

**REPORT N° 42/07**  
PETITION 156-05  
ADMISSIBILITY  
LUIS WILLIAMS POLLO RIVERA  
PERU  
July 23, 2007

**I. SUMMARY**

1. On February 28, 2005, the Inter-American Commission on Human Rights (hereinafter "the Commission," "the Inter-American Commission," or "the IACHR") received a petition filed by Carolina Loayza Tamayo (hereinafter "the petitioner") and by Luis Williams Pollo Rivera, acting on his own behalf, (hereinafter "the alleged victim" and/or "the petitioner") claiming the international responsibility of the Republic of Peru (hereinafter "Peru," "the State" or "the Peruvian State") for the prosecution and subsequent conviction for a ten-year term of Mr. Luis Williams Pollo Rivera, a physician, on charges of having performed medical procedures on behalf of members of a subversive organization. On April 12, 2005, the Board of Directors of the Peruvian Social Security Medical Association was accredited as a co-petitioner in this complaint before the IACHR.

2. The petitioner claims that the Peruvian State is responsible for violating the rights set forth in Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), and 9 (principle of legality) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in conjunction with the violation of the obligations set out in Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) of such international instrument. Regarding admissibility requirements, the petitioner states that the judgment issued by the Permanent Chamber of the Supreme Court of Justice, notified on February 4, 2005, upholding the conviction of 10 years in prison handed down by the National Chamber for Terrorism Crimes in a judgment of December 22, 2004, exhausted the domestic remedies and that the petition was filed within the six-month deadline.

3. In turn, as of the drafting of this Report, the Peruvian State has refrained from submitting the comments it deems relevant in connection with the petitioners' complaint.

4. In this report, the Commission concludes that the petition is admissible regarding the alleged violations to humane treatment, personal liberty, fair trial, the principle of legality and the right to judicial protection set forth in Articles 5, 7, 8, 9 and 25 of the American Convention, respectively, and also declares it admissible with respect to Articles 1(1) and 2 of such international instrument, in compliance with the requirements set out in Articles 46 and 47 thereof; it further decides to notify the parties of this decision and to publish this report in its Annual Report.

**II. PROCESSING BY THE COMMISSION**

**1. Processing of the petition**

5. The petition was filed with the Commission on February 28, 2005, by means of a letter dated February 14 of that year. On March 22, 2005, the Commission forwarded the relevant parts of the complaint to the Peruvian State and gave it a period of two months to submit any comments it deemed pertinent.

6. On March 1, 2005, the IACHR received additional information provided by the petitioner. On April 12, 2005, a communication was received from the Board of Directors of the Peruvian Social Security Medical Association, accrediting the association as co-petitioner in this complaint.

7. By means of a letter dated May 27, 2005, the State requested an extension of the deadline for submitting its comments; this was granted by the IACHR on June 16, 2005, and due notice was sent to the petitioner.

8. By means of a letter dated August 2, 2005, the petitioner submitted to the IACHR documents requesting, pursuant to Article 30(3) of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter "the Rules of Procedure"), that the facts described in petition No. 156/05 be taken as proven, since more than three months had passed since the Commission asked the Peruvian State to submit its comments. Furthermore, the petitioner requested that an admissibility report be adopted, without prejudice to the right of the parties to submit additional comments. The IACHR acknowledged receipt of such communication on August 16, 2005.

9. On February 6, 2006, the Commission reiterated the request for comments on the petition that had been conveyed to the Peruvian State on March 22, 2005, and also informed the petitioners of that communication.

10. On March 27, 2006, the Inter-American Commission received additional information submitted by the petitioner, and on the following March 29, the IACHR acknowledged receipt of that information and forwarded it to the Peruvian State.

11. By means of a letter dated May 2, 2006, received by the Executive Secretariat on May 19, 2006, the petitioner requested once more the enforcement of Article 30 of the Rules of Procedure, which would consequently rule that the facts described in petition No. 156-05 be considered as proven and furthermore apply Article 37(3) of the Rules of Procedure, whereby the question of the case's admissibility would be deferred until the merits were debated and discussed.

12. On October 12, 2006, the Commission received an *amicus curiae* brief filed by the Association of Latin American Students (LALSA), Cardozo Students for Human Rights (CSHR), and members of the Association of Students for the Public Interest (PILSA), intended to assist with the petition. On November 15, 2006, the Commission acknowledged receipt of this document.

13. By means of a letter dated December 4, 2006, the National Council of the Medical College of Peru submitted additional information regarding Mr. Luis Williams Pollo Rivera's situation.

14. On November 30, 2006, and March 7, 2007, the IACHR received a document sent by the petitioner, repeating the request made in the communication of May 2, 2006.

## **2. Processing of precautionary measures**

15. On July 27, 2005, the IACHR granted precautionary measures on behalf of Mr. Luis Williams Pollo Rivera, who, at the time the request for precautionary measures was made, was being held at the Miguel Castro Castro prison. The information submitted by the petitioners indicated that Mr. Luis Williams Pollo Rivera suffers from diabetes and kidney disease, and that adequate medical attention was not provided at that detention center. Given the risks facing the beneficiary, the Commission asked the Peruvian Government to adopt the measures necessary to provide Mr. Luis Williams Pollo Rivera with adequate medical attention for as long as he remained in the custody of the prison authorities.

16. By means of a letter dated May 2, 2007, the Commission decided to renew the precautionary measures in the same terms in which they were originally given, on account of official medical information received certifying the serious condition of Mr. Pollo Rivera's health and the consequent need for specialized medical treatment.

## **III. POSITIONS OF THE PARTIES**

### **A. Petitioner (alleged victim acting on his own behalf)**

17. The alleged victim, Luis Williams Pollo Rivera, a physician specializing in traumatology and orthopedics, states that he was arrested, prosecuted on two occasions, and sentenced to a ten-year prison term on charges of having performed medical procedures on members of the terrorist organization known as Communist Party of Peru – Shining Path (“PCP-SL” or “Sendero Luminoso”). Specifically, the petitioner reports that he was arrested for the first time on November 6, 1992,<sup>1</sup> by police officers of the National Anti-Terrorism Directorate (DINCOTE) following statements made during the criminal prosecution of a member of the Shining Path, who claimed that Mr. Luis Williams Pollo Rivera had amputated his right leg. He states that at the time of his arrest, he was working as a trauma service doctor at the Dos de Mayo state hospital.

18. He claims that as a result of those statements, he was tried and sentenced to life imprisonment for the crime of treason against the homeland by masked (“faceless”) judges presiding over military courts. He filed a review remedy against that judgment, which was declared admissible by the military courts; consequently, the case was referred to the regular courts in 1993 and, under a ruling handed down on November 7, 1994 by the Specialized Chamber for Terrorist Crimes, he was acquitted of the charges. This ruling was upheld by the Supreme Court on November 4, 1996, which ruled that the lower court’s judgment was not subject to annulment.

19. The petitioner states that on December 16, 1994, the Ministry of Health authorized the alleged victim’s return to the Dos de Mayo Hospital, where he was employed prior to his January 1991 arrest.<sup>2</sup>

20. The petitioner claims that during his first arrest he was taken to the offices of the National Anti-Terrorism Directorate (DINCOTE) in downtown Lima where he was interrogated by the police. He states that he was tortured and his spine was injured, preventing him from walking and forcing him to use a wheelchair because of the intense pain and lack of strength in his legs.

21. The petitioner reports that his second arrest took place on August 26, 2003, and was carried out by members of the National Intelligence Directorate (DIRIN), in the city of Andahuaylas, where he was working at the ESSALUD Hospital. He reports that he was arrested because he was once more being investigated for allegedly collaborating with the PCP-SL organization by providing medical attention to some of its members between 1989 and 1991, as claimed by statements made by a “repentant” and other “collaborators.”

22. Mr. Pollo Rivera says that the order for his arrest and his subsequent prosecution arose from the criminal trial of a number of presumed members of that terrorist organization (case file No. 113-95). In those proceedings, a judgment was handed down on November 21, 1996, by a “faceless” judge, ordering “the forwarding of certified copies of the relevant trial documents to the office of the Provincial Prosecutor, for criminal charges to be brought against William Pollo Rivera for crimes against law and order – terrorism – (acts of collaboration), to the detriment of the State.”<sup>3</sup> The petitioner states that the Provincial Prosecutor subsequently filed charges against Mr. Luis Williams Pollo Rivera as an alleged collaborator in the health sector of “Popular Socorro of Peru, Communist Party of Peru, Shining Path,” accusing him of collaborating in the crime of terrorism.

23. As a result of his trial, Mr. Pollo Rivera states that the National Terrorism Chamber convicted him on February 24, 2004, for crimes against law and order – terrorism, in the manner of collaboration, and sentenced him to ten years in prison and required him to pay 1000 nuevos

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<sup>1</sup> At the time of his first arrest, the petitioner reports that guarantees had been suspended in the city of Lima and that this situation continued until 2003, under the provisions of Decree Law 24150, in force since June 8, 1985, and Legislative Decree No. 470, which amended Article 5 of D.L. No. 24150 to regulate relations between the Military Political Command and various authorities under its jurisdiction in the areas where emergencies had been declared (November 8, 1991). He also reports that the legislation governing the crime of terrorism was set out in Decree Law No. 24475.

<sup>2</sup> Mr. Pollo Rivera cites Director’s Resolution No. 0946-94/D/UP of December 16, 1994, authorizing the reincorporation of Mr. Luis Williams Pollo Rivera into the public administration as of that date, as a level 3 physician in post No. A-010 at the Dos de Mayo National Hospital.

<sup>3</sup> The original complaint includes, in its annexes, the judgment handed down by the Special Criminal Chamber of the Lima Superior Court of Justice; case file No. 113-95 of November 21, 1996, p. 5164.

soles (Peruvian currency) as civil damages. He filed a special annulment remedy against this conviction in which, in spite of contradictory statements from witnesses who did not incriminate him, the Permanent Criminal Chamber of the Supreme Court, in a judgment of December 22, 2004, dismissed those statements made by witnesses that raised doubts about his having committed the crime of collaboration in terrorist acts,<sup>4</sup> paying attention solely to the testimony made against him in order to secure his conviction. He reports that this judgment upheld the conviction of the ten-year prison sentence imposed by National Terrorism Chamber but annulled the fine of 1000 nuevos soles in damages in order to satisfy the principle of favorability in criminal law, since pursuant to the criminal legislation in force at the time the punishable action was committed, an additional fine was not established. The petitioner reports that subsequently, in a judgment of January 24, 2005, the Specialized National Criminal Chamber for terrorism crimes ordered that the writ of execution be issued and that the alleged victim be notified, which took place on February 4, 2005.

24. In his complaint, the petitioner stresses that despite the police statements given by certain witnesses during his criminal trial, the Permanent Criminal Chamber of the Supreme Court of Justice maintained that Mr. Luis Williams Pollo Rivera “rendered support to Shining Path through his medical knowledge and, essentially, undertook a series of tasks for the Health Sector of Popular Socorro in order to promote the activities and goals of the terrorist organization (providing food and medical supplies).”<sup>5</sup>

25. The petitioner further points the Peruvian State’s failure to comply with the terms of the judgment issued on November 18, 2004 by the Inter-American Court of Human Rights in the case of *De La Cruz Flores v. Peru*, regarding the international prohibition of criminalizing medical acts and of criminalizing the failure of attending physicians to report the criminal actions of their patients.<sup>6</sup> In connection with this, the petitioner claims that the Criminal Chamber of the Supreme Court distorted the interpretation of this jurisprudence to convict him by stating that: “The charges against the defendant Polo Rivera or Pollo Rivera are not centered on the fact that he *circumstantially* and *in isolation* attended to patients whose circumstances indicated they were involved in terrorism crimes, much less for not having reported them – facts which, incidentally, he categorically denies; rather, they center on the fact that he was associated or related, as a clandestine collaborator, with the reasoning behind the actions of the terrorist organization “Sendero Luminoso,” taken in pursuit of its ends. In his position, the accused assisted and intervened in the reiterated, organized, and voluntary tasks of supporting Shining Path’s sick and wounded by rendering medical assistance – the analysis of which cannot be conducted in isolation, but rather in light of the series of actions specifically carried out and proven – and also by providing drugs and other forms of care to the organization’s sick and wounded – and with whom he was put in contact by the organization, or about whose condition and location he was informed by them, they did not come to him on an emergency basis and for the sole purpose of medical attention – and by maintaining the support organization structured for that purpose. Indeed, with that aim, as already noted, he tried to convince one female member not to leave the group. In those circumstances, the actions of the accused were of course related to the aims of the terrorist organization – keeping its members operational so they could carry out terrorist acts – based on a functional adaptation to its needs and thereby significantly favoring the actions of “Shining Path.”<sup>7</sup> The petitioner notes that the Criminal Chamber of the Supreme Court also stated that this “complemented the definition of the crime of terrorist collaboration and established that the crime was not the act of practicing medicine, without that hindering the analysis of those who knowingly and voluntarily assist in various tasks regarding the health apparatus of a terrorist organization.”<sup>8</sup>

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<sup>4</sup> The petitioner cites the contradictions in the testimony he believes exist in the judgment of the Lima Supreme Court of Justice, at pages 35 and 36.

<sup>5</sup> The petitioner refers to the fifth “whereas” clause of the judgment handed down by the Supreme Court’s Criminal Chamber on December 22, 2004.

<sup>6</sup> I/A Court H.R., *Case of María Teresa de la Cruz Flores*. Judgment of November 18, 2004, Series C No. 115, paragraph 102.

<sup>7</sup> The petitioner refers to the seventh “whereas” clause of the judgment handed down by the Supreme Court of Justice on December 22, 2004.

<sup>8</sup> *Ibid.*, ninth “whereas” clause.

26. The petitioner also claims that the principles of due process, *res judicata*, legality, and statutory limitations were ignored by the Peruvian State.

27. With reference to the principle of due process, the complainant claims to have challenged several police statements at his second criminal trial, on the grounds that the statements were taken with *ex officio* lawyers appointed by police authorities. In this connection, the petitioner pointed out that the Constitutional Court had determined the unconstitutionality of Article 12(f) of Decree Law No. 25475, which stipulated that the police authorities were responsible for appointing *ex officio* counsel; and that, consequently, statements given under such circumstances were to be held null and void. However, the National Terrorism Chamber ruled that those statements “were given in accordance with the formalities of Articles 62 and 72 of the Code of Criminal Procedure; in other words, with the presence of the prosecutor and of the defense counsel, and so cannot be ruled invalid or false.”<sup>9</sup>

28. With respect to the principle of *res judicata*, the petitioner claims that he was acquitted in his first criminal trial for the crime of collaboration with terrorism, but that the National Terrorism Chamber of Lima, ignoring the earlier decision, in its judgment of February 24, 2004 sentenced him to a ten-year prison term and to a payment of 1000 nuevos soles to the Peruvian State as civil damages. The petitioner reports that the argument used by the National Terrorism Chamber to ignore *res judicata* was that Mr. Pollo Rivera’s two criminal trials were for separate incidents, since the first solely addressed his collaboration in a surgical operation on one specific member of the terrorist organization.

29. With respect to the principle of legality, the petitioner reports that his defense counsel claimed an exception based on the nature of the action or the principle of legality in his second criminal trial, whereby no person may be prosecuted or convicted for an action or an omission that, at the time of its commission, was not fully, expressly, and unequivocally defined in law as a punishable offense (Article 2, section d, paragraph 24 of the Constitution of Peru). The petitioner states that the National Terrorism Chamber ruled the exception based on the nature of the action groundless, arguing that the act of providing medical assistance to members of the subversive group Shining Path, while itself licit, was illegitimate because it took place in secret and was not reported to the authorities as required by Article 407 of the Criminal Code “in order to protect the right of all Peruvians to security and social peace.” The Chamber thus did not find that the purpose was that of exercising medicine, but rather that of promoting the goals of the terrorist organization. The petitioner quotes a section from the Chamber’s judgment stating that: “The State cannot be required to protect medical intervention intended to preserve the health of an “injured” party; on the contrary, the prevailing obligation is that of protecting society from actions, such as those carried out by Shining Path, which not only endangered our country’s democratic stability, but also the lives of the Peruvians who, in many of their attacks, were killed as a result of violence.”

30. Additionally, the petitioner claims that the principle of legality was violated by the Supreme Court of Justice’s interpretation, holding that the list of terrorist collaboration actions set out in Article 4, sections (a) to (f), of Decree Law No. 25475 are examples of behaviors constituting terrorist collaboration and not an exhaustive list. The petitioner claims that the violation of the principle of legality took place since the practice of medicine is a form of behavior not expressly defined as a crime of terrorist collaboration by the country’s criminal law.<sup>10</sup>

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<sup>9</sup> The petitioner cites the judgment of the National Terrorism Chamber; case file No. 001-00, Lima, February 24, 2004, p. 36.

<sup>10</sup> To better illustrate this, the complainant cites the judgment of the Permanent Criminal Chamber of the Supreme Court of Justice of Lima, R.N. No. 1062-2004-LIMA, which declared that Mr. Luis Williams Pollo Rivera’s conviction was not subject to annulment and stated, in its sixth “whereas” clause, that: “The crime of terrorist collaboration, in the different ways in which it has been legally defined since its placement on the national criminal statute books, punishes those who are in any way related to the material execution of any collaborative act that favors the commission of terrorist crimes or the pursuit of the goals of a terrorist group. Without prejudice of repeating what was said in the Supreme Decree of Execution of December 20, 2004, it should also be said that the relevant acts of collaboration must, first, be related to the activities and goals of the terrorist organization, and, second, they must materially favor terrorist activities *per se* – mere support or moral backing is not punishable; collaborative actions in the criminal activities of the organization are required. The criminalized action must therefore contribute, by its very nature, to the attainment or pursuit of a given goal: favoring the commission of terrorist crimes or the pursuit of the goals of the terrorist organization. It should also be noted that when the law refers to “any collaborative act” or “acts of collaboration that in any way favor,” it is to be

31. Regarding the application of statutory limitations, the alleged victim further claims that in his criminal trial he argued that statutory limitations applied since the events took place in 1989, 1991, and 1992, and, since enforcement of the 1924 Criminal Code was more favorable, he requested that the terms of Article 119 of such Code be applied to him. On the other hand, the National Terrorism Chamber held that this was a continuing crime, stating that similar actions breaching the same legal provision took place at different times during 1989 and 1992. Therefore, the statute of limitations began to run at the time the criminal activity stopped. The petitioner reports that according to the National Terrorism Chamber, statutory limitations apply after the maximum punishment for a crime plus half the time of such punishment has elapsed. Since the maximum prison term is 20 years and half of that is ten, statutory limitations for the prosecution of those offenses apply after a period of 30 years; a period of time that had not yet passed at the time criminal charges were filed with the domestic courts.

32. Finally, the petitioner states that he suffers from diabetes mellitus with progressive loss of vision, an unspecified paralytic syndrome, and secondary hypertension. Furthermore, he claims that since his arrest in 2003, he has been hospitalized on June 5 and 7 of 2004 at the neurosurgery service of the Guillermo Almenara Health Center. He also claims to have received inappropriate medical treatment because of the lack of medicines at the prison where he was being held at the time he submitted the petition before the Commission. Additionally, the petitioner claims that in 2002, an MRI scan was performed on him, as a result of which he was prescribed lumbar disc surgery; however, the procedure was not performed since he was held in Miguel Castro Castro maximum security prison.

33. Based on the foregoing arguments of fact and law, the petitioner maintains that the Peruvian State violated his right to humane treatment, to personal liberty, to a fair trial, and the principle of legality, as set forth in Articles 5, 7, 8, and 9 of the American Convention, respectively, in conjunction with the obligation to respect rights and to adopt domestic legal effects set out in Articles 1(1) and 2 thereof.

34. In addition, the alleged victim maintains that exercising the medical profession, against the backdrop of turmoil that existed in Peru, was not without pressure and threats brought to bear by the armed groups, which demanded treatment for their members who fell sick or were injured as a result of their terrorist activities. The alleged victim maintains, however, that the State dealt harshly with medical professionals, paying no heed to the possibility of threats or coercion or to the duty of health professionals to assist all those who so require, irrespective of age, illness or affliction, creed, ethnic origin, sex, nationality, political ideology, race, sexual orientation, social class, or any other factor. In that regard, the petitioner holds that even those who have committed such atrocious offenses as terrorism are entitled to treatment by a doctor, and that under no circumstance should such medical practitioner, who legally renders assistance as part of its profession, be considered a lawbreaker. The petitioner adds that although the law requires criminal acts to be reported to the authorities, Peru's 1993 Constitution protects professional secrecy (Article 2, section 18, of the Peruvian Constitution<sup>11</sup>) as a duty derived from medical practice which, consequently, lifts the legal obligation to report crimes, particularly when the person has justified fear of reporting such crimes.

35. With regard to the petition's admissibility requirements, the petitioner claims to have sought judicial protection through domestic venues by using the remedies available for such purpose; notwithstanding those efforts, however, he was sentenced to ten years in prison for legally exercising his profession as a physician. Specifically, the petitioner states that domestic remedies were exhausted after he filed for annulment against the judgment of the National Terrorism Chamber of February 24, 2004, which concluded with his conviction and the matter becoming *res judicata*.

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understood that the collaborative acts listed thereafter (five or six, depending on the law) are intended as mere examples; in other words, they do not constitute an exhaustive list." pp. 37 and 38.

<sup>11</sup> Constitution of Peru. Article 2: "All persons shall be entitled: ... 18. To reserve their political, philosophical, religious, or any other convictions, and to observe professional secrecy."

36. Regarding the conventional filing period, the petitioner argues that he was notified of the Supreme Writ of Execution ordered by the Criminal Chamber of the Supreme Court on February 4, 2005, after his defense counsel requested copies, thus exhausting domestic remedies and filing the petition before the Inter-American Commission on February 14, 2005. Therefore, the petitioner holds that he is within the timeframe set by Article 46(1)(b) of the Convention.

37. The petitioner expressly notes that he is being held, as a convict, at the Miguel Castro Castro Maximum Security Penitentiary in Lima as of the date of this complaint's submission to the IACHR.

## **B. State**

38. In this section, the Inter-American Commission notes that as of the date of the drafting of this report on the admissibility of petition No. 156-05, filed by Luis Williams Pollo Rivera, the Peruvian State has not submitted its response to the petition, which was conveyed to it on March 22, 2005.

## **IV. ANALYSIS OF ADMISSIBILITY**

### **A. Competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae* of the Commission**

39. The petitioner is empowered under Article 44 of the American Convention to file petitions on behalf of the alleged victim, with respect to whom the Peruvian State has agreed to respect and ensure the rights enshrined in the American Convention. Peru has been a party to the American Convention since July 28, 1978, when it deposited the corresponding instrument of ratification. The Commission therefore has competence *ratione personae* to examine the complaint.

40. In addition, the Commission has competence *ratione loci* to deal with the petition, since it claims violations of rights protected by the American Convention occurring under the jurisdiction of the State. The Commission has competence *ratione temporis* to study the claim since the obligation of respecting and ensuring the rights protected by the American Convention was already in force for the State on the date on which the incidents described in the petition allegedly occurred.

41. Finally, the Commission has competence *ratione materiae* to examine this case, since the petition describes possible violations of human rights protected by the American Convention.

### **B. Other admissibility requirements of the petition**

#### **1. Exhaustion of domestic remedies**

42. Article 46(1)(a) of the American Convention states that, for a complaint filed with the Inter-American Commission in compliance with Article 44 of the Convention to be admissible, the remedies available under domestic law must have first been pursued and exhausted in accordance with generally recognized principles of international law. This requirement is intended to facilitate the domestic authorities' examination of the alleged violation of a protected right and, if appropriate, to resolve it before it is brought before an international venue.

43. As indicated by the principles of international law, reflected in the precedents set by the Inter-American Commission and Court, first, the respondent State may expressly or tacitly waive the right to invoke this rule.<sup>12</sup> Secondly, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings before the

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<sup>12</sup> IACHR, Report No. 69/05, Petition 960/03, Admissibility, Iván Eladio Torres, Argentina, October 13, 2005, paragraph 42; I/A Court H. R., *Ximenes Lopes Case. Preliminary Objections*. Judgment of November 30, 2005, Series C No. 139, paragraph 5; I/A Court H. R., *Case of the Moiwana Community*. Judgment of June 15, 2005, Series C No. 124, paragraph 49; and I/A Court H.R., *Case of the Serrano Cruz Sisters. Preliminary Objections*. Judgment of November 23, 2004, Series C No. 118, paragraph 135.

Commission, lest a tacit waiver of the State's right to invoke the objection be presumed.<sup>13</sup> Thirdly, in accordance with how the burden of proof applies, a State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness.<sup>14</sup> Therefore, if the State does not file timely claims regarding this exception, it is deemed to have waived its right to argue the non-exhaustion of domestic remedies and consequently to satisfy the corresponding burden of proof.

44. The Commission believes that the petitioner exhausted domestic remedies. The criminal trial conducted by the National Terrorism Chamber, in which the alleged victim was convicted of crimes against law and order and terrorism in manner of collaboration, sentencing him to ten years in prison, concluded with the judgment of February 24, 2004. The IACHR further notes that the petitioner filed an appeal against this judgment but was upheld by the Permanent Criminal Chamber of the Supreme Court in a decision handed down on December 22, 2004. The Commission consequently believes that the remedies offered by domestic jurisdiction were exhausted by the judgment given by the Permanent Criminal Chamber of the Supreme Court.

## **2. Filing period**

45. Article 46(1)(b) of the Convention states that for a petition to be admissible, it must have been filed within a period of six months following the date on which the complainant was notified of the final judgment at the national level.

46. From documents that the petitioner submitted as annexes, the Commission sees that the decision of the Permanent Criminal Chamber of the Supreme Court was adopted on December 22, 2004, and notice of it was given to the alleged victim on February 4, 2005. The Commission further notes that the complaint against the Peruvian State was sent to the IACHR on February 14, 2005, and received on February 28, 2005. It therefore concludes that the convention requirement for petitions to be filed within a maximum period of six months has been met.

## **3. Duplication of international procedures and *res judicata***

47. Article 46(1)(c) provides that the admissibility of petitions filed with the Commission is subject to the requirement that the matter "is not pending in another international proceeding for settlement," and Article 47(d) of the Convention provides that the Commission shall not admit a petition that is "substantially the same as one previously studied by the Commission or by another international organization." In the filing the petitioner expressly states that the incidents described in this petition have not been placed before any other international venue. Neither does anything in the case file indicates that the substance of the petition is pending a decision in any other international settlement proceeding or that it is substantially the same as any other petition already examined by this Commission or another international body. Consequently, the requirements set out in those articles have been met.

## **4. Characterization of the alleged facts**

48. As the Commission has stated on other occasions, this stage in the proceedings is not for establishing whether or not a violation of the American Convention was committed. For the purposes of the admissibility report, the IACHR must simply decide whether the claims describe

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<sup>13</sup> I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case, Preliminary Objections*, Judgment of February 1, 2000, Series C No. 66, paragraph 53; *Castillo Petruzzi Case, Preliminary Objections*, Judgment of September 4, 1998, Series C No. 41, paragraph 56; and I/A Court H.R., *Loayza Tamayo Case, Preliminary Objections*, Judgment of January 31, 1996, Series C No. 25, paragraph 40. The Commission and the Court have said that "an early stage in the proceedings" is to be understood as meaning "the admissibility stage of proceedings before the Commission: that is, before any examination of the merits." See, for example: IACHR, Report No. 71/05, Petition 543/04, Admissibility, Ever de Jesús Montero Mindiola, Colombia, October 13, 2005, quoting I/A Court H.R., *Case of Herrera Ulloa*, Judgment of July 2, 2004, Series C No. 107, paragraph 81.

<sup>14</sup> IACHR, Report No. 32/05, Petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral *et. al* (persons living with HIV/AIDS), Guatemala, March 7, 2005, paragraphs 33-35; I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community, Preliminary Objections*, *supra* note 3, paragraph 53; *Durand and Ugarte Case, Preliminary Objections*, Judgment of May 28, 1999, Series C No. 50, paragraph 33; and I/A Court H. R., *Cantoral Benavides Case. Preliminary Objections*, Judgment of September 3, 1998, Series C No. 40, paragraph 31.



incidents that could tend to establish a violation of the American Convention, as required by Article 47(b), and whether the petition is “manifestly groundless” or “obviously out of order,” as required by section (c) of that article. The level of conviction regarding those standards is different from that required in deciding on the merits of a complaint. At this juncture the IACHR must perform a summary, *prima facie* evaluation, which in no way represents a preliminary judgment or untimely opinion on the merits. Its own Rules of Procedure sets out the distinction between the evaluation that is performed in order for a petition to be ruled admissible and the one carried out to determine whether or not the State is responsible, by establishing clearly separate phases for admissibility and for merits.

49. In the case at hand, the petitioner claims that the Peruvian State violated the right to humane treatment, to personal liberty, to a fair trial, and the principle of legality, enshrined respectively in Articles 5, 7, 8, and 9 of the American Convention, in conjunction with the obligation to respect rights and to adopt domestic legal effects contained in Articles 1(1) and 2 thereof.

50. As of the drafting of this Report, the State has submitted no comments regarding this claim.

51. In consideration of the facts described herein, the Commission finds that the petitioner has made claims that are not “manifestly groundless” or “obviously out of order” and that, if proven true, could constitute violations of Articles 5, 7, 8, and 9 of the American Convention, in connection with Articles 1(1) and 2 of such international instrument.

52. The Commission applies *iura novit curiae* principle regarding the knowledge and decision of the alleged violation of article 25 of the Convention in connection with its articles 1(1) and 2.

53. In particular, the Commission believes it should point out that the facts of this petition are fundamentally, although not exclusively, related to the alleged criminalization of the practice of medicine, since the alleged victim was prosecuted and convicted for actions relating to his profession as a physician, a situation that has already been analyzed and ruled on by the Inter-American Court in its jurisprudence concerning the Peruvian State<sup>15</sup> in a case which is similar to the one at hand.

54. Since these aspects of the petition are not manifestly groundless or obviously out of order, the Commission holds that the requirements set forth in Article 47(b) and (c) of the American Convention have been met as regards this aspect of the claim.

## **V. CONCLUSION**

55. The Commission concludes that the case is admissible and that it has competence to examine the petitioner’s claim regarding the alleged violation of Articles 5, 7, 8, 9 and 25 of the American Convention, all in connection with the obligations arising from Articles 1(1) and 2 thereof.

56. In light of the foregoing arguments of fact and law, and without prejudging the merits of the case,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES:**

3. To declare the instant petition admissible as regards the alleged violation of rights enshrined in Articles 5, 7, 8, 9 and 25 of the American Convention, all in conjunction with the obligations arising from Articles 1(1) and 2 thereof.

4. To convey this report to the petitioners and to the State.

5. To continue with its analysis of the merits of the case.

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<sup>15</sup> I/A Court H. R., *Case of De la Cruz Flores*. Judgment of November 18, 2004, Series C No. 115.

6. To publish this decision and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 23<sup>rd</sup> day of the month of July, 2007.  
(Signed): Florentín Meléndez, President; Paolo G. Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Evelio Fernández Arévalos, Clare K. Roberts and Freddy Gutiérrez, Commissioners.