State argues that the petitioner filed her application with the IACHR on May 14, 1999, whereas Marcela arrived in Argentina on June 9, 1995. It states that this is evidence that the application was presented after the time for doing so had lapsed.

51. As for the admissibility of the petition, the State holds that the petitioners have not met the requirements set forth in Articles 46 and 47 of the American Convention, as there is no knowledge, nor has it been proven, that the complainants had exhausted domestic remedies, nor that they had complied with the procedural time frames. To the contrary, it states that the complaint was not lodged within the time provided for by the Convention. Among the domestic remedies not used by the petitioners, the State points to habeas corpus, constitutional *amparo*, and criminal law remedies. Regarding the criminal law remedies, the State argues that the petitioners have not had recourse to the criminal law authorities to set in motion an investigation into the conduct alleged by the petitioners that is defined as criminal by the domestic legal order, such as the sexual violation. It holds that there is no information that they had recourse to domestic remedies. In view of all of the foregoing, the State asks that the complaint be found inadmissible.

IV. LEGAL ANALYSIS

A. Competence *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci*

52. The petitioners are authorized by Article 44 of the Convention to submit complaints to the IACHR. The alleged victim in this case was under the jurisdiction of the Bolivian State on the date of the facts adduced. For its part, the Bolivian State ratified the American Convention on July 19, 1979. Accordingly, the Commission is competent *ratione personae* to examine the petition.

53. The Commission is competent *ratione loci* to consider the petition, inasmuch as it alleges violations of rights protected by the American Convention said to have taken place in the territory of a state party to said treaty.

54. In addition, the Commission is competent *ratione temporis* insofar as the obligation to respect and ensure the rights protected by the American Convention had already entered into

force for the State on the date on which the facts stated in the petition are alleged to have taken place.

55. Finally, the Commission is competent *ratione materiae*, because the petition alleged violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

56. Article 46(1)(a) of the American Convention provides that for a petition submitted to the Inter-American Commission to be admissible, pursuant to Article 44 of the Convention, one must have pursued and exhausted domestic remedies, in accordance with generally recognized principles of international law. The purpose of this requirement is to enable national authorities to learn of the alleged violation of a protected right, and, when appropriate, have an opportunity to resolve it before it is heard by an international body.

57. The prior exhaustion requirement applies when remedies are available in the domestic system that are adequate and effective to remedy the alleged violation. In this regard, Article 46(2) specifies that the requirement does not apply when there is no due process in the domestic legislation to protect the right in question; or if the alleged victim did not have access to the domestic remedies; or if there is an unjustified delay in the decision on those remedies. As indicated in Article 31 of the Commission's Rules of Procedure, the State bears the burden of demonstrating that the domestic remedies have not been exhausted, unless it can be clearly deduced from the record.

58. In this regard, the petitioners have invoked the exception to the exhaustion of domestic remedies rule (Article 46(2)(b)). They note that Marcela Porco was impeded from accessing domestic remedies due to the existence and application of Law 1008 of July 19, 1988, which directly annulled and therefore rendered ineffective the use of remedies to protect her rights. Specifically, they argue that the prohibition of the benefit of provisional release provided for in Article 109 of Law 1008, which was applied to the case of Marcela Porco, made it impossible for her to pursue any *habeas corpus* or *amparo* remedy, since under that legal provision it would have been declared unfounded. Finally, they argue that as the remedies are inadequate and ineffective, the petitioners did not have any obligation to exhaust them.

59. The Inter-American Court has indicated that a state that alleges non-exhaustion must indicate the domestic remedies that remain to be exhausted, and provide evidence of their effectiveness.⁴ The State alleges that there is no evidence or proof that the petitioners had exhausted domestic remedies. Among the domestic remedies that were not used by the petitioners, the State notes the *habeas corpus*, constitutional *amparo*, and criminal law remedies. As regards the criminal law remedies, the State argues that the petitioners have not had recourse to criminal law authorities to investigate the conduct alleged by the petitioners that is classified as criminal by the domestic legal order, such as sexual violation. Based on the foregoing, it asks that the petition be found inadmissible.

⁴ IACHR, Report No. 32/05, Petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral and other persons affected by HIV/AIDS, Guatemala, March 7, 2005, para. 33-35; I/A Court H.R., *Case of the Mayagna (Sumo) Community of Awajitjini. Preliminary Objections*, *supra* note 3, para. 53; *Durand and Ugarte Case. Preliminary Objections*, Judgment of May 28, 1999. Series C No. 50, para. 33; and I/A Court H.R., *Cantoral Benavides Case. Preliminary Objections*, Judgment of September 3, 1998. Series C No. 40, para. 31.

60. As regards the domestic remedies adduced by the State, the IACHR considers that the State has not provided the Commission with any specific information as to how the remedies invoked would have helped resolve the situation posed. It does not suffice for the State to simply indicate the failure to exhaust domestic remedies generally, because the application and effectiveness thereof will depend on the formal or substantial requirements of the domestic law and its consistency, and the possibility of using them effectively in a specific case. As the Inter-American Court has indicated:

Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.⁵

A remedy must also be effective --that is, capable of producing the result for which it was designed.⁶

61. In addition, specifically for the remedies of habeas corpus and constitutional *amparo*, the State has not indicated how those remedies could be applied given Article 109 of Law 1008, which states: "In proceedings on controlled substances, the benefit of provisional release does not apply." In light of that article, the IACHR considers that none of the procedures indicated by the State had reasonable prospects for success, thus they would not be effective in accordance with the general principles of international law.

62. Given that the main claim presented by the petitioners is related to the detention in presumably inadequate conditions and allegedly without "the necessary medical care," the Commission considers that the suitable remedy would have been the recourse of *habeas corpus*. It also considers that the law in force at that time did not offer the possibility of access to this fundamental guarantee. Considering the foregoing, the Commission concludes in this case that the petitioners are excused from complying with the requirement of exhaustion of domestic remedies, in keeping with Article 46(2).

63. It only remains to be stated that the invocation of the exceptions to the rule of exhaustion of domestic remedies rule set forth in Article 46(2) of the Convention are closely linked to the determination of possible violations of certain rights enshrined therein, such as the guarantees of access to justice. Nonetheless, Article 46(2), by its nature and purpose, is a norm with autonomous content vis-à-vis the substantive norms of the Convention. Therefore, the determination of whether the exceptions to the prior exhaustion rule provided for in that provision are applicable to the instant case should be handled prior to, and separately from the analysis of the merits of the matter, for it requires a different standard of appreciation from that used to determine the violation of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects that have prevented the exhaustion of domestic remedies in the instant case will be analyzed, as pertinent, in the report adopted by the Commission on the merits of the dispute, in order to determine violations of the American Convention.

⁵ I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 64.

⁶ I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 66.

2. Time period for submission of the petition

64. As provided for in Article 46(1)(b) of the Convention, for a petition to be admitted, it must be submitted within six months of the date on which the complaining party was notified of the final decision in the domestic courts. The six-months rule ensures certainty and legal stability once a decision has been adopted.

65. Pursuant to Article 32(2) of the IACHR's Rules of Procedure, in those cases in which exceptions to the prior exhaustion requirement apply, the petition must be submitted within a reasonable time, in the Commission's view. According to this article, in analyzing this question, the Commission "shall consider the date on which the alleged violation of rights occurred and the circumstances of each specific case."

66. In the present case, the Commission has established that the exception to the prior exhaustion rule set out at Article 46(2) applies, and therefore it must evaluate whether the petition was submitted in a reasonable time based on the specific circumstances of the situation submitted for its consideration. In this respect, the IACHR observes that the original petition was submitted on December 30, 1994. The incidents alleged in the petition began on June 2, 1994. Therefore, the IACHR considers that the petition was submitted in a reasonable time.

3. Duplicity of procedures and *res judicata*

67. Article 46(1)(c) of the Convention provides that the admission of petitions is subject to the requirement that the matter "is not pending in another international proceeding for settlement"; and Article 47(d) of the Convention stipulates that the Commission will not admit a petition that is substantially the same as a prior petition or communication already examined by the Commission or by another international organization. In the present case, the parties have not claimed to the existence of either of these two grounds of inadmissibility, nor can they be deduced from the record.

4. Colorable Claim

68. For purposes of admissibility, the Commission must decide whether the petition states facts that tend to establish a violation, as stipulated by Article 47(b) of the American Convention, if the petition is "manifestly groundless" or "obviously out of order," as per Article 47(c). The standard of appreciation of these rules is different from that required to decide on the merits of a complaint. The Commission must make a *prima facie* evaluation to examine whether the complaint sets forth facts that tend to establish a violation of a right guaranteed by the Convention and not to establish the existence of a violation. Such an examination is a summary analysis that does not imply any prejudice or preliminary opinion on the merits.⁷

69. The Commission considers that if the facts set forth are proven – regarding alleged irregularities in the trial, as well as the alleged deficiencies in several provisions of Law 1008 under which Marcela Porco was tried, and the alleged lack of judicial guarantees and judicial protection –, they could tend to establish a possible violation of the rights enshrined in Articles 7, 8(1), and 25 of the American Convention in relation to the obligations established Articles 1(1) and 2 of the same instrument.

⁷ See IACHR, Report No. 128/01, Case No. 12,367, Herrera and Vargas ("La Nación"), Costa Rica, December 3, 2001, para. 50; Report No. 4/04, Petition 12,324, Rubén Luis Godoy, Argentina, February 24, 2004, para. 43; and Report No. 29/07, Petition 712-03, Elena Tellez Blanco, Costa Rica, April 26, 2007, para. 58.

70. In addition, it considers that the alleged mistreatment and sexual abuse suffered during the time when she was in State custody, and the failure of the State to provide adequate health treatment could tend to establish a possible violation of Articles 5(1) and 11(1) of the American Convention on Human Rights, in connection with Articles 1(1) and 2 of said instrument.

V. CONCLUSION

71. Based on the considerations of fact and law herein made, and without prejudging on the merits, the Inter-American Commission concludes that the instant case satisfies the requirements of admissibility set forth in Articles 46 and 47 of the American Convention, and, accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To find this petition admissible with regard to the alleged violations of the rights recognized in Articles 5(1), 7, 8(1), 11(1), and 25 of the American Convention in relation to Articles 1(1) and 2 of that same instrument.
2. To notify this report to the State and the petitioners.
3. To publish this decision and include it in its Annual Report.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 4th day of March, 2008. (Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice-Chairwoman; Felipe González Morales, Second Vice-Chairman; Sir Clare K. Roberts, Florentín Meléndez, Paulo Sérgio Pinheiro, and Víctor E. Abramovich, members of the Commission.